UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 07-1959 ADM/JSM

CARLOS ARIAS, et al. Plaintiffs, v. UNITED STATES IMMIGRATIONS AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY, et al. Defendants.	)	**RESPONSE OF FEDERAL DEFENDANTS**

This is a civil rights action in which Plaintiffs seek an injunction, declaratory judgment and damages arising out of the conduct of Deportation Agents and their supervisors for having allegedly violated constitutional rights during Operation Cross Check, which concluded on Friday, 13, 2007. To justify injunctive relief, Plaintiffs claim while Agents were executing warrants of removal, the Agents entered private residences without consent, questioned individuals and arrested them without probable cause and an advise of their rights and counsel. Plaintiffs' erroneously, however, rely on criminal law even though the warrants and apprehensions are civil. Similarly, Plaintiffs fail to establish standing and subject matter jurisdiction. A future injury is missing. Moreover, they have alternative remedies, including pursuit of their constitutional claims in pending removal proceedings. Moreover, they are unlikely to prevail on the merits and the public interest and balance of the harms do not favor

granting an injunction. Therefore, the court should deny injunctive relief to these Plaintiffs who have different interests and claims. [1]

I. The Motion for Temporary Restraining Order and Amended Complaint.

On April 24, 2007, an Amended Complaint, Amended Motion for Temporary Restraining Order, Amended Memorandum in Support and were filed without prior notice to the Defendants or this Court.[2] The filing was completed with less than four business hours before Defendant's response was due. Defendants immediately notified Plaintiffs' counsel that their agreement to maintain the status quo had not changed. Newly added parties that were not named or Hondurans with official papers when the agreement was reached would not be covered. Regardless of the sharp practice of Plaintiffs' counsel to present one set of circumstance to the Court and opposing counsel at a status conference and change them at the eleventh hour, the Amended Motion for TRO does not set forth the terms or conditions of the requested restraining order. Likewise, the Proposed TRO Order was not amended.

The Proposed TRO Order contains the same requests for injunctive relief that are pleaded in the Amended Complaint. The Amended Plaintiffs request the following injunctive relief:

---

[1]Plaintiffs refer to "deportation."Congress, however, jettisoned that term and replaced it with "removal" in 1996.

[2]Lest the Court believe they were minor amendments, the Amended Motion for TRO attached Sixteen Affidavits while the Complaint had three. Moreover, the complaint contained 85 paragraphs. The Amended Complaint contained 333 paragraphs. Similarly, the Amended Complaint seeks certification of a class. Para. 71-80.

1. Prohibit further immigration enforcement proceedings or deportation actions against Plaintiffs during the pendency of the case;

2. Prohibiting the transfer of Plaintiffs out of Minnesota "until Plaintiffs have been afforded their full statutory and constitutional rights and opportunity to appear before an immigration court to raise their constitutional issues" and

3. Prohibiting Defendants from engaging in the allegedly unlawful, abusive and discriminatory acts identified in Counts I-VI, including specifically enjoining ICE from conducting warrantless searches.

Paragraphs 2, 3 & 7 of prayer for relief. Count I claims violation fo the Fourth Amendment arising out of warrantless searches and seizures. Count II claims a violation of the Fifth Amendment by taking Plaintiffs into custody without affording them unspecified constitutional rights. Count III claims violation of the Fifth Amendment alleging that Plaintiffs were not advised of their rights to remain silent and to an attorney. Count IV claims violation of the Sixth Amendment right of counsel during custodial interrogations.[3] Count V is a Bivens action for damages generally alleging the Plaintiff Carlos Arias was a victim of violations identified in the previous paragraphs. Finally, Count VI is another Bivens action for damages by Plaintiff Dulce Arias who also claims to be a victim of the violations alleged in Counts I-IV.

[3]The First four counts are identified as part of the class action.

II. FACTUAL BACKGROUND.

A. Plaintiffs.[4]

All Plaintiffs have been processed and prepared for a hearing before an Immigration Judge, who may reduce the bond and release them. The hearings have concluded or are pending at this time unless the Plaintiff agreed to removal.. Each Plaintiff received an opportunity to be represented by counsel at these

The First Plaintiff, Carlos Arias, is one of nine (9) Plaintiffs who have been placed in IJ proceedings and appeared before an Immigration Judge after receiving an opportunity for pro bono counsel.. They have been released pending another appearance. Ten (10) Plaintiffs are lawfully in the United States and were not arrested or placed in removal proceedings.[5]

Four (4) Plaintiffs were removed to Mexico on April 18, 2007.[6]

The balance of the Plaintiffs are not subject to removal.

B. Defendants.

While Defendants are assigned to Immigration and Customs Enforcement, they are

---

[4]The Amended Complaint added Plaintiffs. Defendants have not had an opportunity to investigate their backgrounds.

[5]Francisco Munoz, Vincente Cisneros Abonce, Audrey Mithun, Raul Veliz, Jr, Wenscelao Padilla Guzman, Jorge Zelaya, Leah Garcia, Jaime Reyes, Marlen Alonso Soriano and Albis Munoz.

[6]CORIA RODRIGUEZ, David, GUERRO DIEZ, Teresa, CORONEL GUERRERO, Santiago, CISCERNOS CARRENO, Fabiola.

Deportation Agents. While they have authority to make criminal arrests, no such arrests were made during operation Cross check.

C. Operation Cross Check.

"Operation Cross Check" targeted aliens with unexecuted Warrants of Removal or Deportation and other identified criminal aliens in Kandiyohi County Minnesota. Criminal aliens were foreign born and had criminal records. Second Declaration of Gay. Planning and execution of "Operation Cross Check" was conducted with approval of the Fugitive Operations Unit. Declaration of Berg and Second declaration of Gay.. Planning for the operation focused on the development of primary target lists, analysis of data, prioritization of targets, and the commencement of enforcement actions against removable aliens. Id. 4.

Targets were selected based on reliable information from multiple sources; aliens with outstanding Warrants of Removal or Deportation, aliens that had possibly reentered the United States illegally after having been removed from the United States previously, and criminal aliens that were referred to Immigration and Customs Enforcement (ICE) by a Kandiyohi County probation officer. The probation officer informed ICE that most of the people that she supervised were born in foreign countries and were here illegally. Using the probation officer's information, criminal records, and various commercial databases a list of preliminary targets was compiled. Id.

Officer Gay conducted part of the investigation that lead to compiling a list of targets. Declaration of Gay. 5. He found that six people had unexecuted warrants of removal,

which made them fugitives. Additional targets were selected from criminal records. A Kandiyohi County Community Corrections Probation Officer had previously contacted me and her case load included foreign born individuals. Using that information I was able to find records in ICE databases regarding 24 individuals on the probation list for Kandiyohi County. The remaining targets without prior alien registration were selected based on a list of subjects provided by by Kandiyohi County and Willmar law enforcement agencies which were investigating forgery/ID theft. In addition, the severity of their criminal convictions was considered. At the same time ICE Office of Investigations' was investigating the fraudulent use of Puerto Rican birth certificates. Further verification of the grounds to target individuals was made using commercial database searches, which returned duplicate records for these persons. Finally, a target list was sent to the Willmar Police Department (WPD), Kandiyohi County Sheriff's Office (KCSO), and the Kandiyohi County Community Corrections Probation Office. Declaration of Gay.

