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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 12-09012-BRO (FFMx) CV 13-04416-BRO (FFMx)	Date	September 9, 2016
Title	DUNCAN ROY ET AL. V. COUNTY OF LOS ANGELES ET AL. GERARDO GONZALEZ V. IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL.		

Present: The Honorable	BEVERLY REID O'CONNELL, United States District Judge	
Anel Huerta	Not Present	N/A
Relief Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER RE PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION [151, 152]

I. INTRODUCTION

Currently pending before the Court are Plaintiffs' Motions for Class Certification.[1] (*See* Dkt. Nos. 151, 152.) The Court has considered all of the papers filed in support of and in opposition to the instant motion as well as oral argument of counsel at the hearing held on August 29, 2016. For the reasons explained below, the Court **GRANTS in part and DENIES in part** Plaintiff's Motion.

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[1] There are two Motions in this case: one arises from *Duncan Roy et al. v. County of Los Angeles et al.*, No. 12-cv-09012-BRO-FFM, while the other arises from the related action *Gonzalez v. Immigration & Customs Enforcement et al.*, No. 13-cv-04416-BRO-FFM. On July 28, 2015, the two cases were consolidated. (*See* Dkt. No. 91.)

The named Plaintiffs in the *Roy* action are Duncan Roy, Alain Martinez-Perez, Annika Alliksoo, and Clemente De La Cerda (the "Roy Plaintiffs"). (*See* Dkt. No. 125 (hereinafter, "Roy SAC").) The named Plaintiffs in the *Gonzalez* action are Geraldo Gonzalez and Simon Chinivizyan (the "Gonzalez Plaintiffs"). (*See Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 44 (hereinafter, "Gonzalez TAC").) Collectively, the Court will refer to these parties as "Plaintiffs."

Defendants in the *Roy* action are the County of Los Angeles and Leroy Baca, the Sheriff of Los Angeles County (the "Roy Defendants"). (*See* Roy SAC ¶¶ 13–14.) Defendants in the *Gonzalez* action are Immigration and Customs Enforcement ("ICE"), Thomas Winkowski, Acting Director of ICE, David Marin, Acting Field Office Director for the Los Angeles District of ICE, and David Palmatier, the Unit Chief for the Law Enforcement Service Center of ICE (the "Gonzalez Defendants"). (*See* Gonzalez TAC ¶¶ 15–18.) Collectively, the Court will refer to these parties as "Defendants."

II. BACKGROUND

A. Factual Background

1. The Roy Plaintiffs

Plaintiffs Duncan Roy, Alain Martinez-Perez, Annika Alliksoo, and Clemente De La Cerda are a group of individuals who were or are currently in the custody of the Los Angeles County Sheriff's Department ("LASD") and who were denied either bail or release from custody on the basis of an immigration hold. Duncan Roy ("Mr. Roy") is a British citizen who the Roy Defendants allegedly detained for eighty-nine days pursuant to an immigration hold. (Roy SAC ¶ 9.) According to Mr. Roy, the Roy Defendants refused to allow him to post bail. (*Id.*) Alain Martinez-Perez ("Mr. Martinez-Perez") is a Mexican citizen that the Roy Defendants detained for six days after they denied him bail even though the district attorney declined to file criminal charges. (Roy SAC ¶ 10.) Annika Alliksoo ("Ms. Alliksoo") is an Estonian citizen who Defendants detained for a total of eighteen days and held for three days after a state court judge ordered Ms. Alliksoo's release. (Roy SAC ¶ 11.) Clemente De La Cerda ("Mr. De La Cerda") is a Mexican citizen and a lawful permanent resident. (Roy SAC ¶ 12.) As of the date of filing, Mr. De La Cerda was still in the LASD's custody pursuant to an immigration hold. (*Id.*)

The Roy Plaintiffs initiated this putative class action on behalf of themselves and others similarly situated.[2] Collectively, Plaintiffs challenge the legality of the LASD's

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[2] On January 25, 2016, the parties stipulated to dismiss Mr. Roy's claims. (*See* Dkt. No. 134.) Thus, Mr. Roy is no longer a party to this action. Mr. Martinez-Perez and Ms. Alliksoo seek damages on behalf of all individuals injured by the Roy Defendants' practice of refusing bail requests and detaining individuals beyond the time permitted by state law. (Roy SAC ¶¶ 10, 11.) Mr. De La Cerda seeks equitable relief on behalf of all individuals who are currently or who will in the future be in Defendants' custody on the basis of an immigration hold. (Roy SAC ¶ 12.) Specifically, he seeks to bar Defendants from detaining individuals beyond the time permitted by state law "solely on the basis of an immigration hold not supported by a probable cause determination." (*Id.*)

practice of detaining individuals solely on the basis of immigration holds placed by ICE. (*See* Roy SAC.)

a. ICE Detainer Forms and Practices

In August 2009, LASD and ICE activated the "Secure Communities" program in Los Angeles County. (Roy SAC ¶ 18.) Under this program, LASD provides ICE with the fingerprints and booking information of every arrested individual during the booking process. (*Id.*) An agent in ICE's Law Enforcement Support Center checks the fingerprints against ICE and Federal Bureau of Investigation databases. (*Id.*) If the reviewing agent with ICE's Enforcement and Removal Operations Unit determines that ICE needs to take some action regarding a person detained, the agent provides LASD (or the local law enforcement agency) with a Form I-247, also referred to as an immigration or ICE detainer. (Roy SAC ¶ 19; *see also* Declaration of Lindsay Battles (Dkt. No. 151-2) (hereinafter, "Battles Decl."), Exs. B, C, Z.) Pursuant to 8 C.F.R. § 287.7(a), an immigration hold is intended to advise a law enforcement agency that the Department of Homeland Security ("DHS") seeks to arrest or detain an alien in the agency's custody. (Roy SAC ¶ 21.) The detainer form also requests that the agency detain the alien for an additional forty-eight hours beyond when the subject would otherwise have been released. (Roy SAC ¶ 22.) Immigration holds may be issued for various reasons, including: (1) if ICE has initiated an investigation to determine whether the person is subject to removal from the United States; (2) if removal proceedings have already been initiated; (3) if ICE has served a warrant of arrest for removal proceedings; or, (4) if ICE has obtained an order of deportation or removal from the United States for the subject. (Roy SAC ¶ 23.)

Since October 2010, ICE has used several different versions of the detainer form. (*See* Battles Decl., Exs. B, C, Z.) On the version dated August 2010, the form included a line that would allow detainer if an "[i]nvestigation has been initiated," while the version dated December 2011 states that detainer is allowed only if ICE had "[i]nitiated an investigation." (*See* Battles Decl., Exs. B, Z.) According to the Roy Plaintiffs, during the class period, ICE issued 21,179 detainers with the "initiated an investigation" box selected, and 2,911 detainers with no reason for detainment indicated at all. (*See* Battles Decl., Ex. BB.) In December 2012, two months after the Roy Plaintiffs initiated this

action, ICE revised the detainer form by removing the "initiated an investigation" option and instead adding an option stating that ICE has "[d]etermined that there is a reason to believe the individual is an alien subject to removal from the United States." (*See* Battles Decl., Ex. C.)

From October 2010 until a new detainer form was introduced in 2015, the detainer form requested that the LASD detain an individual for up to forty-eight hours beyond the time that the individual would otherwise be eligible for release (excluding weekends and holidays). (*See* Battles Decl., Exs. B, C, Z.) In 2015, ICE revised its detainer form and created two different forms: the I-247D, for individuals with a higher enforcement priority, and the I-247X, for individuals with lower enforcement priority. (*See* Battles Decl., Exs. D, E.) These new detainer forms replaced the option which stated ICE had a "reason to believe" with the statement "probable cause exists that the subject is a removable alien." (*Id.*) The new detainer forms still request forty-eight hours of additional detention, but no longer exclude weekends and holidays. (*Id.*) Additionally, during the class period, only nineteen percent of all of the ICE detainer forms that LASD received were supported by a final order of removal, and only 0.5% were supported by the initiation of removal proceedings. (*See* Battles Decl. ¶ 3.)

The Roy Plaintiffs challenge two of the LASD's practices related to immigration holds. First, they assert that the LASD has engaged in a pattern and practice of unlawfully denying bail to inmates who were subject to an immigration hold, thereby preventing these individuals from securing their release. (*See* Roy SAC ¶¶ 47–55.) Second, Plaintiffs challenge the LASD's practice of detaining individuals solely on the basis of an immigration hold and beyond the time or authority permitted under state law to hold an inmate in custody. (Roy SAC ¶¶ 57–60.)

b. Bail Practices

According to the Roy Plaintiffs, from October 2010 to October 2012, LASD's policy was to deny inmates with immigration detainers the ability to post bail. (*See* Roy SAC ¶¶ 47–56; *see also* Declaration of Xanadu Copo (Dkt. No. 151-34); Declaration of Emilia Flores (Dkt. No. 151-35); Declaration of Alejandro Delgado (Dkt. No. 151-36); Declaration of Mike Gradilla (Dkt. No. 151-37); Declaration of Alec Rose (Dkt. No. 151-

38); Declaration of Brendan Hamme (Dkt. No. 151-39); Declaration of James Kallas (Dkt. No. 151-40); Declaration of Lauro Jiminez (Dkt. No. 151-41); Declaration of Morris DeMayo (Dkt. No. 151-43); Declaration of Rocio Ramirez (Dkt. No. 151-44).) LASD would mark immigration detainers in the electronic jail booking system as "no bail" holds. (*See* Battles Decl., Ex. L (hereinafter, "Sivard Dep.") at 116:15–116:20; *see also* Battles Decl., Exs. T, U.) Shortly before this litigation commenced, LASD voluntarily changed its policy to allow individuals on immigration detainer to post bail. (*See* Battles Decl., Ex. V.) Further, while LASD policy was not to book anyone into jail for whom bail was set at less than $25,000, until June 2014, this policy did not apply to those with immigration detainers issued against them. (*See* Battles Decl., Ex. N; *see also* Battles Decl., Ex. S (hereinafter, "Sivard Rule 30 Dep.") at 77:17–79:7.)

