IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-CV-2494-JLK-MJW

RINALDO YARRITO, et al.,

Applicants,

v.

JULIE L. MYERS, Assistant
Secretary for Homeland Security,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW IN RESPONSE TO THE ORDER TO SHOW CAUSE

Respondent Julie L. Myers, Assistant Secretary, United States Immigration and Customs Enforcement ("ICE") respectfully responds to the Court's December 13 Order to Show Cause.

INTRODUCTION

United Food and Commercial Workers Union Local No. 7 ("Union") has filed a petition for a writ of habeas corpus on behalf of individuals they believe were taken into detention during a worksite enforcement action by ICE. The worksite enforcement action was predicated on an ICE investigation which revealed that a significant number of workers at Swift & Company's ("Swift") Greeley, Colorado compound were illegal aliens and had illegally obtained employment by stealing the identities of United States citizens and lawful

permanent residents. In bringing this case, the Union has identified applicants by using those false identities.

Procedural Background

Applicants are allegedly individuals who purportedly were taken into detention by ICE Officers during a worksite enforcement action at the Swift meatpacking plant compound in Greeley, Colorado on December 12, 2006. Petition at ¶ 4. On December 8, 2006, ICE applied for and was granted a civil administrative search warrant by United States District Court Judge Figa to assess the citizenship and immigration status of the Swift employees. Exhibit 1, Declaration of Paul Maldonado, Supervisory Special Agent, ICE ("Maldonado Decl.") at ¶ 2. The appropriate cause shown for the warrant was the culmination of a nationwide ICE investigation that led to the justifiable suspicion that a large number of Swift employees were illegally in the United States and working without permission by using stolen identities. *Id.* The search warrant was served on December 12, 2006, at approximately 7:30 a.m. on Swift beef plant manager Bill Danley, who informed ICE that there were approximately 1400 employees on that shift between the two plants (one beef, one lamb). *Id.* at ¶¶ 2, 3. He provided a list of all employees scheduled for work that day. After discussing the operation with Mr. Danley, ICE decided to conduct the survey of the citizenship or immigration status of the beef plant employees in the beef plant cafeteria, which holds approximately 700 people. Id. at ¶ 3. Swift management then brought

approximately 700 people in groups to the beef plant cafeteria, and rotated in additional employees as the initial entrants completed their survey and made cafeteria space available. *Id*. at ¶ 4. No workers were prevented from leaving the area. *Id*. at ¶ 11. All announcements made by ICE during the survey were done in English and Spanish to ensure each individual was advised of what was going on. *Id*. at ¶ 4.

Upon entry into the cafeteria, an announcement was made by ICE (in both English and Spanish) requesting that all employees who were born in the United States move to one side of the cafeteria, and the remaining employees were asked to move to a different area of the cafeteria. *Id*. at ¶ 5. The remaining employees were further separated into two groups based on their representations of working with immigration documentation and working without immigration documentation. *Id.*

ICE agents then conducted interviews, limited to eliciting background information, of each Swift employee to determine each employee's nationality and immigration status. *Id*. at ¶ 7. ICE agents conducted each interview in either Spanish or English, whichever was most appropriate considering the language most fluently spoken by the employee. *Id.* The employees found to be credibly claiming United States citizenship were asked to return to work as soon as it was safe to do so. *Id.* The noncitizen employees claiming to have lawful status were interviewed and, if they were determined to be lawfully present, were also asked to return to work. *Id.* If certain employees needed immigration documents outside the

facility to confirm their lawful status, these employees were allowed to contact family and friends by telephone to bring those documents to the Swift plant, and present them to the ICE agents at the gate. If and when ICE agents received confirming documentation of the employee's lawful, work-authorized immigration status, that employee was then instructed to return to work. *Id.*

Undocumented employees were advised of what was happening to them, placed in handcuffs and escorted to the buses waiting outside the plant. *Id.* at ¶ 8. When a bus was full, it departed for the Denver Federal Center, a processing center located in Lakewood, Colorado. *Id.* ICE repeated this process until all of the approximately 1,400 employees were interviewed. *Id.* at ¶ 9. ICE provided a list of all employees arrested to Mr. Dwayne Newkirk, Director of Human Resources for Swift. *Id.*