In addition to investigating available information, on April 5, 2007, Officer Gay and his Supervisor Officer Peter Berg met with representatives of the Willmar Police Department, the Kandiyohi County Sherriff's Office and the Kandiyohi County Probation Department. During this meeting, ICE described "Operation Cross Check" and asked for assistance in correctly identifying addresses for the targets and to provide assistance during the arrest phase of the operation by guiding us to the targeted addresses. The probation officer confirmed that her probationers had reported birth in foreign countries and additional

information. If there was specific information on people that were born in foreign countries and who had been charged with crimes, ICE would attempt to interview those persons to determine alienage and removability. Declaration of Berg.

During the April 5, 2007, briefing, the Willmar Police provided information on an ongoing case concerning forgery and identity theft involving Puerto Rican birth certificates. These Puerto Rican birth certificates were being bought and used by persons not born in the United States or Puerto Rico in an apparent attempt to gain unlawful employment and a new identity as a United States Citizen. The Willmar Police Department provided names of people that they knew to be foreign born reasonably believed were falsely using the Puerto Rican birth certificates. The use of fraudulent documents violates immigrations laws. Declaration of Berg.

. Operation Cross Check contemplated attempting interviews to assess alienage and removability. Declaration of Berg. These are known as knock-and-talk operations. ICE did not have search or criminal arrest warrants. Declaration of Gay. At the target addresses, Deportation officers would attempt to make contact and obtain consent to enter the residence from the occupants. Declaration of Berg.All of which part of ICE standard operating procedure. Operation Cross Check was not designed to enforce criminal laws. It was a civil enforcement operation.

For example, Plaintiff Fabiola Cisneros was targeted for an investigation into her immigration status due to her felony conviction for Wrongfully Obtaining Assistance and

Identity Theft. Cisneros was convicted of stealing $22,050.16 by lying in her applications for taxpayer-funded medical assistance. Information was forwarded to ICE by the Kandiyohi County Sheriff's Department and Willmar Police Department as part of their investigation into the fraudulent use of US identification documents. The Willmar PD investigation revealed that Cisneros was born in Mexico. After confirming her address and locating it Officer Gay knocked on the door. Third Declaration of Gay.

Fabiola Cisneros opened the door within moments of knocking. I said to her in Spanish, "Somos la policia. Buscamos una persona. Puedo entrar?" (We are the police. We are looking for someone. May I come in?) Cisneros motioned her head up and down indicating yes, said "Si" (the Spanish word for yes), and stepped aside to allow the door to be opened. A Willmar Police Department Detective and I then entered the trailer, and I asked Cisneros to step into the front room of the trailer. An Deportation Agent followed into the trailer. Via radio I alerted the other members of the team that we had entered the trailer. The other team members then entered the trailer at various times after that, but I cannot say for sure who entered and exactly when. Declaration of Gay.

In Spanish, Officer Gay asked Cisneros if there were any others present in the trailer, and if we could look for other persons. ("Hay otras personas aqui? Vamos a buscar, OK?") Cisneros answered in Spanish that her husband and children were there, and that we could look. An ICE agent encountered Cisneros's husband, Vicente Cisneros-Abonce, coming out of the bedroom, and the ICE agent asked him to go to the front room where his wife was.

A child was asleep on the couch in the front room; I do not recall if the child woke or not. The other team members checked the trailer for other adults, and none were found. ICE procedures provides for having all adults in a target house gather in a central room for the safety of all persons present, not just law enforcement officers. Declaration of Gay.

After gathering the adults, Officer Gay confirmed that the woman was Fabiola Cisneros. The Willmar Police Department Detective recalled Cisneros from his investigation, and the photo I had matched Cisneros. Cisneros confirmed that her name was Fabiola Cisneros. Cisneros's husband then stated that he was a lawful permanent resident of the US, and that he had filed a "Petition for Alien Relative" application (I-130) for Cisneros. This was confirmed by telephone with the ICE Law Enforcement Support Center. In spite of the approved I-130, Cisneros' felony conviction made her removable. Therefore, I informed Cisneros and her husband that she was under arrest for immigration violations. Cisneros was placed into handcuffs and removed from the home to a waiting transportation van. Declaration of Gay.

At no time did Cisneros or Vicente Cisneros-Abonce tell the deportation Agents to leave. Vicente Cisneros-Abonce several times retrieved various immigration documents that he believed relevant to the immigration status of Cisneros. An ICE agent always accompanied him to retrieve these documents. Fabiola Cisneros was the only individual placed in custody at the residence. Declaration of Gay. Pursuant to an Administrative order of removal, Fabiola Cisneros was Removed to Mexico on April 18, 2007. Exhibit 1.

Operation Cross Check began on April 11 and concluded on April 14, 2007. The first two days of the operation resulted in 39 of the total 49 arrests. There was a significant reduction in arrests the last two days of the operation. Although there were some reports of people not answering doors the first two days, the teams reported many more addresses where no one answered the door during the last two days of the operation. If there was no contact at the target address the teams simply left and went on to the next address. Declaration of Berg.

As a team leader for Fugitive Operation team 2, Officer Gay did not see or otherwise become aware of any nonconsensual entry by any team member. Moreover, to the best of his knowledge, an adult with apparent authority consented to entry and search by members of the arrest teams at all target addresses where I was team leader or in a position to observe. Declaration of Gay.

D. Removal Proceedings Commenced when a Plaintiff was taken into Custody.

Although ICE did not have criminal arrest warrants, it had six Warrants for Arrest of Alien like the one for Carlos Arias. Exhibit 1. The procedures used after Carlos Arias was taken into custody were also used for all Plaintiffs taken into custody during Operation Cross check. The Warrant provided that Carlos Arias was to be taken into custody for violation of the Immigration laws. He was taken into custody on April 11, 2007. Thereafter, in accordance with the immigration procedures, he was examined by an officer other than the one who took Arias into custody. At that time, the officer decide whether to detain or release

an alien on bond or person recognizance. Id. In addition, like Arias, aliens may request administrative review of the bond determination and their removal.

During the examination an alien is provided a Notice. Exhibit 2 at 3. The notice is in his native language and advises the alien of his rights to a hearing and counsel. In addition, the alien is provided a list of attorneys, including "Centro Legal,"who are the lead attorneys in this case. Id. Like Arias, the alien acknowledges receipt of this notice and an EOIR notice that again explains these rights. Id. at 5.

With regard to Carlos Arias and other Plaintiffs placed in immigration proceedings, a Notice to appear is issued. The notice advises the alien of the grounds on which the agency seeks to remove him. Exhibit 2 at 8. The notice has an advice of rights included. This advice warns that his statements may be used against him in the proceedings. He has a right to an Attorney, And describes the process of removal. Carlos Aris received this notice on the same day he was taken into custody. Exhibit 2 at 9. Arias' bond was reduced and he was released on April 19, 2007.

III. THE COURT LACKS JURISDICTION.

A. Plaintiffs fail to show a future injury, which is required to vest this Court with Jurisdiction under Article III of the U.S. Constitution.

