UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Janet Malam,

Petitioner-Plaintiff,

v.

Rebecca Adducci, et al.,

Respondents-Defendants.

______________________________/

Civil No. 20-10829

Honorable Judith E. Levy
Mag. Judge Anthony P. Patti

DEFENDANTS' RESPONSE IN OPPOSITION TO SECOND MOTION TO INTERVENE

I. INTRODUCTION

The applicants' motion to intervene is based on the premise that the need for relief is urgent and they do not have time to wait for a ruling on class certification and any attendant relief. If that were the motivation for this motion, the applicants could have proceeded directly to filing a separate case and an emergency motion for injunctive relief like dozens of other immigration detainees. But that would require them to be subjected to the random judicial draw. The only interest served by intervention, is permitting the applicants to benefit from this Court's prior rulings on the same motion for injunctive relief and avoiding the very real chance that another court will see the issues differently.

Intervention is designed to serve judicial economy where similar issues are raised in individual claims. The purpose of intervention is not to allow parties to take advantage of prior rulings and assure themselves a victory – a benefit denied to other immigration detainees. One of the reasons that intervention is permitted where it is "early in the litigation," is because the ultimate issues have not been decided and there is no unfair advantage where the parties do not yet know how the court will rule. In this case, permitting the applicants to intervene and seek individual relief where the Court has already ruled repeatedly on the same motion for preliminary injunctive relief they intend to file, condones, and indeed promotes, judge-shopping. Accordingly, Defendants oppose the motion.

II. BACKGROUND

The Court is well aware of the underlying facts of the case. As relevant to this motion, this action was originally filed on March 30, 2020, as an individual habeas action by Janet Malam. (Compl., ECF No. 1). Before ruling on Malam's motion for injunctive relief,[1] the Court permitted Amer Toma and Ruby Escobar to intervene because they were detained at the same facility, Calhoun County Correctional Center. (Order, ECF No. 21). Shortly thereafter, the Court granted injunctive relief to Malam and Toma; and ICE voluntarily released Escobar. (Orders, ECF Nos. 23, 29). After securing individual relief, counsel amended the petition to state a class action and add additional named plaintiffs, who also sought, and were awarded, individual injunctive relief. (Am. Pet., ECF No. 43; Order ECF No. 90). Over Defendants' objection, the Court permitted a third amendment to the petition to add more named plaintiffs who also sought, and were awarded, individual injunctive relief. (Order, ECF Nos. 96, 127). A motion for class certification that seeks to certify a class covering all immigration detainees at Calhoun is fully briefed and pending before the Court. (Mot., ECF No. 112).

The applicants, through the same counsel representing the existing plaintiffs, now seek to intervene as additional named plaintiffs and amend the petition a

[1] A distinction between this motion and the last motion for intervention granted by the Court is that at the time of the prior motion, the Court had not yet ruled on an injunctive relief motion.

fourth time, so that they can file a fifth motion for individual injunctive relief. (Mot., ECF No. 130). Defendants oppose this further attempt to add additional plaintiffs so that they can seek individual injunctive relief in this action, rather than filing a new action where they choose not to await the decision on class certification.

III. LAW AND ANALYSIS

A. The applicants should not be permitted to intervene as of right.

The applicants have not shown a need to intervene as of right in this action pursuant to Fed. R. Civ. P. 24. In order to establish intervention as of right, the party seeking to intervene must establish: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000). "Failure to meet any one of the four criteria will require that the motion to intervene be denied." *Id.*

1. The applicants' motion is untimely.

"The determination of whether a motion to intervene is timely 'should be evaluated in the context of all relevant circumstances.'" *Id.* at 472-73. The following factors should be considered in determining timeliness: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3)

the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Id*. at 473.

When considering the relevant circumstances of this case and the identified factors, the applicants' motion to intervene is untimely. This case is a far cry from *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), relied on by the applicants, where a motion to intervene was filed "two weeks after the complaint" and timeliness was not challenged by the parties. *See also Stupak-Thrall*, 226 F.3d at 475 ("The propriety of intervention in any given case…must be measured under 'all the circumstances' of that *particular* case…[t]he absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important of these circumstances.") (emphasis original).

