

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE JIMENEZ MORENO and MARIA)	
JOSE LOPEZ,)	
)	
on behalf of themselves and all others)	
similarly situated,)	
)	No. 11-CV-05452
Plaintiffs,)	
)	
v.)	
)	Honorable Robert M. Dow, Jr.
JANET NAPOLITANO, <i>et al.</i> ,)	
)	
In their official capacities,)	
)	
Defendants.)	

BRIEF IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS

Defendants in their official capacities, by and through their attorneys, Colin A. Kisor, United States Department of Justice, Office of Immigration Litigation - District Court Section, and Craig Oswald, Assistant United States Attorney, move to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction.

I. INTRODUCTION

This is a putative class action immigration case in which Plaintiffs broadly challenge United States Immigration and Customs Enforcement’s (“ICE’s”) authority to issue immigration detainers to other law enforcement agencies. This Court should dismiss this case for three reasons. First, ICE has cancelled the detainers lodged against Plaintiffs Jose Jimenez Moreno (“Moreno”) and Maria Jose Lopez (“Lopez”) and their claims are now moot. Second, Plaintiffs lack standing because they seek only injunctive relief. Third, Plaintiffs lack standing because the ICE detainers for Moreno and Lopez did not deprive them of liberty in any way – they were

being held for criminal reasons throughout the pendency of their detainers. Thus, Plaintiffs cannot reasonably assert that the detainers for Moreno and Lopez constituted a Fourth Amendment seizure, or impacted a protected liberty interest without due process of law in violation of the Fifth Amendment. Therefore the Court should dismiss Plaintiffs' complaint.¹

II. FACTS

ICE is the federal agency charged with identifying and removing unlawfully present aliens, including criminal aliens, from the United States. ICE prioritizes the removal of criminal aliens, and meets that priority in part by using a Form I-247 detainer to facilitate the exchange of information about criminal aliens in federal, state, or local law enforcement custody. *See* 8 C.F.R. § 287.7.

The two named plaintiffs in this case, Moreno and Lopez, have never been in the physical custody of ICE, and no longer have ICE detainers lodged against them. (*See* Attachments A and B).² Plaintiff Moreno was born in Mexico. He was indicted by the State of Illinois on March 22, 2011 for two felonies: a cocaine charge and threatening a public official. He is in the custody of the Winnebago County Jail, unable to make his \$1 million bail. ICE lodged a detainer for him with the Winnebago County Sheriff on March 22, 2011, but cancelled it in August 2011 after

¹ Defendants do not here address Plaintiffs' Motion to Certify a Class (ECF No. 5) because the Court should first rule on Defendants' motions to dismiss. Defendants will oppose Plaintiffs' motion for class certification after the Court sets a briefing schedule on that motion, which has not been presented to the Court in accordance with local rule 5.3(b). Defendants note here, however, that to the extent that the named plaintiffs lack standing to assert these claims, resolution of the motion for class certification becomes moot. *See Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009).

² Attachment A is the I-247 "Immigration Detainer - Notice of Action" for Plaintiff Moreno. Attachment B is the I-247 "Immigration Detainer - Notice of Action" and the related "Federal Bureau of Prisons Detainer Removal" for Plaintiff Lopez.

concluding that Moreno may be a derivative United States citizen. (*See* Attachment A).

Plaintiff Lopez is a Cuban national who has lawful permanent residence status in the United States. She is serving a federal criminal sentence following her guilty plea in the United States District Court for the Southern District of Alabama to misprison of a felony in violation of 18 U.S.C. § 4 in November 2010. (Compl. ¶ 14; *see* Attachment C).³ ICE lodged a detainer with the Tallahassee Federal Correctional Institution on February 1, 2011, but cancelled it on August 15, 2011, because Lopez's offense does not render her removable. (*See* Attachment B). Lopez was sentenced to twelve months and one day of imprisonment, and she is scheduled to be released on November 22, 2011.

III. ARGUMENT

A. Standard of review under Fed. R. Civ. P. 12(b)(1)

Federal courts have limited jurisdiction, and they may exercise that jurisdiction only where it is specifically authorized by federal statute. *See* Fed. R. Civ. P. 12(b)(1); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Teamsters Nat. Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 327 (7th Cir. 2003). If the Court determines that jurisdiction is lacking, the Court cannot proceed at all, and its sole remaining duty is to state that it lacks jurisdiction and dismiss the case. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998). A lack of jurisdiction is presumed until the party asserting jurisdiction proves otherwise. *Kokkonen.*, 511 U.S. at 377; *Teamsters Nat. Auto. Transporters Indus. Negotiating Comm*, 328 F.3d at 327.

³Attachment C is the "Judgment in a Criminal Case" for *United States v. Lopez*, No. 10-cr-00032 (S.D. Ala Dec, 7, 2010.)

B. The named plaintiffs' claims are moot because ICE has lifted the detainees lodged against them.

Plaintiffs Moreno and Lopez seek habeas relief “as an alternative to the first four claims for relief, in the event the court were to rule that the proper or only vehicle for relief is a writ of habeas corpus.” (Compl. ¶ 57.) The detainees at issue for both Moreno and Lopez have been lifted and all of their claims -- including habeas claims -- are therefore moot. (See Attachments A and B). Moreno and Lopez are not in ICE custody and no live case or controversy remains as to their ICE detainees.