The Constitution requires a concrete case or controversy to vest a federal court with jurisdiction. U.S. Const. Art. III § 2, cl. 1. Such a case or controversy requires that the plaintiff demonstrate a personal stake in the case, which is known as standing. A plaintiff must demonstrate: (1) an injury that is concrete, particularized, and actual or imminent rather

than conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, such that the injury may be fairly traceable to that conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiffs fail to demonstrate standing, which deprives this Court of jurisdiction or lack an irreparable injury and have alternative remedies. Consequently, the Complaint should be dismissed for lack of jurisdiction or injunctive relief denied.

In Lyons, the Plaintiffs brought a civil rights action seeking declaratory, injunctive and damages for alleged violations of constitutional rights. Lyons, 461 U.S. at 97-8. The defendants were the City and four individual officers. the plaintiff alleged that his First, Fourth, Eighth and Fifth Amendment rights were violated during a traffic stop when officers placed him in a choke hold. Id. He alleged, "'pursuant to the authorization, instruction and encouragement of defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever." Id., at 98. He sought injunctive relief prohibiting the use of choke holds and declaratory relief that they violated his rights. The District Court granted the relief. The Court of Appeals affirmed and the Supreme Court reversed holding that the plaintiff lacked standing. [7]

[7]It is axiomatic that if standing is lacking, the plaintiff also failed to show an irreparable injury. Moreover, even if standing exists, a Plaintiff does not automatically demonstrate an irreparable injury.

According to Lyons, standing requires that "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Id. at 101-2 (citations omitted). However, precedent showed that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.'" Id., at 102 *quoting* O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). O'Shea, involved the enforcement of criminal laws and it was presumed that the Plaintiffs would be law abiding in the future and thereby avoid future injury. Lyons, 461 U.S. at 103. Likewise, in the instant case, the Court must presume that Plaintiffs will abide by the laws and thereby avoid future injury.[8]

In Lyons, the Court also examined precedent concerning a claim by a father that police behavior that had resulted in the death of one son could result in the death of his other son, who was similarly situated. Id. The Court, however, rejected such allegations as sufficient for a plaintiff to establish standing. Id., at 104-5. As in Lyons, the instant Plaintiffs have failed to demonstrate standing, let alone irreparable injury.

Plaintiff's allegation of a class action does not modify the analysis or result in

[8]There is also a presumption that law enforcement officers act within their authority and the law. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 489-490(1999); Overton v. Bazzetta, 539 U.S. 126, 132 (2003)("In civil rights action brought by prison inmate, burden is not on state to prove the validity of prison regulations at issue, but on inmate to disprove it.").

standing. In John Does 1-100 v. Boyd, 613 F.Supp. 1514 (D.Minn. 1985) the plaintiff class claimed to be subjected to indiscriminate strip searches at a prison. Although, unlike Lyons the court noted that every inmate would be strip searched, the court ruled that the plaintiffs lacked standing and denied a motion to certify the class. Indeed, it pointed out that the plaintiffs must show that in the past they had repeatedly be subjected to the same treatment. Id. at 1528-29. As in Boyd, in Smook v. Minnehaha County,
457 F.3d 806 (8th Cir. 2006) ruled that standing did not exist to challenge searches of juveniles.

In Smook, the District Court had granted injunctive relief on a civil rights claim. It had ordered that the county juvenile detention center "may not, consistent with the Constitution, conduct future searches comparable to the search of Smook." Id., at 816. The Court of Appeals reversed stating "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of [juvenile detention officials] are unconstitutional." Smook, 457 F.3d at 816. Likewise, in the instant case, Plaintiffs do not allege that they will be subjected to warrantless arrests, searches or stops in the future. Absent such the alleged rights to due process, counsel and advice of rights do not vest standing let alone irreparable harm. Moreover, as argued below, aliens have another forum to press their claims; immigration proceedings and individual Bivens actions. Indeed, the cases cited by Plaintiffs do not hold differently.

B. The Immigration and Naturalization Act as Amended Strips this Court of Jurisdiction and Vests it Exclusively in the Court of Appeals.

Section 1252(b) and (g) precludes subject matter jurisdiction except in the Court of Appeals. Although Plaintiffs claim that arrests and searches were conducted in violation of the Constitution, these claims arise from actions to commence removal proceedings or execute removal orders against aliens. Consequently, subject matter jurisdiction is controlled by 8 U.S.C. § 1252(g), which precludes any court from having jurisdiction to hear any cause or claim arising from such action. Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g) . Elsewhere in the section Congress created exclusive jurisdiction in the Court of Appeals. 8 U.S.C. § 1252(b)(9). Consistent with Section 1252(g), subsection (b)(9) also strips the District Courts of jurisdiction and makes the Court of Appeals the only court with jurisdiction to resolve claims like those raised in this case :

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). Essentially, 8 U.S.C. § 1252 creates a single procedure, that excludes

the District Courts, to review alien claims challenging removal orders, their execution, or commencement of removal proceedings. Reno v. American-Arab Anti-Discrimination Committee, et al., 525 U.S. 471 (1999)(hereinafter AAADC).

In AAADC, the Supreme Court held there is no judicial review unless judicial review is provided for in Section 242, 8 U.S.C. § 1252. There, the aliens had complained, and the Service had admitted, that proceedings had been commenced against the aliens because of their affiliation with an organization that supports terrorist activity. The aliens claimed selective prosecution in violation of their constitutional rights to free speech and freedom of association. The Supreme Court held that 8 U.S.C. § 1252(g) deprived the federal courts of jurisdiction over the aliens' suit, which challenged the commencement of proceedings against them.

8 U.S.C. § 1252(g) expressly applies to three discrete actions that the Attorney General may take: His "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders." According to the Supreme Court, that section of the Act was designed to protect discretionary determinations by immigration officials, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed in Section 242 of the Act. The Court stated:

> [E]ven after all of the transitional cases have passed through the system, Section 242(g), as we interpret it[,] serves the continuing function of making it clear that those specified decisions and actions, which . . . some courts have held not to be included within the non-final-order review prohibition of [former Section 106], are covered by the "zipper" clause of Section 242(b)(9).

Id. at 943. The Court made clear that the "zipper" clause is a "general jurisdictional limitation" which precludes judicial review unless the Act provides for it. The Supreme Court's construction of Section 242(g) and, more significantly, Section 242(b)(9), leads inexorably to the conclusion that for the instant case, the Act prohibits the types of collateral challenges to the Attorney General's decision to apprehend aliens in order to commence proceedings or to execute the removal orders at issue herein that the Plaintiffs assert in their Complaint.

While St. Cyr allowed district courts to exercise habeas corpus jurisdiction, the REAL ID Act modified that holding and stripped the District Courts of such jurisdiction. As a result, even if Plaintiffs argue that AAADC was limited by St. Cyr, they do not establish jurisdiction over the instant claims by aliens.

