UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*,

Plaintiffs,

- against -

IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

ECF Case
07 Civ. 8224 (JGK) (FM)

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF

PREET BHARARA
United States Attorney for
the Southern District of New York
Attorney for Defendants
86 Chambers Street
New York, New York 10007
Tel: (212) 637-2800

DAVID BOBER
SHANE CARGO
BRANDON COWART
KRISTIN L. VASSALLO
Assistant United States Attorneys
– Of Counsel –

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Preliminary Statement

This action arises from the efforts of U.S. Immigration and Customs Enforcement ("ICE") to remove illegal aliens from the United States—in particular, gang members and aliens who illegally remained in the country after disregarding removal orders. Under national enforcement initiatives, two of ICE's New York regional offices conducted operations to apprehend these aliens by obtaining consent to enter residences where officers and agents believed they would be found. Under the Immigration and Nationality Act ("INA"), ICE officers and agents may arrest any person whom they believe is in the country illegally, be it the target of an operation or someone they encounter while searching for the target.

The 25 plaintiffs allege that ICE officers and agents entered their residences without consent in violation of the Fourth Amendment, and that ICE unconstitutionally targets Latinos in violation of the Equal Protection Clause of the Fifth Amendment. Plaintiffs seek monetary compensation from the United States under the Federal Tort Claims Act as well as from 68 individual defendants under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). Plaintiffs also seek "the issuance of a permanent injunction prohibiting Defendants from engaging in the unlawful and abusive practices alleged" in the fourth amended complaint, dated December 21, 2009 ("Cmplt."). See Cmplt. ¶ 466.

This Court should dismiss plaintiffs' claim for injunctive relief. Because plaintiffs lack standing to obtain injunctive relief, this Court is without subject-matter jurisdiction, and the injunction claims should be dismissed under Fed. R. Civ. P. 12(b)(1). In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court stated that "[a]bstract injury is not enough" to obtain injunctive relief, and that even where a constitutional violation has occurred in the past, for a plaintiff to have standing, the threat of a recurrence must be "real and immediate," not "conjectural or hypothetical." Id. 101-02 (citations and internal quotations marks omitted). A

plaintiff's fear that unconstitutional conduct will be repeated is insufficient to establish the requisite likelihood of future injury. In applying Lyons, the Second Circuit has recognized that to establish standing to enjoin law enforcement practices, a plaintiff must satisfy a dual burden: he "must demonstrate both a likelihood of future harm and the existence of an official policy or its equivalent." Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004) (emphasis in original).

Plaintiffs cannot meet either requirement. Plaintiffs admit that ICE has not returned to any of their homes since the incidents alleged in the complaint. Nor, despite amending their complaint four times, have they made any factual allegations suggesting that agents are likely to return. Thus, plaintiffs' alleged fear of a future unconstitutional encounter is no less speculative than the plaintiff's claim in Lyons.

Plaintiffs' lack of standing is underscored by the fact that, notwithstanding the extensive discovery undertaken in this case, including production of 65,000 pages of documents and 75 total depositions, plaintiffs still cannot point to any policy requiring or even permitting officers and agents to enter homes without consent. To the contrary, ICE's written policies require officers and agents to obtain consent to enter homes in the absence of a search warrant. And more than 10,000 pages of training materials, together with the testimony of 36 defendants plaintiffs already have deposed, demonstrate that ICE conveyed these policies to its employees, and that ICE officers and agents understand that they are required to act in conformity with the policies and training that require them to obtain consent. Thus, even if plaintiffs could show that a particular employee did not understand or did not follow ICE's policies and practices concerning consensual operations, that would not establish that plaintiffs face an immediate, non-speculative fear of future constitutional violations.

Second, plaintiffs' injunction claim should also be dismissed under Rules 12(b)(6) and Rule 12(c). Because plaintiffs have not demonstrated a likelihood of future constitutional violations, plaintiffs cannot plausibly assert that ICE has an official policy, or an unofficial practice, of authorizing or requiring its agents to enter homes without consent. And, in any event, because monetary compensation is available for any past or future violations, plaintiffs cannot establish that they will be irreparably harmed absent an injunction.

Finally, the Court should decide the Government's motion without permitting additional discovery. More than two-and-a-half years ago, in October 2007, the Court relied on Lyons to deny plaintiffs' application for a TRO, concluding that plaintiffs could not demonstrate a reasonable likelihood of suffering future, irreparable harm. Shortly thereafter, the Government filed a motion to dismiss for lack of standing. The Court adjourned the motion—then ultimately denied it without prejudice—based at least in part on plaintiffs' representations that the scope of Bivens- and injunction-related discovery would be coterminous. That has not been the case, as plaintiffs' injunction claim has been primarily driving discovery to date; but more importantly, discovery has only validated the Court's initial conclusion that plaintiffs are not entitled to equitable relief. Thus, the Court should reject plaintiffs' assertion that this motion is premature.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Organization and Responsibilities of ICE

Situated within the Department of Homeland Security, ICE was created from elements of several legacy agencies, including the former U.S. Customs Service and the former Immigration and Naturalization Service. See Declaration of Darren Williams, dated Dec. 5, 2007 ("Williams Decl.") ¶ 3. With more than 15,000 employees, ICE is DHS's largest investigative bureau, and it is the federal government's second largest investigative agency. In addition to enforcing federal

immigration law, ICE targets the people, money, and materials supporting criminal and terrorist activities. Id.

ICE has four law enforcement divisions, two of which are relevant here: ICE's Office of Investigations ("OI"), and its Office of Detention and Removal Operations ("DRO"). Id. ¶ 4. DRO promotes public safety and national security by apprehending and removing illegal aliens from the United States, especially those who have violated removal orders. Id. OI is ICE's division of criminal investigations, and it monitors a wide range of activities relating to the illegal movement of people and goods in and out of the United States. See Declaration of Jeffrey Knopf, dated Dec. 7, 2007 ("Knopf Decl.") ¶ 3. OI investigates national security threats, financial and smuggling violations, financial crimes, human trafficking, narcotics smuggling, child pornography and exploitation, immigration fraud, and other immigration violations. Id.

B. Statutory Powers of ICE Employees

Under Section 287 of the INA, 8 U.S.C. § 1357, and its implementing regulations, ICE officers and agents may, without a warrant, "arrest any alien in the United States[ ] if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [relating to the admission, exclusion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2).

An alien arrested without a warrant must be examined by an immigration officer to determine whether "there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws." 8 C.F.R. §§ 287.3(a), (b). If such evidence exists, the officer issues a "Notice to Appear," see 8 C.F.R. §§ 239.1, 1003.15, which vests the immigration court with jurisdiction and initiates removal proceedings against the alien. See 8 C.F.R. § 1003.14.

Once an alien becomes subject to a final removal order, specified ICE employees may issue a warrant of removal. See 8 C.F.R. § 241.2(a). The warrant of removal authorizes the arrest of the subject of the warrant, but it does not grant authority to enter residences without consent.

C. The Allegations of the Complaint

Plaintiffs live or lived in Suffolk, Nassau, and Westchester counties, and include persons of unspecified status, lawful permanent residents, and United States citizens. The complaint alleges that in eight separate incidents—four that were conducted by DRO in February, March, and April of 2007, and four that were conducted by OI during the week of September 24, 2007—ICE officers and agents entered plaintiffs' residences without consent. According to the complaint, the alleged illegal entries were "part of a broad pattern and practice, if not official policy of ICE." Cmplt. ¶ 426.

The complaint alleges the following about the operations:

On the morning of February 20, 2007, several ICE officers arrived at the East Hampton home of five plaintiffs. Id. ¶¶ 23, 190-241. Someone answered the door, but ICE officers entered without consent, searched without permission, and detained family members living there. Id. On the same morning, ICE officers went to the East Hampton home of another plaintiff, forcibly entered her home, and while arresting her, exacerbated a pre-existing injury to her arm. Id. ¶¶ 25, 242-85.