There were no locked doors, and no one was prevented from leaving the area. *Id*. at ¶ 10. Officers ensured that the employees entered the cafeteria in a safe and orderly fashion and had properly stored their meatpacking tools, many of which were dangerous objects. *Id*. at ¶ 11. Officers did not frisk the employees or act in anything but a calm and courteous manner so as to facilitate the safest environment possible. *Id.* at ¶ 10. A Swift management team was present during the entire vetting and questioning period. *Id.* at ¶ 12. Public telephones were available for those aliens who wanted to contact family members or friends who could bring evidence of lawful status or simply to make calls. *Id.* at ¶ 6. There were

no reports or observations of anyone requesting counsel during this period, and no counsel came to meet any individual clients because no employee requested counsel. *Id.* at ¶ 12. This same procedure was followed at the lamb processing plant with approximately 130 employees. *Id.* at ¶¶ 13-16.

A total of 260 aliens working without proper work authorization were arrested at the two Swift plants. *Id.* at ¶ 17. The first bus carrying undocumented aliens arrived at the Denver Federal Center at approximately 12:00 noon. *Id.* at ¶ 17. While still on the buses, ICE officers, whose native language is Spanish, orally advised the aliens, in Spanish or English as necessary, of their rights (including the reason for their arrest, the right to a hearing before an immigration judge, the right to contact an attorney, the right to communicate with the consular officers from their countries) and options in proceeding with the resulting immigration charges. *Id.*[1]

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[1] Aliens who do not want to return to their native country voluntarily, or who are not offered the privilege of voluntary return, based on their criminal history or immigration record, are ordinarily detained pending a decision of whether to issue a Notice to Appear before an immigration judge. ICE has at least forty-eight hours, according to regulation, to decide whether to issue a Notice to Appear and to arrange the appropriate charges to be stated in the Notice. *See* 8 C.F.R. § 287.3. If ICE decides to issue the Notice to Appear, the Notice is drafted and the alien is served with a copy as soon as practicable. On some occasions, aliens who are not offered voluntary departure still want to return to their home countries as soon as possible, and these aliens may sign a stipulated order of removal. In this order, the alien is provided with a full list of his or her rights in a removal proceeding (in English and Spanish), those rights are read orally, in Spanish if appropriate, and the alien chooses to waive his or her right to an in-person appearance before an immigration judge, in the interest of speeding up his or her removal. Finally, aliens who have previously been

ICE agents began the administrative processing within approximately 15 minutes of the first bus's arrival at the Denver processing center. *Id.* at ¶ 18. ICE agents asked the group of aliens whether they ever had contact with immigration officers previously or had been convicted of a crime. ICE agents instructed aliens who responded affirmatively to go to the rear of the bus. *Id.* ICE agents then took the other aliens, who did not have prior records, off the bus first and provided them the opportunity to voluntarily return to their native Mexico, an alternative which allows the aliens to return to their countries as soon as possible without a hearing. All Mexican nationals requesting voluntary return were determined to be non-criminals with no prior immigration contact. *Id.* Approximately 75 aliens requested voluntary return to Mexico and were returned that same evening, at Government expense, after completion of processing which included entry of their biographical data into the immigration data bases and completion of the I-826. *Id.* ICE agents then processed the remaining aliens as noted below.

The Denver Federal Center processing facility was divided into four stations, and each alien started in the first station and then proceeded through the rest. *Id.* at ¶ 20. The first

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removed from the U.S. and who have entered illegally, or who have been convicted of aggravated felonies and are not permanent residents, may be subject to alternative forms of removal. The aliens who have previously been removed from the U.S. and reentered illegally are subject to reinstatement of a prior removal order. Aggravated felons are subject to an expedited administrative removal proceeding. In both of these cases, the alien may be ordered removed without an immigration judge's involvement. Maldonado Decl. at ¶ 19.

station was to search IDENT, an automatic fingerprint identification database. *Id.* IDENT is used to retrieve records (including photographs and aliases) of aliens ICE has previously encountered. *Id*. At the second station an ICE agent again gave each alien of his or her rights in writing (in Spanish and English); gave each alien his or her *Miranda* rights; and made sure each alien completed the biographic portion of his or her Deportable Alien Record (I-213). *Id.* Afterwards, ICE agents then gave each alien an alien registration number (an A-number) and an A-file, and asked the alien to wait until there was an opening at the interview station (the third station). At the interview station, an agent conducted an in-depth interview, completed the form I-213, and issued a Notice to Appear ("NTA") (the charging document). *Id.* At the fourth and final station, a Spanish-speaking agent explained to, and served on the alien the NTA, the Warrant of Arrest (form I-200), and the Notice of Custody Determination (form I-286, advising the alien of custody, bond, and right to reconsideration of custody by an immigration judge), and a list of local legal organizations. *Id.* The agent again explained to the alien his or her rights, and answered the alien's questions. *Id.* After completing processing, the agent turned over the alien to ICE Detention and Removal Officers present at the processing area, who then placed the alien (and his or her bag of possessions) on the bus. *Id.* at ¶ 24. As each bus was filled, it left for the detention centers. *Id*.

