IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; ROSA ARELLANO; DELFINA ARIAS; SONIA MENDOZA; ROSALVA RODRIGUEZ; CANDACE MICHELLE SVENNINGSEN; MICHAEL RAY GRAVES; ALICIA RODRIGUEZ; SERGIO B. RODRIGUEZ,	§	CIVIL NO. 2-07CV-188-J
Plaintiffs,	§	OPPOSITION TO MOTION TO DISMISS
v.	§	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, MICHAEL CHERTOFF, SECRETARY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, JULIE L. MYERS, ASSISTANT SECRETARY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN AND JANE DOES 1-100,	§	
Defendants.	§	

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OPPOSITION TO MOTION TO DISMISS

I INTRODUCTION

In this action plaintiffs seek declaratory and injunctive relief restraining defendants U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) to comply with the Immigration and Nationality Act (INA) and the First, Fourth and Fifth Amendments to the United States Constitution when conducting workplace law enforcement operations aimed at apprehending undocumented immigrants. Plaintiffs allege that ICE agents, as a matter of policy and practice, engage in the mass detention of workers present during workplace "surveys" without warrants or individualized cause to believe they are deportable aliens.

Defendants move to dismiss on two grounds: First, defendants argue that regardless of the constitutionality of their detaining the plaintiffs and members of plaintiff United Food and Commercial Workers (UCFW), mootness precludes the plaintiffs from challenging defendants' warrantless mass detentions. Second, defendants simply deny as a factual matter that they pursue such a policy and practice.

Insofar as defendants' first argument is concerned, the claims of both the individual plaintiffs and the UCFW are justiciable. Unlawful pre-trial detention is inherently transitory, and were a litigant required to sue and obtain class certification while still detained, defendants could violate the law indefinitely with impunity.

Defendants' evidentiary argument, of course, is wholly improper on a motion to dismiss, which must be decided on the pleadings alone and without regard to defendants' affidavit and other evidence. In all events, the overwhelming evidence demonstrates that defendants do in fact engage in a policy and practice of, warrantless mass detentions in violation of the INA and the Fourth Amendment.

"Motions to dismiss are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). When a motion to dismiss attacks a litigant's standing, all of the material allegations of the complaint are accepted

as true and the complaint is viewed in the manner most favorable to the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Similarly, defendants' Rule 12(b)(6) motion may be granted only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996). Here again, the court must accept the factual allegations as true. *Norman v. Apache, Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994). Dismissal may not be predicated on evidentiary materials outside of the pleadings. *Test Masters*, *supra*, at 570 n2.

Applying these well-established principles to the case at bar, it will be seen that defendants' motion should be denied.

II PLAINTIFFS RETAIN STANDING TO CHALLENGE DEFENDANTS' PROGRAM OF ARBITRARY, WARRANTLESS ARRESTS AND DETENTIONS.

The Government first argues that plaintiffs lack standing to sue because the principal injury they complain of—unlawful detention—has ended, and they cannot demonstrate a likelihood of future injury sufficient to save their instant claims from mootness. Motion to Dismiss at 2-14.[1]

Plaintiffs disagree. Defendants nowhere contend that they have discontinued workplace enforcement operations or altered in any way the procedures they follow in

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[1] The motion raises no argument that the individual plaintiffs lack standing to sue for damages. Complaint, ¶¶ 41-42.

Defendants' mootness argument is, of course, colorable only insofar as it pertains to plaintiffs' claims for *injunctive* relief. "It is well-established that 'claims for damages or other monetary relief automatically avoid mootness,' so long as the underlying claim remains valid on its merits." *de la O v. Hous. Auth.*, 417 F.3d 495, 499 (5th Cir. 2005); *accord*, *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 874 (5th Cir. 2000) ("'Justiciability must be analyzed separately on the issues of money damages and the propriety of equitable relief.'"). Even assuming, *arguendo*, that plaintiffs' claims for injunctive relief were not cognizable, the individual plaintiffs' damages claim, and, *a fortiori*, the legality of defendants' detaining them would remain justiciable. *Sapp v. Renfroe*, 511 F.2d 172,

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conducting such operations. To the contrary, defendants have pledged to step up the number and frequency of workplace operations and admit of nothing improper in the way they conduct these operations. It is therefore clear that a live dispute remains between defendants and the putative class. That a class has yet to be certified does not impair the justiciability of plaintiffs' claims because the detentions are transitory and no litigant could sue and obtain class certification while detained for several hours.

In any event, there *is* a substantial likelihood that the individual plaintiffs, the UCFW, and other UCFW members will again be subjected to mass ICE detentions.

Both individually and in combination, these factors establish that this is a concrete case and controversy suitable for judicial resolution.

A Plaintiffs' claims challenging a program of unlawful warrantless arrests and pre-trial detention are capable of repetition, yet evading review.

The mootness doctrine asks "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." 13A C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3533, at 212 (2d ed. 1984). Defendants' burden of demonstrating mootness is a heavy one. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). A case becomes moot only "if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

It is axiomatic that "although a case may be technically moot, a federal court may nevertheless retain jurisdiction if a continuing controversy exists or if the challenged problem is likely to recur or is otherwise capable of repetition." *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991). Generally, the capable of repetition

176 (5th Cir. 1975) (graduation of student who challenged constitutionality of school board action does not moot claim for money damages).

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doctrine applies only where two circumstances are present: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (internal citation and quotation marks omitted).[2]

Here it is reasonable to expect that the individual plaintiffs—and nearly certain that the UCFW and other UCFW members—will again be subjected to the same actions that prompted the instant suit.

