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)

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

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Preliminary Statement

Plaintiffs' opposition papers take them far afield from the straightforward analysis this Court must undertake in deciding the Government's jurisdictional motion. Under the Second Circuit's construction of Lyons, plaintiffs 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) (citing Lyons, 461 U.S. at 105-06) (emphasis in original). Thus, unless plaintiffs can show both Shain elements, the Court must conclude that the threat of future unconstitutional entries into plaintiffs' homes is speculative and conjectural, requiring dismissal of the claims for injunctive relief.

Plaintiffs have established neither Shain element. Regarding likelihood of future harm, plaintiffs cannot dispute that ICE has not returned to any complaint location in the roughly three years that have passed since the alleged infractions occurred. That alone requires dismissal for lack of standing, as plaintiffs merely state a generalized grievance concerning enforcement activities that occurred three years ago.

Second, plaintiffs cannot establish that ICE policies require or permit officers and agents to enter homes without consent. ICE's written policies, which the Government provided in 2007, clearly and indisputably require ICE employees to obtain consent. See Moving Mem. 25-27. Moreover, plaintiffs have deposed the two declarants who submitted the policies, two ICE 30(b)(6) witnesses who testified about ICE policy, and 45 ICE defendants, none of whom, as plaintiffs concede, has testified that officers and agents are free to disregard these policies. Thus, even if plaintiffs could establish a likelihood that ICE will return to their homes, they cannot demonstrate that, once there, they would be required or even permitted to enter without consent pursuant to "an official policy or its equivalent," Shain, 356 F.3d at 216.

A. Plaintiffs Have Not Demonstrated a Substantial Likelihood That ICE Will Return to Their Homes

The passage of time alone establishes that plaintiffs cannot establish "a likelihood of future harm," Shain, 356 F.3d at 216, thus requiring dismissal for lack of standing. In fact, this Court explicitly recognized at the TRO hearing on October 9, 2007, that the passage of time (then five months) was a primary reason plaintiffs could not demonstrate threat of future injury. See Hr'g Tr. at 55, Oct. 9, 2007 (Cargo Decl., Ex. A). Now, more than three years have passed without incident (in the case of four complaint locations), and plaintiffs cite no case finding standing where so much time has passed. Cf. Mancha v. ICE, No. 1:06-CV-2650, 2007 WL 4287766, at *2 (N.D. Ga. Dec. 5, 2007) (no reasonable threat of future injury where 15 months had passed without incident); Arias v. ICE, No. 07-CV-1959, 2008 WL 1827604, at *12 (D. Minn. Apr. 23, 2008) (even assuming ICE's policies were unconstitutional, no standing because plaintiffs "have not alleged any facts demonstrating a realistic threat that they will again be the target of the enforcement effort"); Barrera v. U.S. Dep't of Homeland Sec., No. 07-CV-3879, 2009 WL 825787, at *9 (D. Minn. Mar. 27, 2009) (no standing where plaintiffs could not demonstrate a "realistic threat of future harm").

Plaintiffs offer four reasons for the Court to overlook the passage of time. First, plaintiffs claim that because ICE allegedly had been to one of the plaintiff's homes 13 months before the operation at issue in the complaint, there is a "realistic threat of future harm." Opp. Mem. 7 (quoting Nat'l Cong. for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999)). This argument is both factually and legally flawed.

Although the Government has produced more than 65,000 pages, not a single document corroborates plaintiffs' assertion that ICE conducted an operation at the Rosa-Delgado residence in 2006, and no ICE defendant has testified to any involvement in that alleged operation. Thus, plaintiffs have not demonstrated by a preponderance of the evidence that the incident even

occurred. See Nash v. City Univ. of N.Y., No. 02 Civ. 8323 (GBD), 2003 WL 21135720 (S.D.N.Y. May 16, 2003) (Moving Mem. 24). Further, even assuming that the 2006 operation occurred, the fact that one out of eight complaint locations was visited twice (in a 13-month period) before the complaint was filed does not change the fact that no complaint location has been revisited since this action was filed in 2007. Thus, even if, at the time of the second alleged incident in 2007, Rosa-Delgado legitimately feared a third visit, any fear she now claims to have is speculative and conjectural because of the passage of time.

