STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF NOBLES **FIFTH JUDICIAL DISTRICT**
CASE TYPE: OTHER CIVIL

Case No.: _____
Judge: _____

Rodrigo Esparza, Maria de Jesus de Pineda, Timoteo Martin Morales, Oscar Basavez Conseco; On behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Nobles County; Nobles County Sheriff Kent Wilkening; All individuals being sued in their individual and official capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs submit this Memorandum of Law in support of their Motion for Class Certification pursuant to Rules 23 and 7.02 of the Minnesota Rules of Civil Procedure Local Rule 7.02.

INTRODUCTION

Defendants Sheriff Kent Wilkening and the Nobles County Sheriff's Office have a policy and practice of illegally detaining people with no authority to do so. The detainees have either posted bond, been dissuaded from posting bond, completed their sentences, or otherwise resolved their criminal cases, and are now, or will be detained solely because federal immigration authorities asked the Nobles County Sheriff's Office ("NCSO") to keep them in custody. Minnesota law requires Defendants to release these individuals. Yet Defendants instead hold Plaintiffs, and those similarly situated, illegally for days, weeks, and even months past when state authority to hold them has passed based on Sheriff Wilkening's incorrect belief that Defendants have the authority to keep individuals in jail that are suspected of civil violations

of federal immigration law, but not suspected of having committed any crime for which they have not yet answered. That authority does not exist.

Plaintiffs now seek to represent a group of similarly situated individuals who are currently being or will be held by Defendants. Class treatment is the only available method to effectively challenge Defendants' unlawful policies and practices. Plaintiffs request that the Court certify the following class pursuant to Minnesota Rules of Civil Procedure Rules 23.01 and 23.02 as:

> All past, current and future detainees in the Nobles County Jail who were, are, or will be, the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form I-200) sent to the Nobles County Jail by officers or representatives of United States Immigration and Customs Enforcement.

This case squarely meets the criteria for class certification under Minn. R. Civ. P. 23.01. First, the proposed Class consists of an unknown number of noncitizens under the jurisdiction (and either now or in the future will be within the custody) of Sheriff Wilkening and the NCSO. As Plaintiffs have alleged, upon information and belief, more than 40 people under the jurisdiction of Defendants have been subjected to the unlawful detention complained of in the last calendar year. The characteristics of these individuals make joinder a practical impossibility: their identities and phone numbers are hard to ascertain and their locations may change as immigration authorities move them around the state, the country, and the world.

Second, the claims of the named Plaintiffs and those of the proposed Class share a set of common core issues including: whether Defendants have the authority under Minnesota law to hold people suspected of civil violations of federal immigration law after they have posted bond, completed their sentence, or been released on their own recognizance; whether the receipt of Forms I-247A, I-200, I-203, or any combination thereof, give Defendants the right to continue

imprisoning individuals who would otherwise be released; whether Defendants conduct, described above and in the Complaint violates the Minnesota Constitution and other relevant state laws, among other issues.

These issues all arise from the same unlawful conduct by Defendants and satisfy the second requirement of Rule 23.01. The relief requested – to prohibit Defendants from acting as a state-arm of a federal agency for the purpose of jailing people for immigration violations – would be the same for all class members as well.

Third, the named Plaintiffs and the members of the proposed Class have been detained wrongfully by the same Defendants under the same policy and practice. The claims of Plaintiffs Rodrigo Esparaza, Maria de Jesus de Pineda, Timoteo Martin Morales and Oscar Basavez Conseco are thus typical of the claims of other members of the proposed class.

Finally, the named Plaintiffs have no conflict with the Class and are adequately represented by experienced lawyers from the ACLU of Minnesota and Anthony Ostlund Baer & Louwagie P.A., who are capable of protecting the interests of the class.

This case also amply meets the criteria set forth in Rule 23.02. Cases such as this—which seek declaratory and injunctive relief to compel Defendants to come into compliance with the law—are presumptively appropriate for such certification. Certification will allow Plaintiffs to secure a remedy matching the scope of Defendants' violations. Furthermore, class certification will advance the policies that support class actions by conserving judicial resources and providing relief for class members unable to vindicate their rights due to financial inability, fear of retaliation, and the inherently transitory nature of their status. Lastly, a class action will forestall contradictory decisions on this legal issue.

FACTUAL BACKGROUND

Plaintiffs, on behalf of themselves and others similarly situated, have sued Defendants under the Uniform Declaratory Judgments Law, Minn. Stat. § 555.01, and Minnesota Rules of Civil Procedure 57 and 65; seek mandamus relief under Minn. Stat. § 586 and the Minnesota Constitution alleging that Defendants maintain a policy of unlawfully holding individuals for immigration authorities in violation of Minnesota law.