During processing at the Denver Federal Center, ICE agents did not deny any

requests for attorneys, and did not deny any attorneys access to their clients. *Id.* at ¶ 23. Only one alien requested to speak to an attorney, and that alien was released because he was already in deportation or removal proceedings. *Id.* ICE agents offered use of their cell phones to any aliens who requested to use phones at the processing center. ICE agents honored all requests by the aliens to use bathroom facilities. *Id.* ICE provided liquids and two meals for each detainee during the process. No notable adverse incidents occurred between the aliens or between the aliens and ICE officers. *Id.* ICE agents completed processing at approximately 2:00 a.m., December 13, 2006. *Id.*

After completing processing, ICE transported the aliens to detention centers. *Id*. at ¶ 24. ICE sent the majority of the aliens to ICE's contract detention facility in Aurora. *Id*. However, because beds at the Aurora facility are limited, ICE also transported aliens to the Park County Jail and the Otero County Prison Facility in Chaparral, Colorado. *Id*.

The aliens complicated the process by providing various names. *Id*. at ¶ 22. In some cases, up to five different names have been associated with one alien. *Id*. Due to the difficulties of finding an alien's proper identification, ICE has been able to confirm that only seven of the thirteen individuals named by the Union have been in ICE custody to date, and an eighth name is believed to refer to one of the seven individuals already identified. *Id*. ICE voluntarily returned Juan Diego Gomez-Tejeda, who has been identified as using the name "Rinaldo Yarrito," to Mexico on the evening of December 12, 2006. ("Rinald Dirrato"

is likely the same person.) *Id*. ICE also voluntarily returned Juan Bocanegra-Tejera, who has been identified as using the name "Carlos Perez," to Mexico on the evening of December 12, 2006. *Id*. ICE took Maria Fraga (identified as "Maria E. Fragu") into custody on December 12, but transferred her to the Weld County Sheriff later that same evening pursuant to an active warrant for her arrest (based on identity theft charges) under the stolen identity of "Vanesa Cadaveo." *Id*. ICE booked Jose Isaias Chevez-Navarro, who has been identified as using the name "José Chavez," into the Aurora detention facility on the evening of December 12 (or in the early morning on December 13), and he remains at that facility pending removal proceedings. *Id*. ICE initially transferred Fermin Paiz-Garcia, identified as using the name "Adam M. Flores," to El Paso on December 13, but ICE returned him to Colorado. ICE has detained Mr. Paiz-Garcia at Aurora, pending a removal hearing. *Id*. ICE previously removed Pedro Vicente-Sontay, identified as using the name "Roberto Burgos Roman," from the United States under the name "Pedro Pablo Perez." ICE initially transferred him to El Paso on December 13, but has returned him to Colorado. ICE has detained Mr. Vicente-Sontay at Aurora, pending a removal hearing. *Id*. ICE also initially transferred Fabian Anaya, identified as using the name "Lionel Vicente Chum," to El Paso on December 13, but has also returned him to Colorado. ICE has detained Mr. Anaya at Aurora, pending a removal hearing. *Id*. ICE has not been able to match the remaining five names to individuals detained at the Greeley plant. *Id*.

On December 13, 2006, the United Food and Commercial Workers Local No. 7 ("Union") filed a petition for a writ of habeas corpus, claiming to represent thirteen individuals as a next friend. On the same date, the Court ordered Respondents to show cause why the writ should not issue on or before December 18, 2006; directed that "the applicants shall remain in custody and within the jurisdiction of this court until further order;" and instructed the applicants to file a brief in support of their petition (also due on December 18, 2006).