On May 11, 2005, Section 106(a) of REAL ID amended the INA's jurisdictional statute at 8 U.S.C. § 1252, to clarify that district courts lack jurisdiction, habeas or otherwise, to review any removal order for any alien, criminal or non-criminal. Nadarajah v. Gonzales, __ F.3d __, 2006 WL 686385, *5 (9th Cir. March 17, 2006); Enwonwu v. Gonzales, 438 F.3d 22, 33 (1st Cir. 2006); Ramirez-Molina v. Ziglar, 436 F.3d 508, 512 (5th Cir. 2006); Ishak v. Gonzales, 422 F.3d 22, 29 (1st Cir. 2005). The REAL ID Act expresses "Congress' clear intent to have all challenges to removal orders heard in a single forum (the courts of appeals)." Gittens v. Menifee, 428 F.3d 382, 383 (2d Cir. 2005)

As a result, Section 1252, which the Supreme Court in INS v. St. Cyr, 533 U.S. 289 (2001), found to preclude "judicial review" over criminal aliens' removal orders, but not to

preclude "habeas review" in district court, now clearly preludes all review in district court including habeas review. Specifically, Congress enacted new Section 242(a)(5) of the INA, 8 U.S.C. § 1252(a)(5), *as amended by* REAL ID Act § 106(a). This provision, which is entitled "Exclusive Means of Review," states as follows:

> **Notwithstanding any other provision of law (statutory or nonstatutory)**, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be ***the sole and exclusive means for judicial review*** of an order of removal entered or issued under any provision of this Act . . . .

8 U.S.C. § 1252(a)(5) (emphasis added);Tostado v. Carlson, --- F.3d ----, 2007 WL 957529 (8th Cir. 2007); Martinez-Rosas v. Gonzales, 424 F.3d 926, 929 (9th Cir. 2005); *see also* 8 U.S.C. § 1252(b)(9), *as amended by* REAL ID Act § 106(a) (expressly repealing habeas corpus review of removal-related claims).

Congress made these amendments effective immediately and applicable to any "final administrative order of removal, deportation, exclusion" that was "issued before, on, or after the date of enactment of this division." REAL ID Act § 106(b). *Martinez-Rosas, supra*. Accordingly, Section 106(a)'s amendments apply to the instant case because they seek to stay the execution of removal orders "issued before . . . the date of enactment" of the REAL ID Act.

C. Section 1252(f) Precludes Jurisdiction to Enjoin Immigration Operations to Inspect, Apprehend, Examine, Exclude and Remove Aliens.

While Section 1252(b) and (g) vest exclusive jurisdiction in the Courts of Appeal over claims by aliens regardless of the relief requested, the INA also discusses jurisdiction

to enjoin immigration operations like the instant one. 8 U.S.C. § 1252(f) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, **no court** (other than the Supreme Court) **shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of Title II**, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter [part] have been initiated.

8 U.S.C. § 1252(f)(1).[9] Section 1252(f)(1) expressly encompasses any party, regardless of whether or not the party is an alien. Consequently, Plaintiff is did not avoid its application by naming Plaintiffs who were not aliens. Likewise, it includes actions for damages or any other relief, such as a declaratory judgment, that may be combined with or be the equivalent of a request for injunctive relief. Accordingly, Plaintiff's did not avoid the jurisdiction stripping provisions by seeking damages or declaratory relief. So long as the injunction would enjoin operations in Chapter 4, Title II and the exception does not apply, this Court lacks jurisdiction to issue an injunction.

When the Act was codified, Chapter 4, Title II became Part IV, Subchapter II of Title

---

[9]With regard to the Plaintiffs who subject to a prior order of removal, not only does 8 U.S.C. § 1252(f) preclude an injunction arising out of operations covered in 8 U.S.C. § 1221-31, it also precludes enjoining the removal of the alien. 8 U.S.C. § 1252(f) (2) provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

Id. This provision balances the finality of removal orders against ensuring that the order is valid. Here, Plaintiffs do not claim that the entry or execution of a prior order was prohibited. Instead, they argue that the manner of execution violated their rights. Hence, the provision is inapposite.

8 Chapter 12. Stated differently, Chapter 4 is found at 8 U.S.C. § 1221-1231. 8 U.S.C. § 1226 is entitled "Apprehension and detention of aliens." Subsection (a) concerns arrest, detention and bond on a warrant of removal. It provides, "on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Subsection (c) concerns the detention of criminal aliens who have committed violations that would otherwise result in the alien being inadmissable to or deportable from the United States.8 U.S.C. § 1226(c).[10]

8 U.S.C. § 1227 concerns deportable aliens and generally describes the grounds for removing aliens who are found in the United States. Section 1228 concerns aliens who in addition to being removable pursuant to Section 1227 are subject to "expedited removal ... [for] committing aggravated felonies." Procedures for initiating removal are contained in 8 U.S.C. § 1229 and include, inspection, apprehension, notice and representation by counsel.

Although Plaintiff's claim that they have not been permitted access to attorneys, Section 1229 provides time to meet with an attorney and a list of *pro bono* attorneys who

[10]8 U.S.C. § 1226 contains its own jurisdiction stripping provision, which is consistent with Section 1252(b), (g) and (f).. Subsection (e) provides, "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

are available[11]. 8 U.S.C. § 1229(b)(1), (2).

In addition to provisions concerning representation by counsel 8 U.S.C. § 1252(f) also precludes an injunction concerning, removal proceedings(8 U.S.C. § 1229a), adjustment of status (8 U.S.C. § 1229b), voluntary departure (8 U.S.C. § 1229c), Records of admission and departure (8 U.S.C. § 1230) and the detention and removal of aliens subject to a final order of removal (8 U.S.C. § 12231). All of Plaintiffs claims come within 8 U.S.C. § 1252(f) and jurisdiction to enter an injunction is precluded unless they come within the exception.

The exception in Section 1252(f) does not cover Plaintiff's or their claims. Injunctions are precluded, "other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter [part] have been initiated." This language exempts the Immigration Judge, BIA and Court of Appeals, who, as argued above, have exclusive jurisdiction pursuant to Section 1252(b) and (g). These Courts and administrative bodies apply the provisions of chapter 4 of Title II (8 U.S.C. § 1221-31) to individuals against whom proceedings are pending. As a result, the exception preserves a single procedure fro review, commencing with the Notice to Appear and concluding with a Petition for Review in the Court of Appeals. It does not vest the District Court with poser to enter an injunction. Instead, its purpose is to provide the remedy elsewhere for

[11]The right to an attorney in removal proceedings is statutory and is not a requirement of the Sixth Amendment. *Infra.*.

individuals in proceedings and abolish it for others.[12] As a result, this Court lacks jurisdiction to enter an injunction.

IV. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PROVING THE ESSENTIAL ELEMENTS FOR A TEMPORARY RESTRAINING ORDER (TRO).

Plaintiff, as the party seeking injunctive relief bears the full burden of proof as to each of the four factors identified in Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981)(*en banc*); Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987). The four factors are: (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. Id., at 113; *accord* Medtronic, Inc. v. Gibbons, 527 F. Supp. 1085, 1090 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982). Courts are to apply the Dataphase factors to analyze requests for preliminary injunctions, as well as temporary restraining orders. S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project, 877 F.2d 707, 708 (8th Cir. 1989); Jackson v. National Football League, 802 F. Supp. 226, 229 (D. Minn. 1992). An injunction is "a drastic and extraordinary remedy that is not to be routinely granted." Intel Corp. v. ULSI Systems Technology, Inc., 995 F.2d 1566, 1568 (Fed. Cir. 1993).