Defendants' public statements are replete with promises that they will pursue a vigorous program of factory enforcement operations into the foreseeable future.[3]

The Government's brief and evidence in support of dismissal confirm defendants' resolve to continue workplace surveys and the policies and practices their agents observe during such operations. Given the Government's insistence that these

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[2] We recognize that in Johnson v. Moore, 958 F.2d 92, 94-95 (5th Cir. 1992), the court refused to extend the "capable of repetition, but evading review" doctrine to an analysis of the likelihood of future harm for the purposes of determining standing rather than mootness. But the court's reasons for doing so in that case--namely that the plaintiff "lacks standing from the outset of litigation"--are inapplicable here.

[3] *E.g.*, Remarks by Secretary of Homeland Security Michael Chertoff, Press Conference on Operation Wagon Train, December 13, 2006, www.dhs.gov/xnews/releases ("In fact, I'm pretty much going to guarantee we're going to keep bringing these cases."). Defendant Chertoff has stated that future raids will not be "limited to a single industry," and that future enforcement will be pursued through "a comprehensive approach" with a substantial increases in worksite enforcement. *Id.* The Government also contends that illegal immigrants comprise "a very large share" of all food processing workers, and that the food processing industry ranks second only to agriculture as an employer of illegal immigrants. *See* Congressional Research Service Report (CRS) RL33351, April 6, 2006, at 43; CRS RL32044, April 6, 2006 at 7-8, *citing* Passel, UNAUTHORIZED MIGRANTS, NUMBERS AND CHARACTERISTICS, Pew Hispanic Center, June 14, 2005. See also Complaint ¶ 32 ("Defendants carried out the unlawful searches and seizures … as alleged herein … pursuant to custom, policy, practice and usage that defendants have followed, and unless and until enjoined by this Court, will continue to follow at dozens of work sites nationwide. Defendant Chertoff has publicly declared that such raids will continue to occur into the foreseeable future.").

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mass detentions were necessary for "safety," ICE agents will surely be instructed to employ these same procedures again and again in future enforcement operations.

As for UFCW members, there is no serious doubt that they will again be targeted by defendants' workplace operations. "The UFCW currently represents 1.3 million workers across the United States, Canada, and Puerto Rico in industries including retail food, meatpacking and meat processing, and food processing…," industries defendants have singled out as high level targets for their enforcement actions. Complaint ¶ 5. As for the individual named plaintiffs, all remain UFCW members who continue to be employed in the meat-packing industry and at plants defendants give every indication they will raid again. *See generally* Exhibits 2-8 filed concurrently herewith (declarations of individual named plaintiffs).

This record supports a finding that plaintiffs have a reasonable expectation of future injury sufficient to support their claim for injunctive relief.

First, that the individual plaintiffs and their fellow union members were targeted in the past, though not determinative, supports an inference that they will again be subjected to challenged activity.[4] This inference is strengthened by defendants' express resolve to continue a policy and practice of officially sanctioned mass detentions and

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[4] *See O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury."); *Nicacio v. United States I.N.S.*, 797 F.2d 700, 702 (9th Cir. 1985) ("possibility of recurring injury ceases to be speculative when actual repeated incidents are documented.").

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warrantless arrests.[5] Finally, there is no question but that the named plaintiffs suffered injuries shared by a class comprising thousands of workers.[6]

As against the foregoing, the Government relies on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for the proposition that the claims of individual plaintiffs for injunctive relief cannot stand. Motion to Dismiss at 8. Defendants' reliance is misplaced.

In *Lyons*, the plaintiff sought an injunction against a policy under which "police officers were instructed to use chokeholds only when lesser degrees of force do not suffice and then only 'to gain control of a suspect who is violently resisting the officer or trying to escape.'" *Id*. at 106. The plaintiff claimed, however, that he had been choked into unconsciousness "without any provocation," and this was the policy and practice. *Id*. at 106.

The Supreme Court noted the absence of any written or oral pronouncements by the Los Angeles Police Department sanctioning the unjustifiable application of the chokehold and pointed to the absence of "any [record] evidence showing a pattern of police behavior" suggestive of an unconstitutional application of the chokehold. *Id*.[7]

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[5] *James v. City of Dallas*, 254 F.3d 551, 564 (5th Cir. 2001) ("The continued threat of collection actions or foreclosures by the City . . . also suffices to demonstrate the likelihood of real and immediate future injury."); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) ("pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights" supports standing).

[6] *See Armstrong v. Davis*, *supra*, 275 F.3d at 861 ("When a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, we may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established.").

[7] In contrast, the Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a "pattern" of illicit law enforcement behavior. *See Allee v. Medrano*, 416 U.S. 802, 812 (1974); *Hague v. CIO*, 307 U.S. 496 (1939); *see also INS v. Delgado*, 466 U.S. 210 (1984); *Rizzo v. Goode*, 423 U.S. 362, 375 (1976) (distinguishing *Allee* and *Hague* as involving patterns of misbehavior, not isolated incidents).

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Finally, the Court observed that the jurisprudential concerns of "equity, comity, and federalism" sharply constrict federal judicial oversight of "state law enforcement authorities," *id*. at 112, thereby making injunctive relief inappropriate:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that *the City ordered or authorized police officers to act in such manner*.

Id. (emphasis added).

The differences between *Lyons* and the case at bar are several. First, here plaintiffs allege that ICE agents as matter of policy and practice—followed at all plants targeted during the Swift raids—engage in mass detention of workers without warrant or any individualized reason to believe that the detained workers are aliens removable from the United States. Unlike *Lyons*, there is nothing incredible about the plaintiffs' allegations that they will again be subjected to the conduct that gave rise to this litigation or that the treatment they experienced is aberrational.[8]

Second, plaintiffs ask this Court to restrain a *federal* agency from a program of unconstitutional conduct. None of the prudential concerns over federalism, which were central to *Lyons*, are present here.[9]

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[8] This Court has broad discretion to determine whether the likelihood of future injury is sufficient to support a claim for injunctive relief. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1388 (5th Cir. 1980). However, that discretion "must always be utilized to insure that the public interest is adequately protected from any realistic threat of future injury." *Id*.