Second, plaintiffs claim that notwithstanding the passage of time, ICE "does not have a policy prohibiting return visits," and that ICE "does in fact return to homes more than once, looking for the same target." Opp. Mem. 7. This argument also misses the mark. Obviously, neither ICE nor any other law enforcement agency would issue a policy prohibiting its agents from visiting a location more than once. Targets are often away from home, or ICE may later learn that a different target resides at the same location. So it is not surprising that ICE defendants have testified that during their careers, they have on occasion conducted operations at a given location more than once. See, e.g., ICE 4 Tr. at 138:23-139:3 (Gordon Decl., Ex. 49) (possibly returning to a previously visited home "[i]f new record searches had revealed that the alien [had] registered a car there recently or something to that effect. Any recent record that would show activity for that individual at that location.").

But the absence of a "one time only" policy does not establish that plaintiffs face a real and immediate threat of a future unconstitutional encounter. To the contrary, ICE defendants have testified that second visits are the exception, rather than the rule, and there is no reason to think that the homes at issue here—after three years of no enforcement activity—face any particular risk of resumed operations, let alone unconstitutional ones. And it should not be the

case that ICE has to create de facto safe houses—i.e., locations where it can never return because of a prior operation—to make a case for lack of standing.

Third, plaintiffs claim that ICE has manufactured lack of standing through voluntary cessation by "decid[ing] to not subject plaintiffs to further raids after plaintiffs initiated this action in October 2007." Opp. Mem. 8. But this argument is also factually and legally flawed. There is no order, or even an informal agreement, preventing ICE from returning to plaintiffs' homes during this litigation. During the October 2007 hearings, which related to plaintiffs' application for a temporary restraining order, the Court requested a representation from this Office that ICE would not retaliate against the plaintiffs during the pendency of the TRO application, and we conveyed those instructions to ICE. But after the Court denied the TRO, the status quo was restored, and this Office immediately informed ICE that it could resume its normal operations. Thus, the suggestion that there has been some sort of preliminary injunction agreement, which plaintiffs never sought, in place since 2007 is simply incorrect. Put simply, there is no formal or centralized ICE policy of "cessation" that might render the "voluntary cessation" doctrine applicable; rather, there is a three-year history demonstrative that these plaintiffs are at no particular risk of new enforcement activity.

Indeed, in Lyons, the Court considered and explicitly rejected the voluntary cessation argument plaintiffs make here, explaining that "[t]he equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." Lyons, 461 U.S. at 109. Further, if plaintiffs' injunction claim is dismissed, they still have a claim for damages against ICE and the individual defendants. Thus, rather than evading review, defendants' actions will be subject to it. Finally, under plaintiffs' formulation, Lyons would be

invalidated as a practical matter: no plaintiff would ever lack standing because if the defendant had returned, the plaintiff would invoke that as evidence of likely recurrence, but if the defendant did not return, the plaintiffs would base standing on the defendant's voluntary cessation. In accordance with Lyons, the Court must reject this Catch-22 contention.

Fourth, plaintiffs claim that it is more likely that they "will face future injury" because they "need only engage in law-abiding, routine activities to be subject to the future government action they seek to enjoin." Opp. Mem. 8. But plaintiffs' claim that they "were engaging in a host of innocuous activities—sleeping, doing laundry, and watching television—when ICE agents raided their homes," Opp. Mem. 9, is difficult to harmonize with the fact that plaintiffs have repeatedly involved the Fifth Amendment when asked about their living arrangements, evidently based on the immigration and criminal consequences of being in the country illegally or providing illegal housing. See Hr'g Tr. at 6, Oct. 15, 2009 (Cargo Decl., Ex. J) (explaining that plaintiffs would invoke the Fifth Amendment to prevent incriminating testimony concerning harboring of illegal aliens); Parties' Joint Letter, Aug. 27, 2009, at 12 (Cargo Decl., Ex. K) (explaining that plaintiffs have invoked the Fifth Amendment relating to information that could incriminate them under 8 U.S.C. §§ 1324-25, which prohibit improper entry by an alien, harboring an illegal alien, and re-entry of a removed alien); see also Fernandez-Vargas v. Gonzales, 548 U.S. 30, 46 (2006) (illegal alien "continued to violate the law by remaining in this country day after day, and . . . the United States was entitled to bring that continuing violation to an end").

Moreover, in contrast to the cases plaintiffs cite, Opp. Mem. 9-10, plaintiffs lack standing regardless of whether they can avoid future encounters by engaging in law-abiding behavior. That is, even assuming plaintiffs are not presently engaged in any illegal behavior, the Government has never premised plaintiffs' lack of standing on their ability to prevent ICE from

returning to their homes. Because these operations were conducted based on consent rather than probable cause, the issue is not whether plaintiffs can prevent ICE from returning to their homes, but whether their claimed fear is speculative in light of the passage of time and the absence of any policy permitting entry without consent.