A case is moot and must be dismissed for lack of jurisdiction when “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *St. John’s United Church of Christ v. City of Chicago*, 502 F. 3d 616, 626 (7th Cir. 2007) (internal citation omitted); *see also Iddir v. INS*, 166 F. Supp. 2d 1250, 1258-59 (N.D. Ill 2001) (holding that case was moot and therefore non-justiciable because the INS did not have the power to grant the relief requested); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997) (holding that where there is no longer any controversy, an Article III court lacks subject matter jurisdiction because a controversy must exist at all stages of litigation); *Chicago & Northwestern Transp. Co. Railway Labor Executives’ Ass’n*, 908 F.2d 144, 149 (7th Cir. 1990) (stating, “we lack jurisdiction because there is no case or controversy as these words are used in Article III of the Constitution”); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 621 (7th Cir. 1985) (quoting *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983) (“Federal Courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.”)).

In this case, ICE cancelled the immigration detainees issued against both Moreno and

Lopez and no case or controversy remains as to any claims they had related to their detainers. Thus, their claims -- habeas and otherwise -- are now moot. Accordingly, this Court should dismiss the complaint.

C. Plaintiffs Moreno and Lopez lack standing to pursue this complaint because they cannot show that they will be subject to imminent harm.

The Court should dismiss this case under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs Moreno and Lopez each lack standing to assert their Constitutional, APA and habeas claims. Article III, Section 2 of the Constitution limits the subject matter jurisdiction of this Court to certain “cases” and “controversies.” The doctrine of standing “is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The first element of standing is injury in fact. *Id.* When a plaintiff seeks only injunctive and declaratory relief – as in the instant case – the court must assess whether the plaintiff has sufficiently shown a real and immediate threat of “future harm” in order to determine whether the plaintiff has satisfied the “injury in fact” requirement. *See Palmer v. Chicago*, 755 F.2d 560, 571 (7th Cir. 1985) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). Seventh Circuit precedent is clear that, for an injury to suffice for prospective relief, it must be “imminent.” *See Shirmer v. Nagode*, 621 F.3d 581, 585 (7th Cir. 2010). A threat of injury that is “conjectural” or “hypothetical” is insufficient to establish standing; and “past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.” *Lyons*, 461 U.S. at 102-03.

A factual challenge to jurisdiction arises where “the complaint is formally sufficient but the contention is that there is in fact no subject matter jurisdiction.” *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003). Defendants here raise a factual challenge

to Plaintiffs' standing because external facts call into question the Court's jurisdiction. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009). When considering a motion involving a factual attack against jurisdiction, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Evers v. Astrue*, 536 F.3d 651, 656-57 (7th Cir. 2008) (internal citations and quotations omitted).

Defendants here raise a factual challenge to Plaintiffs complaint because the fact that both detainers have been cancelled means that neither Moreno nor Lopez faces imminent harm, and, consequently, neither has a continuing interest in obtaining injunctive relief. Accordingly, Plaintiffs lack standing. *See Shirmer*, 621 F.3d at 585.

D. Neither Plaintiff experienced any harm from the detainers.

Plaintiffs also lack standing to challenge detainers under the Fourth and Fifth Amendments. (Compl. ¶¶ 41-51). Plaintiffs allege that the ICE detainers constituted a "warrantless arrest," but this is not true. (Compl. ¶ 43). The ICE detainers were issued to the law enforcement agencies after Plaintiffs had already been arrested and were in custody. (Compl. ¶¶ 13,14). When ICE lodges detainers for people like Moreno and Lopez who are in criminal custody it does not "unreasonably take away, limit, or otherwise impact [Plaintiffs'] liberty." (Compl. ¶42). Any deprivation of liberty Lopez and Moreno experienced (or are experiencing) is solely the result of their criminal custody and is completely untraceable to ICE detainers. *Cf. Atem v. Ashcroft*, 312 F. Supp. 2d 792, 794 n.1, 796 (E.D. Va. 2004) (habeas petition moot where alien was held as immigration detainee but later transferred to custody of U.S. Marshal, and remained in federal, non-immigration custody). Therefore, the ICE detainers

did not constitute a seizure that could have violated the Fourth Amendment rights of Plaintiffs. Absent any sort of harm or injury from a detainer, Lopez and Moreno lack standing.

Plaintiffs claim that the ICE detainers deprive them of their liberty without due process of law. (Compl. ¶¶ 49-51). However, the ICE detainers resulted in no deprivation of liberty for either Lopez or Moreno before they were cancelled by ICE. Moreno remains in the custody of the Winnebago County Jail, unable to make his \$1 million bail for his felony indictment. Lopez is serving a federal criminal sentence following her guilty plea and is scheduled to be released on November 22, 2011. *See, e.g., Terrell v. Godinez*, 966 F. Supp. 679, 683 (N.D. Ill. 1997) (holding that the administrative segregation of a prisoner for two months did not impact a protected liberty interest, so “whether [the prisoner] received due process of the law is irrelevant.”). Neither Moreno nor Lopez allege that the ICE detainers had any effect on the conditions of their confinement before ICE cancelled them. Because the ICE detainers did not, actually or constructively, affect Moreno’s or Lopez’s length or conditions of confinement, the detainers did not result in a deprivation of liberty. Thus, Plaintiffs lack standing to assert their Second and Third claims for relief based on an asserted violation of their due process rights, because they have not been harmed.

IV. CONCLUSION

Because ICE has cancelled the detainers which it had lodged against Plaintiffs this Court should hold that Moreno and Lopez lack standing, and that their claims, including their alternative habeas claims, are moot. Accordingly, this Court should dismiss this case with prejudice.

Date: October 14, 2011

Respectfully submitted,

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