UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, et al.,	:	
	:	ECF Case
Plaintiffs,	:	Civil Action No.
	:	07 CIV 8224 (KBF)
-against-	:	
	:	
IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	:	
Defendants.	:	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs challenge a policy, pattern, and practice of constitutional misconduct during ICE New York's home raid operations. Carried out under the auspices of nationwide operational plans and consistent with established policies, these home raid operations — and the actions of ICE agents who executed them — shared coercive and unlawful characteristics. Defendants admit that both the operations and the challenged policies driving ICE agents' conduct continue. The proposed class, as revised during oral argument, falls squarely within the category of civil rights cases embraced by Rule 23(b)(2):

> Persons who are (1) Latino; (2) reside within the jurisdiction of ICE New York; and (3) who have been, or in the future will be, subject to a home raid operation.

Recent certification decisions arising from incidents of approximately the same "age" as the incidents here confirm that a class should be certified.

II. NAMED PLAINTIFFS AND CLASS MEMBERS HAVE STANDING

At oral argument on class certification, the Court raised the issue of whether the alleged incidents were "stale" and therefore presented a mootness problem. To a large extent, this issue was previously addressed by the Court in connection with the Government's motion to dismiss Plaintiffs' injunctive relief claims, in which the Government argued that Plaintiffs could not establish the likelihood of future harm or of recurrence.[1] As detailed in Plaintiffs' opposition brief, Plaintiffs possess significant evidence of such likelihood, thus showing that they have standing to seek injunctive relief.[2]

In August 2011, the Court denied the Government's motion to dismiss.[3] Specifically, the Court held that Plaintiffs had alleged facts sufficient to show the likelihood of future harm and of

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[1] 5/19/2010 Dfts' Mem. in Supp. of Mot. to Dismiss Claim for Injunctive Relief (ECF No. 241).

[2] *See* 7/9/2010 Plfs' Mem. of Law in Opp'n to Motion to Dismiss Claim for Injunctive Relief (ECF No. 257); Decl. of Donna L. Gordon and Exhibits cited in support of same.

recurrence, subject to ultimate proof at trial. For example, because Plaintiffs adequately alleged that ICE had violated the Fourth and Fifth Amendments in conducting warrantless operations at Plaintiffs' homes, continued to conduct operations under the same policies and practices, relied on outdated intelligence and computer databases, had not implemented policies that would prevent recurrence, and had threatened to return to one home and had actually returned to another, future harm was likely.[4]

A. Even if Defendants had voluntarily ceased the challenged policies and practices, this case is not moot.

Plaintiffs' claims for injunctive relief are not moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[5] Here, there is no indication that the questioned policies and practices have ceased; to the contrary, Defendants admit that they remain in force.[6] Thus, no event has occurred which makes it impossible for this Court to provide effectual relief on behalf of the class.[7]

Even assuming *arguendo* (and contrary to the evidence) that, after this suit was filed, Defendants voluntarily changed or ended the challenged misconduct, this case would still not be moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not

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[3] 8/1/2011 Opinion and Order (ECF No. 286), *available at* 2011 WL 3273160.

[4] *Id.* at 43, 54-58 (2011 WL 3273160, at *17, *21-23).

[5] *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

[6] *E.g.*, 6/16/2010 ICE's Resps. to RFA Nos. 12-15, 37-39 (identified policies remain in effect, and "ICE currently conducts operations under the auspices of Operation Community Shield . . . Operation Cross Check . . . [and] Operation Return to Sender.") (Ex. 1); 11/1/2011 M. Forman Tr. 64:19-66:16, 18:15-22:6 (Operation Community Shield ongoing nationwide operation at retirement in 2010) (Ex. 2); 6/21/2010 OI 30(b)(6) Tr. 70:10-25, 76:9-78:18, 212:23-213:21, 215:15-24 (agent handbooks and policies unchanged) (Ex. 3); 7/30/2010 Hr'g Tr. 32:9-33:4 ("[A]fter Judge Koeltl denied the TRO application, we informed ICE that it could resume its normal operations.") (Ex. 4); 1/4/2012 Hr'g Tr. 30:15-32:3, 33:9-25 (Ex. 5). Unless otherwise indicated, all numbered exhibits are attached to the Decl. of Aaron R. Hand, filed herewith.