c. Arrest and Detention Based on Immigration Retainers

According to the Roy Plaintiffs, from October 2010 to June 2014, LASD's policy was to comply with ICE's issued immigration detainers and to detain individuals for up to forty-eight hours beyond the time they were eligible for release (excluding weekends and holidays). (*See* Battles Decl., Exs. F–K; *see also* Sivard Dep. at 66:13–66:18.) At the time, LASD recorded immigration detainers in its Automated Jail Information System ("AJIS"), which made the detainers visible to the public and the jail staff through its "inmate locator." (*See* Sivard Dep. at 32:16–33:5.) The Roy Plaintiffs allege that LASD characterized detainers as mandatory holds within its electronic data systems, although LASD knew (or should have known) that detainers are actually voluntary administrative requests. (*See* Roy SAC ¶¶ 31–37.) LASD complied with all immigration detainers, treating them as mandatory. (*See* Roy SAC ¶ 17; *see also* Battles Decl., Ex. M.) In March 2014, however, LASD took steps, pursuant to California Government Code section 7282.5(a), to limit the circumstances in which it would honor immigration detainers. (*See* Battles Decl., Ex. F.) Further, in June 2014, LASD voluntarily adopted policies in order to reduce the detention time of an individual on an immigration detainer and to enable an individual's transfer to ICE without extending the detention beyond the time the individual would otherwise be eligible for release. (*See* Battles Decl., Exs. J, K.) Additionally, in June 2014, LASD stopped recording immigration detainers in AJIS and began keeping only a paper copy of the detainer in the inmate's file. (*See* Battles Decl., Ex. J; *see also* Sivard Dep. at 29:3–29:15.)

The Roy Plaintiffs aver that during the class period, LASD never had a policy of bringing people held on ICE detainers before a judge for a probable cause determination while in LASD's custody despite maintaining procedures for ensuring other inmates held on warrantless arrests would be released within forty-eight hours. (*See* Sivard Dep. at 159:13–160:6; *see also* Sivard Rule 30 Dep. at 69:3–72:6.) Further, according to the Roy Plaintiffs, this was done even though ICE did not provide detainees with a probable cause hearing within forty-eight hours of being transferred to ICE custody. (*See* Battles Decl., Ex. O.) Accordingly, LASD had no way to ensure individuals detained pursuant to an immigration detainer were not over-retained. (*See* Sivard Dep. at 65:6–66:8; Sivard Rule 30 Dep. at 76:24–77:16; *see also* Battles Decl., Ex. R at 138:16–139:22, 234:2–235:14.)

2. Plaintiffs Gonzalez and Chinivizyan's Related Action

Plaintiffs Gerardo Gonzalez, Jr. ("Mr. Gonzalez") and Simon Chinivizyan ("Mr. Chinivizyan") bring a related action on behalf of themselves and those similarly situated. (*See* Gonzalez TAC.) The Gonzalez Plaintiffs also challenge ICE's detainer form (Form I-247). (Gonzalez TAC ¶ 19.) The Gonzalez Plaintiffs allege that the detainer forms issued against them were unlawful because: (1) ICE did not assess whether they were likely to escape before an administrative warrant could be obtained prior to issuing their detainers; and, (2) ICE requested their detention without requiring a judicial probable cause determination either before or promptly after the initiation of a warrantless arrest based on the detainers. (*See* Dkt. No. 152 (hereinafter, "Gonzalez Mot.") at 2; Declaration of Lindsay Battles (Dkt. No. 152-3) (hereinafter, "Battles Decl. II"), Ex. F at 3–5; *see also* Battles Decl. II, Ex. G (hereinafter, "Rapp Dep.") at 164:8–168:20, 174:4–174:13; Declaration of Jessica Karp Bansal (hereinafter, "Bansal Decl."), Ex. 1 (hereinafter, "Hamm Dep.") at 57:1–57:10, 58:19–58:21, 92:10–92:15, 269:19–270:1.) Additionally, Mr. Gonzalez alleges that his detainer was unlawful, because ICE determined whether there was probable cause for his detainment based on information it kept in electronic databases, rather than through a personal interview with him. (*See* Gonzalez Mot. at 2; *see also* Battles Decl., Ex. H (hereinafter, "San Martin Dep.") at 37:13–37:23.)

a. Issuance of Detainers Without Probable Cause

According to the evidence proffered by the Gonzalez Plaintiffs', ICE issues a "significant percentage" (approximately seventy percent) of its detainers relying only on electronic database checks to determine whether there is probable cause for detainment. (*See* Bansal Decl., Ex. 2 (hereinafter, "Schichel Dep.") at 68:11–69:7, 125:7–126:9, 128:9–130:19, 137:16–138:20, 140:12–142:14, 143:8–144:20, 145:24–147:3, 150:13–19.; *see also* Bansal Decl., Ex. 3; Hamm Dep. at 44:1–45:1, 92:2–92:9; 192:10–192:14, 266:22–266:25; Rapp Dep. at 83:19–83:23, 166:13–163:20, 186:12–188:1.) The Gonzalez Plaintiffs allege that allowing ICE officers to issue detainers based only on information within an electronic database is unlawful for several reasons. First, though ICE's general policy is to advise officers that certain evidence is a "red flag" that an individual might be a United States citizen (and thus is not subject to removal), most of these red flags cannot be detected or investigated through database checks. (*See* Bansal Decl., Ex. 4; Battles Decl. II, Ex. I.) Second, the databases on which ICE relies are outdated and not updated properly in "[t]hree out of ten cases." (*See* Hamm Dep. at 219:17–221:8; Battles Decl., Ex. K at 192:12–194:14.)

Third, the Gonzalez Plaintiffs allege that when reviewing database information, ICE has a policy or practice of placing detainers on individuals despite the electronic databases revealing either no or inconclusive evidence indicating that the individual is subject to removal. (*See* Gonzalez Mot. at 4–5.) For instance, ICE issues detainers against individuals based only on a lack of records in the DHS databases. These detainers are issued with an indication that a person may be foreign born and are labeled "Foreign Born-No Match." (*See* Rapp Dep. at 148:19–149:19; Battles Decl. II, Ex. O; *see also* Schichel Dep. at 195:17–196:3.) According to the Gonzalez Plaintiffs, the issue with this practice is that no one born in the United States will appear in DHS databases, and may thus be subject to detainment. (*See* Battles Decl. II, Ex. N at 98:11–99:4.)

b. Issuance of Detainers Without Determining Likelihood of Escape

Next, the Gonzalez Plaintiffs allege that ICE issues detainers without making a determination whether the individual is likely to escape before an administrative warrant

could be issued in violation of 8 U.S.C. § 1357(a)(2). (*See* Hamm Dep. at 58:19–58:21, 269:3–270:1; Rapp Dep. at 166:24–168:20.) However, detainers are issued against those already in the custody of another agency, making them, by definition, unlikely to escape. (Gonzalez Mot. at 6.)

c. Issuance of Detainers Without a Prompt Judicial Determination of Probable Cause

Third, the Gonzalez Plaintiffs claim that ICE's policy of issuing detainers without providing a prompt judicial probable cause determination violates the Fourth Amendment. (Gonzalez Mot. at 7.) No judicial officer (including an immigration judge) reviews ICE detainers either before or promptly after they are issued. (*See* Battles Decl., Ex. F at 4–5.) The Gonzalez Plaintiffs allege that this practice violates the Supreme Court's requirement of a prompt judicial determination of probable cause as outlined in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). (Gonzalez Mot. at 7–8.)

III. PROCEDURAL HISTORY

A. The Roy Action

The Roy Plaintiffs filed their initial complaint on October 19, 2012, alleging that the LASD's practices constitute false imprisonment and negligence per se, and violate the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983, the California Constitution, article I, sections 7 and 13, California Government Code sections 815.2, 815.6, and the Tom Bane Civil Rights Act, California Civil Code section 52.1. (Dkt. No. 1.)

On June 8, 2015, the Roy Defendants filed a Motion for Judgment on the Pleadings, (Dkt. No. 71), which the Court granted in part and denied in part on July 9, 2015, (Dkt. No. 88). Also on June 8, 2015, the Roy Defendants filed a Motion to Consolidate this case with the Gonzalez Plaintiffs' action, (*see* Dkt. No. 72), which the Court granted on July 28, 2015, (Dkt. No. 91). On August 24, 2015, the Roy Plaintiffs filed a Motion Seeking Leave to Amend the Scheduling Order and to Amend the Pleadings, (*see* Dkt. No. 96), which the Court granted in part and denied in part, (Dkt.

No. 107). On October 2, 2015, the Roy Plaintiffs filed their First Amended Complaint. (Dkt. No. 109.) On October 26, 2015, the Roy Defendants filed a Motion to Dismiss and to Strike two paragraphs from the Roy Plaintiffs' First Amended Complaint. (Dkt. No. 112.) The Court granted the Roy Defendants' Motion to Dismiss in part and denied it in part and granted the Motion to Strike. (Dkt. No. 124.) On December 7, 2015, the Roy Plaintiffs filed their Second Amended Complaint. (Dkt. No. 125.) The Roy Defendants filed their Answer to the Second Amended Complaint on December 22, 2015. (Dkt. No. 129.)

B. The Gonzalez Action

Mr. Gonzalez filed his initial Complaint on June 19, 2013. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 1.) On July 10, 2013, Gonzalez filed a First Amended Complaint, which added Mr. Chinivizyan as a named Plaintiff. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 10.) After the Court granted the Gonzalez Plaintiffs leave to amend the complaint further, they filed a Second Amended Complaint on September 9, 2013. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 24.) On July 28, 2014, the Court granted the Gonzalez Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint and granted the Gonzalez Plaintiffs leave to amend. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 42.)