DISCUSSION

This Court should deny the applicants' petition for a writ of habeas corpus because this Court does not have proper jurisdiction over respondent and because the petitioner Union does not have standing as next friend, and applicants and the Union have failed to exhaust administrative remedies. Further, even if the Court finds it has jurisdiction and the Union has standing as a next friend, the applicants fail to state a claim on which relief may be granted, as the government provided applicants with the requisite due process protections. In any event, the Court should make clear in its disposition that the petition applies only to the thirteen named applicants, as the applicants do not seek to certify a class, and the action cannot be maintained as a class action in any case.

The Tenth Circuit has held that "[t]he deference due an administrative determination hinges not simply on the petitioners' ability to proceed under the habeas statutes, but rather

on the realm of the agency's authority and the nature of the petitioners' dispute." *Marczak v. Greene*, 971 F.2d 510, 516 (10th Cir., 1992). As excluded aliens have no constitutional right to be paroled into this country, the scope of review of an ICE decision is therefore unrelated to a review the court would undertake were a convicted criminal claiming a violation of constitutional rights. "In immigration matters, the scope of judicial review on a petition for habeas corpus is more truncated than in the criminal context." *Amanullah v. Nelson,* 811 F.2d 1, 16 (1st Cir.1987). The standard of review of agency action is the same for the reviewing district court as it is for this court; the review of agency action is deferential to the agency, and lacks the customary deference to the district court. *Marczak,* 917 F.2d at 516 (citing *Webb v. Hodel,* 878 F.2d 1252, 1254 (10th Cir.1989); *Mason v. Brooks,* 862 F.2d 190, 192 (9th Cir.1988).

I. THE PETITION DOES NOT NAME THE PROPER CUSTODIAN-RESPONDENT.

The Supreme Court made clear that, in cases challenging physical custody, "the immediate custodian, not a supervisory official who exercises legal control, is the proper respondent." *Rumsfeld v. Padilla*, 542 U.S. 426, 439 (2004); *see also* 28 U.S.C. § 2243 ("The writ, or order to show cause, shall be directed to the person having custody of the person detained."); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."); *see also Macias v.*

Greene, 28 F. Supp. 2d 635, 637 (D. Colo. 1998) (holding "[t]he proper respondent to a habeas action is the habeas petitioner's custodian."). More specifically, for "physical confinement" habeas actions, the proper respondents are the wardens of the facilities where the habeas petitioners are being held. *Rumsfeld*, 542 U.S. at 435. This is logical because the writ acts against the person who has "day-to-day control over [the] prisoner." *Brittingham v. United States*, 982 F.2d 378, 378 (9th Cir. 1992); *see also Ex Parte Endo*, 323 U.S. 283, 306 (1944) (writ is directed to prisoner's "jailer"); *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (Parole Commission is not custodian despite its power to release the petitioner).

The Assistant Secretary of ICE is not the proper respondent in a habeas petition. The Tenth Circuit Court of Appeals has held that the warden of a detention facility – the person actually holding the petitioner in physical custody – is the proper respondent for a habeas action, not the Attorney General. *Blango v. Thornburgh*, 942 F.2d 1487, 1491-92 (10th Cir. 1991). "Otherwise, the Attorney General of the United States could be considered the custodian of every alien and prisoner in custody because [he] ultimately controls the [INS] district directors and [the] prisons." *Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *see also Vasquez v. Reno*, 233 F.3d 688, 693, 696 (1st Cir. 2000). The Assistant Secretary of ICE is not the warden of the facilities where the habeas applicants are being held, and, therefore, is not the proper respondent for a habeas petition. The petition should be dismissed for this reason alone.

II. THE UNION HAS NO RIGHT TO SUE AS NEXT FRIEND.

This Court does not have jurisdiction based on next friend standing because the Union has not verified the petition, applicants can appear on their own behalf, and the Union does not have the requisite significant relationship with applicants.[2] Congress codified the next-friend standing doctrine in habeas proceedings in 1948; *see* 28 U.S.C. § 2242.

Applications for writs for habeas corpus must be signed and verified by the person seeking relief or the party acting on their behalf. 8 U.S.C § 2242; 28 U.S.C. § 1746 (signed documents declaring statements to be true under penalty of perjury are sufficient).[3] Courts have found that "[a] habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits." *U.S. v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995). This Court may find that it lacks jurisdiction because the Union's petition in the present case fails to provide any acceptable form of verification. *See Hem v. Maurer*, 458 F.3d 1185, 1201 n.6 (10th Cir. 2006) (citing *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). Without proper verification, the Court cannot properly weigh the credibility of the Union's assertions. Even if the Court allowed petitioner the opportunity

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[2] It appears that the Union does not know who the applicants are, as it identifies the applicants by their stolen or fraudulent identities.

