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 (KBF)**

**DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION**

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**Preliminary Statement**

Plaintiffs recognize that to prevail on their motion for class certification, it is not enough that they allege that each plaintiff was individually subjected to an unconstitutional home entry; rather, they must "challenge a policy, pattern, and practice of constitutional misconduct." Supp. Br.[1] at 1. It is understandable, then, that plaintiffs devote much of their supplemental submission to arguing that the unconstitutional conduct that they allege occurred was "consistent with policies and practices that are still in force," Supp. Br. at 4, and that this lawsuit is not really about seeking compensation for what occurred in the past to them as individuals, but to changing ICE's official policies of discriminating against Latinos as a class. But, contrary to plaintiffs' representations, ICE has no official policy of discriminating against Latinos, or of authorizing non-consensual home entries; rather, ICE policies prohibit the actions and tactics that plaintiffs allege occurred. Thus, even if plaintiffs were able to convince a jury that ICE agents entered their homes without consent in 2007, the agents would have been acting in clear violation of—not in accordance with—ICE's policies. For this reason, the Supreme Court's decision in Wal-Mart, Inc. v. Dukes—which, like this case, involved alleged deviations from, not compliance with, the company's discrimination policy—is controlling, and precludes class certification. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) (requiring that plaintiffs show "significant proof" that Wal-Mart "operated under a general policy of discrimination").

In Wal-Mart, the Supreme Court recognized that employment decisions, such as whether to award a promotion, are based on individual circumstances and, absent compelling proof of systematic general discrimination, they are not subject to catch-all resolution in a class action.

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[1] References to "Supp. Br." are to Plaintiffs' Supplemental Brief in Support of Their Motion for Class Certification, dated January 25, 2012.

The same is true here – ICE's decision to target or arrest an individual, or to use a particular strategy to enter a home, depends on myriad factors, including the nature of the immigration violation, the age of the case, the state of ICE's local and national budget and resources, and responses that individual aliens give to questioning from individual immigration agents. Because each incident in the complaint is intensely fact-specific, plaintiffs are unable to establish commonality under Federal Rule of Civil Procedure 23, and their respective allegations must rise or fall based on what a jury believes occurred at each specific location. Accordingly, the Court should deny plaintiffs' motion for class certification.

## A. Plaintiffs Motion for Class Certification Should Be Denied Because They Are Unable to Show That ICE Has Any Unlawful Policy

### 1. Applicable Legal Standards

The Supreme Court has emphasized that there is a "wide gap" between (i) an individual's claim of discrimination based on an allegedly discriminatory policy, and (ii) the "existence of a class of persons who have suffered the same injury . . . such that the individuals' claim and the class claim will share common questions of law or fact." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982). And to "bridge that gap," plaintiffs must prove "much more" than the validity of their own claims. Id. at 158. In Wal-Mart, the Supreme Court emphasized that Falcon's statement "precisely describes" the burden of establishing commonality for purposes of class certification. See Wal-Mart, 131 S. Ct. at 2553. Because Wal-Mart had no "express corporate policy against the advancement of women," id. at 2548, plaintiffs had to show "significant proof," id. at 2553 (quoting Falcon), of a general policy of discrimination. The Wal-Mart plaintiffs attempted to meet their burden by submitting statistical evidence and 120 affidavits containing descriptions of purported discrimination, but the Court held that their evidence did not establish "the entire company 'operate[s] under a general policy of

discrimination,' which is what [they] must show to certify a companywide class." Id. at 2556 (quoting Falcon, 457 U.S. at 159 n.15).

**2. ICE Policies Do Not "Authorize or Encourage" Unconstitutional Conduct**

Plaintiffs recognize that to satisfy the commonality requirements of Rule 23, Wal-Mart requires that they challenge an illegal policy, and not merely that they give the Court discrete examples of deviation from otherwise appropriate policies. Accordingly, they stray from the core of their complaint—i.e., the specific facts of what occurred at different locations, with different plaintiffs and defendants, on different days—and argue instead that they are really challenging ICE's policies, which, according to plaintiffs, "authorize or encourage unconstitutional conduct." Supp. Br. at 4. But the policies, which were produced in discovery to plaintiffs more than four years ago, do no such thing, and state in no uncertain terms that in the absence of a judicial warrant or exigent circumstances, officers and agents must obtain consent to enter anyone's home.