[7] *E.g.*, *ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004).

deprive a federal court of its power to determine the legality of the practice. . . . A claim does not become moot where it is not 'absolutely clear' that the offense 'could not reasonably be expected to recur.'"[8] Absent a showing that interim events have "completely and irrevocably eradicated the effects of the alleged violation," the case remains live.[9] This case is live.

In addition, similar classes have been certified based on facts and evidence of approximately the same vintage as the raids on named plaintiffs' homes here. On December 23, 2011, the federal district court in *Ortega-Melendres v. Arpaio* certified a class of Latinos subjected to unlawful searches and seizures based on three incidents that occurred in 2007-2008.[10] Less than five months ago, the court in *Morrow v. Washington* certified a class of racial minorities based upon incidents involving named plaintiffs that occurred in 2007-2008.[11] In effect penalizing the plaintiffs for failing to have more recent evidence would be particularly inequitable where, as here, not only do Defendants admit that virtually nothing has changed (*see infra*), but also because discovery is closed and the delay in reaching the class certification question was due in part to Defendants' request for a stay of class certification briefing.[12]

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[8] *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 185 (2d Cir. 2005) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (further noting that "[t]he 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness")).

[9] *Comer v. Cisneros*, 37 F.3d 775, 800 (2d Cir. 1994); *see also White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 169 (2d Cir. 2007); *Farez-Espinoza v. Napolitano*, No. 08-cv-11060, 2009 WL 1118098, at *4 (S.D.N.Y. Apr. 27, 2009).

[10] *Ortega-Melendres v. Arpaio*, No. CV-07-2513, 2011 WL 6740711, at *11-15 (D. Ariz. Dec. 23, 2011).

[11] *Morrow v. Washington*, No. 2:08-cv-288, 2011 WL 3847985, at *6-9 (E.D. Tex. Aug. 29, 2011).

[12] Plaintiffs originally sought class certification in December 2010. Rather than respond then to the motion for class certification, Defendants secured a stay of briefing pending resolution the Government's motion to dismiss the injunctive relief claims. The Court set a schedule for renewed briefing on class certification, requesting that Plaintiffs withdraw their original motion and resubmit a new brief. *See* 12/22/2010 Notice of Motion for Class Certification (ECF No.

B. Plaintiffs challenge the constitutionality of ICE agents' continued conduct, which is consistent with policies and practices that are still in force.

Contrary to Defense Counsel's representation at oral argument,[13] Plaintiffs challenge not one, but a number of policies and practices that authorize or encourage unconstitutional conduct, and the absence of policies to effectively identify and eliminate such conduct. Examples include:

- Permitting the use of ruses in consent-based operations, without caution or prohibition of behavior that undermines consent (e.g., falsely representing that there is an emergency or that agents possess judicial warrants).[14]
- Operational plans, including those specific to consent-based operations, which call for significant shows of force through the presence of multiple armed agents before obtaining "consent."[15]
- Use of teams to surround homes, including entering private backyard areas, effecting seizures of homes and occupants before seeking "consent."[16]
- Policies and practices permitting systematic "sweeps" throughout homes as a matter of course, even when there are no articulable concerns for officer safety.[17]
- Detentive questioning of individuals within homes absent constitutional authority.

Plaintiffs have also identified the absence of procedures necessary to identify and combat unconstitutional conduct. Agents, for example, are not informed, much less disciplined or retrained, after a judicial determination that they violated the Fourth Amendment.[18] Agents

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272); 3/8/2011 Hr'g Tr. 83:16-24 (Ex. 6) (referencing stay); 8/11/2011 Order (ECF No. 289) (setting renewed briefing schedule). Fact discovery closed in substantial part in August 2010. 8/9/2010 Order (ECF No. 259); 1/11/2011 Order (ECF No. 274).

[13] 1/4/2012 Hr'g Tr. 30:15-31:5 ("The one policy that plaintiffs have identified . . . .") (Ex. 5).

[14] *See* Opening Class Cert. Br., Ex. 90; 11/1/2011 M. Forman Dep. Tr. 265:2-266:25, 276:21-277:24 (Ex. 2).

[15] *See* Opening Class Cert. Br., Exs. 86-87.

[16] *See*, *e.g.*, Montgomery Report ¶¶ 71, 77, 90 (Ex. 7); Montgomery Rebuttal Report ¶¶ 16-17, 19, 34, 43-46 (Ex. 8); Opening Class Cert. Br., Ex. 87 at US2951.

