IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN **DIVISION**

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

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Named Plaintiffs Jose Jimenez Moreno and Maria Jose Lopez filed this class action to represent the hundreds or even thousands of individuals who—on any given day—are subject to unconstitutional immigration detainers issued by the U.S. Immigration and Customs Enforcement agency ("ICE"). Moreno and Lopez have standing to serve in this capacity, and their suit presents live, justiciable claims. The motion to dismiss should be denied.

INTRODUCTION

Defendants' motion to dismiss is a futile attempt to prevent judicial review of ICE's widespread, unlawful practice of instructing federal, state, and local law enforcement agencies to detain individuals beyond when they should otherwise be released. The complaint alleges that this practice exceeds Defendants' constitutional and statutory authority, unlawfully deprives individuals of their liberty without probable cause, unlawfully denies them an opportunity to be

heard prior to the deprivation, and unlawfully conscripts state and local law enforcement officials to enforce a federal regulatory program. These are issues of critical importance to the class, and Named Plaintiffs are eager to represent the class in litigating these claims on their merits.

Defendants, in contrast, hope to avoid judicial review altogether. Within weeks of the filing of this complaint, ICE lifted the detainers that applied to the two Named Plaintiffs. That in itself was good news, as the detainers had been unlawfully issued. But Defendants have now proceeded to use the lifting of these two particular detainers as the basis for a motion to dismiss the entire class action. Indeed, Defendants apparently hope to avoid review indefinitely: when two additional plaintiffs came forward with a motion to intervene, ICE promptly lifted their detainers as well, and Defendants now contend that their claims are moot for the same reason.

Not surprisingly, the jurisprudence relating to mootness precludes this sort of gamesmanship. *First*, these claims fall within an exception to the mootness doctrine for claims in a class action that are "inherently transitory." The wrongful conduct alleged here is ongoing, and yet for any individual, it is of such a limited and uncertain duration that it would be unlikely for any one class member to remain subject to a detainer long enough for this Court to certify a class. Were it not for the special rules for "inherently transitory" claims, Defendants' unconstitutional conduct might neatly evade judicial review. And *second*, under Seventh Circuit case law, Defendants cannot moot a class action—or any action, for that matter—simply by suspending the offensive conduct. Even with respect to these individuals, the claims here are "capable of repetition yet evading review." Plaintiff Moreno, for example, remains in state custody today, and Defendants have made no effort to demonstrate that there are mechanisms in place that would prevent the very same events from occurring if he is moved to another state facility or has any other encounter with law enforcement.

For the same reasons, Defendants also cannot avoid this lawsuit by arguing that these Named Plaintiffs can no longer claim actual or imminent harm. Although Defendants frame this argument in terms of "standing," it is actually "mootness" in disguise. Defendants do not seriously contend that the Named Plaintiffs lacked standing to assert their claims at the outset of this case—nor could they, as long-standing U.S. Supreme Court and Seventh Circuit precedents dictate otherwise. Instead, Defendants argue only that the Named Plaintiffs lack standing ***today***, because ICE lifted their detainers. Obviously, the fact that the Defendants lifted the offending detainers after the suit was filed does not undermine the Named Plaintiffs' claims of "harm" any more than it renders this action moot.

BACKGROUND

The Practice of Immigration Detainers. Named Plaintiffs Jose Jimenez Moreno and Maria Jose Lopez filed this class action to challenge ICE's assertion of authority to direct federal, state, and local law enforcement agencies to detain individuals after no other legal basis for custody exists—merely so that ICE can have an opportunity to investigate their immigration status. The detainers are issued absent any charging documents, arrest warrants, or deportation orders. They are also unsupported by probable cause, are not accompanied by notice to the detained individual or his or her attorney, and provide no opportunity for the detained individual to challenge their lawfulness. Copies of the detainers issued against Moreno and Lopez are attached as Exhibit A.

ICE's issuance of unlawful detainers is a widespread practice. Each year, ICE issues hundreds of thousands of detainers nationwide. Corrected Compl. ¶ 28, ECF No. 4 (total of 270,988 in fiscal year 2009 and 201,778 in the first eleven months of fiscal year 2010). Most of those detainers, including the ones issued against these particular named Plaintiffs, are grounded

on nothing more than ICE's initiation of an investigation into the individual's immigration status. *See id.* ¶ 4.