The Gonzalez Plaintiffs filed a Third Amended Complaint on August 18, 2014. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 44.) The same day, they also moved for class certification. (Dkt. No. 45.) On September 15, 2014, the Gonzalez Defendants filed a Motion to Dismiss for Lack of Jurisdiction. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 53.) On October 24, 2014, the Court granted the Gonzalez Defendants' Motion in part. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 61.) On February 4, 2015, the Gonzalez Defendants filed their Answer to the Third Amended Complaint. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 73.) On June 8, 2015, the Roy Defendants filed a Motion to Consolidate the two cases, which the Court granted on July 28, 2015. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF Nos. 88, 95.)

C. Combined Proceedings

On May 9, 2016, both the Roy and the Gonzalez Plaintiffs brought the instant Motions for Class Certification. (Dkt. No. 151 (hereinafter, "Roy Mot."); Gonzalez Mot.) On June 28, 2016, the Roy Defendants timely filed their Opposition, (Dkt. No. 165 (hereinafter, "Roy Opp'n")), and the Gonzalez Defendants filed their Opposition and a Corrected Opposition, (Dkt. Nos. 163, 164 (hereinafter, "Gonzalez Opp'n")). On July 22, 2016, the Roy and Gonzalez Plaintiffs timely replied. (Dkt. Nos. 169 (hereinafter, "Roy Reply"), 172 (hereinafter, "Gonzalez Reply").)

The Roy Plaintiffs move to certify two classes seeking equitable relief pursuant to Federal Rule of Civil Procedure 23(b)(2), and four classes and two subclasses seeking damages pursuant to Rule 23(b)(3). The classes and their definitions are as follows:

(1) **False Imprisonment Equitable Relief Class**: All LASD inmates detained beyond the time they are due for release from criminal custody, solely on the basis of immigration detainers, excluding inmates who have a final order of removal as indicated on the face of the detainer.

(2) ***Gerstein* Equitable Relief Class**[3]: All LASD inmates detained beyond the time they are due for release from criminal custody, solely on the basis of immigration detainers, excluding inmates who have a final order of removal or ongoing removal proceedings as indicated on the face of the detainer.

(3) **False Imprisonment Damages Class**: All LASD inmates who were detained beyond the time they are due for release from criminal custody, solely on the basis of immigration detainers, excluding inmates who had a final order of removal as indicated on the face of the detainer. Specifically, the class seeks

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[3] The Court will refer to Classes 1 and 2 collectively as the "Equitable Relief Classes."

damages from those who were detained between November 7, 2011, and the present.[4]

(4) ***Gerstein* Damages Class**: All LASD inmates who were detained beyond the time they are due for release from criminal custody, solely on the basis of immigration detainers, excluding inmates who had a final order of removal or were subject to ongoing removal proceedings as indicated on the face of the detainer. Specifically, the class seeks damages pursuant to federal law from October 19, 2010, to the present, and under California state law from November 7, 2011, to June 5, 2014.

(5) **Post-48-Hours *Gerstein* Subclass**: All LASD inmates who were detained for more than forty-eight hours beyond the time they were due for release from criminal custody, based solely on immigration detainers, excluding inmates who had a final order of removal or were subject to ongoing removal proceedings as indicated on the face of the immigration detainer. Specifically, the class seeks damages pursuant to federal law from October 19, 2010, to the present, and under California state law from November 7, 2011, to June 5, 2014.

(6) **Investigative Detainer Class**: All LASD inmates who were detained beyond the time they were due for release from criminal custody based solely on "investigative detainers." Specifically, the class seeks damages pursuant to federal law from October 19, 2010, to the present, and under California state law from November 7, 2011, to June 5, 2014.

(7) **No-Bail Notation Class**: All LASD inmates on whom an immigration detainer had been lodged and recorded in LASD's AJIS database, and who were held on charges for which they would have been eligible to post bail. Specifically, the

[4] Each of the Roy Plaintiffs' proposed damages classes includes a subclass based on the same conduct but relying on California Civil Code section 52.1 rather than federal law. The Roy Defendants do not challenge the state law subclasses separately from the federal class, thus the Court will address the proposed classes synonymously.

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12-09012-BRO (FFMx)** **CV 13-04416-BRO (FFMx)**	Date	September 9, 2016
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class seeks damages pursuant to federal law from October 19, 2010, to October 18, 2012, and under California state law from November 7, 2011, to October 18, 2012.

(8) **No-Money Bail Subclass**[5]: All LASD inmates on whom an immigration detainer had been lodged, who would otherwise have been subject to LASD's policy of rejecting for booking misdemeanor defendants with a bail amount of less than $25,000 (including Order of Own Recognizance). Specifically, the class seeks damages pursuant to federal law from October 19, 2010, until when the practice ended, and under California state law from November 7, 2011, to the earlier of when the practice ended or June 5, 2014.

(*See* Roy Mot. at 16–18.)

The Gonzalez Plaintiffs move to certify one class and two subclasses seeking equitable relief pursuant to Rule 23(b)(2):

(1) **Judicial Determination Class**: All current and future persons who are subject to an immigration detainer issued by an ICE agent located in the Central District of California, where the detainer is not based upon a final order of removal signed by an immigration judge or the individual is not subject to ongoing removal proceedings. Plaintiffs proposed Judicial Determination Class will seek rescission of class members' detainers and a declaration that Defendants' issuance of detainers against class members without providing a judicial determination of probable cause violates the Fourth Amendment.

(2) **Probable Cause Subclass**: All members of the Judicial Determination Class for whom ICE has issued an immigration detainer based solely on checks for the individual in government databases. The Probable Cause Subclass, to which Plaintiff Gonzalez belongs will seek rescission of subclass members' detainers and a declaration that Defendants' issuance of detainers against

[5] The Court will refer to Classes/Subclasses three through eight collectively as the "Damages Classes."

subclass members in reliance on database checks alone violates the Fourth Amendment.

(3) **Statutory Subclass**: All members of the Judicial Determination Class for whom ICE did not issue an administrative warrant of arrest at the time it issued an immigration detainer. The Statutory Subclass, to which both Plaintiffs belong, will seek rescission of subclass members' detainers and a declaration that Defendants' issuance of detainers against subclass members without making an individualized determination that the individual is likely to escape before a warrant can be obtained for his arrest violates 8 U.S.C. § 1357(a)(2).

(*See* Gonzalez Mot. at 10–11.)

IV. EVIDENTIARY OBJECTIONS

The Roy Defendants raise evidentiary objections to some of the statements in and exhibits attached to a number of the declarations included with the Roy Plaintiffs' Motion. (*See* Dkt. No. 166 (hereinafter, "Roy Defs.' Objs.").) First, they object to the Declaration of Lindsay Battles and attached Exhibits A, F, K, O, P, Q, T, and BB, and portions of the Declarations of Barry Litt, Mr. Martinez-Perez, and Ms. Alliksoo on various grounds, including lack of foundation, lack of authentication, and hearsay. (*See id.*)

The Court may "consider inadmissible evidence in deciding whether it is appropriate to certify a class." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 965 n.147 (C.D. Cal. 2015) ("Since a motion for class certification is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. . . . At the class certification stage, the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims." (internal quotations omitted)); *accord Waine-Golston v. Time Warner Entm't-Advance/New House P'ship*, No. 11cv1057–GPB(RBB), 2012 WL 6591610, at *9 (S.D. Cal. Dec. 18, 2012) ("Since a motion to certify a class is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence." (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (explaining that the class

certification procedure "is not accompanied by the traditional rules and procedures applicable to civil trials"))); *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010) ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial."). Accordingly, the Court **OVERRULES** the Roy Defendants' objections for the limited purpose of this Motion for Class Certification.

Next, the Roy Defendants object to the Declarations of Aurelio Lopez Rodriguez, Xanadu Copo, Emilia Flores, Alejandro Delgado, Mike Gradilla, Alec Rose, Brendan Hamme, James Kallas, Melissa Keaney, Morris DeMayo, and Rocio Ramirez on the grounds that the identities of these declarants were not disclosed pursuant to Federal Rule of Civil Procedure 26(a). (*See* Roy Defs.' Objs.) Pursuant to Rule 37(c), the court may exclude or refuse to rely on any witness who a party fails to disclose in accordance with Rule 26(a). *See* Fed. R. Civ. P. 37(c). However, the Roy Defendants were provided with these declarations on May 9, 2016, when the Roy Plaintiffs filed the instant Motion. (*See* Roy Mot.) Though the Roy Defendants have had more than three months to seek additional time to depose or cross-examine the undisclosed witnesses, they have failed to do so. Therefore, the Court finds that exclusion of this testimony is not necessary, because the Roy Defendants were apparently not significantly harmed by the Roy Plaintiffs' failure to disclose. *See Carrillo v. B & J Andrews Enters., LLC*, 2013 WL 394207, at *8 (D. Nev. Jan. 29, 2013) ("[T]he failure to disclose, under the circumstances is not so harmful that it necessitates total preclusion.").

V. LEGAL STANDARD

A party seeking class certification bears the burden of establishing that the prospective class satisfies each requirement of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Under Rule 23(a), the party seeking certification must establish all four of the following: (1) numerosity; (2) commonality; (3) typicality; and, (4) adequacy of representation. Fed. R. Civ. P. 23(a). This requires proof that:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.; *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Certification should be granted only if, "after a rigorous analysis," the court determines that the prospective class satisfies the requirements of Rule 23(a). *Wal-Mart Stores*, 564 U.S. at 350–51 (internal quotation marks omitted) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The same principles apply to a Rule 23(b) analysis. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Under Rule 23(b)(2), "[c]lass certification . . . is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. A 23(b)(2) class should be certified only if "the party opposing the class has acted or refused to act on ground generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Under Rule 23(b)(3), the representative of the putative class must establish that: (1) common questions "predominate over any questions affecting only individual members"; and, (2) class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (internal quotation marks omitted).