[17] *E.g.*, Ch. 42, Special Agent Handbook at 42-15 (Ex. 9); Montgomery Report ¶¶ 53-59 (Ex. 7).

[18] *See, e.g.*, *United States v. Ali*, No. 05-CR-785, 2006 WL 929368, at *8 (E.D.N.Y. Apr. 7, 2006); 6/22/2010 DRO 30(b)(6) Tr. 307:16-308:23, 313:2-18 (Ex. 10); ICE 4 Tr. 326:24-329:16 (Ex. 11); ICE 3 Tr. 278:12-279:19 (Ex. 12); ICE 1 Tr. 337:2-342:23 (Ex. 13); C. Shanahan Tr. 247:11-248:12 (Ex. 14).

either misunderstand — or are willing to misrepresent under oath — when their conduct has been determined to violate Constitutional protections.[19]

C. ICE's warrantless home operations are ongoing.

The warrantless home raid operations challenged here were not anomalous or unauthorized. To the contrary, ICE agents consistently testified that their actions were in harmony with ICE's policies and practices. Supervisory officials admit that many policies do not distinguish between consent-based and warrant-based operations, or consider the question of whether standard practices, such as shows of force or ruses, have the effect of undermining voluntary consent.[20] No agent was reprimanded as a result of any of the operations at issue in this case, in spite of three internal complaints, two Immigration Judges' findings of egregious conduct, letters from Congressmen and Senators, and complaints from local law enforcement.[21] ICE has not shown that it changed the questioned policies; to the contrary, ICE confirms that the policies remain in place, and that the challenged operations continue.[22]

D. Sworn statements and media accounts of recent victims of ICE's home raid policies and practices confirm that ICE's unlawful conduct has not ceased.

With the exception of the withdrawal of the "quota" memoranda,[23] Defendants' counsel has not identified changes to any of the ICE policies and practices that were in effect when

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[19] *Compare United States v. 90-23 201st St.*, 775 F. Supp. 2d 545, 555–56, 563 (E.D.N.Y. 2011) (suppressing evidence in light of Fourth Amendment violation and citing prior ruling in criminal proceeding), *with* ICE 33 Tr. 23:11-25:17 ("Q. What was the result of that suppression hearing? A. The government was successful. The evidence did not get suppressed, so the government was successful.") (Ex. 15).

[20] *E.g.*, 11/1/2011 M. Forman Tr. 262:9-266:2, 277:1-18 (operative ruse policy did not include restrictions for consent-based home operations) (Ex. 2).

[21] *See, e.g.*, Opening Class Cert. Br., Exs. 1-2, 47, 54, 65, 66, 68-69; 6/16/2010 ICE's Responses to RFA Nos. 32-33 (Ex. 1); 4th Am. Compl. Exs. 5-6, 13.

[22] *See supra* note 6.

[23] 1/31/2006 Torres Memo (Ex. 16); 9/29/2006 Torres Memo (Ex. 17); 12/8/2009 Morton Memo (Ex. 18); 1/4/2012 Hr'g Tr. 31:18-33:10 (Ex. 5).

named Plaintiffs' homes were invaded. Defendants consistently took the position that discovery concerning home raid activities should be limited to the specific operations at named plaintiffs' homes in 2007, and discovery largely proceeded on that basis.[24] Requests for target lists and ethnicity data were similarly restricted.[25] Nevertheless, in opposition to Defendants' Motion to dismiss the Injunctive Relief claim, Plaintiffs submitted significant and substantial evidence, including evidence from agent depositions and ICE, that Defendants' actions at Plaintiffs' homes were consistent with their conduct both in the New York area and nationally. For example, the information contained in ICE's training manual, issued in 1979, has remained unchanged.[26]

In addition, at the suggestion of the Court, Plaintiffs here submit additional examples of ICE's unlawful conduct post-dating the raids on Plaintiffs' homes in this case.[27] As the attached declarations of three Latina women attest, in December 2009, immediately following a workplace raid in Newburgh, New York (Orange County), ICE agents, accompanied by one or more local officers, went to the second-floor apartment of two of the Latino workplace arrestees before dawn. They banged loudly on the front door, rang doorbells, entered the backyard to climb a staircase to a deck, shone flashlights through windows, and eventually entered the bottom apartment of a two-family house when a seventeen-year-old girl opened the door. Without permission, they entered the first apartment, proceeded through a locked door, and entered the second-floor apartment without consent. Once inside, weapons drawn, they detained and

[24] *E.g.*, Defendants' Objections to 4th Set of Document Requests, Nos. 3-10 (Ex. 19); 10/15/2009 Discovery Hr'g Tr. 39:3-21, 43:2-7 (Ex. 20); 7/30/2010 Discovery Hr'g Tr. 79:24-80:7 (Ex. 4); 4/30/2010 Defendants' Supp. Objections & Resps. to Interrog. Nos. 3-6 (Ex. 21).