On March 19, 2007, ICE officers "burst into" several rooms within a large boarding house in Mount Kisco, New York, id. ¶¶ 311, 313, and arrested many individuals who were living there, including three plaintiffs, id. ¶¶ 29, 307-23. A similar incident allegedly occurred on April 18, 2007, at a rooming house in Riverhead, New York, when ICE officers "burst into" five plaintiffs' bedrooms and later arrested them. Id. ¶¶ 27, 286-306.

On the morning of September 24, 2007, ICE agents arrived at the Westbury home of three plaintiffs and entered when a minor opened the door. Id. ¶¶ 31, 324-42. The agents entered another Westbury home the same morning, and one agent pointed a gun at a plaintiff's chest. Id. ¶¶ 33, 343-53.

On September 27, 2007, ICE agents went to two homes in Huntington Station, New York. At one home, a team of ICE agents and assisting police officers intimidated a plaintiff, who was outside near his vehicle, then "slipped past" another plaintiff and searched the inside of the house. Id. ¶¶ 35, 354-376. At the other house, ICE agents "pushed past" a plaintiff, detained other plaintiffs and their relatives, and entered another plaintiff's room without waking her. Id. ¶¶ 37-38, 377-418. According to the complaint, ICE agents had been to the same location, looking for the same person, in August 2006. Id.

In addition to seeking equitable relief and Bivens damages, the complaint asserts eight claims under the FTCA. Id. ¶¶ 490-543. As to injunctive relief, plaintiffs seek an order "permanently enjoining" ICE from "deploying groups of armed agents" to enter and search Latinos' homes, and to search and seize Latinos. See id. 135-37 (prayer for relief). They also seek an order requiring ICE to (i) perform "adequate" investigations, (ii) "maintain and update" internal databases, (iii) "design and maintain adequate training courses," and (iv) "implement corrective measures." Id. 137-38.

The initial complaint also sought certification of a class composed of Latinos or those who associate with Latinos in the New York metropolitan area. See Complaint, dated Sept. 20, 2007, ¶ 205. The fourth amended complaint narrows the class to persons "who have been subjected to and/or are at imminent risk of home raids" because they are Latinos and reside in the New York metropolitan area. See Cmplt. ¶ 443.

D. Background Concerning the Enforcement Operations at Issue

1. Early 2007 Operations Targeting Fugitives and Other Aliens

The February, March, and April 2007 operations were carried out by DRO under national enforcement operations known as Operation Return to Sender and Operation Cross Check. See Williams Decl. ¶ 5. Under Operation Return to Sender, DRO seeks to apprehend criminal and non-criminal aliens who have disregarded removal orders, often referred to as fugitive aliens or alien absconders. Id. ¶ 6.

In February, March, and April 2007, DRO's New York Field Office locally implemented Operation Return to Sender. Id. ¶ 8. DRO officers first identified residences where they believed they would find the targets of these operations. They then approached the residences and, if appropriate, asked for consent to enter. Id. ¶ 10.

Under DRO's "knock-and-talk" practices, officers knock on the door and identify themselves as either ICE officers or police. If they wish to enter, they must seek and obtain consent, and if they wish to search the premises, they must obtain separate consent to search. Id. ¶ 11. DRO officers are instructed that they must abide by the scope of the consent and that consent can be revoked at any time. Id. If officers encounter other, non-target aliens whom they believe are in the United States illegally, they can arrest those aliens without a warrant.

DRO arrested 213 aliens from 16 countries in the February-March operation and 170 aliens from 25 countries in the March-April operation. Id. ¶ 13.

Like Operation Return to Sender, Operation Cross Check is a national program administered by DRO, but it targets specific alien populations, such as aliens working in certain industries. Id. ¶ 14. The New York Field Office conducted Operation Cross Check locally in April 2007, and the goal was to apprehend criminal aliens—again, employing knock-and-talk

conversations—who had been convicted of violent crimes. Id. ¶¶ 14-15. During the local operation, DRO arrested 131 aliens from 28 countries. Id. ¶ 16.

2. September 2007 Operations Targeting Alien Gang Members

The September 2007 operations were carried out under a national enforcement initiative known as Operation Community Shield. See Knopf Decl. ¶ 4. Under Operation Community Shield, ICE partnered with federal, state, and local law enforcement agencies, and together they targeted gang members for criminal prosecution or removal from the United States. Id. ¶ 5.

The local implementation of Operation Community Shield was called Operation Surge, and OI's local office in Long Island, New York, conducted a Surge operation in September 2007 in Nassau and Suffolk counties. Id. ¶¶ 1, 6. ICE worked with local police departments to identify potential targets, which included members of MS-13 and other gangs. Id. ¶ 7. Approximately 160 ICE agents participated, with the assistance of many law enforcement officials from Nassau and Suffolk counties. ICE did not obtain judicial warrants to enter or search because the operations were to be conducted using consensual "knock-and-talk" procedures. During the operation, ICE arrested 195 aliens from nine countries.

E. ICE Policies Governing Home Searches

As noted, these operations were to be carried out based on consent. See Williams Decl. ¶¶ 10-11, 15, 17; Knopf Decl. ¶¶ 8-9, 12. Several ICE manuals set forth the policies ICE officers and agents were required to follow. See Williams Decl. ¶ 17-21; Knopf Decl. ¶ 12-19.

1. Applicable DRO Policies

The conduct of DRO officers is generally governed by the Detention and Removal Operations Policy and Procedure Manual (the "DROPPM"). See Williams Decl. ¶ 17. Chapter 19 of the DROPPM sets forth policies governing DRO's Fugitive Operations Program, including Operation Return to Sender and Operation Cross Check. Id.

Chapter 19 requires DRO officers to obtain informed consent before entering a residence. Id. ¶ 19. The manual states:

> Warrants of Deportation or Removal are administrative rather than criminal, and do[ ] not grant the authority to breach doors. Thus informed consent must be obtained from the occupant of the residence prior to entering.

See Williams Decl. ¶ 19; see also DROPPM (Williams Decl., Ex. A) US 000016 and US 000044 (same) (undated addition to manual). The manual emphasizes that absent a judicial search warrant, officers may enter a residence only after obtaining authorized consent. See Williams Decl. ¶ 21. In a provision addressing "arrest locations," the manual dictates:

> Officers can knock on a door and request to speak with the occupants of the house without first obtaining a search warrant. However, in order to enter a residence, ***someone who has authority to do so must grant informed consent, unless a court-approved search warrant is obtained in advance.***

Id.; see also DROPPM (Williams Decl., Ex. B) US 000018 (emphasis in original) and US 000047 (same) (undated addition to manual).[1]

2. Applicable OI Policies

The DROPPM does not apply to OI agents, but their conduct is similarly governed by two manuals addressing searches and seizures: (i) Chapter 42 of the Special Agent's Handbook; and (ii) the Law of Arrest, Search and Seizure Manual, commonly referred to as the M-69. See Knopf Decl. ¶ 12. Both manuals require that agents obtain consent to enter if they do not have judicial search warrants. Id. ¶ 14. Chapter 42 states:

> Voluntary and effective consent to search obviates the need for a warrant or probable cause. To justify a search without a warrant on this ground, there must be a violitional [*sic*], duress-free permission to enter and make the kind of search agreed to.

[1] These provisions remain in force and have not been modified or superseded since the Williams Declaration was submitted in 2007. See Supplemental Declaration of Darren Williams, dated May 19, 2010 ("Williams Supp. Decl.") ¶ 2.

Id.; see also SA Handbook (Knopf Decl., Ex. 1) US 000818. The chapter explains that "[e]ffective consent to a warrantless search may be given either by the suspect or by any third party who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected." Knopf Decl. ¶ 15; see also SA Handbook (Knopf Decl., Ex. 1) US 000819.