ICE made its first production of documents—nearly 1,000 pages of policy materials—on November 9, 2007, and many of ICE's core policies concerning consent-based operations were addressed in two declarations from December 2007: the Declaration of Darren Williams ("Williams Declaration"), dated December 5, 2007 (Ex. 1),[2] and the Declaration of Jeffrey Knopf ("Knopf Declaration"), dated December 7, 2007 (Ex. 2). The Williams Declaration addressed the policies of ICE's Office of Detention and Removal Operations ("DRO")—now known as the Office of Enforcement and Removal Operations ("ERO")—the ICE division that conducted the February, March, and April 2007 operations at issue in the complaint. The Knopf

[2] Citations to "Ex." are to the exhibits to the Declaration of David Bober, dated February 17, 2011, which is being served concurrently with this memorandum.

Declaration addressed the policies of ICE's Office of Investigations ("OI")—now known as Homeland Security Investigations ("HSI")—which conducted the September 2007 operations referenced in the complaint.

With respect to the 2007 DRO operations, which targeted criminal and fugitive aliens, DRO's New York Field Office first identified residences where it believed it would encounter targets, then approached the locations and, if appropriate, asked for consent to enter. See Williams Decl. (Ex. 1), ¶ 10. During DRO's "knock-and-talk" investigations, officers knock on the door and identify themselves as ICE officers or police. If they wish to enter, DRO policy is that officers 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. These provisions and many others are set forth in the Detention and Removal Operations Policy and Procedure Manual (the "DROPPM"), which has been posted on ICE's intranet since before 2007. Id. at ¶¶ 17-18. Portions of the DROPPM were attached to the Williams Declaration, see Exs. A and B, and more than 120 unredacted pages of that manual, which is frequently updated, have been produced in this litigation.

As for the September 2007 operations, they were carried out by OI in partnership with federal, state, and local law enforcement agencies. See Knopf Decl., (Ex. 2), ¶ 5. Approximately 160 ICE agents participated, and the goal of the operation was to use "knock-and-talk" investigations to locate and arrest known gang members who were subject to removal from the United States. Id. ¶ 8. 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. Id. ¶ 12. Both manuals require that agents obtain consent to enter if they do not have judicial search warrants, id. ¶ 14, and relevant portions of the manuals were attached to the Knopf Declaration.

In addition to the materials discussed above, ICE has produced more than 65,000 pages of documents, including approximately 12,000 pages of training materials; additional documents concerning consent-based operations, such as a 200-page lesson plan concerning the ICE academy's Fourth Amendment training program (US22378-22597); 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);[3] and Fourth Amendment training materials that are used for training and refresher courses in the field (Ex. 3, Ex. 11, Ex. 28). Although an exhaustive discussion of these materials is beyond the scope of the current motion, because plaintiffs have alleged five specific "policies and practices that authorize or encourage unconstitutional conduct," see Supp. Br. at 4, a brief explanation is appropriate.

First, plaintiffs claim that ICE permits ruses "without caution or prohibition of behavior that undermines consent." Supp. Br. at 4. This is incorrect – in fact, ICE's Fourth Amendment refresher training states that ruse techniques "must not be coercive" and "may not convince resident[s] they have no choice but to let [the] officer inside." See US29011 (Ex. 3). And it specifically lists types of ruse techniques that are allowed (e.g., using fake business cards and altering the appearance of government vehicles), and ones that are not (e.g., representing to be an

[3] We have not included these materials as exhibits in an effort to keep the already voluminous motion papers to a reasonable size. In the event the Court wishes to review these policies, we of course will provide them.

employee of the Occupational Safety and Health Administration). See US29012 (Ex. 3). Moreover, Chapter 42 of the Special Agent's Handbook explains that "duress-free permission" is required, see US5785 (Ex. 4), and the "M-69" manual states that "[c]onsent is involuntary when it is the product of coercion or threat, express or implied," see US5858 (Ex. 5). The memorandum plaintiffs cite (Supp. Br. at 4 n.14) does not purport to define the types of ruse techniques that could produce involuntary consent. Instead, its focus is the effect that ruse techniques "may have on [the] security or public image" of other state and federal agencies, and it therefore bars the use of ruses involving health and safety programs. See US6792-93 (Ex. 6); see also US29823 (OI guidance) (Ex. 7) (disallowing "ruses involving health and safety programs administered by a private entity, or a federal, state, or local government agency").