Finally, plaintiffs' authorities do not dictate a different result. In two of the cases, plaintiffs could not feasibly avoid future injurious encounters. See Roe v. City of N.Y., 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) (plaintiffs, intravenous drug users, were required to spend time in known drug areas to participate in needle-exchange programs); 31 Foster Children v. Bush, 329 F.3d 1255, 1267 (11th Cir. 2003) (plaintiffs were in defendants' physical custody). And in the other two, the Ninth Circuit explicitly relied on the district court's factual finding that the alleged injuries were likely to recur. See Zepeda v. INS, 753 F.2d 719, 726 (9th Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318, 1324 (9th Cir. 1985). Finally, in National Congress for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999), a case predating Shain, the Court found that more than fifty percent of the plaintiffs had suffered repeated injuries, which obviously is not the case here.

B. Plaintiffs Have Not Established That ICE Has a Policy Requiring or Permitting Entry Without Consent

Not only have plaintiffs failed to establish a likelihood that ICE will return to their residences, which alone requires dismissal, they have also failed to establish that if ICE ever does return, its officers and agents will be compelled to enter plaintiffs' homes without consent pursuant to "an official policy or its equivalent." Shain, 356 F.3d at 216.

The Court's analysis, which need only be conducted if the Court first concludes that plaintiffs have demonstrated a likelihood that ICE will return, must begin with ICE's official policies. And plaintiffs do not dispute that the policies provided in 2007, see Moving Mem. 25-26, require ICE employees to obtain consent. Thus, even assuming that ICE returns to plaintiffs'

homes, the assertion that ICE officers will be compelled by ICE policy to enter without consent is wholly unsupported. See Lyons, 461 U.S. at 106

Unable to refute the clear language of ICE's policies, plaintiffs claim that they nonetheless "easily show" they have standing because of alleged "de facto" policies of unlawful conduct. Opp. Mem. 11. Plaintiffs raise several examples of alleged misconduct and mismanagement, and even claim that ICE employees are free to disregard its written policies. As shown below, however, these allegations do not support the assertion that ICE has a practice of violating its official policies concerning consent.

First, plaintiffs assert that some provisions of Chapter 19 are mandatory and some are advisory, so that ICE employees cannot discern whether they are actually required to obtain consent. See Opp. Mem. at 21-22. This argument, however, is mere semantics, and it ignores the language of Chapter 19 and the other relevant policy materials. Chapter 19 states 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***." See Williams Decl. ¶ 21; see also DROPPM (Williams Decl., Ex. B) US 000018 (emphasis in original.). Similarly, Chapter 42 of the Special Agent's Handbook states: "[v]oluntary 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." See Knopf Decl. ¶ 12; see also SA Handbook (Knopf Decl., Ex. 1) US 000818. Finally, Chapter III of the M-69 explains to 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" and that a "person may revoke his or her consent to search at any time." Knopf Decl. ¶¶ 16-18; see also M-69 (Knopf Decl., Ex. 2) US 000747-8. The fact that a policy unrelated to home entries (checking the probation status of possible targets) is advisory rather

than mandatory does not somehow prove that all of ICE's policies are advisory, especially given that the policies at issue each use nonconditional language with respect to obtaining consent.

Moreover, plaintiffs point to no evidence suggesting that anyone at ICE believes that they are free to disregard these policies. Rather, ICE defendants have uniformly testified that obtaining consent to enter and search a home is required in the absence of a judicial warrant. See, e.g., ICE 50 Dep. Tr. at 48:6 – 49:7 (Gordon Decl., Ex. 77) ("Q: What was th[e] regular procedure [for obtaining consent]? A: It would consist of obtaining consent to enter and then obtaining consent to search . . ."); ICE 18 Dep. Tr. at 198:6-14 (Gordon Decl., Ex. 55) ("I felt it was my obligation . . . to ensure that all team members were . . . aware that when executing an administrative arrest warrant that we needed to obtain consent."); see also ICE 9 Dep. Tr. at 29:11 – 30:4 (Gordon Decl., Ex. 51); ICE 1 Dep. Tr. at 74:23 – 75:4 (Gordon Decl., Ex. 48); ICE 25 Dep. Tr. at 37:22-25 (Gordon Decl., Ex. 62); ICE 45 Dep. Tr. at 35:2-6 (Gordon Decl., Ex. 74); ICE 43 Dep. Tr. at 71:2-10 (Gordon Decl., Ex. 73).