Chapter III of the M-69, entitled "Searches and Seizures," likewise informs agents that they may search a residence without a warrant or probable cause only if they obtain the voluntary consent of "the person in control of the premises." Knopf Decl. ¶ 16; see also M-69 (Knopf Decl., Ex. 2) US 000747. The provision further explains that whether consent is voluntary depends on the totality of the circumstances, and it provides illustrative examples. See Knopf Decl. ¶ 17; see also M-69 (Knopf Decl., Ex. 2) US 000747-48. The M-69 instructs agents that consent may only be effectively given "by the person with the primary right to occupy the premises or a third party who possesses common authority over, or other sufficient relationship to, the premises." See Knopf Decl. ¶ 18; see also M-69 (Knopf Decl., Ex. 2) US 000748. Thus, the manual explains, "a landlord or hotel owner may not give valid consent to search the rented premises." Id. The manual also notes that a "person may revoke his or her consent to search at any time." Id. The M-69 also states that agents may conduct a protective sweep only if they have "a reasonable suspicion based on specific articulable facts" that the residence "harbors an individual who presents a danger to those on the scene." Knopf Decl. ¶ 19; see also M-69 (Knopf Decl., Ex. 2) US 000747.[2]

[2] These provisions remain in force and have not been modified or superseded since the Knopf Declaration was submitted in 2007. See Supplemental Declaration of Jeffrey Knopf, dated May 19, 2010 ("Knopf Supp. Decl.) ¶ 2.

Although Chapter 42 and the M-69 refer to their contents as "guidelines," both manuals are mandatory. Knopf Decl. ¶ 13. OI agents must abide by them during enforcement operations, and they are not free to develop conflicting alternative practices. Id. Since before 2007, Chapter 42 of the Special Agent's Handbook has been available to OI agents on ICE's intranet. Id. The M-69 is available to all ICE employees on ICE's intranet. Id.

F. Early Proceedings and the Government's Initial Motion to Dismiss

Plaintiffs filed this action on September 20, 2007.[3] On October 5, 2007, plaintiffs served an order to show cause seeking a temporary restraining order prohibiting, among other things, ICE from entering or searching any home, or seeking consent to enter any home, without a judicial search warrant.

Following two hearings, the Court denied the TRO Motion on October 9, 2007, on the basis that there was "no reasonable showing of immediate and irreparable injury." See Transcript of Oct. 9, 2007 Argument ("Oct. 9, 2007 Tr.") (Cargo Decl., Ex. A) 55. The Court reasoned that under Lyons, the same question that governs a plaintiff's entitlement to injunctive relief—whether he or she can establish "future substantial and irreparable injury which cannot be remedied at law"—also governs the plaintiff's standing to sue for such relief. Id. 56. The Court

[3] The first complaint concerned only DRO operations, but plaintiffs amended their complaint on October 4, 2007, to incorporate allegations concerning the OI operations conducted on Long Island in September 2007. On March 6, 2009, plaintiffs filed a third amended complaint, which added an equal protection claim. On December 14, 2009, over the Government's objection, the Court granted leave to amend the complaint a fourth time to add as Bivens defendants four additional ICE agents, two additional supervisors, two high-level former directors (John Torres and Marcy Forman), and two former agency heads (Michael Chertoff and Julie Myers). See Docket No. 199 (Order granting leave to amend). Plaintiffs filed the fourth amended complaint on December 21, 2009, see Docket No. 202, and ICE answered on April 30, 2010, see Docket No. 230. Although the high-ranking officials have moved to dismiss the complaint (in its entirety) as against them, the Government is not moving to dismiss the complaint's equal protection claims as against all defendants.

accordingly held that, because there was no evidence that the complained-of home entries will again "be directed against these plaintiffs," plaintiffs failed to show a likelihood of success on the merits. Id. The Court distinguished DeShawn E. v. Safir, 156 F.3d 340 (2d Cir. 1998), on the ground that in that case, the fruits of the police department's allegedly unconstitutional interrogations were being used in criminal delinquency proceedings in violation of plaintiffs' constitutional rights. See Oct. 9, 2007 Tr. 56. Finally, the court noted that the relief sought in the TRO Motion was extraordinary because it sought to bar ICE from conducting "what is otherwise a constitutional search based on consent." Id.

On October 17, 2007, plaintiffs served an order to show cause seeking expedited discovery, and the Court held a conference on October 22, 2007. Although the Government asserted that obtaining dismissal of the injunction claim would significantly limit the scope of discovery, see Transcript of Oct. 22, 2007 Hearing (Cargo Decl., Ex. B) 15, 24, the Court stated that because Bivens-related discovery would proceed nonetheless, deciding the Government's motion to dismiss would not alter discovery, id. 15-17 ("[A]ll of that discovery is coming down the road in any event, right? All of that presumably is going to come out not too long in the future."). However, the Court suggested that the parties attempt to settle the order to show cause by ICE providing plaintiffs with "any policies, practices, procedures, [and] guidelines that apply to the searches at issue in the complaint." Id. 33. In response, in November 2007, ICE produced more than 800 pages of policy and training materials relating to warrantless searches and administrative arrests.

On December 7, 2007, the Government served a motion to dismiss for lack of standing. Instead of filing an opposition, plaintiffs requested adjournment of the motion pending additional discovery. See letter from Gennardo to Judge Koeltl, dated Dec. 27, 2007 (Cargo Decl.,

Ex. C) 1. Plaintiffs argued that "[a]n implicit or tacitly condoned or authorized policy of misconduct may establish a 'likelihood of future harm,' and thus suffice to confer standing." Id. 5. Plaintiffs contended that they could obtain this discovery "through depositions of the declarants; depositions of the agents in question who conducted the raids; and the provision of documentary evidence, such as emails and memoranda, relating to ICE's preparation for the raids in question." Id. 6.

Defendants responded to plaintiffs' letter on January 7, 2008, asserting that there was no legal basis for allowing plaintiffs to take discovery on the standing issue absent a meritorious cross-motion under Fed. R. Civ. P. 56(f). See Jan. 7, 2008, letter from Wolstein to Judge Koeltl (Cargo Decl., Ex. D) 3-4. The Government noted that plaintiffs had not submitted an affidavit showing what facts they were seeking or how such facts would create a genuine issue of material of fact with respect to plaintiffs' standing.

On January 15, 2008, the Court held a hearing to address the settlement of plaintiffs' expedited-discovery motion, which was filed on October 17, 2007, but later narrowed following the Government's production of policy documents in November 2007. At the hearing, plaintiffs argued that "there's no way any court could decide the [standing] motion the way the government has set it up without full and fair discovery." See Transcript of Jan. 15, 2008 Hearing ("Jan. 15, 2008 Tr.") (Cargo Decl., Ex. E) 16. The plaintiffs also reiterated their position that "when you get to the bottom line, we don't see any distinction between the discovery that is relative to our injunction relief claims versus our Bivens claim." Id. 10; see also id. ("They so overlap that there is no distinction.").

On July 30, 2008, the Court denied the Government's motion to dismiss as moot in light of the filing of the second amended complaint. On August 29, 2008, the Government wrote to

inform the Court that it intended to renew its motion and was prepared to do so at that time. See Aug. 29, 2008, letter from Eshkenazi to Judge Koeltl (Cargo Decl., Ex. F) 1. The Government pointed out that it had already produced approximately 5,000 pages of documents, including policy and procedure manuals relevant to plaintiffs' claim for injunctive relief, and that "plaintiffs' bases for seeking injunctive relief have become more hypothetical and conjectural with the passage of time." Id.

G. Discovery Taken in the Case

As noted above, the Government made its first production of documents—nearly 1,000 pages of policy materials—on November 9, 2007, in connection with its motion to dismiss. The Government produced additional documents starting in June 2008, and as of the date of this motion, the Government has produced more than 65,000 pages of documents, including approximately 12,000 pages of training materials, in response to six sets of document requests containing more than 150 separate demands. In addition to producing unredacted versions of the policy materials that were produced in November 2007,[4] the Government has produced additional documents concerning consent-based operations, including a 200-page lesson plan concerning the ICE academy's Fourth Amendment training program (US22378-22597), and hundreds of pages of training materials relating to training that employees receive at the Federal Law Enforcement Training Center ("FLETC") concerning search and seizure (US10360-10527; US15716-15877), the Fourth Amendment (US10686-10794), constitutional law (US10891-10930), and building entry and search techniques (US19711-19726).

[4] These documents were only minimally redacted. Out of more than 850 pages, sentences or portions of sentences of just seven pages were withheld on the basis of the law enforcement privilege.