[3] Absent a statutory definition, plain language defines verification as "[a] formal declaration made in the presence of an authorized officer, such as a notary public, or (in some jurisdictions) under oath but not in the presence of such an officer, whereby one swears to the truth of the statements in the document." Black's Law Dictionary (8th Ed. 2004)."

to remedy this omission, the Court should still find that the Union lacks next friend standing on two additional grounds.

The Supreme Court has established a two-prong test to establish such standing. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). These two requirements are jurisdictional. *Id*. at 164; *Williams v. Boone*, 1999 WL 34856, *5 (10th Cir. 1999) (unpublished) (citations omitted) (copy attached per Local Rule 7.1.D.).

First, the next friend must demonstrate that the real party in interest cannot appear on his own behalf, and, therefore, that the real party in interest requires another to litigate the matter. *Whitmore*, 495 U.S. at 163. Detention alone is not enough to establish next friend standing; rather, the next friend must show "inaccessibility, mental incompetence, or other disability." *Id.*; *Williams*, 1999 WL at *5 (*citing Wilson v. Lane*, 870 F.2d 1250, 1253 (7th Cir. 1989) ("A next friend may not file a petition for a writ of habeas corpus on behalf of a detainee if the detainee himself could file the petition.").[4]

Second, the next friend must be truly dedicated to the "best interests of the person on whose behalf he seeks to litigate," and it has been suggested the next friend must also have

[4] Some courts have recognized additional situations that meet this prong including the inability to understand the English language or situation, *Weber v. Garza,* 570 F.2d 511, 514 n.4 (dictum)(citing *united States ex. Rel. Bryant v. Houston*, 273 F. 915 (2d. Cir. 1921), or a lack of access to counsel. *See, e.g.*, *Padilla v. Rumsfeld*, 352 F.3d 695, 703 (2003), *rev'd and remanded*, 542 U.S. 426 (2004); *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1160 (9th Cir. 2002).

some "significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163. Courts have found that this second prong has been met by immediate relatives such as parents, *see, e.g.*, *Vargas v. Lambert*, 159 F.3d 1161, 1163 (9th Cir. 1998); *Hamilton v. Texas*, 485 U.S. 1042, 1042 (1988); *Gilmore v. Utah*, 429 U.S. 1012, 1013-14 (1976); and sisters, *see, e.g.*, *United States ex. Rel. Roth v. Quarles*, 350 U.S. 11, 13 n. 3 (1955). While some courts have recognized that detainees may not have relatives or friends to bring their claims as a next friend, there must still be a showing that a significant relationship exists to establish that the next friend is not an intruder or unintended meddler, styling themselves as a next friend. *Whitmore*, 495 U.S. at 164; *see also Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1160, 1162-63 (9th Cir. 2002) (denying next friend standing where the party seeking next friend standing failed to demonstrate any relationship with the detainees, generally or individually); *Weber*, 570 F.2d at 514 (finding that powers of attorney alone without further showing of relationship and interest did not establish next friend standing).

Here, the Union has not adequately shown next friend standing. First, the Union has not demonstrated that the individual aliens are unable to appear on their own behalf. Unlike *Padilla*, where United States Court of Appeals for the Second Circuit affirmed next friend standing for Padilla's attorney because Padilla was detained incommunicado, *Padilla*, 352 F.3d at 703-4, here the Union's only, and insufficient assertion, is that the Union and Union's

counsel were not notified of where individual applicants were incarcerated. *See* Petition at ¶13. The Union cannot show that individual applicants do not have access to outside communications. Indeed, the Union has hired two immigration attorneys to represent individual aliens who are union members in immigration proceedings. Maldonado Dec. at ¶ 21. Moreover, even where the immigration attorneys hired by the union have not made contact with individual detainees, the detainees were advised of their right to seek legal advice within hours of their arrest and were given access to telephones. Maldonado Dec. at ¶¶ 6, 13, 17, 20.[5] Therefore, where the detainees have the opportunity to access the Union's or their own counsel, this Court should find that the Union does not have next friend standing where the detainees could file habeas petitions themselves. *See Williams*, 1999 WL at *5.