When reviewing motions for class certification, district courts generally are bound to take the substantive allegations of the complaint as true. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir. 1975)). But "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores*, 564 U.S. at 350. Thus, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* (quoting *Falcon*, 457 U.S. at 161)

(internal quotation marks omitted). Further, district courts may, however, "resolve any factual disputes necessary to determine whether" a plaintiff's claims meet the Rule 23 criteria. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (noting a factual dispute regarding commonality and holding that the court is "required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole"). Ultimately, district courts have "broad discretion to determine whether a class should be certified and to revisit that certification throughout the legal proceedings before the court." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir. 2010).

VI. DISCUSSION

A. Whether Plaintiffs Have Met the Requirements of Rule 23(a)

1. Whether the Roy Plaintiffs' Equitable Relief Claims Are Moot

As an initial matter, the Roy Defendants argue that the Roy Plaintiffs' Equitable Relief Classes cannot be certified because the claims seeking equitable relief are mooted by LASD's current policies. (*See* Roy Opp'n at 2.) As the Roy Plaintiffs admit, since June 2014, LASD has adopted policies that reduce the time that LASD detains an individual with an immigration detainer and enables LASD to transfer the individual to ICE without extending a person's detention beyond the time they are eligible for release. (Roy Mot. at 4; *see* Declaration of Justin W. Clark (Dkt. No. 167) (hereinafter, "Clark Decl."), Ex. A (hereinafter, "Defs.' Sivard Dep.") at 179:1–179:9; *see also* Clark Decl., Exs. B at 121:5–121:10, C at 217:22–218:22.)

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). "The standard for determining whether a defendant's voluntary conduct moots a case is 'stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013) (quoting

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)). The party asserting mootness bears a "heavy burden" of establishing that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189. "This heavy burden applies to a government entity that voluntarily ceases allegedly illegal conduct." *Bell*, 709 F.3d at 898–99.

2. The Roy Defendants have not met their "heavy burden" of establishing that the challenged conduct here cannot reasonably be expected to resume. Though the Roy Defendants offer evidence that the current LASD policy is to ensure that those retained on ICE detainers are not retained for longer than they would be otherwise,[6] they do not establish that there is no *possibility* that the LASD could change its policy to once again allow extended detainer.[7] *See Bell*, 709 F.3d at 901 (holding that implementation of a policy by the Boise Police Department's Chief of Police lacked sufficient permanence to moot the controversy); *cf. White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (explaining that a government memorandum that was "broad in scope and unequivocal in tone" represented a "permanent change" sufficient to moot the plaintiffs' claim). Thus, the Roy Plaintiffs' equitable claims are not moot.**Numerosity**

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[6] The only evidence which the Roy Defendants provide regarding this change in LASD policy is oral testimony from Mr. Sivard and Mr. House. (*See* Defs.' Sivard Dep. at 120:25–121:7, 179:1–179:9; Clark Decl., Ex. C at 217:22–218:22.) The Roy Defendants provided no evidence of a written policy indicating the change.

[7] At oral argument, the Roy Defendants reiterated its argument that the Roy Plaintiffs' claims were moot because there is now an "absolute policy" that no one subject to an ICE detainer has been held beyond their release date. However, the Roy Defendants have presented no evidence that this new "absolute policy" will always remain in place or could not be amended. Thus, the Court finds that LASD's voluntary change in policy is not enough to moot this action.

The Court next turns to the four elements required under Rule 23(a).[8] First, numerosity is satisfied if "the class is so large that joinder of all members is impracticable." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (citing Fed. R. Civ. P. 23(a)). "The numerosity requirement is not tied to any fixed numerical threshold—it 'requires examination of the specific facts of each case and imposes no absolute limitations.'" *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (quoting *Gen. Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 330 (1980)). Although Rule 23(a) does not require a specific minimum number of class members, Ninth Circuit precedent suggests that numerosity is satisfied when the prospective class includes at least forty members. *Id.*

a. The Roy Plaintiffs' Action

Here, the Roy Plaintiffs have easily met the threshold for numerosity. The Roy Plaintiffs present evidence (that the Roy Defendants do not dispute) indicating the approximate number of class members for each damages class based on LASD's inmate data. (*See* Roy Mot. at 24–25.) The number of potential class members for each class are as follows:

- **False Imprisonment Equitable Relief Class**: 10,072 potential class members, (*see* Declaration of Brian Kriegler (Dkt. No. 155) (hereinafter, "Kriegler Decl.") at 16);
- ***Gerstein* Equitable Relief Class**: 13,030 potential class members, (*see id.*);

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[8] The Court notes at the outset that many of the parties' arguments overlap with the merits of Plaintiffs' claims. "Rule 23 grants courts no license to engage in free-ranging merits inquires at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194–95 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. Thus, though the Court must consider certain merit-based questions in making its class certification decision, the Court expresses no opinion as to the ultimate likelihood of Plaintiffs succeeding on the merits of their claims.

- **False Imprisonment Damages Class**: 10,072 potential class members, (*see id.*);

- ***Gerstein* Damages Class**: 13,030 potential class members from the federal class period and 9,526 potential class members from the state law class period, (*see id.*);

- ***Gerstein* Post-48-Hour Subclass**: 7,197 potential class members from the federal class period and 5,480 potential class members from the state law class period, (*see id.*);

- **Investigative Detainer Class**: 21,179 potential class members, (*see* Battles Decl., Ex. BB);

- **No-Bail Class**: 12,225 potential class members within the federal class period and 6,020 potential class members within the state law class period, (*see* Kriegler Decl. at 16);

- **No-Money Bail Subclass**: 9,197 potential class members within the federal class period and 6,052 potential class members within the state law class period, (*see id.*).

Thus, the Roy Plaintiffs have met their burden of establishing numerosity as the joinder of all of these potential class members would be impracticable. *See Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569–70 (C.D. Cal. 2008) (finding class of approximately 4,000 met numerosity requirement). Moreover, even though the Roy Plaintiffs acknowledge that these are still only potential class members, they explain that "when the full data sets are produced," each class member will be ascertainable through the databases maintained by LASD and ICE. (*See* Roy Mot. at 25); *see also O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) ("[T]he class need not be 'so ascertainable that every potential member can be identified at the commencement of the action.' . . . As long as 'the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." (citations

omitted)). Accordingly, the Court finds that the Roy Plaintiffs have established the numerosity of its proposed classes.

b. The Gonzalez Plaintiffs' Action

The Gonzalez Plaintiffs have also established numerosity. The Gonzalez Plaintiffs allege that each class includes "thousands" of individuals. As they explain, the Judicial Determination Class consists of all current and future persons who are subject to an ICE detainer where the detainer is not based upon a final order of removal or the individual is not subject to ongoing removal proceedings. (*See* Gonzalez Mot. at 12.) According to the Gonzalez Plaintiffs' evidence, ICE agents have issued over 75,000 detainers between December 2012 and February 2016. (*Id.*; *see also* Battles Decl. II, Ex. P.) Further, of the 31,925 detainer requests that ICE issued to LASD, only approximately 6,000 were based upon a removal order or ongoing removal proceedings. (Battles Decl. II ¶ 20.) Accordingly, the Gonzalez Plaintiffs "extrapolate" that the "vast majority" of issued detainers were not based upon a final order of removal or ongoing removal proceedings. (Gonzalez Mot. at 13.)

Similarly, the Probable Cause Subclass consists of everyone in the Judicial Determination Class whose detainer was issued solely on the basis of the government database checks. According to the Gonzalez Plaintiffs' evidence, approximately seventy percent of all detainers issued by ICE in the Southern California area are issued pursuant to database checks rather than in-person interviews. (*See* Schichel Dep. at 68:11–69:7.) Thus, assuming the Judicial Determination Class is made up of thousands of potential class members, the Probable Cause Subclass will almost certainly include thousands of members as well.

And finally, the Statutory Subclass consists of everyone in the Judicial Determination Class except those against whom ICE has issued an administrative warrant of arrest. (*See* Gonzalez Mot. at 13.) According to the Gonzalez Plaintiffs, only approximately 0.1% of all detainer requests were based upon an administrative warrant, thus it appears that the class should also be composed of "thousands." (*Id.*; *see also* Battles Decl. II ¶ 20.) Even where the class size is unknown but "common sense indicate[s] that it is large, the numerosity requirement is satisfied." *Cervantez*, 253

F.R.D. at 569. Therefore, since the Gonzalez Plaintiffs have a reasonable statistical basis for assuming the proposed class sizes are in the thousands, the Court finds that they have established numerosity here.

3. Commonality and Typicality

Next, Plaintiffs must demonstrate commonality and typicality. Rule 23(a)'s commonality and typicality factors "tend to merge" in that both commonality and typicality "serve as guideposts for determining whether, under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Meyer v. Portfolio Recovery Assocs. LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (internal quotation marks omitted) (quoting *Wal-Mart Stores*, 564 U.S. at 349 n.5). "Commonality simply requires that there be at least one legal or factual issue common to the class," *In re Verisign, Inc. Secs. Litig.*, NO. C 02-02270 JW, 2005 WL 7877645, at *5 (N.D. Cal. Jan. 13, 2005), whereas "[t]he test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct," *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). As explained below, the Court is persuaded that Plaintiffs have satisfied both requirements as to the majority of their proposed classes.

a. The Roy Plaintiffs' Action

"Commonality, like numerosity, is a prerequisite which plaintiffs generally . . . satisfy very easily." *Verisign*, 2005 WL 7877645, at *5. The Roy Plaintiffs argue that all of the class definitions depend on either an across-the-board policy or practice that is central to the determination, or identical questions of law and fact. (*See* Roy Mot. at 20–21.) The Roy Defendants, however, argue that the Supreme Court's holding in *Wal-Mart Stores* prevents a finding of commonality in this case. (*See* Roy Opp'n at 7–13.)