In addition, plaintiffs have now deposed 36 ICE officers and agents, including supervisors. At these depositions, plaintiffs have questioned each ICE defendant about ICE's policies and procedures, the deponents' understanding of these policies and procedures, and whether there is a practice of disregarding ICE's policies and practices. Plaintiffs have asked similar questions of 15 third-party witnesses from assisting local law enforcement departments.

ARGUMENT

POINT I

PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION

A. The Standard for Dismissal Under Federal Rule of Civil Procedure 12(b)(1)

"'A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.'" Luckett v. Bure, 290 F.3d 493, 496 (2d Cir. 2002) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)). Because the issue of the Court's jurisdiction is "the first and fundamental question," id. 94, a motion questioning the court's subject-matter jurisdiction must be considered before all other challenges. See Bell v. Hood, 327 U.S. 678, 682 (1946). If a litigant "lacks standing" to assert a claim, then the court "lack[s] subject matter jurisdiction to entertain a request for such relief." Shain, 356 F.3d at 215 (citing Whitmore v. Arkansas, 495 U.S. 149, 154-55 (1990)).

The plaintiff bears the burden of establishing, by a preponderance of the evidence, that the Court has subject-matter jurisdiction over his claims. See Makarova, 201 F.3d at 113 (citing

Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)). In considering a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider evidence outside of the pleadings without converting the motion to one for summary judgment. See id.; see also Luckett, 290 F.3d at 496-97; Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). Also, the court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Whitmore, 495 U.S. at 155-56.

B. The Constitutional Requirement of Standing

1. General Requirements

Article III of the constitution limits federal court jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. James Madison wrote that the judicial sphere is "described by landmarks" that are "less uncertain" than those limiting executive and legislative power, see THE FEDERALIST NO. 48, at 384 (James Madison) (John Hamilton ed., 1998), and the Supreme Court has stated that "[o]ne of those landmarks . . . is the doctrine of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). According to Lujan, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Id. (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). Standing poses the question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975).

The Supreme Court has established three "irreducible constitutional" elements of standing. See Lujan, 504 U.S. at 560. First, the plaintiff must have suffered a concrete and particularized "injury in fact"; that is, an injury that is actual or imminent, not conjectural or hypothetical. See id. (internal citations and quotation marks omitted). Second, the plaintiff's injury must be fairly traceable to the defendant's action, not caused by some third party not before the court. See id. (citation and quotation marks omitted). Third, it must be likely—not

merely speculative—that the injury will be redressed by a favorable decision. See id. 561 (citation and quotations marks omitted).

The Supreme Court has stated that "[t]he party invoking federal jurisdiction bears the burden of establishing these elements," and the elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." Id. (citations omitted). Therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. (citations omitted).

While past injury creates standing to seek damages, a litigant seeking declaratory or injunctive relief "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Deshawn, 156 F.3d at 344 (citing Lyons, 461 U.S. at 105-06); see also Lujan, 504 U.S. at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . .") (quotations omitted); Shain, 356 F.3d at 215 ("the fact that such practices had been used in the past did not translate into a real and immediate threat of future injury").

Finally, the standing inquiry must be addressed to the named plaintiffs, a requirement that cannot be circumvented by alleging that a class as a whole faces a threat of imminent injury. See O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.") (citations omitted); Miller v. Silbermann, 951 F. Supp. 485, 490 (S.D.N.Y. 1997) ("Moreover, the fact that plaintiffs purport to represent a broader class 'adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they

personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong . . . .'") (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) (quotation to Warth, 422 U.S. at 502, omitted)); see also Doe v. Blum, 729 F.2d 186, 190 n.4 (2d Cir. 1984) (satisfaction of standing's injury requirement must be determined with respect to named plaintiffs).

2. The Supreme Court's Lyons Decision and its Second Circuit Progeny

The seminal case concerning standing to seek injunctive relief is the Supreme Court's decision in Lyons. See Shain, 356 F.3d at 215 ("City of Los Angeles v. Lyons occupies much of this territory."). In Lyons, the plaintiff alleged that he had been stopped for a traffic violation, and that without justification or provocation, Los Angeles police officers applied a "chokehold," injuring him and rendering him unconscious. See Lyons, 461 U.S. at 97-98. In addition to damages, Lyons sought a preliminary and permanent injunction barring the police department's use of control chokeholds, which had killed 16 people in Los Angeles between 1975 and 1982. See id. at 115 (Marshall, J., dissenting).

The Court began its analysis by noting that "[i]t goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." Id. 101 (citations omitted). "Abstract injury is not enough," the Court stated, and the plaintiff "must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Id. 101-02 (citations omitted).

The fact that Lyons may have been illegally choked in the past, the Court concluded, "while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would

again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." Id. 105. Rather, to establish an actual controversy, and therefore standing, Lyons would not only have to allege that he would have a future encounter with the police, but he would also have to make the "incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or (2) that the City ordered or authorized police officers to act in such a manner." Id. 106 (emphasis in original).

Observing that five months had passed without incident between Lyons' injury and the filing of the complaint, the Court rejected the notion that the "odds" that Lyons would be choked again "are sufficient to make out a federal case for equitable relief." Id. 108. The Court noted that "[n]othing in [the Police Department's] policy . . . suggests that the chokeholds, or other kinds of force for that matter, are authorized absent some resistance or other provocation by the arrestee or other suspect." Id. 110. As a result, the Court concluded, "Lyons is no more entitled to an injunction that any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." Id. 111 (citations omitted).

The Second Circuit has applied Lyons to requests for injunctive relief in three important cases: Curtis v. City of New Haven, 726 F.2d 65 (2d Cir. 1984); Deshawn, supra 17; and Shain, supra 15. In Curtis, the plaintiffs sued the City of New Haven and named police officers for damages and injunctive relief arising from the officers' negligent use of mace. Curtis, 726 F.2d at 65-66. Following separate jury trials on the damages claims, the district court issued an

injunction prohibiting the use of mace except under circumstances set forth in international guidelines. See id. 66.

The Supreme Court decided Lyons six days after the district court issued its decision in Curtis, see id. 67, and the Second Circuit held that under Lyons, "the district court erred in concluding that plaintiffs had standing to obtain injunctive relief." Id. 69. First, the Court reasoned that "[p]laintiffs do not make, in the words of the [Supreme] Court, the 'incredible assertion' that all City police officers always assault people they encounter with mace, or that the City authorizes its police officers to act in such a manner." Id. 68 (quoting Lyons) (emphasis in original). In fact, because the police department's policy did not authorize officers to use mace offensively, the officers "appear to have violated" the policy. Id.

Second, the Court noted that under Lyons, "the critical inquiry is the likelihood that these plaintiffs will again be illegally assaulted with mace." Id. The Court observed that the plaintiffs had not alleged that they would be assaulted with mace without provocation and that there was "no evidence that this has happened since plaintiffs were assaulted in 1977." Id.

In 1998, the Second Circuit concluded in Deshawn, 156 F.3d at 344-45, that Lyons did not preclude the plaintiffs from seeking equitable relief against the New York Police Department. Under New York law, after a juvenile is arrested, he may be released and issued an "appearance ticket," which directs the juvenile to return to family court for a preliminary conference with probation services to determine whether or not delinquency proceedings should be filed. Id. 342-43. In 1995, the NYPD's Family Court Detective Squad began interrogating juveniles when they returned for these conferences. Id. 343. The two named plaintiffs claimed that the Squad unconstitutionally coerced involuntary statements, elicited involuntary waivers of Miranda rights, and questioned juveniles without counsel present. Id. 342. In addition to

seeking declarative and injunctive relief, the plaintiffs moved for class certification, which the district court granted upon the defendants' consent.[5] See id. 344.

After reviewing Lyons, the Second Circuit distinguished the case for three reasons. See id. 344-45. First, "unlike Lyons, the plaintiffs in this case allegedly continue to suffer harm from the challenged conduct because the information secured by the Squad is used to enhance their cases and to obtain plea bargains." Id. 344 (citation omitted). Second, the court stated:

> [T]his case is distinguishable from Lyons because, in Lyons, there was no proof of a pattern of illegality as the police had discretion to decide if they were going to apply a choke hold and there was no formal policy which sanctioned the application of the choke hold. In contrast, the challenged interrogation methods in this case are officially endorsed policies; there is a likelihood of recurring injury because the Squad's activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner. In addition, plaintiffs' complaint alleges that the New York Police Department "has plans to and is in the process of instituting Detective Squads in the Family Court buildings in the Bronx, Brooklyn, and Queens." Thus, unlike Lyons, "the City ordered or authorized [the Squad] to act in such manner," and plaintiffs have standing to seek injunctive relief.