Plaintiffs also cannot claim that ICE does not make its officers and agents aware of these policies. DRO officers and agents receive extensive training throughout their careers, especially in the requirements of the Fourth Amendment. For example, new DRO agents and officers receive Fourth Amendment training during basic training. See generally 30(b)(6) DRO Deponent Tr. at 79:24-102:12 (Gordon Decl., Ex. 81). And members of Fugitive Operations teams must attend the Fugitive Operations Training Program, which administers additional Fourth Amendment training. Id. In addition, all DRO agents and officers must attend refresher training, which includes Fourth Amendment issues. Id. Finally, every six months, Fugitive Operations team members must attend training specific to the Fourth Amendment taught by ICE attorneys. See 30(b)(6) DRO Deponent Tr. at 18:14-23, 61:6-70:11(Gordon Decl., Ex. 81); see also Cargo Decl., Ex. L.

OI agents also receive Fourth Amendment instruction during basic training at the Federal Law Enforcement Training Center. See 30(b)(6) OI Deponent Tr. at 58:6-11; 83:13-19 (Gordon Decl., Ex. 82). They then attend 12 weeks of OI-specific training, which includes thorough instruction concerning Fourth Amendment topics. See 30(b)(6) OI Deponent Tr. at 52:8-21; 53:15-25; 54:1-7; 58:12-14; 62:5-21 (Gordon Decl., Ex. 82). Thus, plaintiffs simply cannot demonstrate that ICE does not convey its Fourth Amendment policies to its officers and agents.

Second, plaintiffs allege that because ICE permits ruse techniques, ICE requires unconstitutional entry of homes. But this argument is based on the flawed premise that ruse techniques are per se unconstitutional, and their reliance on United States v. Montes-Reyes, 547 F. Supp. 2d 281 (S.D.N.Y. 2008), is therefore misplaced. Rather than outlawing ruse techniques, Montes-Reyes simply affirms that the court must consider the totality of the circumstances, including the particular ruse technique used, in determining whether consent was voluntary. 547 F. Supp. 2d at 288 n.7. In fact, the court specifically declined to hold that ruse techniques automatically vitiate consent, noting that the Supreme Court has eschewed "litmus-paper" tests of voluntariness. Id. (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)). Therefore, "[a] deceptive law enforcement tactic—whether used by an undercover or a disclosed law enforcement officer—does not itself require or preclude a finding that an authorized person voluntarily consented to a search." Montes-Reyes, 547 F. Supp. 2d at 290.

Thus, contrary to plaintiffs' claim that ICE authorizes unlawful ruse techniques, Opp. Mem. 27, its policies actually limit the use of ruse techniques in accordance with these principles. See, e.g., Use of Ruses in ICE Enforcement Operations, Aug. 22, 2006, at 1 (Gordon Decl., Ex. 38) (disallowing ruses involving health-and-safety programs administered by any private or governmental agency). And the Court should reject the contention that by permitting the use of certain ruse techniques, ICE has a de facto policy of allowing entry without consent.

Plaintiffs next claim that ICE has a de facto policy of violating the Fourth Amendment because its Office of Professional Responsibility ("OPR") has allegedly engaged in investigations that are "cursory, incomplete and seemingly designed not to uncover any malfeasance." Opp. Mem. 26. This argument has no bearing on standing. First, the suggestion that OPR investigators ask "leading questions," id. at 26, or do not interview enough people (in plaintiffs' opinion), does not establish either likelihood of future harm or the existence of a policy permitting nonconsensual home entries. See Shain, 356 F.3d at 216.

Second, discovery in this case has shown that the OPR investigations were neither cursory nor incomplete. For example, with respect to the ICE agent whom plaintiffs reference, see Opp. Mem. 25, his supervisors required him to come forward after he made a stray email comment about the Long Island operations. At his supervisors' direction, he submitted a detailed memorandum to the Acting Deputy Special Agent-In-Charge, who reported the allegations to OPR, and OPR promptly launched an investigation. After conducting four interviews, OPR concluded, based in part on the agent's own admissions, that his allegations of nonconsensual entries were unsubstantiated. Then, two-and-a-half years later in this case, plaintiffs deposed the agent, and he admitted that he was "probably fifteen or twenty feet away" from the door and guessed that there were "three, four, five people" between him and the person who answered the door. See ICE Complainant Tr. at 93:18-21; 298:13-299:6 (Gordon Decl., Ex. 85). He admitted that the person who answered could have given consent and that he would have no basis to dispute any testimony that consent had been given. Id. at 299:7-302:8.