The factors in this case require a finding of untimeliness. First, the purpose for which intervention is sought is to obtain individual injunctive relief from this Court, which would allow the parties to avoid the random judicial draw. *See Invacare Corp. v. Respironics, Inc.*, No. 04-1580, 2005 WL 3763318, at *4 (N.D. Ohio Apr. 25, 2005) (the purpose of a random draw is "to prevent parties from

'judge shopping' for a judicial officer or forum which they believe will be more favorable."). Because this is a putative class action, all of the other relief sought by applicants' counsel would apply to the applicants if a class is certified. Second, the applicants have likely known about this claim for months given the number of people from Calhoun who have received relief. There is no reason why they could not have filed sooner if time is of the essence. It should also be noted that the issue is not when counsel became aware of the intervenors, but when the intervenors were aware of the action. *See Blount-Hill v. Zelman*, 636 F.3d 278, 286 (6th Cir. 2011) (proposed intervenors "should have attempted to intervene when they first became aware of the action, rather than adopting a 'wait-and-see' approach.").

Third, Defendants would be prejudiced by being forced to respond to yet another injunctive relief motion involving six detainees,[2] while at the same time conducting discovery with Calhoun, opposing Plaintiffs' motion for additional discovery, potentially conducting that discovery, and preparing for an evidentiary hearing. As the Court is aware, there is a full slate of deadlines in this case for the next month, and there is no reasoned basis that the applicants could not file a separate action and seek emergency injunctive relief. Applicants, on the other hand, will suffer no prejudice by the denial of this motion, save their not having their cases assigned to the judge of their choosing.

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[2] Applicant Pedro Quijada was removed on July 3, 2020. *See* Salvatera Dec., Ex. 1.

Fourth, there are unusual circumstances in this case that preponderate against permitting intervention. During the over three months that this case has been pending, this Court has granted injunctive relief no less than seven times on the same basis as that cited by applicants. (Orders, ECF Nos. 23, 29, 33, 41, 68, 90, 127). *See Blount-Hill*, 636 F.3d at 285 (holding that "extensive progress in the district court before the proposed intervenors filed their motion to intervene counsels against intervention."). Since the only issue on which the applicants seek relief separate from the putative class is preliminary injunctive relief, there has not only been extensive progress in this case on that issue, but ultimate rulings.

Unlike a typical civil action where a party intervenes before a ruling on the relief they seek has issued, in this case, because this Court has granted similar motions for preliminary injunctive relief multiple times, it is patently unfair to permit them to intervene. *See Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) ("Judge-shopping clearly constitutes 'conduct which abuses the judicial process.'"); and *Tennessee v. Gibbons*, No. 16-00718, 2017 WL 4535947, at *4 (M.D. Tenn. Oct. 10, 2017) ("Judge shopping is 'a practice that abuses the integrity of the judicial system by impairing public confidence in the impartiality of judges.'") (citing cases). In light of these factors, the applicants' motion to intervene and seek individual preliminary injunctive relief is untimely and their motion should be denied.

2. The applicants cannot establish that they have a substantial legal interest in this case that would be impaired absent intervention.

The applicants argue that they have a substantial legal interest in asserting a violation of their due process rights in light of their continued detention at Calhoun. The question is not whether they have a substantial legal interest in general, the question is whether they have a substantial legal interest *in this case*. *Stupak-Thrall*, 226 F.3d at 471. The applicants offer no reason why they must intervene in this action to protect their interest in constitutional confinement. There is nothing precluding them from immediately filing a separate action and seeking emergency injunctive relief. There is nothing that the existing plaintiffs could do in this action that would compromise the applicants' ability to protect their constitutional rights. The applicants offer no reason that their interests must be asserted in *this* action. Further, as plaintiffs have already conceded, individual actions for injunctive relief will not hinder putative class action relief. (Mot., ECF No. 112, PageID.3813, n.17).

To the extent the applicants refer to a need to intervene to represent their interest in declaratory relief, the argument is unavailing. First, the same counsel represents both the existing plaintiffs and the applicants, so the idea that intervening with the same counsel on the same issue is going to provide different protection is nonsensical. *See Stupak-Thrall*, 226 F.3d at 476 (Where the views of

the proposed intervenors and the existing parties "are in complete accord," the assertion that the intervenors "must intervene to protect their 'different' concerns is unsupported."). Second, declaratory relief may affect the conditions at Calhoun, thereby impacting the applicants, but it would not impair their interests in obtaining constitutional confinement, presumably, it would only benefit them. Further, for declaratory relief to be awarded in this case, the Court must find that the existing named plaintiffs and their counsel will adequately represent the class. *See* Fed. R. Civ. P. 23. Thus, there is no potential impairment to the applicants where the Court is obligated to ensure their interests are protected before class relief can be awarded.