Such a policy violates Minnesota law and is unconstitutional. Plaintiff Rodrigo Esparza's experience is typical of the proposed class. After being arrested in early April 2018, a reasonably small bail amount of $10,000 was set in order to secure his release. However, when his family came to pay the bail they were informed by jail staff that paying the bail would not free Esparza because he had an ICE hold. Similarly, Plaintiff Maria de Jesus de Pineda had bail set at $10,000, after payment of which Minnesota law dictates that she be released from state custody. However, after her family paid the bail, Defendants refused to release her from custody, and instead held her for immigration authorities. This unlawful action is a common practice by Sheriff Wilkening. Holding people for ICE is such an automatic part of the Nobles County Jail's day that staff routinely inform individuals that they won't release anyone with an ICE hold so that some individuals, such as Oscar Basavez Conseco, have to refuse offers of release on recognizance and remain jailed. While local offices across the nation have refused to cooperate with ICE, understanding that a request from ICE is not mandatory,[1] Sheriff Wilkeining has chosen to hold people that ICE requests be held despite having no legal obligation to do so and well after any state authority to hold the person has passed. Particularly heinous are cases such as individuals like

[1] https://www.nytimes.com/2018/06/28/us/migrant-shelters-ice-contracts-counties.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news

Plaintiff Timoteo Martin Morales who had his criminal charges dismissed against him but was still held for ICE rather than being freed.

ARGUMENT

Plaintiff's detailed, well-pled allegations, and supporting materials, provide ample basis for the Court to find that Rule 23.01's requirements of numerosity, commonality, typicality and adequacy are met here. Additionally, the proposed class satisfies Rule 23.02(b), which applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

A. The proposed class satisfies the Requirements of Rule 23.01.

A Minnesota court can certify a class action when it finds that the four requirements of Rule 23.01 have been met. Those requirements are:

> (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.

Minn. R. Civ. P. 23.01. The proposed class meets all of these requirements.

1. Joinder is impractical due to the large number of members in the putative class.

The proposed class is so numerous that joinder of all potential plaintiffs would be impractical, an issue regarding the "numerosity" of the class. There is no rigid or arbitrary number for calculating the size of a class. *See Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc.*, 650 N.W.2d 445 (Minn. Ct. App. 2002). The Minnesota Court of Appeals has

recognized that both a one year period to determine the number of potential class members and reaching 40 class members is typically a good indicator of impracticability. *See Novack v. Northwest Airlines, Inc.*, 525 N.W.2d 592, 599 (Minn. Ct. App. 1995). To support a claim of impracticability of joinder, plaintiffs should provide "some evidence or reasonable estimate of the number of purported class members." *Linquist v. Bowen*, 633 F.Supp. 846, 858 (W.D. Mo.1986). "When the class is very large—numbering in the hundreds—joinder is almost always impracticable, but the difficulty of joining as few as 40 class members may also raise a presumption that joinder is impracticable." *Lewy* 650 N.W.2d at 452 (citing *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995)).

Here, Defendants are alleged to have admitted that over 250 individuals have been affected by ICE detainers in the first quarter of 2018. Complaint, Dkt. 1 ¶ 102-104. Even if Defendants now want to walk that number back, independent statistical information from the TRAC system indicates that over 70 individuals that would be putative class members were held by Defendants in 2017. *Id*.

In addition to the size of the class, courts also consider the inconvenience of trying individual suits and the nature of the action itself in determining the practicability of joinder. *Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc.*, 650 N.W.2d at 452 (citing *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 337 (D. Minn. 1999)).

Lastly, the characteristics of the proposed class show that joinder is impractical, if not impossible. The identities and locations of current and future class members are difficult to ascertain, not least of which is because ICE has taken a more aggressive,[2] and less organized,

[2] "ICE has become Trump's personal bullying squad" https://www.washingtonpost.com/opinions/ice-has-become-trumps-personal-bullying-

approach to immigration enforcement lately.[3] Class members are more likely to be noncitizens in the custody of Defendants who can be, and often are, moved from one detention facility – sometimes not even within Minnesota – to another with little or no notice. *See e.g. Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (certifying class of individuals held in immigration detention in Massachusetts for over 6 months with no bond hearing, based in part on the fact that class members, who were located in various facilities, housed among individuals held under a variety of statutory provisions, did not speak English, did not have counsel, and were unlikely to know they were members of the proposed class). Many of these noncitizens become class members with little to no warning, expecting to leave the Nobles County Jail and instead remaining there with no understanding of the civil process they are being held for.[4]

Accordingly, the proposed class meets Rule 23.01's numerosity requirement by virtue of both the number of potential class members and additional factors that make joinder impracticable.