Plaintiffs seeks a restraining order from "further immigration enforcement proceedings or deportation actions . . . until this Court has had the opportunity to hear and

[12]Preventing individuals other than aliens subject to proceedings from enjoining operations is consistent with rules of standing and limiting injunctive relief to those who are subject to removal.

resolve [their] constitutional claims . . .” Plaintiff’s proposed Temporary Restraining order. The request, however, contradicts another request for injunctive relief. Plaintiff’s also request an order preventing their transfer out of Minnesota “until they have been afforded . . . an opportunity to appear in immigration court to raise their constitutional issues.” Not only is there a conflict between the two requests, this Court lacks jurisdiction and Plaintiffs have an alternative remedy.

A. Plaintiffs fail to Demonstrate Irreparable Harm.

Plaintiffs allege three irreparable injuries occurred during Operation Cross Check: 1) ICE agents violated the Fourth Amendment by entering homes without consent and searching them 2) the Sixth Amendment was violated when Plaintiffs did not receive an opportunity to consult with counsel before custodial interrogations and 3) some of Plaintiffs family members experienced “serious and continuing physical injury.” Memorandum in Support at 5-6. They erroneously claim that because they allege constitutional violations they have shown irreparable harm and support the argument by citing Elrod v. Burns, 427 U.S. 347 (1976) and Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977). Memorandum in support at 5. Instead, these cases as well as settled law require a future harm. for a plaintiff to meet his burden of showing irreparable harm. Moreover, an alternative remedy renders the harm less than irreparable.

The absence of a finding of irreparable harm is alone sufficient to deny an injunction. Modern Computer sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 738 (8th Cir. 1989); Dataphase, 640 F.2d at 114 n.4. A threshold inquiry is whether the moving party

has shown the threat of irreparable injury, Gelco corp. v. Coniston Partners. 811 F.2d 414, 418 (8th Cir. 1987). An injury that may be compensated by money damages is generally not irreparable unless the money is not available or the damages unquantifiable. Ben-Yonatan v. Concordia College Corp., 863 F.Supp. 983, 986 (D.Minn. 1994). Here, Plaintiffs seek damages in addition to injunctive relief. Hence, the damages can be quantified. Moreover, there is no claim that the Defendants lack the resources to pay the damages. Not only will damages compensate for the alleged injuries, Plaintiffs fail to show an impending and irreparable harm.

2. Elrod and Planned Parenthood of Minnesota, require a future injury to demonstrate an irreparable injury.

In Elrod, 427 U.S. at 347, unlike the instant case, the plaintiffs were challenging a rule that applied to each of them. Not, as here, a set of circumstances that may demonstrate a violation of a rule. They were all fired or threatened with firing because of a partisan political affiliation or non affiliation, which implicated the First Amendment, which is not at issue here. Indeed, the holding is narrower than represented by Plaintiffs. Id. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") Moreover, unlike the instant case, the Court stated:

> It is clear . . . that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. [citation omitted]. Since **such injury was both threatened and occurring at the time of respondents' motion** and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief

Id.(emphasis added). Here, unlike Elrod, the alleged damage has occurred and is no longer threatening. Indeed, Plaintiffs seek damages for the alleged injury.

In Planned Parenthood of Minnesota, 558 F.2d at 861, a family planning organization sought to enjoin a mayor from enforcing zoning ordinances that were adopted after the organization had purchased a facility.[13] The Court affirmed the District Court's finding of irreparable injury stating, "Planned Parenthood would be irreparably injured if a preliminary injunction were not issued." Id., at 866. Moreover, the Court found irreparable injury arose from "adverse effect on Planned Parenthood's business, coupled with the incalculable loss of revenue, ... Also the ordinance interfered with the exercise of its constitutional rights and the rights of its patients . . . .Finally, Planned Parenthood's good will was imperiled." Id., at 866-67. In other words, contrary to Plaintiff's memorandum, the irreparable injury was more than an alleged violation of law that had concluded, which is unlike the instant case.

Plaintiff's citations do not escape the need to show a future injury to satisfy not only standing, but also the essential element of an irreparable injury. Hence, even if standing exists, which defendants contest, Plaintiffs have failed to demonstrate an irreparable injury. Moreover, an alternative remedy prevents an injury from satisfying the element of irreparable injury.

---

[13]As the opinion notes, the Court of Appeals applied a different standard than applicable in the first instance by the District Court. Id. at 866.

2. Plaintiffs fail to show an irreparable injury because they have alternative remedies.

Plaintiffs, as their order for injunction relief suggests, may raise their claims in the pending immigration proceedings and have sought damages for the alleged violation of their rights.[14] A plaintiff does not demonstrate irreparable harm where an alternative remedy exists. *See* Sampson v. Murray, 415 U.S. 61, 90 (1974) (available alternative remedies preclude required finding of irreparable injury) . Moreover, mere lapse of time and litigation expense do not constitute irreparable harm. *See* F.T.C. v. Standard Oil Co., 449 U.S. 232, 244 (1980). "The basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 43-44 (1971). Hence, the cost and time necessary to use the alternative remedy do not establish irreparable harm. Here,

The INA states that "no court shall have jurisdiction to review ... any judgment regarding the granting of relief under section ... 240A." INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). "However, the REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231, has added an additional jurisdictional provision to INA § 242. The new provision, INA § 242(a)(2)(D), codifies the Court of Appeals jurisdiction to review constitutional claims or

[14]While not every Plaintiff, Mithun, Veliz, and Fransico Munoz, is subject to removal, such Plaintiffs also fail to demonstrate irreparable harm from the continuation of removal proceedings against other Plaintiffs. Indeed, they show no harm and lack standing to prevent such proceedings.

questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections." Lopez v. Gonzales, 417 F.3d 934 (8th Cir. 2005) *rev'd on other grounds* ___ U.S. ___, 127 S.Ct. 625, 166 L.Ed.2d 462, 75 USLW 4013 (2006). The REAL ID Act "consolidated judicial review of matters pertaining to removal orders in the courts of appeal and expanded appellate jurisdiction to include review of "constitutional claims or questions of law." Hanan v. Gonzales, 449 F.3d 834 (8th Cir. 2006). Unlike the plaintiff in Hanan, Plaintiffs raise constitutional claims that may be addressed by the Court of Appeals on direct appeal from the removal proceedings. *see e.g.,* Munoz-Yepez v. Gonzales, 465 F.3d 347, 351 (8th Cir. 2006). Hence, Plaintiff's who are subject to removal proceedings they have an alternative remedy in removal proceedings. Likewise, Plaintiffs who are subject to Final Orders of removal may move to reopen their removal proceedings and take advantage of an appeal to the Courts of Appeal.

Although generally aliens can not suppress evidence asserted to be procured in violation of the Fourth Amendment in removal proceedings, they are not without a remedy.[15] INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) [Fourth Amendment based exclusionary rule inapplicable to deportation proceedings]; Patel v. INS, 790 F.2d 720 (8th Cir. 1986); Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979). According to the government, if there was a policy or widespread abuse, or an egregious Fourth Amendment violation that transgresses

[15]Even if the Court find that the immigration procedures do not allow the instant Plaintiffs to suppress evidence, these cases also stand for the proposition that such Plaintiffs are unlikely to succeed on the merits because they lack such a right.

fundamental fairness, the exclusionary rule may apply. Lopez-Mendoza, 468 U.S. at 1050-51 and n. 5; Matter of Cervantes, 21 I & N. Dec. 351, at 353(BIA 1996). Moreove3r regardless of the Fourth Amendment, suppression may be urged under the Fifth Amendment. Matter of Garcia-Flores, 17 I. & N. Dec. 325 (BIA 1980). Indeed, coerced confessions may be suppressible. Navia-Duran v. INS, 568 F.3d 803 (1st Cir. 1977). Regarless of an alien's likehood of success, Immigration Judges can and will entertain motions to suppress unlawfully obtained evidence in removal proceedings, meaning these aliens who will face an Immigration Judge have an alternative remedy and have not exhausted it.