[25] *E.g.*, 10/15/2009 Discovery Hr'g Tr. 67:2-6 (limiting Plaintiffs' request for documents concerning race or national origin of all targets for operations from January 2006 onward to only 131 individuals that were purported subject of September 2007 operations) (Ex. 20).

[26] *E.g.*, OI 30(b)(6) Tr. 77:13-78:18 (Ex. 3).

[27] *See* Decls. of Jane Doe Nos. 1, 2 and 3 (Exs. A-C to Decl. of Ghita Schwarz, filed herewith).

interrogated women and children in the home. ICE did not purport to act pursuant to a warrant. This conduct is strikingly similar to the conduct endured by named Plaintiffs, providing additional evidence that ICE New York continues its coercive practices, particularly with respect to Latinos.

The challenged policies and practices are consistent across ICE divisions and throughout nation. Memoranda and training manuals permitting ruses and training agents to conduct protective sweeps and detentive stops within the home apply to all ICE field agents. Defendant agents detailed to New York in 2007 participated in unlawful conduct alongside their New York colleagues. Thus evidence that agents persist in such conduct in other jurisdictions is relevant to whether unlawful practices continue in New York.

Similar conduct is, in fact, ongoing across the nation. For example, in Tennessee, ICE documents and sworn statements from both Latinos subject to ICE's conduct and ICE agents themselves demonstrate that the challenged practices were still underway throughout 2010.[28] Heavily redacted FOIA documents indicate that ICE conducted warrantless home operations under the auspices of Operation Community Shield — one of the operations at issue here — using large teams of agents to effect arrests primarily of Latinos.[29] ICE agents' declarations confirm that these operations were warrantless; that agents positioned themselves at all exit points; that agents centralized and interrogated residents; and agents swept locations immediately after entry, as is "customary."[30] Plaintiffs' declarations recount non-consensual entries and

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[28] *See Cahuec-Castro et al. v. Worsham et al.*, No. 3:11-cv-928 (M.D. Tenn.) (suit against seven ICE agents for pre-dawn raid on Oct. 1, 2010); *Tapia-Tovar et al. v. Epley et al.*, No. 3:11-cv-102 (M.D. Tenn.) (suit against three ICE agents and two local police offices for home raid on Feb. 7, 2010); *Escobar et al. v. Gaines et al.*, No. 3:11-cv-994 (M.D. Tenn.) (suit by 14 Latino U.S. citizens challenging warrantless, pre-dawn home raid operations on October 20, 2010).

[29] *See* Excerpts from Pl.'s Resp. to Order to Show Cause, *Ozment v. U.S. Dept. of Homeland Security, ICE*, No. 3:11-cv-429 (M.D. Tenn. Oct. 4, 2011), ECF Nos. 17-1 to -4 (Ex. 22).

[30] *See* Declarations of ICE Defs. Worsham and Epley in *Tapia-Tovar et al. v. Epley et al.*, No. 3:11-cv-102 (M.D. Tenn. July 18, 2011), ECF Nos. 25-26 (attached as Exs. 23-24).

break-ins, sweeps and searches, detentive questioning within Latinos' homes, and ICE agents' liberal use of offensive language derogatory to Latinos.[31] Media and public interest reports confirm that the challenged policies and practices continue.[32] Congressman John Conyers recently requested an independent review of complaints that "agents have engaged in a pattern of warrantless searches, racial profiling, and unlawful detentions of U.S. citizens and immigrants alike" after an internal ICE investigation dismissed allegations of wrongdoing by ERO/Detroit.[33]

The fact that even these incidents have come to the attention of Plaintiffs is significant given the enormous obstacles faced by immigrants and others in accessing high-quality low-cost legal services that can help bring unlawful conduct to light, and the widespread fear of reprisals in the event a complaint against ICE is lodged.[34] After all, it is ICE, not Plaintiffs, who have control over evidence of their practices, and ICE does not willingly share information about its activities. ICE officials vehemently resist public review, and liberally invoke privileges and

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[31] *See* Declarations of D. Tapia-Tovar and A. Vasquez in *Tapia-Tovar et al. v. Epley et al.*, No. 3:11-cv-102 (M.D. Tenn. Aug. 22, 2011), ECF Nos. 34-1 and -2 (attached as Exs. 25-26). Additional Declarations filed in Immigration proceedings arising from ICE raids at same apartment complex are attached as Schwarz Decl., Exs. D-I.