Similarly, plaintiffs claim that OPR inadequately investigated an anonymous complaint of racial profiling, see Opp. Mem. 25, but that is not supported by the record. In response to the complaint—that someone suggested going to Home Depot to "fill up the buses"—OPR conducted 10 interviews and issued a detailed nine-page report. OPR's conclusion—that the

allegation was unsubstantiated—has actually been bolstered by discovery in this case. For example, ICE 19 testified in his deposition that a participating Hempstead Village detective, not anyone from ICE, made the comment. See ICE 19 Tr. at 199:23-200:4. (Gordon Decl., Ex. 56). The detective's intent, however, was not to apprehend day laborers but rather to arrest MS-13 gang members who extorted cash from the workers as they returned from their jobs. Id. at 199:20-200:25; see also ICE 20 Tr. at 346:15-347:6 (Gordon Decl., Ex. 57); ICE 18 Tr. 277:4-277:22 (Gordon Decl., Ex. 55). In fact, not a single witness in this case, third party or otherwise, has testified that these comments originated from ICE. In short, without conceding that OPR's investigations have any bearing on plaintiffs' standing, extensive discovery has only supported OPR's conclusions, thereby undermining plaintiffs' criticisms of the investigations.

Next, plaintiffs claim that ICE has a de facto policy of violating the constitution because ICE allegedly discriminates against Latinos. Putting aside that plaintiffs never explain the relationship to ICE's policies concerning consent, plaintiffs' assertions are simply incorrect. First, ICE has no policy permitting discrimination against Latinos. To the contrary, ICE has an explicit, DOJ-endorsed policy prohibiting discrimination. See DOJ Guidance Regarding The Use of Race By Federal Law Enforcement Agencies, June 2003, at 563 (Cargo Decl. Ex. M). That policy expressly repudiates the assumption "that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity." Id. And it "imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires." Id. at 564. DHS requires that all law enforcement activities comply with that DOJ policy, with serious consequences for any employee who disregards the policy. See The Department of Homeland Security's Commitment to Race Neutrality In Law Enforcement Activities, June 1, 2004, at 1 (Cargo Decl. Ex. N).

Second, plaintiffs have identified no pattern and practice of discrimination, let alone an institutional discriminatory intent to enter Latinos' homes without consent. Plaintiffs conclude, for example, that because ICE agents departed a residence when a white male (James Berry) answered the door, ICE must discriminate against Latinos. Opp. Mem. 18. But participating local police officers accompanied ICE to the residence, and Mr. Berry, a veteran EMT and volunteer fire rescue worker, testified that he knew nearly every officer on the force. Berry Tr. at 10:8-10, 27:23-25 (Gordon Decl., Ex. 88). The police officers immediately recognized him as someone other than the target, so there was no reason for ICE to nonetheless stay to "question[ ] Mr. Berry or attempt[ ] to seek entry into his home," Opp. Mem. 18, and there is no evidence suggesting that ICE's decision to leave was related to Berry's status as a "white male," id.

Plaintiffs also argue, Opp. Mem. 20, that they have standing in part because "[b]oth ICE agents and third-party witnesses have testified that agents of both DRO and OI referred to Latinos as 'wetbacks.'" This argument is both misleading and irrelevant. In support of this assertion, plaintiffs cite the deposition testimony of two third parties who were not present at any of the operations at issue in the complaint or, indeed, any operations at all. Nassau County Police Lieutenant Andrew Mulrain testified that officers under his supervision told him that "terms like wetback and other derogatory terminology was being utilized" by unspecified ICE agents, but he learned this information "almost third hand," after speaking with officers who were "out in the field." Mulrain Dep. Tr. at 90-92 (Gordon Decl., Ex. 106). Police Commissioner Lawrence Mulvey testified that he heard from Mulrain that the word had been used, adding yet another level of hearsay. Mulvey Dep. Tr. at 69 (Gordon Decl., Ex. 105). The only agent who was actually present in the field who testified that he heard that word was ICE 4, who stated that he had heard one or two other agents use the word "wetback" at some point in the past, not during the operations. ICE 4 Dep. Tr. at 325 (Gordon Decl., Ex. 49).