With regard to Plaintiffs, who are neither subject to removal nor a prior order of removal, their own Pleadings identify an alternative remedy. Notwithstanding such Plaintiffs lack of a legal interest in removal proceedings, they have brought Bivens actions to secure their rights. Consequently, even though these Plaintiffs do not have the removal proceedings and appeal procedures available to them, they have sought an alternative remedy. Moreover, injunctive relief for past harms regardless of a Plaintiffs status as an alien.

B. The Balance of the Harms to Defendant and the Public Disfavor Injunctive Relief that Prevents Enforcement of the Laws.

Plaintiffs a argue that the alleged constitutional violations out weigh the harm associated with "delaying [removal proceedings] until Plaintiffs' constitutional claims can be resolved." Memorandum in support at 7. As demonstrated by their own pleading and

the INA, They erroneously state that Plaintiffs' are unable "to pursue any civil or criminal legal relief for . . ." the alleged violations. Id. Moreover, they cite Morrison v. Heckler, 602 F.Supp. 1482 (D.Minn. 1984) and Pacific Fronteir v. Pleasant Grove City, 414 F.3d 1221 (10th Cir. 2005), which are inapposite.

The balance of harm must tip decidedly toward the plaintiff to justify an injunction. General Mills, Inc. v. Kellogg, 824 F.2d 622, 624 (8th Cir. 1987); Allen v. State of Minnesota, 867 F.Supp. 853 (D.Minn. 1994). Here, the balance of the harms does not favor issuing an injunction.

Plaintiff's showing of harm is hyperbole, can be rectified in alternative forums or damages and is based on inapposite significant harm. As with other cases cited by Plaintiffs, Pacific Fronteir, 414 F.3d at 1221, concerned a city ordinance that restrict Plaintiff's First Amendment rights. There door to door salesmen claimed that their commercial speech rights were violated when required to post a bond and supply fingerprints to obtain a business license. Here, the First Amendment is not pleaded. Similarly, they do not allege that a regulatory change has infringed on any rights. With regard to the balance of harms, unlike the instant case, the bond and fingerprint requirement did not materially advance the city's interests in tracking down tortfeasors. Id. at 1236-7. Here, the Plaintiffs do not allege violation of First Amendment rights and Defendants were executing valid warrants of removal and apprehending individuals with probable cause to believe the violated immigration laws.

Unlike the instant case, Morrison, 602 F.Supp. at 1482, was properly a class action. Moreover, it sought to enjoin the imminent implementation of an administrative program arguing that the program did not comply with the authorizing amendment. Finally, the court found that the plaintiffs would be denied benefits required for "essential medical or nutritional child care needs." While Plaintiffs claim that children are being deprived of a parent, they do not allege that the denial is a result of an ongoing or imminent program change. Consequently Morrison is inapposite.

Against Plaintiff's alleged injury the Court should balance the injury to Defendants if the injunction is granted. In the instant case, the injury involves the continued knowing violation of the immigration laws, which among other things allows employers to take advantage of people illegally in the country. Moreover, limited government resources are expended on the illegally present aliens. A probation officer in Willmar was supervising 30 illegal immigrants. Finally, the government annually issues thousands of visas to Hispanic countries, but in an atmosphere of lax enforcement scoff laws gain a prize. Indeed, by enjoining removal proceedings, some Plaintiffs are put to a disadvantage.

One Plaintiff, a Honduran, has agreed to voluntary departure with safeguards. This option is time sensitive and will expire soon. By agreeing to voluntary departure under the applicable restrictions, this plaintiff will not have been removed. As a result, if he is found in the United States a second time, he retains the right to a full and complete hearing before removal. On the other hand, if he loses this opportunity, he also loses the right to the an immigration hearing.

Importantly, Plaintiffs seek an injunction forbidding warrantless searches. But, the law allows for such searches. Individuals may consent to searches. Indeed, such searches are also justified by exigent circumstances, including protection of the law enforcement agents and the people in the vicinity. Hence, Plaintiff's request for relief puts deportation officers at risk.

In balancing In the process of balancing the harm to the parties, if the harm to the defendant outweighs the irreparable injury to the movant, then the movant faces a heavy burden of demonstrating that she is likely to succeed on the merits. Jordano v. Steffen, 797 F.Supp. 886, 890 (D.Minn. 1992). Indeed, even if the harm is drastic, a plaintiff will not prevail where it is not likely they will prevail on the merits. Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F.Supp. 713, 721 (D.Minn. 1986)

C. It Is Improbable That Plaintiff Will Succeed on the Merits.

Aliens and citizens are protected by the Constitution but the protections are different. Aliens are not entitled to enjoy all the advantages of citizenship. Mathews v. Diaz, 426 U.S. 67, 78 (1976). "For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." Id. Although Plaintiff have not been charged with crimes, Plaintiffs erroneously cite criminal cases, whereas, the instant case is a civil matter.

1. Plaintiffs are unlikely to prevail because they have not exhausted administrative remedies.

As stated previously, Plaintiffs that have an interest, though not standing, in the immigration proceedings that they seek to enjoin, have administrative forums that may consider their constitutional claims, grant relief and provide for an appeal the Board of Immigration appeals and Court of Appeals. *See*, . Lopez-Mendoza, 468 U.S. at 1032 (1984).; Matter of Cervantes, 21 I & N. Dec. at 353; Matter of Garcia-Flores, 17 I. & N. Dec. at 325 (Fifth Amendment). Regardless of an alien's likelihood of success on such motions, Immigration Judges can and will entertain motions to suppress unlawfully obtained evidence in removal proceedings. Moreover, her decision is subject to appeal and can be reversed or affirmed in the Board of Immigration appeals or the Court of Appeals. None of the instant Plaintiffs, however, have exhausted these remedies, absent which they are unlikely to succeed on the merits in this case.

2. Plaintiffs for whom warrants were issued are subject to the fugitive disentitlement doctrine.

Those Plaintiffs taken into custody on a Warrant of Removal already have a final order of removal, and are required by statute to turn themselves in after the order of removal becomes administratively final. 8 U.S.C. 1253(a)(1)(D). If they failed to do so, they are fugitives from justice and the fugitive disentitlement doctrine applies. Matter of Barocio, 19 I. & N. Dec. 255, at 257 (BIA 1985); *See* Barnett v. Young Men's Christian Association, Inc., 268 F.3d 614 (8th Cir. 2001). The fugitive disentitlement doctrine has been applied to aliens since at least 1993, Bar-Levy v. U.S. Dept. of Justice, I.N.S., 990 F.2d 33 (2nd Cir.

1993), and was very recently applied by that circuit to dismiss a petition for review. Gao v. Gonzalez, ___ F.3d ___, 2007 WL 829063 (2nd Cir., March 20, 2007). With respect to fugitives from federal court warrants, the fugitive disentitlement doctrine is codified at 28 U.S.C.A. 2466,. The elements are similar in this case.