In *Wal-Mart Stores*, the plaintiffs brought a class action alleging a company-wide pattern of discrimination. *See Wal-Mart Stores*, 564 U.S. at 342. The Court noted that

the "crux" of the case was commonality, because "proof of commonality necessarily overlap[ped] with respondents' merits contention that Wal-Mart engage[d] in a *pattern or practice* of discrimination." *Id.* at 349, 352. The Court found that the plaintiffs lacked commonality because they were attempting to sue over "literally millions of employment decisions at once," and there was no "glue holding the alleged *reasons* for all those decisions together" before certifying a class. *Id.* at 352. The only policy supported by evidence was one that allowed discretion by local supervisors over employment matters, which the Court held was "just the opposite" of a uniform practice "that would provide the commonality needed for a class action." *Id.* at 355. Additionally, the Court analyzed the statistical evidence the plaintiffs provided and held that it failed to establish commonality because it was "too weak to raise any inference that all the individual, discretionary personnel decisions" at issue were discriminatory. *Id.* at 358.

The Roy Defendants argue that *Wal-Mart Stores* places a significant burden of evidentiary proof on the Roy Plaintiffs and that the Roy Plaintiffs have failed to meet that burden. (*See* Roy Opp'n at 11–13.) The Court disagrees with the Roy Defendants as to the majority of the Roy Plaintiffs' proposed classes. The difference between *Wal-Mart Stores* and the instant case is that Plaintiffs here have sufficiently alleged and presented evidence of multiple LASD general policies or practices that were apparently performed with little to no discretion on the part of LASD officers. Specifically, LASD apparently had a policy or practice of (1) detaining inmates even if they would otherwise have been released if there was an ICE hold placed on them, (2) routinely failing to provide a probable cause hearing within a reasonable time, (3) honoring investigative detainers, and, (4) not allowing those who would have otherwise been able to post bail[9] and those

[9] The Roy Defendants argue that the Roy Plaintiffs fail to establish commonality as to the No-Bail Policy Class, in which the Roy Plaintiffs allege that the LASD had a general policy of denying bail to those who had an immigration detainer against them, because the Roy Defendants have offered conflicting evidence that no such policy existed. The Roy Defendants present deposition testimony and documentary evidence that no such policy existed, and LASD would accept bail from those who proffered the bail amount, even if there was an ICE detainer placed against them. (*See* Declaration of Greg Sivard (Dkt. No. 167) ¶¶ 6–8, Exs. D, E; *see also* Clark Decl., Exs. A, B.) However, the Roy Defendants' evidence is not convincing, as it also makes clear that there was confusion amongst LASD officers as to whether inmates with immigration detainers could post bail. (*See* Defs.' Sivard Dep. at

who would otherwise have been released on their own recognizance to be released because there was an immigration detainer against them. (*See* Roy Mot. at 20–2; *see also* discussion *supra* Section II.A.1.b.) Thus, the "glue" that the Supreme Court required in *Wal-Mart Stores* exists here—all LASD employees regardless of location or position apparently followed these broad policies.

The Court agrees with the Roy Defendants, however, that the Roy Plaintiffs have failed to establish commonality as to the *Gerstein* class. The *Gerstein* class claims that the detention of all class members for any period of time violates the class members' rights under the Fourth and Fourteenth Amendment, while the Post-48 Hour *Gerstein* subclass claims that all detentions for more than forty-eight hours violated the class members' Fourth and Fourteenth Amendment rights. (Roy Mot. at 17.) Liability for the *Gerstein* classes "turns on whether inmates held after they were due for release on criminal matters were denied a prompt judicial determination of probable cause." (Roy Mot. at 20.) The Roy Defendants argue that the Roy Plaintiffs have failed to establish how these theories are subject to class-wide determination.

The Supreme Court has held that a detained individual must be provided "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 125. In *McLaughlin*, 500 U.S. at 56, the Supreme Court held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." However, the timing of a probable cause determination in a particular case does not pass "constitutional muster simply because it is provided within 48 hours." *Id.* Additionally, if it takes longer than forty-eight hours to provide a probable cause determination, "the calculus changes." *Id.* at 57. In that case, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance" justifying the delay in making the determination. *Id.*

117:25–118:5.) Thus, the Court finds that the Roy Plaintiffs have presented enough evidence to establish commonality.

The Roy Defendants argue that class certification is inappropriate based on *Gerstein* because each inquiry must be made individually to determine whether a probable cause determination was provided in a reasonable time frame. (*See* Roy Opp'n at 20–21.) The Court agrees as to those Defendants whose probable cause determination was made in less than forty-eight hours. Under the Supreme Court's direction in *McLaughlin*, generally a probable cause determination made within forty-eight hours is reasonable, unless there are specific facts supporting unreasonableness. *See McLaughlin*, 500 U.S. at 56. Thus, whether each class member who was provided a probable cause hearing within forty-eight hours was provided a hearing within a reasonable amount of time would be an individualized inquiry dependent on the facts of the case. *See Ilae v. Tenn*, Civ. No. 12-00316 ACK-KSC, 2013 WL 4499386, at *5 (D. Haw. Aug. 20, 2013) ("The County is permitted to make warrantless arrests, and the 48-hour timeframe in the alleged policy . . . generally complies with the promptness requirement."). For those who were not given a probable cause hearing for more than forty-eight hours, however, it may be found as a matter of law that all such delays were unreasonable. *See id.* at 57. Thus, the Court finds that the Roy Plaintiffs have failed to establish commonality for the *Gerstein* class, though they have met the commonality requirement for the Post-48-Hours *Gerstein* subclass.

As for typicality, "[t]he Ninth Circuit does not require the named plaintiffs' injuries to be 'identical with those of the other class members, [but] only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same injurious course of conduct.'" *Cooper*, 254 F.R.D. at 635 (second modification in original) (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001)). Here, the Roy Plaintiffs have alleged that at least one of the still-active named Plaintiffs are typical of each proposed class:

- **False Imprisonment Equitable Relief Class**: Mr. De La Cerda, at the time of filing, like other class members, faced possible detention on the basis of an ICE detainer without being subject to a final order of removal, (*see* Roy SAC ¶ 12; Battles Decl. ¶ 25);

- ***Gerstein* Equitable Relief Class**: Mr. De La Cerda, at the time of filing, like other class members, faced the possibility of detention on the basis of an immigration detainer without being subject to a final order of removal or ongoing removal proceedings, (*see* Roy SAC ¶ 12; Battles Decl. ¶ 25);

- **False Imprisonment Damages Class**: Mr. Martinez-Perez and Ms. Alliksoo were both detained beyond the time they were due for release based on their criminal charges, though neither were subject to a final order of removal or ongoing removal proceedings, and further, their detentions fall within both the federal and state class periods, (*see* Roy SAC ¶¶ 10–11; Battles Decl. ¶ 25);

- **Post-48-Hours *Gerstein* Class**: Mr. Martinez-Perez and Ms. Alliksoo were both detained for at least forty-eight hours beyond the time they would have otherwise become eligible for release, (*see* Roy SAC ¶¶ 10–11);

- **Investigative Detainer Class**: Mr. Martinez-Perez and Ms. Alliksoo were both detained beyond the time they would have otherwise been released based on their criminal detentions based solely on an "investigative detainer," (*see* Battles Decl., Exs. X, AA);

- **No-Bail Class**: Mr. Martinez-Perez and Ms. Alliksoo were both assigned a "no-bail" notation within LASD's electronic systems and were thus denied the right to post bail, (*see* Roy SAC ¶¶ 10, 11, 75, 83–85);

- **No-Money Bail Subclass**: Mr. Martinez-Perez and Ms. Alliksoo both had bail amounts less than $25,000, yet, instead of being released, were detained by LASD due to an ICE detainer, (*see* SAC ¶¶ 75, 83–85).

Accordingly, the Court finds that the Roy Plaintiffs have presented facts to support a finding that at least one of the named Plaintiffs adequately represent other class members in this action. Further, the Roy Defendants have not disputed the named Plaintiffs' typicality. Thus, the Court finds that the Roy Plaintiffs have established

commonality for all of their claims other than the *Gerstein* class and have established typicality as to all of their remaining proposed classes.

b. The Gonzalez Plaintiffs' Action

The Gonzalez Plaintiffs allege that they have established commonality because their claims raise multiple questions common to the class and subclasses. (Gonzalez Mot. at 16.)

First, the Judicial Determination Class challenges ICE's practice of failing to provide a judicial determination of probable cause at any point while an individual is held in ICE custody. The Court finds that the Gonzalez Plaintiffs' Judicial Determination Class, like the Roy Plaintiffs' *Gerstein* Damages Class, is not appropriate for class-wide relief. As addressed above, *Gerstein* and *McLaughlin* create a presumption that a failure to provide a probable cause hearing within forty-eight hours of arrest is a violation of an individual's Fourth Amendment rights. *See McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 126. However, individuals who were detained for less than forty-eight hours and were not given a prompt judicial determination of probable cause may not have had their constitutional rights violated, as a prompt probable cause determination may not have been required. Thus, the Gonzalez Plaintiffs have created an overbroad class by crafting a class definition that includes *everyone* who was detained without a prompt judicial determination of probable cause, without consideration of the time they were ultimately detained. Therefore, the Court finds that the Gonzalez Plaintiffs have failed to establish commonality as to their proposed Judicial Determination Class.

However, "[t]he Court may cure the defects of a proposed class definition where the class is overbroad." *Soto v. Castlerock Farming & Transp., Inc.*, No. 1:09-cv-00701-AWI-JLT, 2013 WL 6844377, at *23 (E.D. Cal. Dec. 23, 2013). The Court finds that, for the reasons enumerated above, a class consisting of members who were detained for more than forty-eight hours meets the commonality requirement, as forty-eight-hour or longer detentions may be considered presumptively unlawful under *Gerstein* and *McLaughlin* and may be subject to class-wide determination. Therefore, the Court *sua sponte* limits the Gonzalez Plaintiffs' proposed Judicial Determination Class to consist of those who were detained for at least forty-eight hours.