But even assuming it is true that the word "wetback" was used during the operations or at some unspecified time in the past by two of the defendants, the record makes clear that these were isolated incidents, as numerous other witnesses—who were actually present during the operation—have testified that they witnessed no such behavior. See Deposition of Port Washington Officer Raymond Ryan 139:21-25 – 140:1-4 (Cargo Decl., Ex Q) (Q: Did you hear the term "wetback" being used on either September 24, 2007 or September 26, 2007? A. No, absolutely not. Q. Did you hear any derogatory terms towards Latinos being used on September 24, 2007 or September 26, 2007? A. No.); see also Deposition of NCPD Officer Richard Ierardi 261:15-21 – 262:1-4 (Cargo Decl., Ex. R) (Q. On September 24, 2007 do you remember any of the ICE agents using derogatory language? A. No. Q. Do you remember any ICE agent referring to Latinos as wetbacks? A. No. Q. Is that something you think you'd remember? A. Yes. My partner's Latino. Q. Do you remember any, other than wetback, do you remember any derogatory language that was used? A. No.).

In any event, even if an ICE officer or agent used racially insensitive language, at most it would be probative of that one person's intent to discriminate, and can hardly serve as the basis to implement a sweeping injunction against an agency with tens of thousands employees that plainly prohibits racial discrimination as a matter of policy.

Next, plaintiffs raise a host of complaints about ICE's enforcement operations, but each amounts to a dispute concerning its law-enforcement techniques, and none establishes that ICE has a de facto policy of entering homes without consent. For example, although plaintiffs may prefer that operations not be conducted in the "early morning hours," Opp. Mem. 13, a Nassau County detective who participated in the operations testified that the practice is generally favored, especially in urban environments, to ensure officer safety. Ruiz Tr. at 106: 2-9 (Cargo

Decl., Ex. O) (during the day "there's more chances of people getting hurt" so "[i]t's a safety issue . . . to stop at a certain time.").

Plaintiffs also complain that ICE should not position officers and agents at the perimeter of houses, and that its agents should not carry longarms during operations. Although this issue is irrelevant to standing, ICE's use of weapons was influenced by the fact that the operations sought to apprehend gang members, including members of the violent MS-13 gang.

Similarly irrelevant to standing is plaintiffs' objection to officer safety measures employed once consent to enter was obtained. For example, plaintiffs claim that ICE should not use a "control point," but they cite no authority supporting the proposition that officers may not request that persons they encounter congregate in a central location, especially where, as here, the officers were often vastly outnumbered. Likewise, plaintiffs object to ICE's use of "protective sweeps" during their operations. But the Fourth Amendment permits a properly limited protective sweep in various situations, including during home operations. See Maryland v. Buie, 494 U.S. 325, 337 (1990); see also United States v. Miller, 430 F.3d 93, 98 (2d Cir. 2005) ("[A] law enforcement officer present in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep").

Finally, plaintiffs argue that because Commissioner Mulvey complained about the Long Island operations, ICE has a de facto policy of entering homes without consent. But Commissioner Mulvey admitted he had no first-hand knowledge of the operations at issue, and he based his complaints on second- and third-hand information. See Mulvey Tr. 70:19-71:2 (Gordon Decl., Ex. 105) (referring to information he received as "obviously hearsay"). And his allegations were consistently contradicted by the nine Nassau County detectives who actually participated in the operations. See, e.g., Ruiz Tr. at 33:6-10 (Cargo Decl., Ex. O) (operations

were "uneventful"); Benedetto Tr. at 163:18-21 (Cargo Decl., Ex. P) (nothing unusual occurred); Bolitho Tr. at 261:2-8 (Gordon Decl., Ex. 89) (same).[1]

In the end, plaintiffs' claim of standing boils down to allegations of isolated misconduct by a very large agency, which has conducted thousands of operations in the New York metropolitan area since this action was filed in 2007. To borrow the Court's analogy, see Oct. 9, 2007 Hr'g Tr. at 51-52, plaintiffs' theory would permit a criminal defendant pursuing a motion to suppress to enjoin all law enforcement activities by merely asserting that other unlawful searches had occurred. Lyons prevents that result, and plaintiffs give the Court no good reason to disregard it.