The issuance of detainers is also a continuing, repetitive practice. Plaintiffs learned through a Freedom of Information Act request that ICE does not keep records of detainer cancellations or the reasons therefor. *See* Ex. B. As a result, individuals who were subjected to detainers that ICE later cancelled, whether because it completed its investigation or because an individual filed a lawsuit challenging the validity of the detainer, are in perpetual jeopardy of having to endure similar episodes in the future. Indeed, through its Secure Communities Program—which is already in effect in a majority of counties within the Seventh Circuit and will become compulsory in 2013—ICE compels local law enforcement agencies to share information in real time on every individual whom they arrest. *See* Ex. C. Accordingly, there is a significant risk of serial detention, as any time an individual who has already been subjected to an unlawful detainer has another encounter with local law enforcement officials, there is no mechanism to prevent the same thing from happening again.

A detainer—or second or third subsequent detainer—has very real consequences for the individual against whom it is issued. Not only are individuals subject to at least forty-eight hours of detention beyond the conclusion of their lawful term in custody, but they also may experience deleterious collateral consequences. For example, U.S. citizen Sergey Mayorov, whose motion to intervene in this action is currently pending, *see* Mot. to Intervene, ECF No. 25, was subjected to a detainer and—on the same day—was summarily disqualified from continuing to participate in a diversionary boot camp in which he was progressing satisfactorily. Intervening Pls.' Compl. Inj. Declaratory Relief Pet. Writ of Habeas Corpus ¶ 13, ECF No. 25-2. Had this not occurred, he

would be free today. But instead, he has now served nearly nine months in a medium-security prison.

These Named Plaintiffs. Moreno and Lopez seek to end ICE's wrongful and repetitive practice of issuing unlawful detainers. Moreno is a U.S. citizen who is currently awaiting trial at the Winnebago County Jail in Rockford, Illinois. Corrected Compl. ¶ 13, ECF No. 4. He was arrested and taken into state custody on March 21, 2011. *Id.* The very next day, ICE issued an "immigration detainer" against Moreno, instructing state authorities to detain him for an additional forty-eight hours or more beyond the end of his term of lawful custody. *Id.* ICE did not interview or otherwise contact Moreno before issuing the detainer, *id.*, and he has had no opportunity to contest it, *see id.* ¶ 23.

Lopez is a legal permanent resident of the United States. *Id.* ¶ 14. In November 2010, she pleaded guilty in federal court to misprision of a felony—a non-removable offense. *Id.* Lopez later surrendered to the Federal Correctional Institution in Tallahassee, Florida, to serve a year-long sentence. *Id.* ICE issued a detainer against her one week later, instructing state authorities to detain her for an additional forty-eight hours or more beyond the end of her term of lawful custody. *Id.* ICE did not interview or otherwise contact Lopez before issuing the detainer, *id.*, and she too has had no opportunity to contest it, *see id.* ¶ 23. On November 22, 2011, after ICE lifted its detainer against her in response to her participation in this action, Lopez was released from custody. When she filed this suit months earlier, however, she was subject to the prospect of additional detention lasting forty-eight hours or more after the time when, but for the detainer, she would have been released.

Named Plaintiffs brought this suit on August 11, 2011, to challenge ICE's authority to issue detainers against them and other similarly situated individuals. *Id.* ¶ 1. They assert that ICE

has exceeded its constitutional and statutory authority, *id.* ¶ 39, unlawfully deprived them of their liberty without probable cause, *id.* ¶¶ 38, 42-45, unlawfully denied them an opportunity to be heard prior to the deprivation, *id.* ¶¶ 48-49, and unlawfully compelled and conscripted state and local officials to enforce a federal regulatory program, *id.* ¶¶ 53-54. They seek injunctive and declaratory relief and, in the alternative, writs of habeas corpus. *Id.* ¶¶ 40, 45, 51, 55 & 57.