Third, the applicants make the argument that they must be permitted to intervene in this action because their claims are "time sensitive." (Mot., ECF No. 130, PageID.4303). As already noted, if time is the concern, applicants would be better served by not intervening in this case, which adds a procedural step, and seeking emergency injunctive relief in their own action. Lastly, the applicants will not be "impaired in their pursuit of virtually identical relief," if the existing plaintiffs are ultimately unsuccessful before this Court, because this Court's rulings are not binding. (Mot. 130, PageID.4304). *See Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even

upon the same judge in a different case."). Not to mention, the applicants and the plaintiffs have the same counsel, so the idea that there is any difference in how their claims will be litigated is a farce. *See Stupak-Thrall*, 226 F.3d at 476.

3. The applicants fail to explain their argument for inadequate representation where they are represented by the same counsel as the existing plaintiffs and seek identical relief.

Curiously, the applicants, represented by the same counsel representing the existing plaintiffs and currently seeking class certification, argue here that the existing plaintiffs may not be adequate to represent the applicants – who are members of the class they seek to represent. Putting aside the incongruity of their argument, they do not address the adequacy of representation at all. Instead, the applicants merely reassert the allegation that their injunctive relief claims are urgent – never explaining why then they seek to intervene in this action, delaying their request for injunctive relief by interposing an additional procedural step.

The reality is that there is no reason that the applicants *need* to intervene in this action as a matter of legal right. Rather, they *want* to intervene in this action, even at the cost of further delay, because they are confident they will get the injunctive relief they seek based on prior rulings from this Court granting the same request. This Court should not permit such a bold abuse of the judicial process, particularly where there is no harm to the applicants in seeking emergency injunctive relief in a separate action.

B. The applicants should not be permitted to intervene permissively.

Rule 24(b) provides that "on *timely motion*, the court may permit anyone to intervene who…has a claim or defense that shares with the main action a common question of law or fact." *Blount-Hill*, 636 F.3d at 287 (emphasis original). Courts must "examine the question of timeliness when gauging the propriety of a motion to intervene, whether permissively or as of right." *Stupak-Thrall*, 226 F.3d at 479. "To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). "Once these two requirements are established, the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Id*.

As set forth above, the applicants' motion is untimely because the applicants have no legitimate purpose for intervening in this action just to seek individual preliminary injunctive relief, and the unusual circumstance of this Court already having ruled repeatedly on that issue makes it unfair to permit intervention even if it involves the same legal and factual issues. *Id*. at 473. Those same reasons also militate against permissive joinder in general. *See United States v. Dotson*, No. 17-20830, 2019 WL 2005924, at *4 (E.D. Mich. May 7, 2019) (denying motion for reassignment "to restrain what may appear to be judge-shopping."); and *In re W.*

Caribbean Airways Crew Members, No. 07-22015, 2010 WL 11601239, at *9–10 (S.D. Fla. Jan. 8, 2010) (finding unusual circumstances weigh against intervention where "[f]irst and foremost, the Motion to Intervene strongly hints of forum shopping.").

IV. CONCLUSION

For the above reasons, Defendants ask this Court to deny the second motion for intervention.

Respectfully submitted,

MATTHEW SCHNEIDER
United States Attorney

By: /s/ Jennifer L. Newby________

Jennifer L. Newby (P68891)
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Dated: July 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, the foregoing paper was filed with the Clerk of the Court using the ECF System which will give notice to all counsel of record.

/s/ Jennifer L. Newby

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANET MALAM,

Plaintiff-Petitioner,

QAID ALHAMI et al.,

Plaintiff-Intervenors,

and

ZAID SHAER MOHAMMAD AL-ARAJ, AHAMMAD ALI, JUAN GUERRERO BERNANDEZ, ZIGGY MARCUS GARVIE, GAN JIN, TAUQIR NIAZI, AND PEDRO QUIJADA

Potential Plaintiff-Intervenors,

v.