Lastly, the Union has not affirmatively shown that it has a significant relationship with or represents the best interests of the applicant-detainees. The Union has a limited relationship to the applicant-detainees akin to the powers of attorney relationship that the United States Court of Appeals for the Fifth Circuit found insufficient to establish standing in *Weber*. 570 F.2d at 514. Here, all the Union claims is an interest in the applicants' continued employment and conditions of employment, *see* Petition ¶5, and concern as to the applicants' whereabouts. *See* Petition ¶13. The fact that the Union seeks to represent

[5] Unlike the Sixth Amendment right to counsel in criminal cases, 8 C.F.R. § 287.3(c) provides that aliens in immigration detention need only be provided notice of the right to be represented. *See infra* part III(C).

applicants using stolen identities demonstrates that the Union knows little about the applicants they seek to protect, and further illustrates the lack of a significant relationship. As such the petition should be dismissed for a lack of jurisdiction because the petition is not verified, applicants can appear on their own behalf, and the Union does not have the requisite significant relationship with applicants.

III. THE APPLICANTS HAVE NOT EXHAUSTED AVAILABLE REMEDIES.

In addition, applicants have failed to exhaust their administrative remedies. "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed . . . remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969)). Although exhaustion may not be required in all aspects of habeas review, "[g]enerally, a habeas petition cannot be used to substitute for direct appeal." *Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004) (citing *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). Importantly, where the administrative process can address claims of due process violations, exhaustion is required. *See Akinwunmi v. INS*, 194 F.3d 1340, 1341 (10th Cir. 1999).

The various violations of due process that the Union believes to have occurred (without submitting a single statement from any of the applicants as to what actually occurred) are all violations which may be alleged and addressed in various removal proceedings, should the individuals wish to make such claims. Individual aliens may be placed in reinstatement proceedings, *see* section 241(a)(5) of the Immigration and Nationality

ACT ("INA"), 8 U.S.C. § 1231(a)(5), or in removal proceedings, *see* INA § 240, 8 U.S.C. § 1229a, where they can address their due process claims. Aliens in proceedings may also request additional opportunities to retain the counsel of their choice, *see* INA § 292, 8 U.S.C. § 1362, and aliens may request that an immigration judge review any bond determination, *see* INA § 242(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A). Thus, Congress established an administrative process through which aliens may seek their release from detention. Because applicants have failed to exhaust this process, this Court does not have jurisdiction over their claims.

IV. APPLICANTS HAVE RECEIVED DUE PROCESS.

In any event, the Union fails to allege colorable claims of violations of any of the applicants' constitutional rights.

This case arises from a worksite enforcement operation intended to apprehend illegal aliens who were unlawfully employed, and who had apparently, for the most part, secured their employment by stealing the identities of United States citizens and lawful permanent residents.[6] DHS had a lawfully issued warrant to enter the Swift compound, *see* Maldonado Decl. at ¶ 2, and ICE agents have the authority to arrest those present in the United States in violation of the immigration laws, *see* INA § 287(a)(1), 8 U.S.C. § 1357(a)(1). Additionally,

[6] Respondent notes the extraordinary nature of this case -- the use of false identities to bring a suit against the government for arresting and detaining individuals using those same false identities to work illegally in the United States.

a determination on whether to grant bond to an illegal alien detained by DHS is in the sole discretion of the Secretary in the first instance. *See* INA § 236(a)(2), 8 U.S.C. § 1226(a)(2). There is no absolute right to bond, and thus there is no right to be released. *See Reno v. Flores*, 507 U.S. 292, 306 (1993).

Moreover, DHS took numerous steps to ensure that the individual applicants had knowledge of their right to be represented by counsel and provided numerous opportunities for each individual applicant to call family, friends and/or counsel, even though, as explained below, applicants possess no constitutional right to counsel. Accordingly, DHS provided the applicants with a full and fair opportunity to obtain counsel. Thus, the applicants have failed to state colorable constitutional claims, and the petition should be denied.