Simultaneously with the filing of the complaint, Moreno and Lopez moved to certify a class under Rule 23. *See* Pls./Pet'rs' Mot. for Class Certification or Representative Action, ECF No. 5. The proposed class includes

> [a]ll current and future persons against whom ICE has issued an immigration detainer out of the Chicago Area of [R]esponsibility (AOR) where ICE has instructed the law enforcement agency (LEA) to continue to detain the individual after the LEA's authority has expired and where ICE has indicated that the basis for the further detention is that ICE has initiated an investigation into the persons' removability, but not including any noncitizen subject to mandatory detention under 8 U.S.C. § 1226(c). [*Id.*]

It was only ***after*** the Named Plaintiffs filed this lawsuit and sought class certification that ICE lifted their detainers. Nevertheless, ICE—by and through official-capacity defendants Janet Napolitano, John Morton, David C. Palmatier, and Ricardo Wong (collectively "Defendants")—now claims that because these particular detainers have been lifted, the entire class action should be dismissed. *See* Br. Supp. Defs.' Mot. to Dismiss ("Br.") 4-7, ECF No. 10. The Court has placed Plaintiffs' motion for class certification in abeyance pending resolution of this motion to dismiss. *See* Minute Entry, ECF No. 14.

LEGAL STANDARD

When considering a motion that launches a factual attack against jurisdiction—as is the case here—the 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) (quoting *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 625 (7th Cir. 2007)); *see also, e.g., United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc). Still, the district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Evers*, 536 F.3d at 656. In general, motions to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) are disfavored in the civil rights context. *United States v. Beethoven Assocs. Ltd. P'ship*, 843 F. Supp. 1257, 1260 (N.D. Ill. 1994); *see also Klipfel v. Bureau of Alcohol, Tobacco & Firearms*, No. 94 C 6415, 1996 WL 566452, at *3 (N.D. Ill. September 27, 1996).

ARGUMENT

I. This action is not moot.

Defendants' motion to dismiss utterly ignores the pending motion for class certification and the case law that governs mootness, particularly in the class action context. Before their detainers were lifted, the Named Plaintiffs filed a motion for class certification. *See* Pls./Pet'rs' Mot. for Class Certification or Representative Action, ECF No. 5. That timely filing allows this case to remain alive and justiciable. As discussed further below, a plaintiff alleging an "inherently transitory" claim on behalf of a class may proceed with the action even if his individual claim has become moot. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). On this basis alone, the motion to dismiss can and should be denied.

Moreover, the claims of these individual Named Plaintiffs have ***not*** become moot. Defendants have not made the showing necessary to warrant dismissing these claims simply on the ground that the detainers have been lifted. Even where a defendant has voluntarily stopped

the challenged conduct, a plaintiff's claims do not necessarily become moot. *See Nelson v. Miller*, 570 F.3d 868, 882 (7th Cir. 2009). That is particularly so where the claims concern conduct that is short in duration—making it "capable of repetition yet evading review." *Protestant Mem'l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 730 (7th Cir. 2006). This concern is amplified in the class action context, because while the unlawful conduct may have ceased as to the Named Plaintiffs themselves, other class members will continue to suffer unabated. *Gerstein*, 420 U.S. at 110 n.11.

A. A case may not be dismissed as moot when the plaintiff has sought class certification and is pressing claims that are "inherently transitory."

Regardless of the current status of the Named Plaintiffs themselves, their claims are "inherently transitory" and, thus, fall squarely within an exception to the mootness doctrine for putative class actions. *See Olson*, 594 F.3d at 580-83; *see also Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-99 (1980); *Gerstein*, 420 U.S. at 110 n.11. As the Supreme Court has recognized, "an Art. III case or controversy 'may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.'" *Geraghty*, 445 U.S. at 397-98 (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)).

As the Seventh Circuit recently explained, a claim must satisfy two conditions for the "inherently transitory" exception to apply. *See Olson*, 594 F.3d at 582. First, it must be uncertain that the claim "will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class." *Id.* (citing *Gerstein*, 420 U.S. at 110 n. 11). Second, there must be a "constant class of persons suffering the deprivation complained of in the complaint." *Id.* The claims here meet both criteria.