Id. 344-45 (citations omitted) (alterations in Deshawn).[6]

Finally, the Second Circuit applied Lyons to deny a claim for injunctive relief in Shain, 356 F.3d 211. Shain challenged a policy of the Nassau County Correctional Center that "required all admittees to be stripped and searched regardless of the severity of the charge or

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[5] The class was composed of "all children arrested on possible delinquency charges who are summoned to appear at the probation service in a Family Court building and are interrogated by members of the New York City Police Department's Detective Squad." Id. 342.

[6] The court also found that "[u]nlike Lyons, the plaintiffs in this case allege that they, as a certified class, are likely to suffer future interrogations by the Squad," id. 344 (citing Nicacio v. INS, 768 F.2d 1133, 1136-37 (9th Cir. 1985), amended, 797 F.2d 700, 702 (9th Cir. 1985)). In that case, the Ninth Circuit concluded that "[t]he possibility of recurring injury ceases to be speculative when actual repeated incidents are documented," and relied on the district court's finding that "several of the plaintiff class members had actually experienced repeated stops which the court found to have been violative of their rights." Id.

whether the admittee was suspected of concealing a weapon or contraband." Id. 213. After twice being subjected to a cavity search at the Nassau facility, Shain sued Nassau County alleging that its search policy violated the Fourth Amendment. See id. In addition to damages, Shain sought an order enjoining cavity searches, see id., and the district court issued an injunction prohibiting cavity searches "absent a reasonable suspicion that such individual is concealing weapons or other contraband." Id. 214.

On appeal, the Second Circuit acknowledged that Shain "had standing to seek appropriate monetary and declaratory relief" because he "suffered an unconstitutional strip search." Id. 214-15. "But," the court continued, "whether Shain has standing to seek injunctive relief is a different matter." Id. Applying Lyons, the court concluded that Shain lacked standing because he "failed to demonstrate a likelihood of future harm." Id. 216.

First, the court found that Shain did not establish "the likelihood of a future encounter with the Nassau County police likely to result in a subsequent unconstitutional strip search." Id. 215. The court observed that Shain had not been rearrested "in the year between his arrest and his lawsuit," and that even if he were arrested again, "it is entirely conjectural that he would be detained overnight and remanded to the NCCC, as almost all misdemeanor arrestees are released on their own recognizance or on bail." Id. Thus, the "accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective injunctive relief." Id. 216 (citation omitted).

Second, the court stated that Shain's reliance on Deshawn was "misplaced" because Deshawn does not stand for the proposition that "the existence of an official policy, on its own, is sufficient to confer standing to sue on any individual who had previously been subjected to that policy." Id. Rather, "Deshawn E. thus suggests—and Lyons confirms—that a plaintiff

seeking injunctive relief must demonstrate both a likelihood of future harm and the existence of an official policy or its equivalent." Id. (citing Lyons, 461 U.S. at 105-06) (emphasis in original). "Here, Shain has failed to demonstrate a likelihood of future harm and therefore, even if he was subjected to an official policy, he lacks standing to seek injunctive relief." Id.

Although standing determinations necessarily turn on particular facts, several guiding principles have emerged from the case law. First, the alleged future harm must arise from the defendant's continued application of its purportedly illegal policy or procedure, and not be merely the future effect of a past violation. Thus, whereas Lyons' "subjective apprehensions" of being choked in the future did not confer standing because "[t]he emotional consequences of a prior act simply are not a sufficient basis for an injunction," Lyons, 461 U.S. at 107 n.8, one of the reasons the Second Circuit reached a different conclusion in Deshawn was that the plaintiffs "continue[d] to suffer harm from the challenged conduct because the information secured . . . is used to enhance their cases and to obtain plea bargains," Deshawn, 156 F.3d at 344.

Second, the Second Circuit has instructed that the question of whether a claimed future injury is sufficiently real and immediate, or too speculative and conjectural, can in turn be divided into two concrete inquiries—likelihood of future harm and existence of an official policy or its equivalent. See Shain, 356 F.3d at 216. Plaintiffs must demonstrate both to establish standing. Id. In Shain, for example, there was an official policy to conduct cavity searches, but Shain lacked standing because he could not demonstrate a likelihood of again being detained at the prison that followed the policy. See id. 215.

Third, because standing is not merely a pleading requirement, see Lujan, 504 U.S. at 561, the Second Circuit has required plaintiffs to demonstrate—as opposed to merely allege—that they face ongoing unlawful conduct or an imminent threat of future harm. See Deshawn, 156

F.3d at 344-45 (distinguishing Lyons on the basis that there was "no proof of a pattern of illegality," but "the challenged interrogation methods in this case are officially endorsed policies"); Shain, 356 F.3d at 216 (concluding that Shain lacked standing to seek injunctive relief because he "has failed to demonstrate a likelihood of future harm"); see also Whitmore, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III."). Thus, once a plaintiff's standing is challenged based on facts outside the complaint, the plaintiff must prove by a preponderance of the evidence that standing exists. See, e.g, Nash v. City Univ. of New York, No. 02 Civ. 8323 (GBD), 2003 WL 21135720, *1 (S.D.N.Y. May 16, 2003); First Capital Asset Mgmt. Inc. v. Brickellbush, Inc., 218 F. Supp. 2d 369, 378 (S.D.N.Y. 2002) ("plaintiff has the ultimate burden of establishing subject matter jurisdiction . . . by a preponderance of the evidence when the defendant makes a 'factual challenge' on a Rule 12(b)(1) motion") (citations omitted).

3. Under Lyons and its Second Circuit Progeny, Plaintiffs Lack Standing to Obtain Injunctive Relief

In this case, plaintiffs seek "the issuance of a permanent injunction prohibiting Defendants from engaging in the unlawful and abusive practices alleged herein." See Cmplt. ¶ 466. But no matter how plaintiffs cast the relief they seek, they have demonstrated neither a likelihood of future harm nor the existence of an official policy or its equivalent to violate their constitutional rights. Thus, plaintiffs lack standing to obtain injunctive relief.

First, plaintiffs have not demonstrated a likely threat of future harm. At most, some plaintiffs claim that they fear ICE agents will return to their homes and commit constitutional violations. See Cmplt. ¶¶ 340, 351. Yet plaintiffs' counsel conceded at an initial hearing in October 2007 that ICE agents had not returned to any of the plaintiffs' homes. See Oct. 5, 2007 Hearing Transcript (Cargo Decl., Ex. G) 28. In fact, in denying the plaintiffs' motion for a TRO,

this Court found that there was no evidence that the complained-of searches will again "be directed against these plaintiffs." See Oct. 9, 2007 Tr. (Cargo Decl., Ex. A) 56. Now, more than three years have elapsed (in the case of four complaint locations) since the operations detailed in the complaint, and despite amending their complaint four times, plaintiffs have never yet alleged that ICE officers or agents have returned to any of their homes since plaintiffs commenced this action. See Lyons, 461 U.S. at 108 ("We note that five months elapsed between [the date Lyons was choked] and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police."). At bottom, then, plaintiffs' claim of future injury is, if anything, more speculative than Lyons' claim that the police would choke him again, given the amount of time that has passed without further incidents. See Lyons, 461 U.S. at 107 n.8 (the court must look at "the reality of the threat of repeated injury . . . not the plaintiff's subjective apprehensions") (emphasis in original).