[9] *See La Duke v. Nelson*, 762 F.2d 1318, 1324-25 (9th Cir. 1985) ("A third distinguishing feature that separates the present case from *Lyons* is the absence of the prudential

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Finally, unlike *Lyons*, plaintiffs and the members of proposed plaintiff class do not have to induce a police encounter—or do anything else, for that matter—before the possibility of injury can occur. Plaintiffs and their proposed class members are subject to constitutional injury based on completely innocent behavior: going to their jobs.

In *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'r*, 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981), the court held, over an argument identical to that defendants offer here, that Mexican-Americans had standing to obtain prospective relief from systematic exclusion from grand jury service. Holding that "*O'Shea* [*v. Littleton*, 414 U.S. 488 (1974), [10] did] not control the disposition of these cases," the court affirmed the plaintiffs' standing to seek injunctive relief:

> Under these allegations, the threat of future injury is palpable. Unlike the contingency riddled complaint in *O'Shea*, the complainants here claim *an injury that turns on a single contingency: that the jury commissioners will act exactly as they have for the past ten years* . . . Unlike *O'Shea* . . . [plaintiffs'] injury here depends solely upon the action of the [defendants].

622 F.2d at 820-21 (emphasis added); *accord La Duke v. Nelson*, *supra*, 762 F.2d at 1326 (9th Cir. 1985) (distinguishing *Lyons* and affirming plaintiffs' standing to challenge pattern of unlawful seizures flowing from "INS's standard ranch and farm practices").

In sum, the allegations of the complaint, defendants' guarantees of further raids singling out workers in the food processing industry, plaintiffs' continuing employment

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limitations circumscribing federal court intervention in state law enforcement matters.").

[10] In *O'Shea,* the Court held that a litigant seeking injunctive relief must establish a realistic possibility of future injury. *Lyons* applied, but expressly did not extend, *O'Shea.* ("No extension of *O'Shea* … is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought."). *Ciudadanos* accordingly remains valid precedent notwithstanding that *Lyons* was subsequently decided.

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in food-packing plants, and the UFCW's ongoing representation of over one million workers, all establish a likelihood of repeated injury to the individual plaintiffs and the virtual certainty that the UFCW and countless numbers of its 1.3 million members will again be subjected to the actions challenged in this suit. Defendants' suggestion that there is no assurance of "that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions, *Baker v. Carr*, 369 U.S. 186, 204 (1962), places a palpable strain on credulity. Their motion to dismiss should be denied.

B Even were plaintiffs' individual claims moot, which they are not, a controversy suitable for judicial resolution would remain between defendants and the proposed class.

Defendants nowhere suggest that they have stopped conducting workplace surveys or changed the way they conduct such operations. Clearly, a live controversy remains between defendants and the proposed class. Complaint ¶¶ 18-21 (proposed class definition and allegations regarding Rule 23).

In *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000), female undergraduate students filed suit alleging that LSU had violated Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the United States Constitution by denying female students equal opportunity to participate in intercollegiate athletics. *Id*. at 864. As plaintiffs do here, the plaintiffs in *Pederson* sought declaratory and injunctive relief on behalf of themselves and a putative class, and monetary relief on their individual claims. *Id*.; *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 898 (M.D. La. 1996). Though the district court initially certified a class, it later entered an order decertifying the class. 213 F.3d at 865. The named plaintiffs graduated, and on appeal the university argued that their individual claims and those of the putative class were no longer justiciable. *Id*. at 872-73. The court held that the class claims continued to present a live controversy:

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> In the present case, Appellants have all graduated from LSU … [T]hey have not argued that there is any likelihood that any of them will return to LSU and attempt to play varsity sports. As is so often the case in suits for injunctive relief brought by students, graduation or impending graduation renders their claims for injunctive relief moot ... *The issue of injunctive relief, however, is not moot as to the putative class* ... In this case, [LSU] bear[s] the burden of demonstrating that "'there is no reasonable expectation that the wrong will be repeated.'" Appellees have failed to meet this burden. They have made no representation to this court that they are dedicated to ensuring equal opportunities … for both their female and male athletes in the long run. …We will not … declar[e] this issue moot when [LSU has] failed to demonstrate that their Title IX effective accommodation violations will not recur.

213 F.3d at 874-75 (emphasis supplied; citations omitted).[11]

As discussed *post*, the individual named plaintiffs and the UCFW continue to have a reasonable expectation of future threat of harm by defendants' challenged policies and practices. Yet as shown above, even assuming, *arguendo*, that defendants could demonstrate that their wrongful behavior could not reasonably be expected to recur as to any of the individual plaintiffs, their union, or their fellow union members, the claims plaintiffs assert on behalf of the putative class would still remain justiciable. Defendants' motion to dismiss should accordingly be denied.

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[11] *See also, cf., Locke v. Board of Public Instruction*, 499 F.2d 359, 366 (5th Cir. 1974) (disputes of "general public interest" may require a decision even if many attributes of mootness exist).

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III PLAINTIFF UFCW HAS BOTH DIRECT AND ASSOCIATIONAL STANDING TO SUE FOR INJUNCTIVE RELIEF.

A Plaintiff UCFW has associational standing to challenge defendants' program of generalized, warrantless arrests.

In *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court held that an organization may sue to redress its members' injuries even without a showing of injury to the association itself. To establish associational standing, the Court held,

> The association must allege that its members, or any one of them, are suffering … threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit … So long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members…

Id. at 511.