Uncertainty about the continued liveliness of a claim is the "essence" of the "inherently transitory" exception. *Id.* This case captures that "essence" perfectly. Shortly after Named Plaintiffs brought suit challenging the detainers lodged against them and others, ICE cancelled the detainers against them and sought to dismiss their suit as moot. *See* Br. at 2-3. While the motion to dismiss was pending, two additional individuals subject to unlawful detainers sought leave to intervene in this action. *See* Mot. to Intervene, ECF No. 25. But at a hearing on the motion to intervene mere days after its filing, Defendants announced that ICE had also cancelled the unlawful detainers lodged against the intervening plaintiffs. The pattern is clear: each time a potential plaintiff has stepped forward, Defendants have swiftly cancelled that individual's detainer—and then asserted that the claims are moot. With Defendants' strategy already manifest in this case, there can be no doubt that the claims are "bound to become moot before [they] can be litigated to judgment." *Wrightsell v. Cook Cnty., Ill.*, 599 F.3d 781, 783 (7th Cir. 2010).

The uncertain and unpredictable duration of the detainers themselves further supports this conclusion. Like the length of incarceration in a county jail, the duration of a detainer "cannot be determined at the outset and is subject to a number of unpredictable factors, thereby making it inherently transitory." *Olson*, 594 F.3d at 582; *see also Gerstein*, 420 U.S. at 110 n.11. The detainers here were imposed purportedly because an "[i]nvestigation has been initiated to determine whether [Plaintiffs were] subject to removal from the United States." *See* Ex. A. Plaintiffs asserting claims like these—who may not be given notice that such an investigation has begun or that a detainer has been lodged—have no way of knowing what course any investigation by ICE might take or when (or if) the detainers against them might be lifted. Accordingly, unlawful detainers may well be lifted in the normal course—or the individual may be either transferred to ICE's physical custody or detained and released—before a court has the

opportunity to certify a class or adjudicate the lawfulness of the detention. *See Olson*, 594 F.3d at 583.

The claims in this case also satisfy the second requirement for the "inherently transitory" exception because they are "likely to recur with regard to the class," *id.* at 584, and will continue unabated for other class members, even after the lifting of the detainers on these Named Plaintiffs, *see Gerstein*, 420 U.S. at 110 n.11. ICE issues hundreds of thousands of detainers each year, *see* Corrected Compl. ¶ 28, ECF No. 4, which makes it likely that many class members will continue to be harmed by Defendants' unlawful practices, both today and in the imminent future, *see Olson*, 594 F.3d at 584. Indeed, two individuals have already sought leave to intervene in this case, and, as in *Gerstein*, the court may "safely assume that [counsel] has other clients with a continuing live interest in the case." *Gerstein*, 420 U.S. at 110 n.11. So long as ICE continues to issue detainers in accordance with its current policies, harm to current and future class members will be pervasive and amenable to remedy through this class action.

The Seventh Circuit's most recent authority on mootness and class actions further supports this result. Just a few weeks ago, the Seventh Circuit issued a decision reiterating that an offer of full relief to a named plaintiff does not moot a class action unless it comes ***before*** class certification is sought. *See Damasco v. Clearwire Corp.*, No. 10-3934, --- F.3d ---, 2011 WL 5829773, at *3 (7th Cir. Nov. 18, 2011). Here, there is no dispute that Defendants did not lift the detainers against the Named Plaintiffs until ***after*** they filed their motion for class certification. "The pendency of that motion protects [the] putative class from attempts to buy off the named plaintiffs." *Id.* at *4. The same is true here.

It may well be that ICE lifted these detainers for a non-tactical reason—perhaps because it agreed that they had been unlawfully issued. But that merely highlights some of the most

critical problems with ICE's detainer practice. The putative class has asserted—among other things—that ICE's detainer practice exceeds statutory authority and is unconstitutional because it does not require a showing of probable cause and does not provide any avenue for the detainee to challenge the detention. Here, the Named Plaintiffs (as well as the intervenors) had no avenue for challenge ***other than to raise their claims in a federal lawsuit***. The fact that these particular plaintiffs succeeded in drawing ICE's attention to their plight does not redress the statutory and constitutional problems with the practice as it affects hundreds or even thousands of people every day. The law concerning mootness does not permit Defendants to avoid judicial review so easily.