[32] Nathan Treadwell, *Fugitive Operations and the Fourth Amendment*, 89 N.C. L. REV. 507, 513-18 (2011) (Ex. 27); 12/11/2011 Southern Poverty Law Center Letter to J. Napolitano (Ex. 28); Jared Felkins, *SPLC: ICE Raids DeKalb*, TIMES-JOURNAL, Dec. 16, 2011 (warrantless home-raid operations at Latino apartments and mobile homes in Alabama in Dec. 2011) (Ex. 29); Amber Dixon, *Mistaken Raid Shocks Disabled Veteran in San Benito*, VALLEYCENTRAL.COM, Aug. 31, 2011 (coercive approach and entry of home of Latino veteran confronted at his bathroom window in August 2011 in Northern California) (Ex. 30); Mark Curnutte, *Family Disputes Immigration Group's Findings*, CINCINNATI ENQUIRER, Aug. 10, 2011 (Latino resident handled forcefully, damaging interior wall, in a "consent-based" encounter in August 2011) (Ex. 31).

[33] 8/9/2011 Rep. Conyers Press Release (Ex. 32); s*ee also, e.g.*, ICE OPR Report (July 2011 report dismissing complaints of Fourth Amendment violations based on agents' representations of obtained verbal consent in Michigan enforcement activities) (Ex. 33).

[34] *See, e.g.*, New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (Dec. 2011) (Ex. 34); Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010) (Ex. 35); 8 U.S.C. § 1129a(b)(4) (no right to free counsel); *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004) (describing fear and intimidation among immigrants in pursuing civil rights litigation).

exceptions to resist basic FOIA requests. The *Constitution on ICE* authors, for example, had to bring FOIA lawsuits to compel disclosure of the studied datasets.[35] Even then, the government produced only a representative sampling. Further, in removal proceedings, suppression of evidence is available only if a judge finds that ICE's abuses constitute "egregious violations" of the Fourth Amendment,[36] a high burden demonstrated by plaintiffs at two of the raid locations here. These hearings are closed, and any resulting decisions unavailable to the public.

Because the challenged policies remain in force, and because ICE continues to conduct operations in purported accordance with those policies, this case is not moot.

III. THE PROPOSED CLASS IS PROPERLY DEFINED

The revised class definition proposed here is consistent with classes recently certified elsewhere, and complies with each of the requirements of Rule 23:

> Persons who are (1) Latino; (2) reside within the jurisdiction of ICE New York; and (3) who have been, or in the future will be, subject to a home raid operation.

This definition accounts for evidence demonstrating that ICE New York agents unlawfully seize, enter, and search Latinos' homes, and seize Latinos based on their Latino appearance, without reasonable suspicion or probable cause. Racial animus and discrimination, however, are not elements of Plaintiffs' Fourth Amendment claims. Thus, if the Court determines that the Fourth Amendment class or corresponding relief should not be restricted to Latinos, the Court has discretion to certify an alternative Fourth Amendment class encompassing other groups.[37]

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[35] *See* Constitution on ICE at 9 (Ex. 36); *Families for Freedom v. ICE*, No. 08-cv-5566 (S.D.N.Y.); *Seton Hall Sch. of Law Ctr. for Justice v. DHS*, No. 08 Civ. 00521 (D.N.J.).

[36] *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

[37] Such a class definition could be: "Persons who reside within the jurisdiction of ICE New York, and who have been, or in the future will be, subject to a home raid operation." *See Robidoux v. Celani*, 987 F.2d 931, 937 (2nd Cir. 1993) (discretion to modify class).

A. The revised class definition is properly drawn to include "Latinos" who have been or will be subjected to a home raid operation.