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[3] "Judge halts mother-daughter deportation, threatens to hold Sessions in contempt" https://www.washingtonpost.com/local/immigration/judge-halts-mother-daughter-deportation-threatens-to-hold-sessions-in-contempt/2018/08/09/a23a0580-9bd6-11e8-8d5e-c6c594024954_story.html?utm_term=.9573133aed1d

[4] See Testimony of Mary Meg McCarthy, Exec. Dir., Nat'l Immigration Justice Ctr., to Senate Judiciary Committee (Mar. 20, 2013), http://www.immigrantjustice.org/nijc-testimony-submitted-senate-judiciary-committee-hearing-building-immigration-system-worthy-ameri ("[M]any [non-citizens in removal proceedings] are unable to access attorneys because of a lack of financial resources, lack of providers in remote areas, lack of available pro bono assistance, and/or lack of information about available resources. Access to counsel is of particular concern in the immigration detention context. . . . Access to legal information is also critical. Government-funded Legal Orientation Programs are only available in 24 facilities, none of which are in the Midwest.").

2. Common Questions of Law and Fact Exist Between Class Members

Plaintiffs also satisfy the second requirement of 23.01, that there exist common questions of law and fact among the class members. "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich v. Am. Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987) (citing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir.1986)). The Minnesota Court of Appeals has explained that for "commonality to exist, behavior causing a common effect must be subject to some dispute." *Id.* at 214 (citing *In Re Objections and Defenses To Real Property Taxes for The 1980 Assessment*, 335 N.W.2d 717, 719 (Minn. 1983)).

Here, there can be no question that common issues of law and fact dominate this lawsuit because the core issue to be addressed by the Court is the same for each putative class member: can Defendants function as an unsanctioned, state-arm of a federal agency to detain people without probable cause to believe a crime has been committed? If the answer is "no"—which it will be shown at trial is the case—all class members would be entitled to relief.

The questions of law in this action, as well as the facts material to the claim, are common across the proposed classes and include, inter alia, *inter alia*, the following:

- Whether Sheriff Wilkening has the authority under Minnesota law to hold people suspected of civil violations of federal immigration law after Minnesota law otherwise requires their release because they have posted bond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge;

- Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-247A as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;

- Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-200 as grounds to hold people after Minnesota law otherwise requires their release;

- Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-203 as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;

- Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of any combination of the above ICE Forms as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;

- Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of any combination of the above ICE Forms as grounds to dissuade people in the Nobles County jail from posting bond, after which Minnesota law would require their release;

- Whether Plaintiffs have a clear legal right to release when Sheriff Wilkening's state-law authority to confine them has ended, and whether Sheriff Wilkening has a clear and mandatory legal duty to release the Plaintiffs when the state-law authority for their confinement has ended;

- Whether Sheriff Wilkening's policy and practice of holding people at the request of ICE after they have posted bond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge constitutes an unreasonable seizure, in violation of Article I, Section 10 of the Minnesota Constitution; and

- Whether Sheriff Wilkening's policy and practice of holding people at the request of ICE after they have posted bond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge deprives them of procedural due process, in in violation of Article I, Section 7 of the Minnesota Constitution.

In short, the claims of Plaintiffs and proposed class members share the same core questions about Defendants ability to arrest and detain them when there is no probable cause to believe a criminal violation of state or federal law has occurred that the putative class member has not yet answered for.

3. The Named Plaintiffs' Claims Are Typical of the Class and The Named Plaintiffs Will Fairly and Adequately Represent the Class

Typicality and representivity are often viewed as a two-pronged approach

> Intended to insure that the claims of the class members are fully presented and vigorously prosecuted. … Typicality refers to the

> potential for rivalry and conflict which may jeopardize the interests of the class. Similarly, representivity means the representative parties' interests must coincide with the interests of other class members and the parties and their counsel will competently and vigorously prosecute the lawsuit.

Streich, 399 N.W.2d at 215 (internal quotations omitted).

The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members. … The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Lewy*, 650 N.W.2d at 453 (internal citations omitted).

The requirements of typicality and commonality overlap, and typicality is met in the instant case for many of the same reasons discussed above. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both 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").

Here, Plaintiffs have suffered the same treatment, and been subjected to the same constitutional violations, that the proposed class members have—unlawful confinement due to Defendants' unlawful actions. Further, the Plaintiffs' claims are not antagonistic toward putative class members' claims as all class members will benefit from the requested relief.

Similarly, Plaintiffs' interests align with those of other putative class members and named Plaintiffs have retained appropriate counsel to litigate those interests. As mentioned above, the legal theory underpinning Plaintiffs claims are identical to those of the proposed class

members and there is no conflict that would disturb this relationship. Indeed, many of the factual circumstances supporting the named Plaintiffs' claims are similar, and will likely also be similar or nearly identical to putative class members' experiences with Defendants. Further, Plaintiffs' counsel includes lawyers from the ACLU of Minnesota and Anthony Ostlund Baer & Louwagie P.A., each of which are experienced in civil litigation matters generally, and class actions specifically.