Next, the Probable Cause Subclass alleges that it is the Gonzalez Defendants' unlawful policy to base probable cause determinations on only a check of an online database. (*See* Gonzalez Mot. at 18.) Thus, the question common to the class is whether this practice is unlawful. Third, the Statutory Subclass examines the question of whether ICE violates 8 U.S.C. § 1357(a)(2) by having a policy or practice of not determining whether an individual is likely to escape prior to the time it could obtain an administrative warrant before issuing a detainer that results in detention. (Gonzalez Mot. at 19.) This leads only to a common question challenging the practice.

The Gonzalez Defendants contend that "probable cause is a highly fact specific inquiry," and thus the Gonzalez Defendants' classes lack commonality. (*See* Gonzalez Opp'n at 17.) This argument appears to reference the Probable Cause Subclass. However, the Probable Cause Subclass does not challenge whether ICE actually had probable cause; rather, it challenges the alleged practice of basing probable cause only on information contained in an online database, rather than through in-person interviews or determinations. (*See* Gonzalez Mot. at 18.) Thus, individual determinations of whether ICE had probable cause as to any given individual is unnecessary.[10] Additionally, the Gonzalez Defendants allege that ICE's new detainer forms now require that agents have probable cause regarding the individual's need for removal before issuing a detainer. (Gonzalez Opp'n at 17–18.) Even assuming this is the case, as addressed above, a voluntary change in policy does not moot the Gonzalez Plaintiffs' claim.

Next, the Gonzalez Defendants argue that the proposed classes are too broad and not yet ripe because they include both current and future individuals. (Gonzalez Opp'n at 18.) "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (alteration and citation omitted). However, including "future class members in a class is not itself unusual or objectionable." *Id.* Rather,

[10] Further, even if the Court construes the Gonzalez Defendants' challenge as one to the Judicial Determination Class, as addressed above, the Court finds that the Gonzalez Plaintiffs have failed to establish commonality amongst the Judicial Determination Class. Thus, any argument attacking the Judicial Determination Class is moot.

"[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe." *Id.* Thus, the Court finds this contention does not defeat a finding of commonality.

Further, the Gonzalez Defendants allege that the Gonzalez Plaintiffs have failed to sufficiently identify what specific policies or practices they are alleging are unconstitutional. (*See* Gonzalez Opp'n at 19.) The Court disagrees. Plaintiff's proposed classes and subclasses clearly indicate what policy each challenges.

As for typicality, the Gonzalez Plaintiffs allege that they are typical of the class, because they are members of each class even though they do not currently have immigration detainers issued against them and are United States citizens. (Gonzalez Mot. at 20–21.) The Gonzalez Defendants argue that the named Plaintiffs are not typical of the class because they "are not even members of the putative classes or subclasses." (Gonzalez Opp'n at 20.) The Court interprets the Gonzalez Defendants' argument as a mootness argument (though a different mootness argument than that made by the Roy Defendants addressed above). The Court disagrees with the Gonzalez Defendants and finds that the Gonzalez Plaintiffs' claims are not moot.

"Although a loss of personal interest in the outcome of the case generally precludes plaintiff from pursuing relief either for his own benefit or on behalf of a class, if the issues raised remain alive, courts apply the mootness doctrine flexibly." *Wilbur v. City of Mount Vernon*, 298 F.R.D. 665, 668 (W.D. Wash. 2012) (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011)). Courts have created an exception to the mootness doctrine where "the class of plaintiffs is transitory (meaning that there is a constant class of persons suffering from the alleged deprivation, but that individuals within the class will likely lose their interest while the case is pending)." *Id.* In that case, the court may certify a class even if the named plaintiff's claims are moot because "the 'relation back' doctrine will relate to [the named plaintiff's] standing at the outset of the case in order 'to preserve the merits of the case for judicial resolution.'" *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (quoting *McLaughlin*, 500 U.S. at 52).

Both Gonzalez Plaintiffs were subject to immigration detainers at the time they joined the litigation. (*See* Gonzalez TAC ¶¶ 12, 14.) But the Gonzalez Plaintiffs' TAC

indicates that the ICE detainers issued against both Mr. Gonzalez and Mr. Chinivizyan requested that they be detained for only forty-eight hours plus weekends and holidays beyond when they would otherwise have been released from custody. (*Id.*) Thus, it appears unreasonable to expect the named plaintiffs' to be subject to an immigration detainer throughout the entirety of this litigation. Therefore, the Court finds that the transitory exception applies to the Gonzalez Plaintiffs' claims and their claims are not moot. *See Wade*, 118 F.3d at 670.

Further, the Gonzalez Defendants claim that Mr. Gonzalez has not demonstrated that he is a typical member of the Probable Cause Subclass because the only reason that Mr. Gonzalez was improperly detained was because a law enforcement officer incorrectly wrote in Mr. Gonzalez's booking record that he was born in Mexico, and thus, they have failed to demonstrate that LASD "routinely" provides inaccurate information to ICE. (Gonzalez Opp'n at 21–22.) However, the Gonzalez Plaintiffs' claims allege that the practice of relying on an electronic database for establishing probable cause is unlawful, and thus Mr. Gonzalez's detainment based on the flawed information in the database makes him typical of the class. (Gonzalez Reply at 8–9.) The Court finds that these facts are sufficient to establish that the Gonzalez Plaintiffs' injuries arose from the same conduct as the injuries to the rest of the proposed subclass. *See Hanon*, 976 F.2d at 508. Thus, the Court finds that the Gonzalez Plaintiffs have established commonality and typicality as to the Probable Cause and Statutory Subclasses.

3. Adequacy of Representation

Finally, Plaintiffs must demonstrate that their lead parties are adequate representatives of the class. The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S. at 625 (internal citation and quotation marks omitted). Under Ninth Circuit precedent, adequacy depends on the resolution of two questions: (1) whether "the named plaintiffs and their counsel have any conflicts of interest with other class members"; and, (2) whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020. "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees,

and a sharing of interest between representatives and absentees." *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1101 (C.D. Cal. 2015) (quoting *Ellis*, 657 F.3d at 985).

a. The Roy Plaintiffs' Action

The Roy Plaintiffs aver that the named Plaintiffs and their current counsel are adequate representatives here, and the Roy Defendants do not dispute the adequacy of the named Plaintiffs or counsel. (*See* Roy Mot. at 25–26.) Mr. Martinez-Perez and Ms. Alliksoo have submitted declarations indicating that they are prepared to pursue the case through to resolution, that they have no conflicts with other class members, and that they understand their responsibilities as class representatives. (*See* Declaration of Alain Martinez-Perez (Dkt. No. 151-31) ¶¶ 3–6; Declaration of Annika Alliksoo (Dkt. No. 151-32) ¶¶ 3–6.) As to Mr. De La Cerda, at oral argument, the Court questioned the Roy Plaintiffs' counsel as to his involvement in the litigation. Counsel indicated that Mr. De La Cerda's deposition has been scheduled and that he is actively participating in the case though he now lives in Mexico. Therefore, the Court finds that all three named Plaintiffs are actively involved in the litigation and are adequately representing the other class members.

Further, class counsel has submitted evidence of their qualifications to represent the class, including that they have worked extensively in identifying and investigating this action and have pursued this case since the litigation began in 2012. (*See* Declaration of Barrett S. Litt (Dkt. No. 151-1) ¶ 8.) Class counsel represents that they have significant knowledge of this area of the law and have handled other class actions and complex litigation. (*Id.*) Additionally, the Roy Plaintiffs' counsel also serves as counsel in the *Gonzalez* action. (*Id.*) Accordingly, the Court finds that the class counsel adequately represent the Roy Plaintiffs' proposed classes.

b. The Gonzalez Plaintiffs' Action

The Gonzalez Defendants present no challenge to the adequacy of the named Plaintiffs other than the argument that they are not typical, as discussed above. First, the Roy Plaintiffs' counsel also represents the Gonzalez Plaintiffs. Thus, the Court finds

that, for the same reasons as above, the Gonzalez Plaintiffs' counsel will adequately represent the class. As for the named Plaintiffs, the Gonzalez Plaintiffs have presented evidence that Mr. Gonzalez is actively participating in the litigation and is adequately representing the class members. (*See* Declaration of Gerardo Gonzalez (Dkt. No. 152-21).) Further, at oral argument, the Court also questioned the Gonzalez Plaintiffs' counsel regarding Mr. Chinivizyan's participation in the case. Counsel indicated that Mr. Chinivizyan is available and has responded to discovery that has been served. Accordingly, the Court finds that both of the named Plaintiffs are adequately representing the proposed classes in the Gonzalez Plaintiffs' action.

4. Whether the Roy Plaintiffs Have Satisfied Rule 23(b)

a. Whether the Roy Plaintiffs Have Satisfied Rule 23(b)(2)

As noted above, certification under Rule 23(b)(2) "is appropriate only where the primary relief sought is declaratory or injunctive," *Zinser*, 253 F.3d at 1195, and the relief requested applies to "the class as a whole," Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) class certification is particularly appropriate in civil rights cases. *See Amchem Prods.*, 521 U.S. at 614 ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) classes]."); *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("Although we have certified many different kinds of Rule 23(b)(2) classes, the primary role of this provision has always been the certification of civil rights class actions.").