C. Plaintiffs Have Not Shown That the Future Injuries They Claim to Fear Are Redressable Through the Injunctive Relief They Seek

Even assuming plaintiffs were to establish that they have a non-speculative fear of ICE returning to their homes, they never explain how this "injury" can be prevented by the injunctive relief they seek. Standing requires redressability, see Moving Mem. 16-17, and injunctions that merely require the defendant to prospectively obey the law are unenforceable. See FED. R. CIV. P. 65; Patterson v. Newspaper & Mail Deliverers' Union, 797 F. Supp. 1174, 1184 (S.D.N.Y. 1992). Such "obey the law" injunctions require the Court, in determining whether a violation of the injunction occurred, to undertake the same analysis and interpretations of the facts as would be required to decide the case on the merits; such injunctions therefore provide no guidance to defendants as to "precisely what acts are forbidden." N. Atl. Instruments, Inc. v. Haber, 188 F.3d 38, 49 (2d Cir. 1999) (Van Graafeiland, dissenting).

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[1] In support of their "de facto" argument, plaintiffs also rely on Constitution on ICE, a report issued by Cardozo Law School claiming that ICE entered 86% of homes in Long Island without consent. Opp. Mem. 12 n. 14. But the authors had no information about the actual circumstances of each arrest, and they base their conclusion on the logical fallacy that if the consent was not recorded, consent was not obtained. See Cmplt. Ex. 2 at 10.

Here, plaintiffs ask the Court to prohibit ICE from "[d]eploying groups of armed agents to descend upon the homes of Latinos in the pre-dawn hours with the intent to enter such homes, without judicial warrants or permission from the residents to do so, through the use of force or by manufacturing 'consent' from residents who are unable—under law or due to the oppressive conditions of the raids—to give legitimate consent." Cmplt. 135-36. But even if the plaintiffs were to obtain that injunction, the Court would still be required to weigh the totality of the circumstances in any future challenge to a consent-based operation. Under the terms of the proposed injunction itself, the Court would have to determine whether, under the circumstances, there were too many agents, i.e., a "group"; whether the occupants of the homes were "Latinos," a term plaintiffs have never defined; whether agents intended to manufacture consent; whether the residents were capable of giving "legitimate consent"; and whether agents employed "force" or other "oppressive conditions." Cmplt. 135-36. These terms are utterly vague, and "[b]ecause the legality of Defendants' actions will likely depend on the specific circumstances with which they are confronted, the Court [can] do little more than order Defendants to refrain from breaking the law. Such an injunction is not permitted and, furthermore, would be of little use in guiding Defendants' actions." Barrera, 2009 WL 825787, at *10.

The forms of injunctive relief plaintiffs allude to in their opposition papers—that OPR conduct more thorough investigations, and that ICE rid its databases of inaccurate information—are equally flawed because whether ICE employees obtain consent in any future home operation will be intensely fact-specific, and will not depend, for example, on whether information in their databases was inaccurate.

Thus, plaintiffs seek an impermissible "obey the law" injunction, and any claim that ICE violated the terms of such an injunction would necessarily bear a striking resemblance to a damages claim based on an alleged Fourth Amendment violation. And because ICE already is

legally obliged to follow the Fourth Amendment, the injunction plaintiffs seek would do nothing to redress the fears they claim to have.

D. Plaintiffs Have Not Demonstrated That They Need Additional Discovery to Adequately Oppose the Government's Motion

Despite the immense amount of discovery that has taken place in this case—more than 65,000 pages of discovery produced by defendants, and more than 100 depositions as of the date of plaintiffs' opposition—plaintiffs continue to argue that the Court should defer decision on this motion because they have not had an adequate opportunity to conduct discovery. This argument must be rejected. Plaintiffs cannot plausibly claim that they have had insufficient opportunity to formulate an opposition to this motion, especially because the Government made essentially the same arguments in a brief filed in December 2007.

Plaintiffs have already imposed extraordinarily burdensome discovery on the Government, and defendants' forthcomingness has been met only with ever-escalating demands—now including a demand to depose the current and former Secretaries of Homeland Security, who had no involvement in planning and implementing the 2007 operations. It is beyond time for discovery to end. Plaintiffs' claim that additional discovery would somehow support their opposition is wholly speculative, and any more discovery would be overwhelmingly cumulative.

To succeed on a Rule 56(f) application, a party must submit an affidavit showing that "the material sought is germane to the [matters at issue in the motion], and that it is neither cumulative nor speculative." Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994); see also Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (Rule 56(f) affidavit must explain "what facts are sought[,] how they are to be obtained, [] how those facts are reasonably expected to create a genuine issue of material fact, [] what effort affiant has made to obtain them, and []why the affiant was unsuccessful in those efforts"). If a request for discovery "is based on

speculation as to what potentially could be discovered," a court should deny the party's request. Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., 265 F.3d 97, 117 (2d Cir. 2001).