B. The Putative Class Satisfies the Requirements of Rule 23.02.

In addition to meeting each requirement of Rule 23.01, Plaintiffs must meet only one of the requirements of Rule 23.02. Here, Plaintiffs and the putative class easily satisfy Rules 23.02(b) and (c), and this class should be certified

1. Plaintiffs satisfy 23.02(b)

Plaintiffs request certification under Rule 23.02(b), which provides that an action may be maintained as a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Certification under Rule 23.02(b) is also appropriate where class members have been injured by conduct based on policies and practices of the defendants that are applicable to the entire class. This case addresses precisely the type of harm that Rule 23.02(b) was designed to remedy. Plaintiffs and the putative class have all been affected by Defendants' unlawful conduct, which makes final injunctive and declaratory relief appropriate, necessary, and likely to be granted. As a result, this Motion should be granted and the proposed Class should be certified.

2. Plaintiffs satisfy 23.02(c)

In the alternative, Plaintiffs also request and are entitled to certification under Rule 23.02(c), which provides that an action may be maintained where two basic conditions are

met. "First, common questions must predominate over individual issues, and second, the class action must be superior to other available methods for the fair and efficient adjudication of the controversy." *Lewy*, 650 N.W.2d at 455. These two prongs are commonly referred to as "predominance" and "superiority," and each are met here. *Id*.

a) Predominance

There is no rigid rule for defining when a question of law predominates an action. Instead, "[a] class action is appropriate when common questions representing the significant aspect of a case can be resolved in a single action." *Lewy*, 650 N.W.2d at 455. Here, a common question predominates this litigation and has in fact been dealt with explicitly both by courts in this state and elsewhere. As described above, the central issue to be determined is if state law enforcement officers are permitted to ignore the limits of their authority under state law and detain individuals exclusively on the basis of a non-binding request from federal immigration authorities based on a suspected violation of immigration laws. Courts have consistently found the answer to this question to be *no*, and Plaintiffs anticipate that that common question will be answered similarly by the Court or a jury in this matter as well.

Here, the authority – or lack thereof – to continue detaining individuals for immigration officials dominates the litigation for the proposed class. The questions of law and fact in this case are clearly relevant to all class members and satisfy the predominance inquiry.

b) Superiority

The second prong – superiority – also is found here. A class action is easily the best form of adjudication for the proposed class group. Factors to consider in that analysis include "manageability, fairness, efficiency, and available alternatives." *Streich* 399 N.W.2d at 218.

"When collective adjudication promises substantial efficiency benefits or makes it possible for class members with small claims to bring suit and enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy." *Lewy* 650 N.W.2d at 457.

The proposed instant class will provide representation to a group of individuals who would otherwise not be able to participate in litigation. There is no better alternative for the group. Further, class certification is the most efficient option because it eliminates the need for this court to deal with hundreds of individual claims. The legal team representing the named Plaintiffs and putative class members is best suited to maintain and protect the interests of the class. In the interest of justice and judicial economy, it is best for this court to consider the common injury—an unconstitutional policy created by Defendants—in a class action.

CONCLUSION

Defendants have been violating the rights of individuals in Minnesota for years by enforcing an unlawful policy of imprisoning Minnesotans at the request of federal authorities, despite having no state law authority to do so. The legal principal Plaintiffs seek to enforce here is not unique; it has been recognized by courts around the country, including in the Federal District Court in Minnesota, against the *same Defendants*. *See Orellana v. Nobles County*, 230 F. Supp. 3d 934 (D. Minn. 2017). Sheriff Wilkening and Nobles County are well aware that applying "ICE Holds" to people in the Nobles County Jail is an unconstitutional extension of their authority, yet choose to ignore their legal duties. It seems too stark a coincidence that Defendants' exercise of this unlawful authority is also lucrative; it is estimated that the Nobles County Jail generates $20,000 in expenses per detainee, paid pursuant to an agreement between and ICE. *See* Complaint, Dkt. 1 ¶ 40; Exhibit D.

Hundreds of people have fallen victim to Defendants' unlawful conduct, and the facts applicable to each named Plaintiff, as well as the putative class, overlap substantially, making this case particularly appropriate for class treatment. As such, for the reasons stated herein, Plaintiffs respectfully request that the Court enter an order certifying this case as a class action pursuant to Rule 23.01 and 23.02 of the Minnesota Rules of Civil Procedure on behalf of the proposed Class, and appoint undersigned Plaintiffs' counsel as counsel for the Class.

ANTHONY OSTLUND BAER & LOUWAGIE P.A.

Dated: August 16, 2018

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