In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), the Court expanded on *Warth*, formulating the following three-prong test:

> We have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[12]

Id. at 343. Plaintiff the UFCW has standing under this three-pong test.

First, as discussed above the UCFW's members, including the named individual plaintiffs, have standing to sue in their own right.

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[12] The first and second *Hunt* requirements are constitutional; the third is prudential. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555-57 (1996).

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Second, the goals of this litigation are germane to plaintiff UCFW's purpose.[13] Here, the UCFW is challenging a pattern and practice of unlawful workplace enforcement operations that impair interests courts have recognized as germane to a labor union's purposes, including, for example —

- frustrating members' realizing the full benefits of their collective bargaining agreement;[14]
- impairing members' constitutional right to freedom from unreasonable seizures of their persons and relative freedom of movement within the workplace,[15]
- creating dangerous conditions of confusion and disorder inimical to workers' health and safety at the workplace,[16] and
- creating fear and intimidation among immigrant workers that discourage their airing grievances and participating in union activities.[17]

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[13] Courts have consistently interpreted the germaneness element as requiring only pertinence or connection, not centrality or even a substantial overlap, between the purposes of the organization and goals of the litigation. Thus, an organization need show only that there is "mere pertinence between litigation subject and organizational purpose…" and that a "critical mass of members claim[] cognizable injuries from these [challenged] policies…" *Humane Society of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988). *See also Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1159 (9th Cir. 1998) (rejecting Park Service's contention that environmental and historic preservation claims no germane to private golf club's purposes because stated purposes of the club did not include environmental or historical objectives; "courts have generally found the germaneness test to be undemanding").

[14] *See, e.g., United Food & Commer. Workers Int'l Union, Local 751 v. Brown Group*, 50 F.3d 1426, 1431 (8th Cir. 1995), *rev. on other grounds*, 517 U.S. 544 (1996) ("loss of pay and benefits to members … are interests that are 'germane' to the UFCW's purpose as the exclusive bargaining agent of its members' terms and conditions of employment…"); *see also Automobile Workers v. Brock*, 477 U.S. 274, 281-88 (1986) (union has standing to challenge an agency's construction of statute providing benefits to workers unemployed because of competition from imports).

[15] *See e.g., San Bernardino Pub. Emples. Ass'n v. Stout*, 946 F. Supp. 790, 797 (C.D. Cal. 1996) (protecting members' constitutional rights germane to union's purpose).

[16] *See e.g., United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 611-12 (7th Cir. 1999) ("environmental concerns" germane to union's purpose to protect its members from environmental risks that could affect job-related health and safety).

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Here, too, addressing these injuries is plainly pertinent to plaintiff UFCW's purposes as a labor union.

The UCFW exists to advance the treatment and conditions its members experience in the workplace. *See* Exhibit 1, Mark Lauritsen Decl. at ¶ 5 and Attachment A, Article 2 (the United Food & Commercial Workers International Union Constitution provides that among other goals the union is dedicated "to protect and extend … civil rights and liberties, and the traditions of social … justice of the United States"). The UFCW is required by federal law to uphold its Constitution.

Multiple departments within the UCFW are charged with protecting members' human and civil rights. For example, the UFCW's Civil Rights and Community Action Department "is dedicated to advancing the principles and practices of equality, freedom, and economic and social justice . . . [and] to help workers exercise their rights on the job ..."[18] A "main concern" of the UFCW's Legal Department "is securing the protections that employees are entitled to under law, while working to find new ways to advance the interests of UFCW members and all working people."[19] The "Legal

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[17] *See e.g., Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1503-04 (D.C. Cir. 1988) (en banc opinion equally divided on other grounds) ("The union's purposes include … protecting its members"; "government's current asylum and deportation policies keep aliens out of the mainstream of the association's business"; "fearful and unwilling to come forward, illegal aliens … do not identify themselves to the union, do not make known their grievances against their employers, and do not become involved in union activities"; "union's current effort to protect its members' interest in reformed asylum and deportation procedures is therefore germane to the union's activities …").

[18] **http://www.ufcw.org/about_ufcw/who_we_are/departments_and_divisions/civrightscommaction.cfm.**

[19] **http://www.ufcw.org/about_ufcw/who_we_are/departments_and_divisions/legal_dept.cfm**.

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Advisor" portion of UFCW's website contains specific links addressing the needs of immigrant workers.[20]

Each of the contracts between the UCFW and Swift Company plants, "includes provisions protecting members' right to take breaks including for meals and to use the restroom." Ex. 1, ¶ 6. As set forth in the Complaint and declarations filed herewith, during the Swift raids plaintiffs and plaintiff UFCW's members were detained for several hours and were not free to take breaks, use bathrooms, eat, or visit the union's representative's office.[21]

The "germaneness" prong of the *Hunt* test is clearly satisfied here.

Finally, the UCFW seeks prospective injunctive relief protecting its members from further arbitrary mass detentions and arrest, and not monetary damages. Individual participation is not necessary where, as here, an association seeks prospective or injunctive relief for its members against an allegedly unlawful governmental policy and practice.[22]

In sum, plaintiff UFCW satisfies all prongs for associational standing; the Court should deny the motion to dismiss UFCW's claims for want of associational standing.

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[20] **http://www.ufcw.org/ufcw_members_only/legal_advisor/immigrant_workers/index.cfm**.

[21] As the exclusive collective bargaining agent of its members, "the UCFW has both a right and a duty to protect members' rights against abridgment by ICE or any other entity that would obstruct members' realizing the full benefits granted them under their collective bargaining agreement and the laws of this nation." Ex. 1 ¶ 7.

[22] *See Warth*, *supra*, 422 U.S. at 515 ("[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.").