Plaintiffs cannot meet their burden of showing that they need additional discovery to oppose defendants' jurisdictional motion. Although they claim that they require a "significant" (though unspecified) number of additional depositions and documents to establish standing to bring this suit—as if 100 depositions is not enough—none of the evidence plaintiffs cite in their 56(f) affidavit justifies further delay in adjudicating the Government's jurisdiction motion.

First, much of the evidence plaintiffs seek has no bearing on whether they have standing to bring this action. Unlike a litigant seeking discovery under 56(f) in connection with a summary judgment motion, plaintiffs here cannot succeed by claiming that they "are seeking information . . . about matters important to [their] claims, including the injunctive relief claim." See Gordon Decl. 7. Rather, they must show that the outstanding discovery is relevant to the matters at issue on this motion, namely, their standing to bring this suit. For instance, although plaintiffs assert that they need 30(b)(6) testimony from ICE concerning (a) its system for handling "internal and external complaints," (b) the method by which targets were selected for the operations at issue in the complaint, (c) agents' interactions with "non-Latinos" during these operations, (d) "communications with ICE headquarters" about the operations, and (e) the manner in which the United States Attorney's Office searched for documents from individual defendants, see Gordon Decl. 12-13, 16, none of these topics has anything to do with the issue of whether plaintiffs are at risk of future constitutional violations. Likewise, while plaintiffs insist that they need additional depositions and documents showing, inter alia, whether consent was recorded at each home, and whether agents "properly identif[ied] the proper addresses of their targets" or "targeted and profiled Latinos" in connection with the 2007 operations, Gordon Decl. at 21, 33-35, this information is irrelevant to whether plaintiffs can show a likelihood that they

will suffer future unconstitutional conduct at the hands of ICE employees. The same is true of the expert discovery described in plaintiffs' Rule 56(f) submission: despite their claim that expert testimony on "pattern and practice, complaint processing procedures, and racial profiling . . . will bolster plaintiffs' allegations of racial profiling and constitutional violations," Gordon Aff. at 41, plaintiffs do not explain why they need expert discovery to oppose this motion, let alone how such testimony will show they have standing.

Plaintiffs' 56(f) request should be denied because it is based entirely on speculation. Throughout their submission, plaintiffs baldly assert that additional discovery will reveal information that will help them establish standing, but their conjecture is baseless. For example, plaintiffs say that additional discovery "will reveal that ICE . . . profiled and/or targeted Latinos" and that they "expect to obtain additional policies that explicitly and implicitly endorsed coercive, unlawful, and discriminatory conduct," yet they offer no support for these predictions or explanation as to why three years of intensive discovery has not been enough time. Similarly, while plaintiffs argue that they require documents concerning an alleged 2006 operation at 15 West 18th Street in Huntington Station to oppose the motion, defendants have already diligently searched for such documents and explained those efforts to plaintiffs.

Finally, plaintiffs' request should be denied because all of the depositions and documents plaintiffs seek are cumulative to the voluminous discovery that has already taken place. Because plaintiffs have had the Government's motion papers since 2007, they have had three years to prioritize discovery to allow them to oppose the motion. During that time, defendants have furnished plaintiffs with more than 65,000 pages of written and electronic discovery in response to six sets of document requests containing more than 150 separate demands, made available more than 48 current and former employees for depositions, provided 21 hours of 30(b)(6) testimony on ICE databases, training, and policies, and responded to 45 requests for admission.

Quite simply, there is no topic on which plaintiffs seek additional documents or testimony that has not already been addressed or that they have not had an opportunity to address. For example, while plaintiffs claim that they need to depose more than a dozen additional defendants and ICE employees to "uncover additional evidence" regarding the 2007 operations and their aftermath, these topics have repeatedly been explored at every deposition. As for plaintiffs' claim that they need to depose Michael Chertoff, Julie Myers, and other former high-ranking officials to properly oppose this motion, there is simply no basis for such an argument, because even if plaintiffs were entitled to take such depositions (a position that defendants do not concede), any testimony by these high-ranking officials who had no involvement in the planning of these operations would be cumulative to the testimony that ICE employees who did have operational planning responsibility have already given.

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
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