B. The voluntary lifting of the detainers did not moot even these individual Plaintiffs' claims.

Even outside the class action context, "[i]t is well established that a defendant's voluntary cessation of a challenged practice does not necessarily moot a case." *Nelson*, 570 F.3d at 882. Rather, the case will be come moot only when "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000)). The burden of proving that the behavior cannot reasonably be expected to recur is a heavy one, intended to prevent defendants from evading judicial review and sanction by mere "predictable protestations of repentance and reform." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (quotation omitted); *see also Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002). As the Supreme Court has acknowledged, the courts have an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction" to avoid judicial review, and that interest may "counsel[ ] against a finding of mootness." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

These same concepts are reflected in the cases holding that a claim is not moot when it is "capable of repetition yet evading review." *Olson*, 594 F.3d at 583. Even where the wrongful conduct ends for a reason other than "voluntary cessation," these cases examine whether there is a "reasonable expectation or a demonstrable possibility that the same controversy will recur involving the same parties." *Protestant Mem'l Med. Ctr.*, 471 F.3d at 731 (quotations omitted). So, to fall within this exception to the mootness doctrine, the claim must be "repeatable by the same plaintiff." *Brandt v. Bd. of Educ. of City of Chi.*, 480 F.3d 460, 464 (7th Cir. 2007).

Defendants may have withdrawn the unlawful detainers lodged against the two Named Plaintiffs, but they have made no attempt at all to demonstrate that the challenged behavior cannot reasonably be expected to recur with respect to these same individuals. Further, like the defendant in *Pleasureland Museum v. Beutter*—whose voluntary cessation the court found inadequate to moot the plaintiff's claims—Defendants here have failed to present any evidence of a permanent policy change regarding the issuance of detainers. *See Pleasureland*, 288 F.3d at 999 ("[T]he . . . moratorium is not permanent and could be lifted at any time."). Thus, they have failed to carry the burden required to show that their voluntary actions have mooted this case.

The situation of Plaintiff Moreno amply demonstrates this problem. He is currently detained in Winnebago County Jail awaiting trial. Although ICE has lifted the unlawful detainer it issued against him, Defendants have not provided any assurance that they will refrain from subjecting him to another detainer. Apparently, Defendants have not definitively accepted the assertion that Moreno is a U.S. citizen; their brief supporting the motion to dismiss states only that they lifted his detainer because he "***may*** be a derivative United States Citizen." Br. at 3 (emphasis added). Further, ICE does not keep records of detainer cancellations or the reasons therefor. *See* Ex. B. If Moreno is convicted, he will likely be transferred to another facility to

serve his sentence. At that point, it is likely that local law enforcement officials will again bring him to ICE's attention. *See* Exs. B & C. Given that ICE will have no record of having issued and cancelled a previous detainer (and, apparently, no records confirming Moreno's citizenship), it stands to reason that Moreno may well become subject to another unlawful detainer. In short, these claims are "capable of repetition, yet evading review." For this reason too, they should not be dismissed.

II. Defendants cannot dismiss this case by claiming that these particular detainers were lifted before these Named Plaintiffs suffered any "harm."

Defendants also argue that the claims in this case should be dismissed for lack of "injury in fact"—both on the ground that these Named Plaintiffs are not currently subject to "imminent harm" and because their detainers were not, in fact, triggered to extend the amount of time they were held in custody. Br. at 5-7. But both of these arguments are based specifically on the idea that the detainers ***have since been cancelled***. *See id.* at 6 (arguing that "the fact that both detainers have been cancelled means that neither Moreno nor Lopez faces imminent harm"); *id*. at 7 (arguing that the detainers "resulted in no deprivation of liberty for either Lopez or Moreno before they were cancelled by ICE"); *id.* ("Because ICE has cancelled the detainers. . . this Court should hold that Moreno and Lopez lack standing."). Accordingly, these "standing" arguments are simply the same "mootness" points discussed above, in different clothing.