Second, plaintiffs claim that ICE's operational plans "call for significant shows of force through the presence of multiple armed agents before obtaining 'consent.'" Supp Br. at 4. But contrary to this assertion, the DRO operations plans that plaintiffs cite (Supp. Br. at 4 n.15) make no mention of "significant shows of force," and the OI operation plans at issue explained that ICE agents would execute "administrative arrest warrants via consensual door knocks at pre-targeted locations." See US1000 (September 2007 operation plan) (Ex. 8). More generally, no ICE policy calls for a "significant shows of force," but instead ICE's detailed Use of Force Policy recognizes a continuum of five different levels of force dictated by the individual circumstances of each encounter. See US6752-6773 (Ex. 9).

Third, plaintiffs claim that ICE policies permit "teams to surround homes, including entering private backyard areas, effecting seizures of homes and occupants." Supp. Br. at 4. But to take one example, one of ICE's manuals devotes seven pages to a discussion of curtilage, which requires ICE agents to take into account factors such as proximity to the home, use of the

area, and steps taken to prevent observation. See US18862-68 (Ex. 10); see also US28998 (Ex. 3) (refresher training materials, discussion of curtilage). These training materials recognize, in accordance with controlling court decisions, that curtilage is entitled to Fourth Amendment protection, see Oliver v. United States, 466 U.S. 170, 180 (1984), and that property is considered curtilage if the property owner has a reasonable expectation of privacy. See, e.g., United States v. Titemore, 437 F.3d 251, 259-60 (2d Cir. 2006) (criminal defendant did not have reasonable expectation of privacy in porch and yard that trooper walked across to reach stairway); Serby v. Town of Hempstead, No. 04 Civ. 901 (DRH)(MLO), 2006 WL 2853869, at *8 (E.D.N.Y. Sept. 30, 2006) ("Plaintiff cannot claim a reasonable expectation of privacy on the walkway or driveway that leads to his door or the unlocked screen door before the inner door to his house."). Thus, even assuming that ICE agents impermissibly entered the curtilage of plaintiffs' homes (which defendants deny), any impermissible entry would have been contrary to ICE policy, as expressed in ICE manuals.

Fourth, plaintiffs claim that ICE's policies and practices permit "systematic 'sweeps' throughout homes as a matter of course, even when there are no articulable concerns for officer safety." Supp. Br. at 4. Again, this is incorrect -- ICE's Fourth Amendment Training materials instruct that protective sweeps are "not automatic simply because officers are in a house to arrest someone." See US29016 (Ex. 3) (emphasis in original). Instead, the officer must "posses[ ] [a] reasonable belief based on specific and articulable facts that [the] area to be swept harbors individual[s] posing a danger to officers on the scene." Id.

Fifth, plaintiffs claim that ICE's policies encourage "[d]etentive questioning of individuals within homes absent constitutional authority." Supp. Br. at 4. In fact, the immigration regulations properly provide that "if the immigration officer has a reasonable

suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning." 8 C.F.R. § 287.8(b)(2). ICE's Fourth Amendment training covers brief, detentive questioning in great detail, explaining, in accordance with Supreme Court case law, that officers "must be able to articulate more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." See US29122 (Ex. 11) (quoting Illinois v. Wardlow, 528 U.S. 119, 124 (2000), and Terry v. Ohio, 392 U.S. 1, 26 (1968)).

In light of these materials, many of which date from 2009 or later, plaintiffs' claim that ICE's "training manual . . . has remained unchanged" since 1979, Supp. Br. at 6, is absolutely incorrect. Although the training manual known as M-69 was written in 1979, the OI 30(b)(6) witness testified that OI's governing policies are frequently updated through promulgations of new memoranda by ICE's Office of the Principal Legal Advisor, see OI 30(b)(6) Tr. (Ex. 12) at 72:14-75:15, and a 1993 version of the M-69 was produced in this case. In addition, the M-69 has been combined with Chapter 42 of the Special Agent Handbook and other materials to form a new ICE Special Agent Handbook, which was issued in 2007. See OI 30(b)(6) Tr. (Ex. 12) at 79:24-80:4. Finally, ICE makes its policy and practice documents available to all of its officers and agents on a dedicated intranet website. Id. at 79:12-18.