The Roy Plaintiffs argue that their proposed Equitable Relief Classes seek only injunctive relief and will apply to their proposed equitable relief classes as a whole. (*See* Roy Mot. at 34–35.) The Roy Defendants claim, however, that certification of the Roy Plaintiffs' claims under Rule 23(b)(2) would be inappropriate, because their claims for damages predominate over their injunctive claims. (*See* Roy Opp'n at 4–5.) It is true that "[c]lass certification under Fed. R. Civ. P. 23(b)(2) is not appropriate where the relief requested relates 'exclusively or predominately to money damages.'" *Nelsen v. King County*, 895 F.2d 1248, 1254–55 (9th Cir. 1990). However, there is a difference between seeking damages for a class certified under Rule 23(b)(2) and seeking to certify separate classes in the same action in which injunctive relief is sought for classes certified under

Rule 23(b)(2) and damages are sought for classes certified under Rule 23(b)(3). *See Ellis*, 657 F.3d at 987–88 & n.10 (9th Cir. 2011) (recognizing that the district court could certify a damages class under Rule 23(b)(3) separate from, or in addition to, an injunctive relief class under Rule 23(b)(2)). This case presents the latter situation: the Roy Plaintiffs are not seeking damages in connection with the Equitable Relief Classes; rather, they are seeking damages in connection with the Damages Classes under Rule 23(b)(3). Thus, whether the damages claims are incidental to the injunctive relief the Roy Plaintiffs seek is irrelevant, because the Roy Plaintiffs are not seeking to recover damages for the proposed Rule 23(b)(2) classes.

The Equitable Relief Classes seek only injunctive relief and, if the Roy Plaintiffs prevail on their claims, will apply generally to the class members as whole. Further, the Court is cognizant of the particular application of Rule 23(b)(2) classes in civil rights actions such as this. Therefore, the Court finds that the Roy Plaintiffs' claims may be certified under Rule 23(b)(2).

b. Whether the Roy Plaintiffs Have Satisfied Rule 23(b)(3)

i. Whether the Roy Plaintiffs Have Demonstrated Predominance

The Roy Defendants' primary argument regarding the Damages Classes is that the Roy Plaintiffs have failed to establish predominance pursuant to Rule 23(b)(3). (*See* Roy Opp'n at 13–24.) Rule 23(b)(3) requires a showing that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Amgen, Inc.*, 133 S. Ct. at 1209–10. The predominance inquiry "tests whether [the] proposed classes are sufficiently cohesive to warrant adjudication by representation" and "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods.*, 521 U.S. at 623. In doing so, it "focuses on the relationship between the common and individual issues" of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998); *see also Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). In other words, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,

there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed. 1986)). A finding of commonality under Rule 23(a)(2) is insufficient by itself to satisfy Rule 23(b)(3). *Id.* ("[The predominance] analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2)."); *see also Nguyen v. BDO Seidman, LLP*, No. SACV 07–01352–JVS (MLGx), 2009 WL 7742532, at *2 n.2 (C.D. Cal. July 6, 2009) (denying plaintiff's motion for class certification where plaintiff did not meet the requirements of Rule 23(b)(3), although noting that the requirements of Rule 23(a) "could be met"). Nevertheless, predominance does not require that the legal and factual issues be identical across the class. Certification is proper where "[a] common nucleus of facts and potential legal remedies dominates [the] litigation." *Id.*; *see also Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 577 (S.D. Cal. 2013) ("[P]redominance in TCPA cases primarily turns on whether a class-based trial on the merits could actually be administered.").

A. False Imprisonment Damages Claim

First, the Roy Defendants argue that the Roy Plaintiffs' False Imprisonment Damages claim involve fact-specific inquiries precluding class certification. (*See* Roy Opp'n at 17–18.) The False Imprisonment Damages Class is based on the legal theory that class members who were detained solely on the basis of ICE detainers are entitled to recover because the detainment constituted false imprisonment under California law. (*See* Roy Mot. at 16.) Under California law, the tort of false imprisonment "consists of the nonconsensual, intentional confinement of a person, without lawful privilege for an appreciable length of time, however short." *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 715 (Cal. 1994) (internal quotation marks omitted). Once the plaintiff has established that a false imprisonment took place, "the burden shifts to the defendant to show a justification for the [imprisonment]." *Levin*, 158 Cal. App. 4th at 1018. According to the Roy Defendants, this shifting burden "means that the question of whether any proposed class member was falsely imprisoned, under California state law, will require individualized determinations." (Roy Opp'n at 18.) The Roy Plaintiffs, on the other hand, contend that

individual determinations are not necessary, because "LASD knew or should have known that all such detentions were unlawful." (Roy Reply at 4.)

According to the Roy Defendants, each claim will require the Court to examine factors such as whether the jail personnel knew or should have known of the illegality of the detainer and whether the detention was without lawful privilege. (Roy Opp'n at 19.) However, the Roy Defendants have not indicated how this inquiry would change on an individual basis. Rather, it appears that one determination could be made in determining whether the LASD was aware, or should have been aware, that the detainer of individuals based on immigration detainers was unlawful and whether there was any privilege that would apply to the LASD as a whole. Thus, the Court finds that common questions predominate and the Court can effectively adjudicate the issue through a single adjudication. *See Hanlon*, 150 F.3d at 1022.

B. The Post-48-Hour *Gerstein* Subclass

The Post-48 Hour *Gerstein* subclass claims that all detentions for more than forty-eight hours violated the class members' Fourth and Fourteenth Amendment rights. (Mot. at 17.) Liability for the Post-48-Hour *Gerstein* Subclass "turns on whether inmates held after they were due for release on criminal matters were denied a prompt judicial determination of probable cause." (Roy Mot. at 20.) As the Court addressed above, for those inmates who were detained for more than forty-eight hours, one issue predominates—whether the failure to provide a judicial determination of probable cause within forty-eight hours is unreasonable. Further, class certification will not prevent the Roy Defendants from presenting individualized affirmative defenses, including whether an emergency or other extraordinary circumstance justified a more than forty-eight-hour delay in making a probable cause determination for specific cases. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015) ("As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected."). Therefore, issues common to the class predominate.

C. Investigative Detainer Class

The Roy Plaintiffs' fourth class, titled the "Investigative Detainer Class," includes all LASD inmates who were detained beyond the time they were due for release from criminal custody based solely on an investigative ICE detainer, because these investigative detainers did not constitute a lawful basis for arrest and violated the members' Fourth Amendment rights. (Roy Mot. at 17.) The Roy Defendants claim that this class is not appropriate for class certification because whether a particular inmate's release date was controlled "solely" by the existence of an ICE detainer would require an examination of the individual's circumstances. (Roy Opp'n at 23.) In response, the Roy Plaintiffs argue that, for purposes of the class definition, the class refers only to those who "became due for release on all criminal matters, and who had no outstanding wants, holds or warrants aside from an immigration detainer." (Roy Reply at 8.) Further, the Roy Plaintiffs note that LASD's database information enables a determination of which inmates fall into these classifications. (*Id.*) The Court agrees with the Roy Plaintiffs. The Roy Plaintiffs' class definition appears straightforward as it applies only to those who were retained, per the LASD database, based only on an "investigative detainer," which can be determined from LASD's database. Thus, common issues predominate.

D. The No-Bail Classes

Finally, the Roy Plaintiffs' last two damages classes and subclasses include the No-Bail Notation Class, which includes all LASD inmates who were not eligible to post bail based on an immigration detainer, and the No-Money Bail Subclass, which includes all LASD inmates who were misdemeanor defendants with a bail of less than $25,000 and would normally not have been taken into custody were it not for an immigration detainer against them. (Roy Mot. at 18.) The Roy Plaintiffs claim that LASD's denial of bail for these inmates violates their constitutional rights. (*Id.*) The Roy Defendants, however, claim that the rights of those who never attempted to post bail could not have been violated, and since there is no way to determine, absent individual inquiry, whether a specific Defendant posted bail, common questions do not predominate. (*See* Roy Opp'n at 22–23.) In response, the Roy Plaintiffs argue that even those inmates who did not attempt to post bail are eligible to receive presumed or nominal damages, and that the members of the No-Money Bail Subclass do not depend on whether the inmate attempted

to post bail, but whether they would have been released but for the ICE detainer. (Roy Reply at 8–9.)

The Court agrees with the Roy Plaintiffs. Even if some inmates did not attempt to post bail, "courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also George v. City of Long Beach*, 973 F.2d 709, 708 (9th Cir. 1992) ("In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights."). The inability to post bail due only to the immigration detainer, even if an individual inmate never actually attempted to do so, could violate the inmate's procedural due process rights. *See Ilae*, 2013 WL 4499386, at *8 (finding the plaintiff had a cognizable claim "that the delay in his admission to bail after bail was set violates the due process clause of the Fourteenth Amendment"). Thus, some inmates never attempting to post bail does not defeat class certification. Moreover, as the Roy Plaintiffs correctly note, the No-Money Bail Subclass includes anyone who would have been released under LASD's policy for having bail less than $25,000 were it not for an immigration detainer. (*See* Roy Reply at 8.) Therefore, all of these class members' alleged constitutional rights would be violated by the mere denial of release. Therefore, the Court finds that the individual questions of fact do not predominate the No-Bail Classes.

Accordingly, the Court finds that the Roy Plaintiffs have established that common questions of law or fact predominate all of the remaining classes and that the Roy Plaintiffs have met their burden under Rule 23(b)(3).

E. Whether Damages Determinations Preclude Certification

Next, the Roy Defendants argue that the individualized assessment that will be required to determine damages for each class member defeats certification. (Roy Opp'n at 24.) Though the Roy Defendants concede that "the presence of individualized damages cannot, by itself, defeat class certification," *see Leyva v. Medline Indus.*, 716

F.3d 510, 514 (9th Cir. 2013), they argue that damages in this case are incapable of class-wide calculation, and thus, would result in individual damages calculations overwhelming the common questions, (*see* Roy Opp'n at 24). However, the Roy Plaintiffs argue that under California Civil Code section 52.1, the majority of class members will seek statutory damages in lieu of actual damages. (*See* Roy Mot. at 30–31; Roy Reply at 10.)

In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), the Supreme Court held that the plaintiffs' proposed method for damages calculations did not establish that damages were capable of "measurement on a classwide basis." But the Ninth Circuit has interpreted *Comcast* to stand for the proposition that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) 987–88 (quoting *Leyva*, 716 F.3d at 514). Moreover, since *Comcast*, the Ninth Circuit has "reaffirmed that damage calculations alone cannot defeat class certification." *Id.* at 987.