Courts routinely "define the class by the activities of defendants," including based on racial descriptors in civil rights cases.[38] Precise delineation is not required for Rule 23(b)(2) injunctive relief actions such as this, nor is class notice or opt-out required given the nature of the requested relief.[39] Other courts have used the term "Latino" in class certification decisions, and recent Department of Justice reports confirm that the term is commonly understood.[40]

The precise definition of Latino does not have a practical significance until later in these proceedings, at the remedy stage after the Court has issued an injunction and someone who purports to be a member of the class seeks to enforce it. At that time, if there is any question of standing, the Court may look to factors including ancestry, linguistic characteristics, Spanish surnames, and country of origin.[41] As for ICE agents' ability to understand who belongs to the class, ICE is well aware of the target's name and country of origin to which deportation is sought before approaching a target's home, where other class members are likely to reside. Further,

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[38] *Int'l. Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 460, 464 (N.D. Cal. 1983) (certifying "all persons of Hispanic or other Latin American ancestry, residing or working within the jurisdiction of the San Francisco District Office of the United States Immigration and Naturalization Service (INS) and/or the Livermore Border Patrol Sector, who have in the past, are now, or may in the future be subjected to the policies, practices and conduct of INS and/or the Border Patrol during the course of INS area control operations directed at places of employment").

[39] *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 398 n.4 (1975); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974); Fed. R. Civ. P. 23(c)(2); *see also Ashe v. Board of Elections*, 124 F.R.D. 45, 47 (E.D.N.Y. 1989); Wright & Miller, Fed. Prac. & Proc. Civ. § 1760 (3d ed. 2011).

[40] *Ortega-Melendres*, 2011 WL 6740711, at *16; *Latino Officers Ass'n City of N.Y. v. City of New York*, 209 F.R.D. 79, 88 (S.D.N.Y. 2002) ("At the liability stage, a class that includes all Latinos and African-Americans is perfectly appropriate."); 12/15/2011 Maricopa County DOJ Report (ECF No. 325-2); 12/19/2011 East Haven DOJ Report (ECF No. 325-3).

[41] *E.g.*, *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 437 (N.D. Cal. 1989); *Latino Officers Ass'n, N.Y., Inc. v. City of New York*, 196 F.3d 458, 461 n.1 (2d Cir. 1999) (addressing interchangeability of "Hispanic" and "Latino").

agents' actions should be guided by whether they are constitutional, not whether the person whose rights they are about to violate is a member of an injunctive class.

Certification of a class of persons who may in the future be subject to unconstitutional conduct is consistent with Rule 23(b)(2), which contemplates prospective injunctive relief, especially in civil rights cases.[42] As demonstrated in Plaintiffs' opening and reply briefs, such classes are certified as a matter of course. Recent decisions confirm that certification of an injunctive class based on identified policies and practices remains the norm.[43]

In response to a suggestion of the Court at oral argument, Plaintiffs respectfully note that the class in this case cannot be restricted to individuals identified on ICE's target lists, or even to just "targets" of ICE operations. According to ICE New York, DRO (now ERO) teams did not operate from "target lists." Even defining "target" more generally to describe a pre-identified person purportedly sought in connection with a home raid operation, the class cannot be so limited. ***Not one of the named plaintiffs was a target, and the majority are citizens***. Due in part to ICE's haphazard approach to data collection and record-keeping, in order to be the subject of an unconstitutional seizure, search, or detention, an individual does not need to be a target, live with a target, or even know a target to be subjected to the complained-of conduct.[44]

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[42] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1388-89 (S.D.N.Y. 1985), *modified on other grounds*, 288 F. Supp. 2d 411 (S.D.N.Y. 2003); *Daniels v. City of New York*, 198 F.R.D. 409, 412 (S.D.N.Y 2001); *In re Cincinnati Policing*, 209 F.R.D. 395, 397-400 (S.D. Ohio 2002); *Murillo v. Musegades*, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (prospective Hispanic class); *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974).

[43] *See, e.g.*, *Morrow*, 2011 WL 3847985; *Ortega-Melendres*, 2011 WL 6740711; *United States v. City of New York*, 276 F.R.D. 22 (E.D.N.Y. 2011).

[44] *See* Opening Class Cert. Br. at 9-10 (describing raids on addresses where ICE knew that purported targets did not live); *Aguilar*, 2011 WL3273160, at *22-23 (noting that plaintiffs adequately alleged that databases used to choose target addresses are inaccurate and incomplete).