**3. Deposition Testimony Belies Any Claim of Widespread Violation of ICE Policies**

Not only are plaintiffs' assertions about the contents of ICE's policies and practices contradicted by the policy materials, ICE officers and agents have testified about these very topics, and their testimony negates any contention that ICE agents had a routine practice of disregarding official ICE policy. For example:

- **Ruse techniques.** See, e.g., ICE 28 Tr. (Ex. 13) at 100:11-17 ("we cannot say there's an emergency like a fire in the house"); ICE 49 Tr. (Ex. 14) at 88:23-89:2 (cannot use "[t]hings like delivery men, mailman, firefighter, gas man, electric company, cable"); ICE 50 Tr. (Ex. 15) at 97:20-24 ("You couldn't knock on a door and yell 'fire.'"); Knopf Tr. (Ex. 16) at 87:13-16 ("Q. Can an agent use a ruse that a medical emergency exists inside a home? A. No."); ICE 39 Tr. (Ex. 17) at 97:25-98:22 (same); ICE 41 Tr. (Ex. 18) at 237:20-24 (cannot state that "their house is burning or there's a gas leak").

- **Use of force.** See, e.g., ICE 58 Tr. (Ex. 19) at 196:13-197:5 (during the September 2007 operations, never drew his weapon, and no one on his team ever did); ICE 42 Tr. (Ex. 20) at 240:9-14 (no drawn weapons or hands on weapons); ICE 45 Tr. (Ex. 21) at 234:16-22 (no drawn weapons); ICE 50 Tr. (Ex. 15) at 178:19-25 (no drawn or pointed weapons); ICE 33 Tr. (Ex. 22) at 157:22-158:4 (same); ICE 31 Tr. (Ex. 23) at 182:19-24 (same), at 142:6-8 (no forcible entries); ICE 37 Tr. (Ex. 24) at 172:17-173:19 (same); ICE 52 Tr. (Ex. 25) at 180:12-181:7 (same); ICE 13 Tr. (Ex. 26) at 130:6-12 (level of permissible force determined by nature of threat to officer safety); ICE 15 Tr. (Ex. 27) at 254:14-21 (no physical force was used).

- **Curtilage.** See, e.g., ICE 33 Tr. (Ex. 22) at 149:20-152:16 (explaining that agents do not need consent for areas "outside the house where one wouldn't normally have a reasonable expectation of privacy" but would need consent if there were a "locked gate"); id. at 151:20 (explaining that no consent is needed for areas "le[ft] open to the public view"); ICE 40 Tr. (Ex. 29) at 176:24-179:25 (agents do not need consent for "wide open area[s]" surrounding a home that are "accessible by non-intrusive techniques"); ICE 47 Tr. (Ex. 30) at 148:11-149:6 (explaining that if agents encountered locked fence or "do not enter" or "no trespassing" sign "then you'd have to get permission to enter," but that agents typically are allowed to cross fences and lawns to approach front door).

- **Protective sweeps.** See, e.g., ICE 2 Tr. (Ex. 31) at 138:7-10 (protective sweep limited to "Tak[ing] a look in the open areas that could be a danger to the officers"); ICE 18 Tr. (Ex. 32) at 176:3-7 ("we do a protective sweep to ensure that there are no threats to law enforcement at the location"); ICE 31 Tr. (Ex. 23) at 163:2-164:22 (protective sweep typically limited to locations where unknown persons may be hiding); ICE 20 Tr. (Ex. 33) at 373:13-17 (protective sweep limited to "reasonable place a person may be hiding"); ICE 51 Tr. (Ex. 34) at 90:24-92:16 (protective sweep limited to areas where person might be hiding).

- **Detentive questioning.** See, e.g., ICE 29 Tr. (Ex. 35) at 289:9-290:9 (explaining that officers can engage in brief detentive questioning based on reasonable suspicion, in accordance with Terry v. Ohio); Peter Smith Tr. (Ex. 36) at 157 (ICE officers can inquire of an alien's status when they have reasonable suspicion that alien does not have legal status).