Here, the Warrants were issued for five Plaintiffs, who are identified in Exhibit 3. these Plaintiffs failed to depart when ordered but remained in the United States, thereby, evading the jurisdiction of the Immigration Courts. The Fugitive disentitlement doctrine should preclude their claims.

3. Plaintiffs are unlikely to prevail on the merits because they have improperly joined Claims that do not arise From The Same Transaction Or Occurrence or containing Common Question Of Fact Or Law .

Rule 20(a), permits joinder where claims arise from, (1) same transaction or occurrence and (2) common question of law or fact, must be met for joinder to be allowed. Boyd v. Diebold, 97 F.R.D. 720, 723 (E. D. Mich. 1983). If the test for permissive joinder is not satisfied, a court, in its discretion, may sever the misjoined parties, so long as no substantial right will be prejudiced by the severance. Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). Where misjoinder is found, it is appropriate and just, under Fed. R. Civ. P. 21, to drop all but the first named plaintiff. Id. The Court should sever and dismiss from this action all of the plaintiffs except for the lead plaintiff, Carlos Arias, because they cannot satisfy the joinder requirements of Rule 20.

a. Plaintiffs are not properly joined because their claims do not arise out of the same transaction or occurrence.

The first prong of Rule 20 requires that plaintiffs assert a right arising out of the same transaction or occurrence, or series of transactions or occurrences. Fed. E. Civ. P. 20(a). The "same transaction" or "series of transactions" requirement refers to similarity in the factual background of a claim. Heath v. Bell, 448 F. Supp. 416, 418 (M.D. Pa. 1977). "In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued . . . ." Mosley v. General Motors Corp., 497 F.2d 1332, 1333 (8th Cir. 1974).

In Heath, several federal inmates alleged that the United States Parole Commission was applying its guidelines unlawfully. The court recognized that "the only connection among the claims is that they all involve decisions of the United States Parole Commission." Heath, 448 F. Supp. at 418. In denying joinder under Rule 20, the court opined as follows:

> [I]f two petitions were alleging that they were unlawfully denied parole because of their mutual involvement in a certain incident, that might be an appropriate case for joinder. However, the mere fact that a parole decision is involved is not enough of a connection to satisfy the same transaction requirement.

Id. (footnote omitted). In Papagiannis v. Pontikis, 108 F.R.D. 177 (N.D. Ill. 1985), three plaintiffs alleged that they had been bilked by the defendants with respect to investments in oil wells. Each plaintiff had entered into a separate purchase contract, at a different time, as to a working interest on different wells on the same leasehold. Each plaintiff alleged violations of the same laws. The district court found that

> [t]hough the nature of the alleged misrepresentations to each investor was much the same, and that may reflect a pattern of conduct by defendants . . . nothing in the Complaint even hints at any linkage between the plaintiffs or between the making of the separate representations to each.

Papagiannis, 108 F.R.D. at 178. The district court went on to find that plaintiffs' claims did not involve the same transaction or occurrence, "for that characterization does not fairly apply to two victims' wholly separate encounters with a confidence man simply because he follows the same routine in cheating each of them." Id., at 179.

Here, each Plaintiff's separate encounters with Deportation officers or other defendants do not involve the same transaction. Consequently, even if there is a common question of law, which Defendants deny, the Plaintiffs are not properly joined in this action.[16]

b. Plaintiffs are not properly joined because there is no common question of fact or law.

Plaintiffs also fail to satisfy the second prong of the test for permissive joinder, which requires that there be a common question of law or fact. Fed. R. Civ. P. 20(a). Although plaintiffs suggest, they do not allege, that USCIS engages in a policy of delay and they have not included, nor are there any, factual allegations that would support such a claim. As in Coughlin, "each applicant or petitioner presents a different factual situation. Therefore, each must receive personalized attention by the INS and, ultimately, by the Court." Coughlin, 130 F. 3d at 1351. Thus, there can be no common question of fact.

[16]For similar reasons Plaintiffs will be unable to satisfy the requirements to maintain a class action. *See* F. R. Civ. P. 23.

> [A]lthough Plaintiffs' claims are all brought under the Constitution and the Administrative Procedure Act, the mere fact that all Plaintiffs' claims arise under the same general law does not necessarily establish a common question of law or fact. Clearly, each Plaintiff's claim is discrete, and involves different legal issues, standards, and procedures. Indeed, even if Plaintiffs' cases were not severed, the Court would still have to give each claim individualized attention. Therefore, the claims do not involve common questions of law or fact.

Coughlin, 130 F.3d at 1351. As a result of the claims in this case, the Court will be in the same position as the Coughlin court.

c. Plaintiffs have not shown that joinder will promote trial convenience.

Fed. R. Civ. P. 20 is designed to promote trial convenience and to expedite the final determination of disputes. League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977), *citing* Mosley, 497 F.2d at 1332. Joinder of the 59 plaintiffs in this case does not preserve judicial resources. Each of the plaintiffs' applications is factually distinct. Joining them together does not expedite the resolution of this case, since each application requires individual attention.

Further, no substantial right will be prejudiced by severance. *See* Coughlin, 130 F. 3d at 1351, citing Fed. R. Civ. P. 21. Each plaintiff can initiate his or her own civil action asserting the same claims as are advanced in the instant case. In fact, an individual case likely would proceed more quickly than this one, which includes so many unrelated plaintiffs. Therefore, defendants request that the Court sever and dismiss all but the lead plaintiff.

4. Plaintiffs are unlikely to prevail on their constitutional arguments.

The United States Constitution confers on Congress the power to regulate matters relating to immigration. U.S. Const. art. 1, § 9, cl. 1. In addition, the Supreme Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977) *quoting* Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). This broad grant of authority is exclusive to Congress. Galvan v. Press, 347 U.S. 522, 531-32 (1954). Congress authorized immigration agents to make warrantless arrests and searches in 8 U.S.C. § 1357.

Among other things, Operation Cross Check included the execution of warrants of removal. Section 1357 provides, "Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." 8 U.S.C. § 1357(a). While executing warrants, aliens were also apprehended for violation of the immigration laws. With regard to arrests and questioning without warrants, Section 1357 provides:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal

> of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
>
> * * *
>
> (4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and
>
> (5) to make arrests--
>
> (A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or
>
> (B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Id. Incident to the execution of warrants and apprehension of aliens, Operation cross check resulted in searches. In this regard, Section 1357 provides:

> Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

8 U.S.C. § 1357(c). 8 U.S.C. § 1357 is constitutional.

In some instances, the authority of Deportation officials to conduct warrantless interrogations has been limited to situations where such officials have a reasonable suspicion, based on specific articulable facts, that the person may be an alien who is illegally in the country. These factors include personal appearance and dress; nervous or erratic behavior; And whether the person is in an area believed to be populated by a fairly high concentration of illegal aliens. *see* United States v.. Hernandez-Rojas, 470 F.Supp. 1212 (D.C.N.Y., 1979).