As discussed above, the Court has found that class litigation is capable of resolving broad issues of liability in this case. The Court maintains the authority to decertify the class at any stage prior to judgment; thus, even if decertification is required at a later date due to individualized damages calculations, the Court is satisfied that these calculations alone do not defeat class certification at this stage. *See Aichele v. City of Los Angeles*, 314 F.R.D. 478, 496 (C.D. Cal. 2013) ("Because a court may modify its certification order at any time prior to final judgment, the fact that later developments in this case *may* render the class mechanism inappropriate does not undermine its usefulness at this stage, when Plaintiffs seeks to establish alleged constitutional violations based on uniform, broadly applied policies affecting each class member equally.").

F. Whether the PLRA Precludes a Finding of Predominance

The Roy Defendants next argue that the Prison Litigation Reform Act ("PLRA"), which prevents current inmates from recovering emotional distress damages without a showing of physical injury, defeats class certification here. (*See* Roy Opp'n at 29.) According to the Roy Defendants, the Roy Plaintiffs' proposed classes explicitly refer to

current inmates and those who may be incarcerated in the future. (*Id.*) Therefore, these class members would be bound by the damages limitations in the PLRA. (*Id.*) The Court disagrees. As the Roy Plaintiffs argue, the proposed classes are limited to those who were detained "solely on the basis of immigration detainers," not on criminal charges.[11] (Roy Reply at 15.) Those detained based on immigration detainers are not "prisoners" for the purposes of the PLRA. *See Agyeman*, 296 F.3d at 886 (holding that immigration detainees are not "prisoners" within the meaning of the PLRA). Moreover, even if there were limitations on damages for some class members, as discussed above, these damages limitations would not be enough to defeat class certification. *See Aichele*, 314 F.R.D. at 496.

G. Whether Common Causation Questions Predominate

Finally, the Roy Defendants argue that common questions regarding causation do not predominate. (*See* Roy Opp'n at 30–31.) To recover for constitutional violations under 42 U.S.C. § 1983, as the Roy Plaintiffs seek to do here, the Roy Plaintiffs must: (1) identify a specific government policy, practice, or custom; (2) establish that the

[11] The Court acknowledges the difficulty that arises from the No-Bail Class. The No-Bail Class applies to all inmates who were held on charges and who had a no-bail indicator placed on their file. However, as the Roy Defendants noted, not all inmates who had a no-bail notation placed on them attempted to post bail. Thus, those who did not attempt to post bail were not retained *solely* based on the immigration detainer; rather, they remained incarcerated based on the criminal charges against them. These class members would be subject to the damages limitations of the PLRA. *See Agyeman v. I.N.S.*, 296 F.3d 871, 886 (9th Cir. 2002) ("As defined in the PLRA, a 'prisoner' is 'any person incarcerated or detained in any facility who is accused of, convicted of, sentenced of, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial released, or diversionary program.'" (quoting 28 U.S.C. § 1915(h)). Still, as addressed above, these individualized damages determinations, on their own, are not enough to defeat class certification.

policy, practice, or custom exists; and, (3) establish a causal nexus between the constitutional violation and the government conduct. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978). According to the Roy Defendants, each class member will require a separate trial and be required to prove that the government policy actually caused a violation of the class member's rights. (*See* Roy Opp'n at 31.) Therefore, the Roy Defendants claim that these individual inquiries defeat class certification. (*Id.*) However, courts frequently certify classes pursuant to § 1983 claims. *See, e.g.*, *Thomas v. Baca*, 231 F.R.D. 397 (C.D. Cal. 2005) (granting class certification for § 1983 action brought by current jail detainees); *Otero v. Dart*, 306 F.R.D. 197, 208 (N.D. Ill. 2014) (certifying class based on claim of unreasonable detainer by sheriff's office). Thus, the Court is not persuaded that causation inquiries will be so individualized as to predominate. Rather, if the Roy Plaintiffs are able to establish that the alleged policy controlled the Roy Defendants' detainment decisions, the policy itself may satisfy the causation requirement.

ii. Whether Class Action Litigation is the Superior Way to Proceed

"In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser*, 253 F.3d at 1190. Rule 23(b)(3)'s four factors are: (1) the class members' interests in individually controlling the prosecution in separate actions; (2) the extent and nature of any litigation concerning the controversy that has already begun by the class members; (3) the desirability (or lack thereof) of concentrating the litigation in a particular forum; and, (4) the likely difficulties in managing a class action. *See* Fed. R. Civ. P. 23(b)(3). "A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citation omitted).

The Roy Defendants argue that the Roy Plaintiffs "have not articulated how this case can manageably be litigated while preserving County Defendants' due process and fair trial rights." (Roy Opp'n at 32.) According to the Roy Defendants, the only way in which the Roy Plaintiffs will be able to proceed is to put on evidence from a certain

number of inmates to allow the jury to extrapolate liability to the rest of the class. (Roy Opp'n at 33.) This "trial by formula" method was rejected by the Supreme Court in *Wal-Mart Stores*. *See Stone v. Adv. Am.*, 278 F.R.D. 562, 566 n.1 (S.D. Cal. 2011) (noting that the Supreme Court "disapproved" of "cases that allowed 'trial by formula'"). However, the Roy Plaintiffs have not indicated that they intend to use a trial by formula method to determine liability. Rather, the Roy Plaintiffs explain that, based on the testimony of their expert, Dr. Brian Kriegler, they will be able to review LASD's data from its online databases and identify those inmates who were held beyond their expected release date based solely on the basis of an immigration detainer. (*See* Roy Mot. at 33; Kriegler Decl. at 8–9.) This data can then be cross-referenced to excludes those inmates who had final orders of removal. (Roy Mot. at 33.) Further, and as addressed above, even if there is no uniform way to calculate damages in this case, the individual calculation of damages is not enough to defeat class certification. *See Aichele*, 314 F.RD. at 496. Thus, the Court is not persuaded by the Roy Defendants' argument.

As to the other factors, the Court agrees with the Roy Plaintiffs that class litigation is the superior way to handle this litigation. First, each class member has a limited interest in individually bringing their own action as the damages arising from each constitutional violation are not significant. *See Zinser*, 253 F.3d at 1190 ("Where damages suffered by each putative class member are not large, this factor weighs of favor of certifying a class action."). As to the second factor, neither party references, and the Court is unaware of, any other litigation that is already pending challenging LASD's policies other than the related *Gonzalez* action. Third, it is practical to bring this case in this district as it challenges the policies of local law enforcement. And finally, as addressed above, this case appears to be manageable, as the Roy Plaintiffs have presented methods of determining class members based on the electronic databases of LASD and ICE records. (*See* Roy Mot. at 32–34.) Therefore, the Court finds that class litigation is the superior way of proceeding with this action.

5. Whether the Gonzalez Plaintiffs Have Satisfied Rule 23(b)(2)

The Gonzalez Plaintiffs claim that certification under Rule 23(b)(2) is appropriate as they seek to have three specific policies found unlawful and that a decision in their

favor will apply to all class members. (Gonzalez Mot. at 23–24.) The Gonzalez Defendants' primary argument against certification of the Gonzalez Plaintiffs' claims is that any relief that the Gonzalez Plaintiffs seek is now moot because ICE has created a new detention program taking the place of the program which Plaintiffs challenge. (Gonzalez Opp'n at 23–24.) Specifically, ICE created and has been using detainer forms that expressly state that ICE has probable cause that the individual is a removable alien and expressing the basis for that determination. (Gonzalez Opp'n at 23.) Additionally, ICE has directed and begun training its agents that a return of "Foreign Born-No Match" should not lead to the issuance of a detainer, but should lead to an interview with the subject. (Gonzalez Opp'n at 24.) As addressed above, however, voluntary policy changes do not moot class claims. *See Knox*, 132 S. Ct. at 2287. Thus, even though the Gonzalez Defendants present evidence indicating that ICE has effectively changed its policy, the Court finds that this is not enough to render the Gonzalez Plaintiffs' claims moot.

The Court agrees with the Gonzalez Plaintiffs that their claims are suitable to be decided on a class-wide basis as the policies challenged equally affected all members of the class. Further, as with the Roy Plaintiffs' Equitable Relief Classes, the Court recognizes that this conclusion is particularly appropriate given the common use of Rule 23(b)(2) in certifying civil rights class actions. Accordingly, the Court finds that the Gonzalez Plaintiffs have satisfied Rule 23(b)(2) as to the Probable Cause and Statutory Subclasses.

VII. CONCLUSION

In light of the foregoing, Plaintiffs' Motions for Class Certification are **GRANTED in part** and **DENIED in part**. Specifically, the Court certifies the following of the Roy Plaintiffs' proposed classes: (1) False Imprisonment Equitable Relief Class; (2) *Gerstein* Equitable Relief Class; (3) False Imprisonment Damages Class (and the included state law subclass); (4) Post-48 Hour *Gerstein* Subclass (and the included state law subclass); (5) Investigative Detainer Class (and the included state law subclass); (6) No-Bail Notation Class (and the included state law subclass); and, (7) No-Money Bail Subclass (and the included state law subclass). The Court certifies the

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12-09012-BRO (FFMx)** **CV 13-04416-BRO (FFMx)**	Date	September 9, 2016
Title	**DUNCAN ROY ET AL. V. COUNTY OF LOS ANGELES ET AL.** **GERARDO GONZALEZ V. IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL.**		

following of the Gonzalez Plaintiffs' proposed classes: (1) Judicial Determination Class (limited to those who were detained for more than forty-eight hours without receiving a judicial determination of probable cause); (2) Probable Cause Subclass; and, (3) Statutory Subclass. The Court declines to certify the Roy Plaintiffs' proposed *Gerstein* Class.

IT IS SO ORDERED.

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