Second, plaintiffs have not demonstrated "the existence of an official policy or its equivalent," Shain, 356 F.3d at 216 (citing Lyons, 461 U.S. at 105-06), requiring or even permitting ICE agents to conduct unconstitutional searches. To the contrary, ICE's official policy mandates that agents obtain consent to enter and search a home in the absence of a search warrant. See Williams Decl. ¶¶ 10-11, 15, 17-21; Knopf Decl. ¶¶ 8-9, 12-19. Chapter 19 of the DROPPM, which governed the DRO officers' conduct of Operation Return to Sender and Operation Cross Check and which remains in effect, see Williams Supp. Decl. ¶ 2, explains that warrants of removal are "administrative rather than criminal," and do "not grant the authority to breach doors." DROPPM (Williams Decl., Ex. A) US 000016. The manual instructs that "in order to enter a residence, ***someone who has authority to do so must grant informed consent,***

unless a court-approved search warrant is obtained in advance." DROPPM (Williams Decl., Ex. B) US 000018 (emphasis in original).

Moreover, as explained in the Williams and Knopf declarations, ICE's practice is to obtain consent to enter homes through "knock-and-talk" conversations. See Williams Decl. ¶¶ 10-11, 15; Knopf Decl. ¶¶ 8-9. As the Williams Declaration explains, if someone answers the door where an alien targeted by DRO is believed to reside, officers identify themselves as police or ICE agents and seek consent to enter. See Williams Decl. ¶ 11. If the officers wish to search any part of the premises, they are required to obtain consent to search, and that consent can be revoked at any time during the search. Id.

The manuals that govern the conduct of OI special agents, Chapter 42 of the Special Agent's Handbook and the M-69, are equally plain in stating that consent must be obtained in the absence of a search warrant. See Knopf Decl. ¶¶ 12-19; see also Knopf Supp. Decl. ¶ 2 (these provisions remain in effect). The Special Agent's Handbook states that "[v]oluntary and effective consent to search premises obviates the need for a warrant or probable cause," and "[t]o justify a search without a warrant on this ground, there must be a violitional [*sic*], duress-free permission to enter and make the kind of search agreed to." See Knopf Decl. ¶ 14; SA Handbook (Knopf Decl., Ex. 1) US 000818. Chapter III of the M-69 informs agents that they may search a residence without a warrant or probable cause only if they obtain consent of the person "in control of the premises." M-69 (Knopf Decl., Ex. 2) US 000747. The manual explains that whether consent is voluntary depends on the totality of the circumstances, and that a "person may revoke his or her consent to search at any time." Id. US 000748. In addition, the "knock-and-talk" practices of OI are consistent with those of DRO, in that an officer seeks

consent to enter and that agents may not search other any part of the home without first obtaining additional consent. See Knopf Decl. ¶ 9.

Moreover, although plaintiffs have repeatedly alleged that ICE has a practice, if not a policy, of violating the Fourth Amendment, plaintiffs have now taken the depositions of 36 ICE officers and agents, including supervisors, all of whom have testified that they understand that they are required to obtain consent during the course of these operations. And none of the 15 third-party witnesses from local police departments, many of whom directly participated in the operations and personally observed the conduct of ICE agents, testified that the agents entered plaintiffs' homes without consent. Thus, despite ample testimonial discovery, plaintiffs have not established that the defendants have a practice of disregarding ICE's policies regarding consent.

In the absence of written policies—or unwritten practices or understandings—permitting nonconsensual entries, it is sheer speculation to suppose that, even if agents were to return to plaintiffs' homes—which is itself purely speculative—they would violate plaintiffs' Fourth Amendment rights. See Lyons, 461 U.S. at 106 (complaint "did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy"), 108 ("it is untenable to assert . . that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped"); Curtis, 726 F.2d at 68 (although "plaintiffs here have actually suffered past injury," plaintiffs could not demonstrate a likelihood that they would "again be illegally assaulted with mace" because the police department's policy did "not authorize the use of mace in the manner it was used in this case"); cf. Deshawn, 156 F.3d at 345 (distinguishing Lyons because "the challenged interrogation methods in this case are officially endorsed policies"). Thus, plaintiffs

have established neither a likelihood of harm nor the existence of an official policy to conduct unconstitutional home searches.

Deshawn does not compel a different conclusion, because the reasons the Second Circuit distinguished that case from Lyons do not apply here. First, Deshawn explicitly distinguished Lyons on the basis that "the challenged interrogation methods in this case are officially endorsed policies." Deshawn, 156 F.3d at 345. As discussed, ICE's "officially endorsed" policies concerning the operations at issue provide that warrantless home entries and searches may only be conducted based on authorized consent. Thus, plaintiffs cannot claim that the allegedly unconstitutional conduct resulted from an official policy of ICE.

Second, in Deshawn, the plaintiffs continued "to suffer harm from the challenged conduct" because the unconstitutionally obtained information was "used to enhance their cases and to obtain plea bargains." Id. 344. Here, the past injury that plaintiffs have alleged—and for which they seek damages—is the purportedly unconstitutional entry into their homes. And it is a future unconstitutional entry into their homes that they seek to prevent through an injunction. See Cmplt. ¶ 466 (requesting an injunction "prohibiting Defendants from engaging in the unlawful and abusive practices alleged herein.").

Indeed, prior proceedings in this case make clear that plaintiffs do not have standing under Deshawn. At an October 2007 hearing on plaintiffs' TRO application, plaintiffs stated that "[w]hat we're purely challenging here is the unconstitutional conduct by ICE in entering the homes," and "[w]e're seeking an injunction to stop ICE from violating Latinos' constitutional rights." Oct. 9, 2007 Tr. (Cargo Decl., Ex. A) 11. The Court observed that "[i]n Deshawn, the basis for standing was in fact the threat of the continuing use of the evidence allegedly illegally seized. You say that's not what we're arguing about here." Id. Counsel answered "No." Id.

And in denying the plaintiffs' TRO application, the Court noted that "[t]his case is different from Deshawn" because "[t]here the plaintiff class was allegedly in delinquency proceedings where the alleged fruits of the allegedly unconstitutional conduct were being used." Id. 56. That observation remains just as valid today and establishes that the plaintiffs lack standing.

POINT II

PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

For largely the same reasons that plaintiffs lack standing, they cannot state a claim for injunctive relief, even assuming the truth of the allegations in the complaint.

A. Applicable Legal Standards

1. Motion to Dismiss

Under Rule 8, a complaint must include a "statement of the claim showing that the pleader is entitled to relief," see Fed. R. Civ. P. 8(a)(2); and under Rule 12, a defendant may assert that the complaint "fail[s] to state a claim upon which relief may be granted," see Fed. R. Civ. P. 12(b)(6).[7] In Ashcroft v. Iqbal, the Supreme Court held that heightened pleading standards incorporating "plausibility" analysis applies to all federal civil cases, not just those involving conspiracy or other claims requiring "amplification." Iqbal, 129 S. Ct. 1937, 1949 (2009) (relying on Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555-57 (2007)). Conclusory allegations, including the "formulaic recitation of the elements of a cause of action," are not entitled to a presumption of truth. Iqbal, 129 S. Ct. at 1949-50 (internal quotations omitted).

[7] Because ICE has answered the fourth amended complaint, this motion is based on Fed. R. Civ. P. 12(c), and is governed by the standards that apply to motions under Rule 12(b)(6). See, e.g., Katz v. Image Innovations Holdings, Inc., 542 F. Supp. 2d 269, 271-72 (S.D.N.Y. 2008) (Koeltl, J.) ("The standards to be applied to a motion pursuant to Rule 12(c) are the same as those applied to a motion pursuant to 12(b)(6).") (citing Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir.2006)).

Thus, when considering a motion to dismiss, the court must first disregard "'naked assertion[s]' devoid of 'further factual enhancement.'" Id. 1949 (quoting Twombly, 550 U.S. at 557). Then, when considering the factual (i.e., non-conclusory) allegations that remain, the court must assess whether they "plausibly give rise to an entitlement to relief" by presenting "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" in that "the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. 1949-50 (quoting Twombly, 550 U.S. at 570). Merely pleading facts "consistent with a defendant's liability . . . stops short of the line between possibility and plausibility." Id. 1949 (internal quotation marks omitted).