Plaintiffs would have this Court apply criminal procedures to the execution of the civil warrants in this case. Plaintiffs claim that their Fourth Amendment Rights were violated by warrantless non-consenual Home searches. They rely on affidavits of three Plaintiffs and primarily cite two criminal cases, United States v. Parris, 17 F.3d 227 (8th Cir. 1994) and United States v. Chaidez, 906 F.2d 377 (8th Cir. 1990). While the substantive criminal law may help define the boundaries of consent, the criminal procedures and presumptions discussed in such cases and cited by Plaintiffs do not apply.

As the declarations of defendants demonstrate, consent is a factual dispute based on the totality of the circumstances at the time of the event giving rise to the cause of action. Consequently, there are thirty different claims that are not subject to joinder let alone a showing that each individual is likely to prevail on the merits. Moreover, although Plaintiffs seek to restrain all warrantless searches, they are not prohibited at law.

The Fourth Amendment does not forbid warrantless searches or detentions during them. Instead, it permit reasonable searches and detentions. *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968). "It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government-whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement-is not that they always be correct, but that they always be reasonable." Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). In Illinos v. Rodriguez, the Court stated:

> Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). Consistent with the Supreme Court, the Court of Appeals has stated,

> The government may obtain consent for a warrantless search from the defendant or "from a third party who possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected.

United States v. Czeck, 105 F.3d 1235, 1239 (8th Cir. 1997) *quoting* United States v. Matlock, 415 U.S. 164, 171 (1974). The Deportation agents were allowed to obtain consent

for warrantless searches. Consequently, Plaintiffs are unlikely to prevail on their claims that warrantless searches should be enjoined.

5. **Plaintiffs are unlikely to prevail on their Fourth Amendment Claim for alleged investigatory Stops and detentions.**

One Plaintiff, Veliz, claims that on April 12, 2007, he was illegally stopped while driving his vehicle. He was not however, further detained or placed into removal proceedings. Indeed, the Complaint alleges that unlike other Plaintiffs, he was a lawful permanent resident. As a result, he has no connection or interest in or standing to enjoin removal proceedings or warrentless searches. It is unlikely he will prevail on an action for injunctive ro declaratory relief.

6. **Plaintiffs are unlikely to prevail on their Fifth Amendment Claim for alleged violations of the Equal Protection clause.**

Plaintiffs cite Lopez v. United States Immigration and Naturalization Service, 758 F.2d 1390 (10th Cir. 1985) to argue that Plaintiff's were entitled to "Miranda" warnings before custodial interrogations. Lopez does not support their argument.

Lopez, involved the same form of action as the instant case. He complained that immigration agents could not seize his driver's license at a time when he did not have his registration papers. Lopez, 758 F.2d at 1391. The plaintiff was a passenger in a car that was stopped by INS officers. When the plaintiff was unable to demonstrate that he was legally in the United States, he was taken into custody. The following day, he was released when an officer located the a file containing a petition that would legitimize the plaintiff's

presence in the United States. The INS returned the license, which resulted in Colorado initiating revocation proceedings and revoking the plaintiff's license. Id. The plaintiff claimed that taking his license without a hearing violated due process. Id. at 1393. the court, however, held, " the INS was not required to conduct a due process hearing either *before or after* confiscating identification papers that could assist his avoiding detection as an alien." Id. at 1394 (emphasis added).

As this Court will surely do, the Lopez court set the table to analyze an alien's procedural due process claim by stating:

> In considering this contention, we note that aliens, even those lawfully within the country, do not have most of the constitutional rights afforded to citizens. They may be deported for considerations of race, politics, activities, or associations that the government could not punish them for if they were citizens. [citations omitted]. They may be arrested [pursuant] to administrative warrant issued without an order of a magistrate. . . and held without bail.

Id. , at 1393. *citing* Abel v. United States, 362 U.S. 217 (1960); Carlson v. Landon, 342 U.S. 524 (1952).

Contrary to Plaintiffs' use of Lopez to support their arguments, the court also noted that although an alien is entitled to protection of the Fifth and Sixth amendment when charged with a crime, which is not the case here. "That does not mean, [however] that an alien who has violated United States immigration laws is entitled to a hearing before the government may deprive him of an item of his personal property that would assist him in avoiding detection as an alien." Id. As a result, Plaitniffs are unlikely to prevail on their

Fifth Amendment claim.

7. **Plaintiffs are unlikely to prevail on their Sixth Amendment Claim.**

Although removal proceedings are civil proceedings and Plaintiffs were apprehended pursuant to civil warrants and authority, they argue the Arizona v. Roberson, 486 U.S. 675 (1988) "clearly states" that the Sixth Amendment right to counsel attaches to the instant interrogations. Plaintiff's argument lacks merit.

In Roberson, a defendant was arrested at the scene of a burglary and given his Miranda rights. Roberson, 486 U.S. at 678. Three days later while the defendant was still detained a different officer questioned the defendant about a different burglary and obtained information incriminating the defendant in the burglary for which he had been arrested. Id. The Court held that the incriminating statement should be suppressed, but noted that officers "are free to inform the suspect of facts of the second investigation as long as sch communication does not constitute interrogation." Id. at 687. Moreover, any further communication initiated by the suspect is valid. Id. Roberson was an extension of the Court's holding in Miranda which does not apply in the instant case.

> It is settled law in this jurisdiction that deportation proceedings are civil, and not criminal, in nature. *[citation omitted]*. Consequently, those Fifth and Sixth Amendment rights outlined in a Miranda-type warning are inapposite in the context of removal proceedings.

Vasquez-Trujillo v. Gonzales 151 Fed.Appx. 509, 510-11 (9th Cir. 2005); *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984).

As a matter of law, Plaintiffs are unlikely to prevail on their Sixth Amendment claim.

D. The Public Interest Favors Moving Forward with Removal Proceedings and Permitting Warrantless Searches.

In Lopez, 758 F.2d at 1392, the court identified the strong public interest in enforcement of immigration law, stating:

> Congress has conferred upon the INS broad authority to address the problem of illegal aliens. It is a felony to make false statements in matters relating to immigration or to use falsely procured documentary evidence of citizenship. 18 U.S.C. § 1015. The Immigration and Nationality Act authorizes the INS to interrogate any alien or person believed to be an alien. 8 U.S.C. § 1357(a)(1). The Act permits INS officials to arrest aliens whom the officials have reason to believe are in violation of the immigration laws. Id. at § 1357(a)(2). The Act empowers INS officials to detain illegal aliens and permits the Attorney General to arrange for their deportation. Id. at § 1252. These provisions collectively reveal Congress' strong interest in effective enforcement of our immigration laws. The Supreme Court has recognized the significant public interest in the enforcement of immigration policies.

Id. Moreover, unlike citizens, Congress requires an alien to carry evidence of his registration at all times.

In addition to the public interest in the enforcement of immigration laws, there is also a public interest in the use of local government resources to support aliens illegally in the United States. These resources, such as probation offices are limited. Yet, illegal aliens were the subject of thirty probation files and the monitoring that accompanies such activity. Thus, the public has an interest in using its resources for their intended purpose, which does not include the supervision of persons who are illegally present in the United States.

CONCLUSION

For the foregoing reasons and the additional reasons stated in oral argument, injunctive relief should be denied.

For these reasons, the public interest is not served by issuing an injunction.

Dated this 25 day of April 2007.

RACHEL K. PAULOSE
United States Attorney

s/ Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
(612) 664-5600

Attorneys for Defendants