In light of this testimony and the policy materials discussed above, the Court should reject plaintiffs' contention that ICE's policies "authorize or encourage unconstitutional conduct." Supp. Br. at 4. Thus, to the extent that isolated constitutional violations occur from time to time, which is likely inevitable in any large law enforcement agency with tens of thousands of agents (though not conceded to have occurred here), the violations would have arisen from officers and agents violating, as opposed to following, ICE's policies.

**B. Plaintiffs' Other Contentions Do Not Excuse Their Failure to Meet the Requirements of Rule 23(a)**

Plaintiffs have repeatedly criticized the Government for "resort[ing] to arguing the merits of the case," Pls. Reply Mem. at 3,[4] which, they argue, is not relevant to the issue of class certification. See Supp. Br. at 13. But in Wal-Mart, the Court emphasized that district courts are required to resolve "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [the issue] again at trial in order to make out their case on the merits." Wal-Mart, 131 S. Ct. at 2552 n.6. Thus, Wal-Mart requires district courts to engage in a "rigorous analysis" to determine whether plaintiffs have "in fact" satisfied the prerequisites of class certification. Id. at 2551 (quoting Falcon, 457 U.S. at 161). In Ellis v. Costco Wholesale Corp, 656 F.3d 970, 981 (9th Cir. 2011), the Ninth Circuit recently vacated the district court's certification of a nationwide class of current and former Costco employees, faulting the district court for concluding that it "should not inquire into the merits of the suit during the certification process." Id. at 981. The Ninth Circuit took "this opportunity to clarify the correct standard," stating that "a district court must consider the merits if they overlap with the Rule 23(a) requirements." Id.

[4] Plaintiffs' Reply Memorandum in Support of Their Motion for Class Certification, dated Nov. 14, 2011.

In light of these principles, consideration of the merits is essential to class certification, and demonstrates that plaintiffs' motion should be denied. Further, as described in the Government's opposition brief (Opp. Mem. at 15-16), plaintiffs' statistical analysis is flawed, because plaintiffs can draw no evidence of alleged discrimination from the actual work papers that were used to generate the target lists – i.e., there is nothing on the face of the work papers to indicate that individuals were targeted because they were Latino, rather than for their immigration violations. Thus, plaintiffs attempt to rely upon alleged statistical analyses that purport to show that ICE's operations disproportionately affect "Latinos." But innumerable law enforcement operations will likely (and permissibly) have a disproportionate affect on some racial group – presumably an operation focused on Chinese gangs in Chinatown would "disproportionately" affect aliens of Chinese descent; organized crime syndicates tied to specific nations will yield investigations and arrests of people from those nations; and operations, like those at issue here, that target members of predominantly Hispanic gangs will disproportionately affect "Latinos." See Lewis v. Casey, 518 U.S. 343, 375 (1996) (explaining that "a law or official act does not violate the Constitution solely because it has a disproportionate impact," absent "proof of discriminatory purpose"). Even putting that reality aside, plaintiffs' expert makes a number of analytical errors. See Opp. Mem. at 16. If plaintiffs were correct that ICE was intentionally discriminating against Latinos (however defined) by arresting Latinos more frequently than non-Latinos, one would expect to see an ICE operational arrest rate of Latinos that is higher than the percentage of ICE targets who are Latinos. But even using plaintiffs' own data, there is no statistically significant difference between the percentage of ICE operational targets who are from Spanish-speaking countries, and the percentage of ICE-arrested targets who are from Spanish-speaking countries. See Statistical Review of Beveridge Report (Ex. 37), at 1.

Plaintiffs' anecdotal evidence fares no better. During oral argument, the Court asked plaintiffs if they were aware of any similar cases since these operations were conducted in 2007. See Transcript of January 4, 2012, hearing at 12-14. Plaintiffs were unable to provide a single example of non-consensual searches by ICE other than the searches at issue in this case, but have now produced three affidavits from a single operation in the New York area in 2009 (and also one that occurred in Tennessee, which has no evident relevance to a class "limited" to the millions of people within the jurisdiction of ICE New York).