2. Permanent Injunction

To obtain a permanent injunction, "a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." Melnitzky v. HSBC, No. 06 Civ. 13526 (JGK), 2007 WL 195239, *2 (S.D.N.Y. Jan. 24, 2007) (quoting Roach v. Morse, 440 F.3d 53, 56 (2d Cir. 2006)). "Irreparable harm is an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Tom Doherty Assocs., Inc. v. Saban Entertainment, 60 F.3d 27, 37 (2d Cir. 1995) (internal quotation marks omitted). The Second Circuit has emphasized that a plaintiff "must show that it is likely to suffer irreparable harm if equitable relief is denied," not merely that such harm is a "possibility." JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990) (vacating preliminary injunction where district court relied on standard that movant must show only "'the possibility' of irreparable harm") (emphasis in original); see also O'Shea, 414 U.S. at 502 ("basic requisites" of issuance of equitable relief is "likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law") (emphasis added).

Moreover, "an injunction is an extraordinary remedy which ordinarily should not be granted where a plaintiff has not proven a probability or threat of continuing or additional" unlawful conduct. Dolori Fabrics, Inc. v. The Limited, Inc., 662 F. Supp. 1347, 1358 (S.D.N.Y. 1987) (Lumbard, J., sitting by designation) (internal quotation marks omitted); see also Rizzo v. Goode, 423 U.S. 362, 379 (1976) ("[P]rinciples of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances."); see id. 372 (reversing injunction directing police department to develop civilian complaints program where injunction was based on "what one of a small, unnamed minority of policemen might do to [plaintiffs] in the future").

B. The Complaint Fails to Allege Irreparable Harm and Plaintiffs Will Be Unable to Succeed on the Merits Because They Lack Standing to Seek Injunctive Relief

In Lyons, the Supreme Court held that Lyons' fear of again being choked by the police did not entitle him to an injunction prohibiting the department's use of chokeholds. See Lyons, 461 U.S. at 98. In addition to failing to establish standing, see supra 18-19, Lyons made no showing that "he is realistically threatened by a repetition of his experience" with the police and thus "has not met the requirements for seeking an injunction in a federal court." Lyons, 461 U.S. at 109. According to the Court, the "speculative nature" of Lyons' "claim of future injury"—that the police would choke him in the future—"require[d] a finding that [the irreparable harm] prerequisite of equitable relief has not been fulfilled." Id. 111.

Thus, under Lyons, absent a showing that the alleged constitutional violation is likely to be repeated, a plaintiff cannot establish a threat of irreparable injury or entitlement to injunctive relief. And under Iqbal, the threat of recurrence must be supported by plausible, non-conclusory allegations. See supra 29-30.

To be sure, threats of future violations have been held to constitute irreparable harm. But in those cases, the violations were likely, if not certain, to occur. For example, in Jolly v.

Coughlin, 76 F.3d 468 (2d Cir. 1996), a prison inmate refused to submit to an invasive tuberculosis test on account of his Rastafarian religious beliefs. See id. 472. Prison officials responded by placing him in tightly restricted administrative confinement where he was only allowed to leave his cell to take one ten-minute shower per week. See id. Three years later, the district court issued an injunction requiring his release, and it was Jolly's ongoing confinement, which would have continued indefinitely absent an injunction, that triggered a finding of irreparable harm. See id. 482.

In Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984), the violation was not ongoing, but a future violation was certain to occur absent an injunction. There, inmates sought an injunction preventing New York State from closing their prison facility and transferring them to other, overcrowded prisons. See id. 806. Because the State had already decided to close the prison, the irreparable harm stemmed from the alleged (and admittedly unproven) Eighth Amendment violations that were certain to occur absent an injunction preventing closure of the prison. See id. 805-06.

Thus, although a constitutional deprivation may be alleged rather than proven, it nevertheless must be likely rather than speculative. Consequently, although some courts have said that Fourth Amendment violations may constitute irreparable harm, a plaintiff claiming to fear future Fourth Amendment violations must still demonstrate "the usual requirements for injunctive relief," including irreparable harm that is "likely" rather than a mere "possibility," JSG Trading Corp., 917 F.2d at 79. See Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (detainee showed irreparable harm where he was subject to a body cavity search that could "possibl[y]" deprive him of Fourth Amendment rights); Doe v. Bridgeport Police Dep't, 198 F.R.D. 325, 335 (D. Conn. 2001) (plaintiffs entitled to an injunction because they were subject to

"systemic or ongoing constitutional violations," having already been detained and criminally charged; consequently, threat to plaintiffs' "fourth amendment rights is actual and imminent and not remote or speculative").

Plaintiffs will be unable to demonstrate irreparable harm because the complaint contains only speculative allegations that ICE officers and agents are likely to violate their Fourth Amendment rights. At most, the complaint alleges that some plaintiffs fear that agents will return to their homes and commit constitutional violations, see Cmplt. ¶¶ 206, 252, 261, 304, 340, 351, 235, and that agents stated during two of the eight incidents alleged in the complaint that, in one case, they would "be back," id. ¶ 238, and in the other, that they would "return later that day or in the following week." Id. ¶ 371. But plaintiffs' fear of a future unconstitutional encounter is exactly the kind of speculation that Lyons rejected as insufficient. See Lyons, 461 U.S. at 111; supra 26-27. Nor does the complaint allege any facts to cast as a "real or immediate threat," Lyons, 461 U.S. at 111, some agents' statements that they would return to the homes they had visited, much less that if the agents did return they would likely violate plaintiffs' rights. Indeed, plaintiffs have amended their complaint four times, but they have never alleged that ICE has returned to their homes since the incidents alleged in complaint, half of which occurred more than three years ago.

Nor is plaintiffs' claim to irreparable harm saved by their unsupported allegations that ICE has officially authorized and enforced a "policy, practice and/or custom" of allowing agents to enter homes without a search warrant or consent. Cmplt. ¶¶ 426, 456. This is merely plaintiffs' "incredible assertion" that it is ICE policy to allow, even require, agents to conduct unconstitutional, warrantless entries into private homes in carrying out its obligations to remove illegal aliens from the United States. Lyons, 461 U.S. at 106 (it would be an "incredible

assertion" for plaintiff to allege that City of Los Angeles "ordered or authorized" police officers to choke everyone they encounter). The complaint contains no factual allegations to support this conclusory claim, much less factual allegations that plausibly demonstrate that conclusion. See Iqbal, 129 S. Ct. at 1949-50. As a result, plaintiffs fail to meet their obligation to provide plausible and non-conclusory allegations concerning the likelihood of future injury. Id.

Finally, plaintiffs' alleged injuries, if proven, can be adequately remedied by monetary relief; the Bivens remedy exists precisely to compensate individuals for Fourth Amendment violations by federal agents. See Bivens, 403 U.S. at 395, 397; Wilkie v. Robbins, 127 S. Ct. 2588, 2611-12 (2007) ("a victim of a Fourth Amendment violation by federal officers has a claim for relief in the form of money damages"); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 736-37 (2004) (Bivens provides damages remedies for any unauthorized arrest of an alien and "for any seizure of an alien in violation of the Fourth Amendment"). Indeed, in creating that remedy, the Court relied on the fact that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty" such as the federal agents' unlawful entry, arrest, and search at issue in the case. Bivens, 403 U.S. at 395. In Lyons, the Supreme Court held that the plaintiff had "an adequate remedy at law" in his pending suit for damages against the offending officers and the City. 461 U.S. at 111.

The same is true here. Plaintiffs have asserted Bivens claims against 68 defendants based on the same eight incidents that allegedly support their claim for injunctive relief. See Cmplt. ¶¶ 484-89. Given that plaintiffs have a well-established remedy for any future Fourth Amendment violations by ICE, plaintiffs will be unable, as a matter of law, to demonstrate irreparable harm in the absence of a permanent injunction. See, e.g., Helios & Matheson North Am., Inc. v. Vegasoft Oy, No. 07 Civ. 3600 (PAC), 2007 WL 1541204, *2 (S.D.N.Y. May 24,

2007) ("An essential component of an irreparable injury is that it is incapable of being fully remedied by money damages.") (internal quotation marks omitted).[8]

POINT III

THE COURT SHOULD DECIDE THE GOVERNMENT'S MOTION WITHOUT PERMITTING ADDITIONAL DISCOVERY

In their April 14, 2010, letter to the Court, plaintiffs continue to argue that this motion is "premature" and requires the Court "to make, in the absence of a complete record, substantial factual findings." Apr. 14, 2010, letter from Gordon to Judge Koeltl (submitted under seal) 1. In that letter, which plaintiffs submitted before the Court permitted the Government to make this motion, plaintiffs argued that "Defendants' professed desire to renew their motion now is nothing more than another attempt to avoid the very discovery that would enable Plaintiff to defeat Defendants' motion," and that "[s]uch gamesmanship is inappropriate and should not be condoned." Id. 5. Plaintiffs also claim that "[i]n cases like this one where evidence concerning standing overlaps with evidence on the merits, it is common for courts to decide the matter of standing after the close of pre-trial discovery and/or the close of evidence." Id. 2.