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B Plaintiff UFCW has suffered direct injuries to its own interests, including the loss of hundreds of union members.

The UFCW also has standing to sue in its own right. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself …" *Warth, supra*, 422 U.S. at 510. To satisfy the direct standing requirement an organization must show (i) an injury in fact (ii) that is traceable to the defendant's challenged conduct and (iii) that is likely to be redressed by a favorable decision in the district court. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); *Allendale Neighborhood Association v. Austin Transp. Study Policy Advisory Committee*, 840 F.2d 258, 261-62 (5th Cir. 1988).

Here the Government challenges the UFCW's ability to satisfy only the injury-in-fact prong of this standing test. Defendants contend that the mass detention of the UCFW's members did no more than cause the union to incur "litigation costs" for this case. Motion to Dismiss at 5-8. Defendants' argument is without merit.

An association suffers a direct injury sufficient to establish standing where it has expended resources to counteract the effects of the challenged activity. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Association of Community Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360-361 (5th Cir. 1999) (*ACORN*).[23]

Here, there is no question but that the UFCW diverted substantial resources to ameliorate the impacts of defendants' challenged actions on its members and their families. *See* Exhibit 1 ¶¶ 10-16 (detailing a range of resources and funds the UFCW was

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[23] The union has also suffered a cognizable injury because as discussed *infra* it has suffered economic harm and harm to its prospects. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-587 (5th Cir. 2006) (political party has standing to enjoin opposing party's replacing candidate on ballot where running new campaign would cause economic harm and harm to its election prospects). While an organization must allege a "concrete and particularized" injury that is "actual or imminent," rather than

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required to divert to dealing with the Swift raids and their aftermath, including "extra staff … diverted away from their regular duties," "transportation, hotel, and living costs for staff members assisting the locals dealing with the raids," a local dedicated "$40,000 to address members' needs in the aftermath of the Swift raids," high ranking officials were forced to "neglect [their] usual duties for more than a week," "local staff, including the local's organizing director, was diverted from their usual duties in order to perform interviews, translations, communicate and coordinate with detention centers and otherwise assist members and their families," one Local's "in-house legal department of four attorneys put aside all of other duties in order to respond to the December 12, 2006 raids").

Furthermore, the union lost hundreds of members who were detained by ICE agents and *not* arrested as unauthorized workers, but who left their jobs because they were fearful of experiencing another raid. *See, e.g.*, Exhibit 1 ¶ 11 (Local 789 "lost members who were detained by ICE but not arrested because they feared that similar raids would take place in the future"); ¶ 12 (UFCW Local 1149 "lost members who were detained by ICE but not arrested because they were traumatized by the raid and feared that similar raids would take place in the future"); ¶ 13 ("UFCW Local 22 … lost many members because they were afraid of being caught up in future raids").

The diversion of union resources and loss of union members cannot possibly be characterized as mere "litigation costs" insufficient to confer standing. Rather, they constitute a direct injury more than sufficient to establish standing. *Haven Realty*, 455 U.S. at 379 n.20 (standing based on non-economic injury).[24]

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conjectural, the injury "need not measure more than an 'identifiable trifle.'" *ACORN*, 178 F.3d at 358.

[24] Injury to an association's activities, including a union's retention and recruiting of members and members' participation in union activities, constitutes a direct injury

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Plaintiff UCFW has standing to sue both for direct injuries and as the representative of its members.

IV THE COMPLAINT STATES CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

A Defendants' motion to dismiss is grounded entirely on evidentiary materials outside the pleadings. Defendants' factual arguments are wholly immaterial to whether plaintiffs have stated a claim upon which relief may be granted.

In disregard of basic federal civil procedure, defendants next urge the Court to dismiss this cause on the grounds that, contrary to plaintiffs' allegations, ICE agents "lawfully conducted the Swift factory surveys and therefore did not violate immigration regulations or employees' constitutional rights." Motion to Dismiss at 15. Defendants reply on the declaration of ICE Deputy Assistant Director Matthew Allen, that boils down to an untested claim that no one was detained or arrested during the Swift raids except upon legally adequate cause. *See, e.g.*, Allen Declaration at ¶ 12 (employees were "free to leave the premises, and to use [their] cell [phones] and pay phones …").

Defendants' denial of culpability, of course, is at odds with multiple allegations of the complaint, which alleges both generally and specifically that plaintiffs were *not* free to leave, but were instead detained and arrested without legal cause.[25]

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sufficient to establish standing. *Havens Realty, supra*, 455 U.S. at 379; *Urbano Herrera & Communications Workers of America v. Medical Center Hospital*, 241 F.Supp.2d 601, 616 (D.C. La. 2002), *reversed and remanded on other grounds*, 467 F.3d 427 (5th Cir. 2006).

[25] *See, e.g.*, Complaint ¶ 13 ("Plaintiff Sergio B. Rodriguez is a lawful permanent resident of the United States. … On December 12, 2006, [ICE] agents, without warrant or a reasonable suspicion based upon articulable facts that he was an immigrant present in the United States in violation of the Immigration and Nationality Act…detained Plaintiff … and then without warrant or probable cause, arrested and transported him to a Denver detention center. Plaintiff Sergio B. Rodriguez was unlawfully detained for approximately 12 hours … At no time while he was detained was he advised of his right to remain silent or right to counsel, or permitted access to counsel."); ¶ 25 ("During the Swift Raids virtually all UFCW members at each Swift plant were detained as a group, told to remain in specific locations for interrogation, and were not

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Resolution of such fundamental factual disputes is wholly improper in the context of Rule 12(b)(6) motion to dismiss. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).[26] Dismissal for failure to state claim is disfavored and is proper only if it appears beyond doubt that plaintiff can prove no set of facts to support the claim. *Schydlower v Pan Am Life Ins. Co.*, 231 F.R.D. 493 (W.D. Tex. 2005).