Defendants do not seem to contend—nor could they—that an individual subject to a pending ICE detainer would lack standing under Article III to challenge it, or that he could only sue during the hours or days in which the detainer is actually triggered and extends his incarceration. At a minimum, having a pending detainer asking or instructing law enforcement to continue holding the individual would necessarily subject him to "imminent harm." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("imminent harm" test is satisfied when "the potential harm

was not uncertain or speculative, but might be expected to occur before the threat could otherwise be averted"); *cf. Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009) (standing exists "as long as there is some nonnegligible, nontheoretical probability of harm that the plaintiff's suit if successful would redress").

Further, as the Seventh Circuit has recognized, an individual may challenge an immigration detainer based on ***future*** confinement—that is, even if the confinement has not begun. *Vargas v. Swan*, 854 F.2d 1028, 1031 (7th Cir. 1988) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 488-89 & n.4 (1973); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968)); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 438-39 (2004) (affirming *Braden*); *Kholyavskiy v. Achim*, 443 F.3d 946, 952 n.6 (7th Cir. 2006) (same). In *Vargas*, the Seventh Circuit held that a detainer "that has as part of its effect the 'holding' of a prisoner for a future custodian who has evidenced an intent to retake or to decide the prisoner's future status at the end of his or her current confinement serves to establish custody for habeas purposes." 854 F.2d at 1032.

Although the *Vargas* Court found it necessary to remand for fact-finding as to whether that test was met, that was a consequence of the fact that the detainer form in use at that time required only that ICE be provided ***notice*** of the person's release. *Id*. at 1032. It did not explicitly request or require local law enforcement to extend his detention so that ICE could assume custody. *See* Ex. D (copy of an I-247 detainer used prior to 1997). Since *Vargas*, ICE has revised its form more than once. The form used for Named Plaintiffs (Ex. A) provides:

> Under federal regulation 8 CFR § 287.7, DHS requests that you maintain custody of this individual for a period not to exceed 48 hours (excluding Saturdays,

> Sundays and Federal holidays) to provide adequate time for DHS to assume custody ….[1]

In view of this language, there can be no doubt that a detainer issued today would support standing to sue. *See Vargas*, 854 F.2d at 1032; *contrast Prieto v. Gluch*, 913 F.2d 1159, 1164 (6th Cir. 1990) (finding no future custody based on the pre-1997 detainer form because it "[did] ***not*** claim the right to take a petitioner into custody in the future nor [did] it ask the warden to hold a petitioner for that purpose") (emphasis added).[2]

The detainers that ICE issued against these Named Plaintiffs were more than sufficient to support a finding of imminent harm and "injury in fact" when the complaint and class certification motion were filed. Defendants' claim that they lack standing today is simply another way to say that their claims have become moot. And as discussed above, Defendants have cited no authority that would permit them to defeat Plaintiffs' standing to bring this class action simply by lifting the detainers on each individual as he or she steps forward.

CONCLUSION

For all these reasons, the motion to dismiss should be denied. The case should proceed to class certification and litigation on the merits of the class's claims.

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[1] The "requests" language is relatively new. Between 1997 and August 2010, ICE used a detainer form stating that "Federal regulations (8 CFR 287.7) ***require*** that you detain the alien for a period not to exceed 48 hours . . . ." *See* Ex. E (emphasis added). But while the term "requests" appears more permissive, the post-August 2010 form applied to Named Plaintiffs still cited the regulation itself, which continues to say that the local law enforcement agency "shall" detain the individual. 8 C.F.R. § 287.7(d). *See* Ex. A. The form has since been changed again; it now "request[s]" the local agency's continued detention but expressly quotes the mandatory language of 8 C.F.R. § 287.7. Ex. F.

[2] Some courts have held that a detainer alone does not constitute "custody" for purposes of habeas jurisdiction, but those rulings were all based on the pre-1997 version of the form. *See, e.g., Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir. 1988); *Echenique v. Perryman*, No. 95 C 4189, 1996 WL 554546, at *3-4 (N.D. Ill. Sept. 24, 1996).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2011, I caused a copy of the foregoing Brief in Opposition to be served on counsel for Defendants via the court's electronic filing system:

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