A. The Arrests Were Lawful.

ICE agents were lawfully present at Swift's Greeley compound pursuant to a civil warrant issued by United States District Court Judge Phillip Figa. The use of civil warrants to authorize the entry upon premises where illegal aliens are believed to be present and to permit their questioning and arrest has longstanding judicial approval. *See Blackie's House of Beef, Inc. v.Castillo*, 659 F.2d 1211, 1219-27 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). Further, it is well settled that the INA authorizes ICE agents to question any alien or person believed to be an alien regarding immigration status and right to be present in the United States. *See* INA § 287(a)(1), 8 U.S.C. § 1357(a)(1). Additionally, INA § 287(a)(2),

8 U.S.C. § 1357(a)(2), authorizes DHS agents to arrest aliens present in the United States without an arrest warrant, if the officer has reason to believe that the alien is in the United States in violation of the immigration laws and is likely to flee before a warrant can be obtained. Here, ICE not only had reason to believe that the aliens were not legally present in the United States, but also that they had obtained employment through the use of stolen identities.

Moreover, DHS unquestionably followed the regulations detailing how to examine suspected aliens taken into detention without an individual arrest warrant. *See* 8 C.F.R. § 287.3; Maldonado Decl. at ¶¶ 6, 13, 17, 20. ICE examined all individuals who were determined to be aliens within 20 hours of their apprehension; advised the aliens of their right to be represented by counsel on numerous occasions; provided the aliens with a list of available free legal services; and provided telephonic access, if requested, to family, friends, or the aliens counsel of choice. *See* Maldonado Decl. at ¶¶ 6, 13, 17, 20.

The applicants have failed to show that the arrests were illegal. In fact, the petition contains no allegations that the individual applicants, who were working due to their use of false identities, were not subject to arrest by ICE for violations of the immigration laws. Indeed, the government has shown that the arrests were legal.

B. As The Decision On Whether Bond May Be Granted Is Discretionary, DHS Has Not Infringed Any "Right" To Bond.

There is no presumption that an alien will be released during his removal proceedings. *Reno v. Flores*, 507 U.S. at 306 ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General").

While acknowledging that the *Flores* Court held that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings," the Supreme Court nevertheless found that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Reno v. Flores*, 507 U.S. at 294 ("Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing process."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings"); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid"); *Carlson*, 342 U.S. at 540 ("The [INA] does not grant bail as a matter of right."). *See* INA § 236(a)(2), 8 U.S.C. § 1226(a)(2).

The process by which the DHS Secretary and the Attorney General exercise that discretion is set forth in the regulations and involves multiple administrative components. ICE makes the initial custody decision in each case – that is, whether to keep the alien in detention pending completion of the removal proceedings, or whether to release the alien on bond or other appropriate conditions. *See* 8 C.F.R. § 236.1(a). The alien may appeal this determination to an immigration judge. 8 C.F.R. § 236.1(d)(1). That decision may in turn be appealed to the Board of Immigration Appeals ("Board"). 8 C.F.R. § 236.1(d)(3).[7] In certain rare cases, the Attorney General himself may be the ultimate adjudicator of the custody decision. 8 C.F.R.§ 3.1(h)(1).

In cases such as these applicants' cases, where the aliens were initially arrested without an arrest warrant, a bond determination must normally be made by ICE within 48 hours. *See* 8 C.F.R. § 287.3(d). In this case, initial bond determinations were made within the first 20 hours, and individual applicants are free to renew any requests for bond in future proceedings. Thus, DHS has infringed on no "right" to bond.

C. DHS Has Not Infringed Applicants' Access To Counsel.

The applicants, without asserting any facts, claim that they are being denied access to counsel. They are wrong.

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[7] In certain cases, DHS may appeal an immigration judge's decision to the Board, 8 C.F.R. § 1003.19(i)(2), and invoke an automatic stay of the immigration judge's order pending the Board's adjudication of the appeal.

It is well settled that removal proceedings are purely civil proceedings, and aliens in deportation proceedings are not entitled to the full panoply of rights available to criminal defendants. *See INS v. Lopez-Mendoza*, 486 U.S. 1032, 1038 (1984). Thus, the Sixth Amendment right to appointed counsel does not apply to aliens in deportation proceedings. *See Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990). An alien merely has the statutory privilege of being represented by counsel of the alien's choice, at no expense to the Government. *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002).

The search warrant for a civil administrative search was executed at approximately 7:30 a.m., Tuesday, December 12, 2006 at the Swift meat plants in Greeley, Colorado. Maldonado Decl. at ¶ 2 . All Swift employees were brought to the plant's cafeteria by Swift management and were interviewed to determine their legal status. *Id*. at ¶¶ 4, 9. Public telephones were available during this time for aliens who wanted to contact counsel, friends, family, anyone who could bring evidence of lawful status, or anyone else. *Id*. at ¶ 6.