Defendants attempt to circumvent the limits of a motion to dismiss by offering two nominally "legal" arguments: First, defendants suggest that their *seizing* plaintiffs was lawful per se because they had obtained warrants authorizing them to *search* various Swift plants. Motion to Dismiss at 16. Second, defendants argue that everything they did during the Swift operations has been approved by the Supreme Court in *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984).

B Nothing in the search warrants defendants obtained authorized ICE agents to detain plaintiffs without individualized cause.

Defendants' first legal argument is transparently flawed: Defendants argue that because "ICE agents were lawfully *present* at Swift facilities pursuant to civil warrants issued by Federal Magistrate Judges," Motion to Dismiss at 16, their *detaining and arresting* plaintiffs was, *a fortiori*, lawful. Defendants' one-page argument relies exclusively on *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981).

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free to leave those areas, regardless of their citizenship or immigration status, and without reasonable suspicion based upon articulable facts that they were immigrants present in the United States in violation of the Immigration and Nationality Act ...").

[26] If on a motion to dismiss for failure to state a claim matters outside the pleadings are presented to and not excluded by the Court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Bowers v. Nicholson*, 2007 U.S. Dist. LEXIS 77636 at 9-10 (S.D. Tex. 2007); *Morin v. Caire*, 77 F.3d 116, 118 (5th Cir. 1996) (same).

Plaintiffs urge the Court to exclude defendants' evidence, or in the alternative, advise that it will be considered and afford plaintiffs an opportunity to conduct appropriate discovery.

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In *Blackie's*, the INS obtained two warrants, the first of "which provided that INS agents might … *search* the 'entire premises of Blackie's House of Beef' because 'there is now being concealed certain persons namely Aliens who are believed to be in the United States in violation of … Title 8, Section 1325 and Section 241(a)(2).'" *Id*. at 1214 (emphasis supplied). The second "directed the INS to 'enter the premises … in order to *search* for persons believed to be aliens in the United States without legal authority.'" *Id*. at 1215 (emphasis added). Blackie's sued for a declaratory judgment, injunctive relief, and damages, alleging that the search warrants were issued in violation of the Fourth Amendment. *Id*. The issue before the court, therefore, was "whether either or both of the warrants were sufficient to protect *the fourth amendment rights of Blackie's*." *Id*. at 1217 (emphasis added).

Here plaintiffs do *not* contest ICE's right to *search* the premises of the Swift plants. But the emphasized text makes obvious the short answer to defendants' argument: Nowhere did the court in *Blackie's* consider, much less approve, the INS's conducting mass *detentions* and warrantless *arrests* of persons present at Blackie's premises merely because it had obtained warrants to *search* those premises.

Here, the search warrants issued for the Swift plants could not have authorized defendants to detain or arrest anyone. *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1020-21 (N.D. Ill. 1982) (INS may utilize an administrative warrant to enter and search a commercial building, but "such a warrant does not authorize the search or seizure of persons found on the premises. Warrants to search premises simply do not authorize the seizure of persons found on the premises."); *see also, cf.*, *Ybarra v. Illinois*,

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444 U.S. 85, 91 (1979) (warrant authorizing search of premises and specified individuals does not provide a legal basis to search or seize other individuals at the premises).[27]

In fact, the warrants issued for the Swift plants did not authorize defendants to detain or arrest anyone. The warrant issued for the Swift plant in Cactus, Texas, for example, was specifically designated a "search" warrant and authorized ICE agents only "to make such search as is necessary to locate persons who are in the United States illegally." Defendants' Exhibit 1 at 3. The other warrants obtained were similarly circumscribed. Clearly, none of these warrants authorized the detention of any of the plaintiffs, much less the mass detention of all workers ICE agents happened to encounter at a particular workplace.

In sum, the Court should reject defendants' attempt to distend the authority conferred by a search warrant into a generalized license to detain and arrest without cause anyone and everyone ICE agents may encounter during a search.[28]

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[27] The Court held in *Ybarra*:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v. New York*, 392 U.S. 40, 62-63.Where the standard is probable cause, *a search or seizure of a person must be supported by probable cause particularized with respect to that person*. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

444 U.S. at 91 (emphasis added).

[28] Finally, defendants' claim that they could engage in the conduct described in the Complaint even if they possessed no warrants because "ICE agents are statutorily authorized to interrogate any alien or person believed to be an alien as to the alien's right to be or remain in the United States." Motion to Dismiss at 15, *citing* 8 U.S.C. § 1357(a)(1). Nothing in § 1357 explicitly or impliedly authorizes the mass detention of all workers during the Swift raids described in the Complaint. Defendant do not offer a

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C *Delgado* does not authorize mass arbitrary detentions or arrests without probable cause. Whether plaintiffs were detained and arrested without warrant or reason is a question of fact that may not be resolved on a motion to dismiss.

Defendants' final attempt to secure dismissal on factual grounds rests on the Supreme Court's 1984 opinion in *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 216 (1984). At issue in *Delgado* was a Fourth Amendment challenge to an INS factory survey. *Id*. at 212-13. The evidence in *Delgado* showed that INS agents approached all workers at their work stations and asked them questions about their citizenship and immigration status. *Id*. Although INS agents stood by the factory exits, there was no evidence that they stopped anyone from leaving. *Id*.

The Supreme Court concluded that the workers were not detained because "[t]he record indicates that when these surveys were initiated, *the employees were about their ordinary business*, operating machinery and performing other job assignments … [and] workers *were not prevented by the agents from moving about the factories*." *Delgado* at 1763 (emphasis added).