REBECCA ADDUCCI, *et al.*,

Respondents-Defendants.

Case No. 5:20-cv-10829-JEL-APP

DECLARATION OF JOSEPH SALVATERA

I, Joseph Salvatera, hereby make the following declaration with respect to the above-captioned matter:

1. I am a Supervisory Detention and Deportation Officer with the Detroit Field

Office of Enforcement and Removal Operations (ERO), U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS). I have been employed with ICE, ERO since November 2008 and in my current position since September 2019. In my current position, my duties include oversight of the detention and removal process for individuals in ICE custody within the Detroit Field Office area of responsibility.

2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.

3. I provide this declaration to verify that two of the petitioners in this case, Pedro Quijada and Angel De La Cruz Lorenzo were removed from the United States via ICE charter missions to El Salvador on Friday, July 3, 2020 and Guatemala on Wednesday, July 1, 2020.

4. A true and accurate copy of the executed Warrant of Removal/Departure (Form I-205) for each of these two petitioners is attached hereto and incorporated herein as Exhibit A.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and based on information obtained from other individuals employed by ICE.

Executed on this 13th day of July, 2020,

Joseph Salvatera
Supervisory Detention and Deportation Officer

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

WARRANT OF REMOVAL/DEPORTATION

Subject ID: [redacted]
File No: [redacted]
Event No: DET2004000205
Date: June 29, 2020

To any immigration officer of the United States Department of Homeland Security:

PEDRO ALFONSO QUIJADA AKA: QUIJADA-URQUILLA, PEDRO
(Full name of alien)

who entered the United States at unknown, unknown (Place of entry) on Unknown Date (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- [X] an immigration judge in exclusion, deportation, or removal proceedings
- [ ] a designated official
- [ ] the Board of Immigration Appeals
- [ ] a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:
212a6Ai;

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:
Salaries and Expenses, Department of Homeland Security 2020

REBECCA ADDUCCI
(Signature of immigration officer)

Field Office Director
(Title of immigration officer)

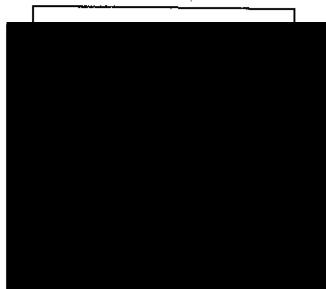
June 17, 2020, Detroit, MI
(Date and office location)

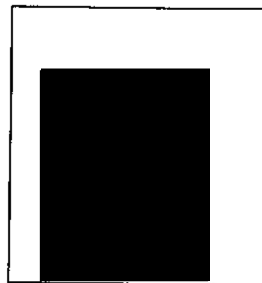
Alien No: [redacted]

ompleted by immigration officer executing the warrant: Name of alien being removed:

EDRO ALFONSO QUIJADA

Port, date, and manner of removal: AEX 7/3/20 ICE AIR


Photograph of alien removed


Right index fingerprint of alien removed

Refused
(Signature of alien being fingerprinted)

(Signature and title of immigration officer taking print)

Departure witnessed by: DO/ASF
(Signature and title of immigration officer)

If actual departure is not witnessed, fully identify source or means of verification of departure:

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If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here. ☐

Departure Verified by: _______________
(Signature and title of immigration officer)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

WARNING TO ALIEN ORDERED REMOVED OR DEPORTED

Event No: DET2004000205 **A-File Number:** [redacted]

Date: 06/29/2020

Alien's name: PEDRO ALFONSO QUIJADA AKA: QUIJADA-URQUILLA, PEDRO

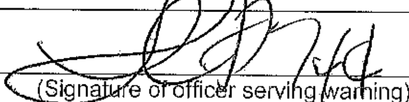
In accordance with the provisions of section 212(a)(9) of the Immigration and Nationality Act (Act), you are prohibited from entering, attempting to enter, or being in the United States:

- [ ] For a period of 5 years from the date of your departure from the United States because you have been found deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated upon your arrival in the United States as a returning lawful permanent resident.
- [X] For a period of 10 years from the date of your departure from the United States because you have been found:
  - [ ] deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.
  - [X] inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated as a result of your having been present in the United States without admission or parole.
  - [ ] deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.
  - [ ] deportable under section 237 of the Act and ordered removed from the United States in accordance with section 238 of the Act by a judge of a United States district court, or a magistrate of a United States magistrate court.
- [ ] For a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported, or removed from the United States, you have been found:
  - [ ] inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.
  - [ ] deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.
  - [ ] deportable under section 237 of the Act and ordered removed from the United States in proceedings under section 238 of the Act.
  - [ ] deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.
  - [ ] to have reentered the United States illegally and have had the prior order reinstated under section 241(a)(5) of the Act.
- [ ] At any time because you have been found inadmissible or excludable under section 212 of the Act, or deportable under section 241 or 237 of the Act, and ordered deported or removed from the United States, and you have been convicted of a crime designated as an aggravated felony, as defined under section 101(a)(43) of the Act.

After your removal has been effected you must request and obtain permission from the Secretary of Homeland Security to reapply for admission to the United States during the period indicated. You must obtain such permission before commencing your travel to the United States. Application forms for requesting permission to reapply for admission may be obtained by contacting any United States Consulate or U.S. Department of Homeland Security office. Refer to the above file number when requesting forms or information.

WARNING FOR ALL REMOVED ALIENS: It is a crime under Title 8 United States Code, Section 1326, for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States without the Secretary of Homeland Security's express consent. Depending on the circumstances of the removal, conviction for this crime can result in imprisonment of a period of from 2 to 20 years and/or a fine up to $250,000.00.

SPECIAL NOTICE FOR SEX OFFENDERS: Federal Law requires a convicted sex offender, including an alien who has been removed from or otherwise departed the United States and subsequently returns, to register in each jurisdiction in the United States in which he or she resides, is employed, or is a student. Violation of this requirement can result in prosecution and imprisonment for up to 10 years under Title 18 United States Code, Section 2250.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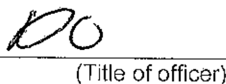

(Title of officer)

(Location of DHS office)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

WARRANT OF REMOVAL/DEPORTATION

Subject ID: [redacted]
File No: [redacted]
Event No: DET2005000053
Date: May 8, 2020

To any immigration officer of the United States Department of Homeland Security:

ANGEL DE LA CRUZ LORENZO AKA: HERNANDEZ, ANDRES DELACRUZ; GOMEZ Machuca, Randay
(Full name of alien)

who entered the United States at Unknown Place (Place of entry) on Unknown Date (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- [ ] an immigration judge in exclusion, deportation, or removal proceedings
- [x] a designated official
- [ ] the Board of Immigration Appeals
- [ ] a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:
241 (a)(5) of the INA;

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:
Salaries and Expenses, Department of Homeland Security 2020

REBECCA ADDUCCI
(Signature of immigration officer)

Field Office Director
(Title of immigration officer)

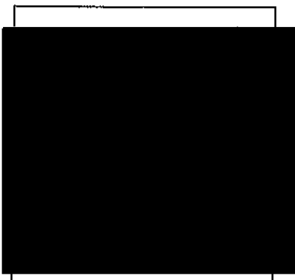
May 8, 2020, Detroit, Michigan
(Date and office location)

Alien No: [redacted]

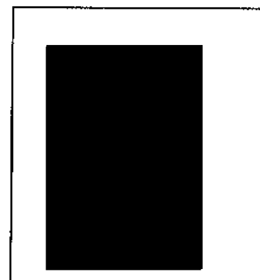
To be completed by immigration officer executing the warrant: Name of alien being removed:

ANGEL DE LA CRUZ LORENZO

Port, date, and manner of removal: JUL 0 1 2020 ASF ICE AIR OPS



Photograph of alien removed



Right index fingerprint of alien removed

ANGEL de la Cruz LORENZO

(Signature of alien being fingerprinted)

B. WEHLING 00

(Signature and title of immigration officer taking print)

Departure witnessed by: Ernest Doyal D.O. ASF

(Signature and title of immigration officer)

Ernest Doyal, D.O. ASF

If actual departure is not witnessed, fully identify source or means of verification of departure:

If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here. ☐

Departure Verified by: M. 8985 LOPEZ DEPORTATION OFFICER

(Signature and title of immigration officer)