Moreover, ICE repeatedly informed all aliens of their rights, including their right to counsel. While applicants were still on the buses that took them to ICE's processing center, ICE officers orally advised everyone, in English and Spanish, of the reasons for their arrests and their rights, including their right to contact an attorney. *Id*.; *see also* Exhibit 2, Notice of Rights and Request for Disposition, Form A-826. The aliens were then processed at the

processing center, which was divided into four stations. Maldonado Decl. at ¶ 20. At the second station, the aliens were again given their rights in writing in Spanish and English, and given their Miranda rights as well. *Id*. At the fourth station, a Spanish-speaking agent served the Notice to Appear on the aliens, provided the aliens with a list of local legal organizations, and once again explained their rights. *Id*.

ICE denied no requests for attorneys, and denied no attorneys access to their individual clients. *See id*. at ¶ 23. Requests to use phones at the processing center were met with offers by ICE agents to allow use of their cell phones. *Id*.

Queries from individuals outside the processing center were complicated by the multiple names used by the aliens. *See id*. at ¶ 22. Unless the person making an inquiry regarding one of the detainees used the name the detainee gave to ICE, DHS had no way of determining initially which of the aliens was the subject of the inquiry. *See id.* Nevertheless, DHS advised everyone numerous times of the reasons for their arrests and their right to counsel, and gave the aliens ample opportunities to contact attorneys of their choice.[8] *See*

[8] Although the Union alleges it represents Union members in employment matters relating to conditions and terms of employment, it makes no showing that it represents individuals in civil immigration proceedings or in criminal proceedings. The Union represents its members in negotiations with the employer (in this case, Swift), and not in their individual contacts with the Federal Government. Additionally, even if the Union could be construed a representing individual aliens, none of the detained aliens requested Union representation. *See NLRB v. Weingarten*, 420 U.S. 251, 257 (1975) ("[T]he right [to Union representation] arises only in situations where the employee requests representation.").

id. at ¶¶ 8, 14, 16, 17, 20. Consequently, the aliens had every opportunity to access counsel, in full compliance with the regulations regarding the processing of aliens arrested without warrant. *See* 8 C.F.R. § 287.3.

D. No Constitutional Right Is Violated By the Detentions At Issue.

The Supreme Court decided in the government's favor the constitutional issues raised by the Union. Specifically, the Court found that no constitutional right is violated when an alien is detained for the brief period of his removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 523, 526 (2003) (noting the Court's "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings"). Because the periods of detention at issue here have been extremely brief – far less than the three to six months in *Kim* – the applicants' claims are foreclosed by *Kim*.

The Supreme Court expressly determined that detention during the removal process prior to issuance of a final order of removal is not the constitutionally suspect "indefinite detention" that was restricted by the Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001):

> While the period of detention in *Zadvydas* was "indefinite" and "potentially permanent," the detention here is of a much shorter duration. *Zadvydas* distinguished the statutory provision it was there considering from § 1226 on these very grounds, noting that "post-removal-period detention, *unlike detention pending a determination of removability*, has no obvious termination point."

Kim, 538 U.S. at 529. Whether the applicants' detentions may some day become "too long" is not an issue before this Court. Habeas corpus is only a process for testing the <u>current</u>

legality of a detention. *Walker v. Wainwright*, 390 U.S. 335, 336 (1968).

The Union has failed to allege even a colorable constitutional claim regarding the detention of the applicants.

V. THE PETITION FOR A WRIT OF HABEAS CORPUS IS NOT MAINTAINABLE AS A CLASS ACTION

It is axiomatic that, for a class action to be certified, a class must exist, and be susceptible to a precise definition. *See A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989). Merely defining the class as "others similarly situated," as the Union does here, without providing detailed guidance regarding how the class could be defined and identified, does not suffice. *See Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994). In addition to failing to define a class, the habeas petition fails to establish the requirements of Rule 23 of the Federal Rules of Civil Procedure – numerosity, commonality, typicality, adequacy of representation, and that the class also satisfies at least one requirement of Rule 23(b). *Monreal v. Potter*, 367 F.3d 1224, 1235 (10th Cir. 2004). The Union fails to make allegations of fact that would satisfy any of the Rule 23 requirements. Thus, this case cannot be maintained as a class action. *See id*.

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CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Habeas Corpus.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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