Plaintiffs' submission of affidavits describing similar conduct echoes the strategy that was specifically rejected in Wal-Mart. There, the plaintiffs attempted to meet their burden of showing a "general policy of discrimination" by providing 120 affidavits "reporting experiences of discrimination" —approximately 1 for every 12,500 class members—and the Court deemed that showing insufficient. But here, plaintiffs' proposed class contains "millions of Latinos" (Plaintiffs' Mov. Mem. at 2)—making it significantly larger than the 1.5 million person class in Wal-Mart ("one of the most expansive class actions ever," 131 S. Ct. at 2547), and combining their three new affidavits with the allegations in the fourth amended complaint brings the total to one anecdote for every 250,000 potential class members. Thus, even if the Court were to assume that every word of the affidavits were true, they would establish, at most, that one constitutional violation occurred out of the thousands upon thousands of immigration arrests that ICE has made in the last four years. Given that 120 affidavits deemed to be true were insufficient to meet plaintiffs' burden (for a smaller class) in Wal-Mart, it is difficult to imagine how three affidavits describing one incident could meet plaintiffs' burden of showing that ICE has "operated under a general policy" of unlawful conduct. Wal-Mart, 131 S. Ct. at 2553.

Plaintiffs blame their inability to marshal more evidence in part on the fact that discovery is now closed. Supp. Br. at 3. But discovery in this case has gone on for years (an undertaking that Dewey & LeBoeuf describes as the largest in the history of its firm[5]), and so plaintiffs cannot plausibly complain that they have had insufficient discovery, or should be granted yet additional inquiry, to try to prove a general policy of unconstitutional conduct. Moreover, and incongruously in light of their complaint that they still lack sufficient information, plaintiffs complain of the "delay in reaching the class certification question," but plaintiffs themselves asked for leave to renew their class-certification motion. See August 12, 2011, Order (Docket Entry 289) (noting that "plaintiffs indicated at the conference today that their prior motion for class certification has been withdrawn"). Whatever the merit of their complaint that class certification should have been resolved earlier, the timing of this motion does not warrant granting relief of any kind.

Apart from failing to satisfy the commonality requirements of Wal-Mart, plaintiffs' proposed class definition suffers from additional defects, which are covered at length in the Government's response to the renewed class certification, and will not be repeated here. A few points that plaintiffs make in their supplemental papers, however, merit some brief discussion. First, at oral argument and in their supplemental submission, plaintiffs rely heavily on Ortega-Melendres v. Arpaio, No. CV-07-2513, 2011 WL 6740711 (D. Ariz. Dec. 23, 2011), in which the District of Arizona certified a class of "all Latino persons who, since January 2007, have been or will be in the future, stopped, detained, questioned or searched by [Maricopa County] agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa

[5] http://www.deweyleboeuf.com /en/Firm/ProBono/ ASignatureProBono Program#2 (last visited February 17, 2012).

County, Arizona." 2011 WL 6740711, at *1. But that case, which is currently on appeal, is distinguishable from this one because the defendants conceded that Maricopa County had an official policy of detaining people based only on suspicion of immigration violations—without reasonable suspicion that a crime had been committed—which the district court found was unconstitutional, and which makes plaintiffs' commonality showing much stronger than it is here. Ortega-Melendres, 2011 WL 6740711, at **19-20. That distinguishes Ortega-Melendres from cases like Wal-Mart, and this one, where there is no general unconstitutional policy, and the plaintiffs instead seek to recover money damages and prospective injunctive relief based on alleged deviations from official policy that, if adhered to, would be entirely legal.

Second, plaintiffs argue that their proposed class of "Latinos" is sufficiently precise because the Court can look to factors including ancestry, linguistic characteristics, Spanish surnames, and country of origin. Supp. Br. at 10. But these factors often cut in multiple directions, and it should not be up to the Court, or ICE, to ascertain, on an individualized basis, which of the potential millions of class members self-identify as Latino. See, e.g., Mireya Navarro, "For Many Latinos, Racial Identity Is More Than Just Color," The New York Times, published January 14, 2012, available at http://www.nytimes.com/2012/01/14/us/for-many-latinos-race-is-more-culture-than-color.html?pagewanted=all (last visited February 17, 2012). The members of a class must be readily ascertainable, and not merely composed of an amorphous group of highly diverse individuals who may "in the future" be the subject of an ICE operation. Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) (declining to certify class of "all learning disabled children in Indiana" in part because "the proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable").

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for class certification.

Dated: New York, New York
February 17, 2012

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