But the Government's jurisdictional motion, submitted more than two-and-a-half years after plaintiffs brought this action, is not premature. First, plaintiffs' citation to Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82 (2d Cir. 2006), for the proposition that the Court should postpone deciding standing is misplaced. As the Alliance court explained,

[8] Plaintiffs also will be unable to prevail on the merits because, as demonstrated above, see supra 24-29, they lack standing to assert their claim for injunctive relief. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). Thus, while the absence of irreparable injury is, alone, fatal to their claim for injunctive relief, plaintiffs' inability as a matter of law to meet the actual-success-on-the-merits requirement also means that they will be unable to show their entitlement to an injunction.

the need to resolve disputed jurisdictional issues at trial arises only when "fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury." Id. 88. Here, however, to the extent that factual issues bearing on standing overlap with factual issues bearing on plaintiffs' entitlement to injunctive relief—such as the question of whether ICE agents are likely to violate plaintiffs' constitutional rights in the future—they will necessarily be adjudicated by the Court, not by a jury, because plaintiffs are seeking equitable relief. See, e.g., CSC Holdings, Inc. v. Westchester Terrace, 235 F. Supp. 2d 243, 264 (S.D.N.Y. 2002) ("It should go without saying that no right to a jury attaches to claims for equitable relief."); Bank of China v. Chan, No. 88 Civ. 0232 (MBM), 1992 WL 298002, *2 (S.D.N.Y. Oct. 21, 1992) (noting "absence of a jury trial right when equitable claims are at issue"). Thus, there is no reason to defer a ruling on the Government's motion pending trial, and the Court is certainly not required to do so as plaintiffs contend. Furthermore, the need for a hearing at all arises only when factual issues bearing on standing are disputed. See Alliance, 436 F.3d at 88. If, "[a]fter limited discovery on the jurisdictional issue," there are no material facts in dispute, a motion to dismiss for lack of standing can be resolved "on motion supported by affidavits." Id. In this case, the plaintiffs have been allowed much more than "limited discovery." Id.

Second, if plaintiffs wish to take additional discovery, they must set forth in an affidavit the precise discovery they seek instead of vaguely claiming that this jurisdictional motion is "premature." The standard used to evaluate a Rule 12(b)(1) motion that is supported by evidentiary matter outside the pleadings, as the Government's motion is here, "is similar to that used for summary judgment under Rule 56." Locksley v. United States, No. 05 Civ. 2593 (JGK), 2005 WL 1459101, *1 (S.D.N.Y. June 15, 2005); see also Kamen v. AT&T, 791 F.2d

1006, 1011 (2d Cir. 1986) ("While a 12(b)(1) motion cannot be converted into a Rule 56 motion, Rule 56 is relevant to the jurisdictional challenge in that the body of decisions under Rule 56 offers guidelines in considering evidence submitted outside the pleadings."). In particular, the Second Circuit has instructed that courts "look to Rule 56(f) for guidance in considering the need for discovery on jurisdictional facts." Gualandi v. Adams, 385 F.3d 236, 244 (2d Cir. 2004).[9]

Under Rule 56(f), a party resisting dismissal "on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (citations and internal quotation marks omitted; alteration in original). A plaintiff's failure to make the showing required by Rule 56(f) warrants denial of the request to take discovery. See Gualandi, 385 F.3d at 245 (affirming denial of plaintiffs request for additional discovery claimed necessary to resist dismissal for lack of subject-matter jurisdiction where plaintiffs did not make showing required by Rule 56(f), and affirming dismissal for lack of subject-matter jurisdiction). Moreover, even a properly supported Rule 56(f) motion should be denied where the request for discovery is "based on speculation as to what potentially could be discovered." Bill Diodato Photog., LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 388 (S.D.N.Y. 2005) (citation and internal quotation marks omitted).

[9] Rule 56(f) provides: "If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order."

Here, plaintiffs cannot plausibly contend that they have not been permitted sufficient discovery to oppose this motion. The Government served its initial motion in December 2007, and that motion makes the same arguments, and relies on the same declarations and documents (produced in November 2007), that this renewed motion does. In fact, on August 29, 2008, after the Government produced more than 5,000 pages of additional documents, the Government informed the Court that it was prepared to renew its motion at any time.

Indeed, plaintiffs have been on notice since October 2007, when the Government raised the issue of standing in response to plaintiffs' TRO application, of the Government's position that plaintiffs cannot establish an immediate risk of future constitutional violations. Thus, plaintiffs have had ample opportunity to pursue all relevant discovery concerning not only ICE's written practices and procedures but also whether unwritten practices differ from those policies.

And they have pursued such discovery. Although the Government produced the relevant policies in November 2007, plaintiffs nonetheless propounded six sets of burdensome document requests, and the Government has now produced more than 65,000 pages of documents in response to those requests. Plaintiffs have also deposed 36 ICE defendants, questioning all of them about the relevant policies as well as their training and understanding with respect to such policies. No ICE defendant has testified that he or she did not understand that officers and agents are required to obtain consent during these types of operations.

Thus, there is no basis to further delay consideration of the Government's motion. The Court decided to postpone deciding the motion based on plaintiffs' representations that Bivens- and injunction-related discovery "so overlap that there is no distinction." See Jan. 15, 2008 Tr. (Cargo Decl., Ex. E) 10. But in their discovery letters, plaintiffs have repeatedly reminded the Government that the bulk of their discovery requests—including the most burdensome ones—

relate to their claims for injunctive relief, not their Bivens claims. See, e.g., Apr. 15, 2010, letter from Librera to Judge Maas (Cargo Decl., Ex. H) 4, 7, 10.[10] Thus, it is no surprise that of the more than 65,000 pages of documents the Government has produced, less than 2,000 pages concern plaintiffs' Bivens claims, and that plaintiffs have spent the vast majority of defendants' depositions asking about ICE policies and practices as opposed to what actually occurred at plaintiffs' homes.

Finally, plaintiffs are likely to argue that their 139-page complaint raises many other issues concerning the management of ICE, so that it is no answer for the Government to argue that ICE's policies and practices require consent to enter. This Court has noted, however, that the "fundamental question" here is "whether [plaintiffs'] constitutional rights were violated because the ICE agents did not seek their consent before entering their homes." Aguilar v. Immigration & Customs Enforcement, 255 F.R.D. 350, 361 (S.D.N.Y. 2008). So while plaintiffs may claim, for example, that "despite the pledges by President Obama that he would alter the Bush administration's policies on immigration enforcement, DHS is actually relying and expanding on the flawed programs that were started by the previous administration," Cmplt. ¶ 438, that allegation does not vest this Court with equitable jurisdiction to assess such policies, much less to issue an injunction requiring the administration to comply with alleged campaign promises. Because plaintiffs' alleged injuries arise from the alleged nonconsensual entries into their homes, plaintiffs' equitable remedies are limited to ICE's policies and practices concerning such entries. And it is only these specific policies—as opposed to generalized criticisms about ICE as an agency—that are relevant to plaintiffs' standing to seek injunctive relief. Because plaintiffs point to no such policies, they lack standing to seek injunctive relief.

[10] The Government's response to that letter is Ex. I to the Cargo Decl.

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' claim for injunctive relief for lack of subject-matter jurisdiction and failure to state a claim.

Dated: New York, New York
May 19, 2010

PREET BHARARA
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/

DAVID BOBER
SHANE CARGO
BRANDON COWART
KRISTIN L. VASSALLO
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Tel. (212) 637-2711
Fax (212) 637-2786