Delgado certainly does *not* hold that ICE agents can *never* detain someone during a factory survey. Rather, the Court there affirmed that an encounter between a law enforcement official and an individual amounts to a detention when "the circumstances

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single precedent decision in any court in any jurisdiction that interprets § 1357 to authorize the type of conduct described in the Complaint. Indeed, every court which has addressed the scope of defendants' powers under § 1357 has required defendants to adduce articulable suspicion of both alienage and unlawful presence prior to the initiation of detentive stops. *See, e.g., Benitez-Mendez v. INS*, 707 F.2d 1107, 1100 (9th Cir. 1983), *amended* 748 F.2d 539 (9th Cir. 1984) (clarifying that a seizure had taken place); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1070 (7th Cir. 1976), *modified on reh'g en banc*, 548 F.2d 715 (1977); *Ojeda-Vinales v. INS*, 523 F.2d 286, 287 (2d Cir. 1975) (following *Au Yi Lau*); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Ramirez v. Webb*, 599 F. Supp. 1278, 1282 (W.D. Mich. 1984).

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of the encounter … demonstrate that a reasonable person would have believed he was not free to leave." *Delgado*, 466 U.S. at 216.[29]

In this case, plaintiffs have alleged that they and thousands of other UFCW members were herded to common areas by armed agents, where they were held against their will. *See, e.g.*, Complaint ¶ 11 ("Plaintiff Michael Ray Graves is a citizen of the United States. … On December 12, 2006, [ICE] agents, without warrant or a reasonable suspicion based upon articulable facts that he was an immigrant present in the United States in violation of the Immigration and Nationality Act, or otherwise subject to seizure, *detained Plaintiff Michael Ray Graves … for approximately eight (8) hours … ICE agents also unlawfully physically restrained* plaintiff Michael Ray Graves." (Emphasis added)); ¶ 25 ("During the Swift Raids virtually all UFCW members at each Swift plant were detained as a group, told to remain in specific locations for interrogation, and were not free to leave those areas").

Plaintiffs do believe that the Court should consider extraneous evidence in ruling on defendants' Rule 26(b)(6) motion to dismiss. Yet if the Court is otherwise inclined,

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[29] *See e.g.*, *La Duke v. Nelson*, *supra*, 762 F.2d at 1328 (9th Cir. 1985) ("Looking at the entire record, … we affirm the district court's conclusion that a seizure of the entire unit is routinely accomplished. Moreover, the Supreme Court's opinion in *INS v. Delgado* only strengthens the validity of the district court's seizure conclusion."); *Florida v. Bostick*, 501 U.S. 429, 434, 439 (1991) (a seizure occurs when consideration of all the circumstances surrounding the encounter shows that the police conduct would have communicated to a reasonable person that he was not free to decline the officer's requests); *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 292 (10th Cir. 1996) ("*Delgado*… is distinguishable because in that case the workers questioned were given no reason to believe the agents were restricting their freedom in any significant way."); *United States v. Grant*, 920 F.2d 376, 384 n.3 (6th Cir. 1990) ("The Court [in *Delgado*] explained that the plaintiffs had not been seized because they had consensual encounters with INS agents and … the workers were generally free to move about the factory.").

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the overwhelming evidence shows that plaintiffs and UFCW members *were* detained *en masse* during defendants' raids.[30]

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[30] *See e.g.*, Declaration of John Heaton, Plaintiffs' Ex. 10, at ¶¶ 4-5 ("An ICE agent … announced for everyone to come out of their work areas and convene at the tool shed…A group of about fifteen ICE agents surrounded our group … The ICE agents had guns on the belts and many of them had guns on their hands. After approximately thirty minutes, an ICE agent announced for our group to move toward the cafeteria, and we walked there with ICE agents lined up on both sides of our group … An ICE agent announced that no one could use any phones"); Declaration of Delfina Arias, Exhibit 3, at ¶¶ 5-6 ("An ICE agent announced that citizens were required to go in one direction toward the men's locker room, and that residents must go in another direction … The agent ordered me to go and wait in the cafeteria … ICE agents were guarding us …"); Declaration of Candace Michelle Svenningsen, Exhibit 6, ¶¶ 6- 8 ("ICE agents told us to line up against the wall and wait to be questioned … agents blocked every doorway and exit. All of the agents had a gun in a holster…. ICE agents did not let people make any phone calls … ICE agents always blocked doorways and would not allow people to move around. We were told what to do and where to go"); Declaration of Anna Arellanes, Exhibit 9, at ¶¶ 5-8 ("I walked toward the restroom but an ICE agent that was blocking the entryway told us we could not use the restroom and that we had to go wait in the hallway … I was detained for about four hours during the ICE raid"; Declaration of Alicia Rodriguez, Exhibit 8, at ¶¶ 4-9 ("My supervisor gave me permission to use the restroom, so I walked out into the hallway toward the bathroom … While I was in the restroom, an ICE agent appeared and yelled for everyone to get out of the restroom and into the cafeteria. The agent hit me on the shoulder with an object … I walked to the union representative's office to report the ICE agent's conduct. While I was waiting for the union rep, an ICE agent ordered me to go to the cafeteria and get in line … All movement of workers was controlled by ICE agents. … Agents blocked every hallway and doorway and ordered people where to go and where to stand … At no time during the detention which lasted about six hours, did I feel free to leave."); Declaration of Sonia Mendoza, Plaintiffs' Exhibit 4, at ¶¶ 4-9 ("ICE agents were blocking all of the exits, they had guns, and agents were directing people where to go and what to do … I asked an ICE agent if I could call my family to let them know that I was okay, and the agent said that I was not allowed to use the phone … I tried to go and talk to my husband in another area of the plant. An ICE agent stopped me and told me that I couldn't leave my area."); Declaration of Rosalva Rodriguez, Plaintiffs' Exhibit 5, at ¶¶ 4-9 ("I was stopped by armed ICE agents near the men's locker room. They told us to form a line and two ICE agents started searching me in my pockets … a group of ICE agents came pointing their guns at us …The line moved into the cafeteria, where ICE agents told me to sit down and would not let anyone go anywhere … I was detained for approximately four hours."); Declaration of Rosa Arellano, Plaintiffs' Exhibit 2, at ¶¶ 4-9 ("one of the ICE agents announced no phone calls, no food, and nobody leaves. No one was allowed in or out of the cafeteria without ICE permission …I believe I was detained for about four hours."); Declaration of Michael Graves, Exhibit 7, at ¶¶ 5-11 ("In the locker room, an ICE agent put plastic handcuffs on our wrists and searched us … An ICE agent … searched my locker and checked for my ID … ICE agents instructed us that no one could eat, drink, or use their cell phones … I

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Defendants' untested assertion that they detained no one during the Swift raids without legally sufficient cause exceeds all credulity. Their motion should be denied. [31]

V PLAINTIFFS HAVE ALLEGED VALID *BIVENS* CLAIMS.

The Government claims that the plaintiffs' claims for damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), fail because those responsible for the injuries arising from those claims are identified via fictitious names.

The Federal Rules of Civil Procedure clearly anticipate plaintiffs' use of fictitious parties. See, e.g., Fed. R. Civ. Proc. §1441(a) ("For the purposes of removal . . .the citizenship of defendants sued under fictitious names shall be disregarded."). The alleging of fictitious defendants in federal actions occurs frequently and is accepted practice in the Fifth Circuit.[32] If, after discovery, the identity of the fictitious defendants remains unknown, the claims against them may be dismissed. *Sheetz, supra*, at 37.

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was detained for about 8 hours during the ICE raid. I was obviously not free to leave since I had been handcuffed, ordered where to go and stand...").

[31] Nor does the complaint's omitting the details set out in plaintiffs' declarations support granting defendants' motion. "A claimant does not have to set out in detail the facts on which the claim for relief is based, but must provide a statement sufficient to put the opposing party on notice of the claim." 2 James W. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 8.04[1][a], at 8-22 (3d ed. 2006), *cited with approval EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 470 fn 2. (5th Cir. 2006); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002) (a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

[32] See, *Doleac v. Michalson*, 264 F.3d 470, 477 (5th Cir. 2001)("we hold that § 1441(a) applies only to John Doe defendants as such, not to subsequently named parties identifying one of those fictitious defendants . . . .") *Nagle v. Lee*, 807 F.2d 435, 440 (5th Cir. 1987) ("the mere naming of a person through use of a fictitious name does not make that person a party absent voluntary appearance or proper service of process."); ("It is stated that the true names of these defendants are not known although there is not a similar averment with respect to Doe and Roe who are frequently designated as fictitious parties.") *Council of Federated Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964); *See also Scheetz v. Morning Call, Inc.*, 130 F.R.D. 34, 36 (E.D. Pa. 1990), *aff'd*, 946 F.2d 202 (3d Cir. 1991) ("Contrary to the defendants assertions, Doe defendants are routinely used as stand-ins for real parties until discovery permits the intended defendants to be installed."); *Richard v. City of Harahan*, 6 F. Supp. 2d 565, 575 (E.D. Lou. 1998) (same).

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The plaintiffs properly described the Doe defendants to the best of their ability as "officers, agents, and employees of the Department of Homeland Security who … during the Swift Raids, planned, authorized, encouraged, executed or acquiesced in the violation" of the plaintiffs rights. Complaint at ¶ 17, p. 8. The plaintiffs note that when they learn the identities of the Doe defendants, they will amend the complaint. *Id.*[33]

VI PLAINTIFFS' PRAYER FOR INJUNCTIVE RELIEF IS SUFFICIENTLY SPECIFIC.

The government lastly argues that plaintiffs' prayer for injunctive relief should be dismissed because the Court is precluded from giving "broad, generalized injunctive relief." Motion to Dismiss at 23. Again, defendants' motion is without merit.

Given the liberal standards of notice pleading, the request for the injunction set forth in the complaint cannot serve to limit the relief available to a prevailing plaintiff. "To obtain a permanent injunction, a party must make a request for such relief in his or her pleading … As a rule, however, the demand for relief contained in a pleading is not determinative of the right to relief or of its character or extent." *Gallagher et al*, 42 Am Jur 2d. Injunctions § 255 (West 2007).[34]

VII CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion to dismiss.

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[33] The defendants also claim that "to the extent that the *Bivens* claims are against the defendants in their official capacity" there are barred by sovereign immunity. Motion at 22.33 Sovereign immunity does not apply in this case, as it is well-settled that *Bivens* actions only lie against federal agents acting in their individual capacities. *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

[34] Additionally, a court has considerable discretion in fashioning a valid injunction. *J. M. Fields, Inc. v Kroger Co.*, 330 F.2d 686 (5th Cir. 1964); Aerosonic Corp. v Trodyne Corp., 402 F.2d 223 (5th Cir. 1968). The plaintiffs believe that the District Court will be capable of crafting an injunction that prevents the defendants from committing the illegal acts and complies the requirements of Fed. Rule Civ. Proc. 65(d).

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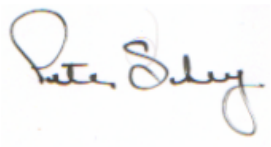

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSITION TO MOTION TO DISMISS was served via the district court's electronic filing system on this 27th day of December, 2007, to the following counsel:

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