B. Evidence demonstrates that ICE New York used purported "targets" in part as a pretext to sweep through Latinos' homes and effect collateral arrests.

Plaintiffs' requested class is rightfully defined to include Latinos in light of evidence that ICE agents disproportionately target and arrest Latinos. Apart from the incidents at named Plaintiffs' homes in 2006-2007, and the evidence that ICE declined to enter and search when a non-Latino person opened the door, Plaintiffs previously cited analysis and data from home raid operations in New York and New Jersey between February 2006 and April 2008, analyzed in the Cardozo *Constitution on ICE* report.[45] That report demonstrated that "Latinos are significantly overrepresented in collateral (non-target) arrests by ICE agents during home raids," and that the "vast majority of collateral arrest records where ICE officers did not note any basis for seizing and questioning the individual were of Latino subjects — 90% in New Jersey and 94% in Long Island."[46] Expert reports and testimony in this case confirm that Latinos were disproportionately targeted at each stage of ICE New York operations — from the selection of "targets," to the arrest of non-target "collaterals."[47] The pretextual nature of the raid operations is underscored by the exceedingly high proportion of ***non-targets*** arrested during agents' "protective sweeps" and detentive questioning. A stunning 99.3% of collateral (non-target) arrests were Latino.[48] Because this data reflects only arrests, it does not account for the large number of other Latinos

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[45] Constitution on ICE at 9 (Ex. 36).

[46] Constitution on ICE at 12 (Ex. 36).

[47] *See* Expert Reports of A. Beveridge (Opening Class Cert. Br., Exs. 45, 106-108) and P. Markowitz (Opening Class Cert. Br., Ex. 46).

[48] Beveridge Report and Exhibits (Opening Class Cert. Br., Exs. 45 ¶ 14; 106-107). Moreover, contrary to the impression created by Defendants' counsel, no *Daubert* motion has been filed in connection with Plaintiffs' statistical analysis. *See* 1/4/2012 Hr'g Tr. 41:5-8 ("The plaintiffs have performed the analytical study, and it's so flawed that it's really subject to a Daubert challenge.") (Ex. 5). Dr. Beveridge, the subject of counsel's remarks, has previously been retained by the Department of Justice, and has not been disqualified as an expert by any court. *E.g.*, Beveridge Tr. 192:24-193:16, 196:24-197:2 (Ex. 37).

affected by the home raid operations, as countless family members, roommates, and children who are not arrested but also suffer the unconstitutional entries and searches.

Specific evidence also shows discriminatory intent, including the use of racially charged terms, such as "wetback," "wet them down," and "wets."[49] An internal ICE complaint raised concerns that individuals were targeted for arrest in an unlawful manner, but nothing came of that complaint.[50] Racial bias is further confirmed by agents' actions at the doors of the homes they approached; agents routinely entered and swept homes when a Latino answered the door, but departed and even apologized when confronted with a non-Latino.[51]

In spite of this, there is no evidence that ICE has taken steps to curb the discriminatory targeting and impact on Latinos or identified new equal protection training programs. Defendants instead refer to the same anti-discrimination policy in place when these abuses occurred.[52]

IV. THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLIES ONLY TO RULE 23 FACTORS, AND NOT THE MERITS

Certification is proper when a "trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[53] A party seeking class certification must demonstrate compliance with the four Rule 23 factors by a preponderance of the evidence; a party is not expected to "prove up" the merits or its entitlement to the requested relief generally.[54] At this stage, Plaintiffs only need to show by a preponderance of the evidence that

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[49] *See* Opening Class Cert Br. at 16; *id.* at Exs. 31, 38, 53, 57.

[50] Opening Class Cert. Br., Ex. 66.

[51] *See* Opening Class Cert Br. at 18.

[52] 1/4/2012 Hr'g Tr. 34:19-35:15 (Ex. 5).

[53] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160-61 (1982)).

[54] *City of New York*, 276 F.R.D. at 30 ("Where factual questions underlying a Rule 23 requirement overlap with merits questions, the court is obligated to decide them, but 'a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement.'")

the *commonality test* (not the merits) is satisfied.[55] Only one common question is required. Moreover, the common questions may vary by count. The Fourth Amendment claim, for example, does not require a showing that Defendants unlawfully target Latinos but rather that that the identified policies and practices give rise to unconstitutional searches and seizures.

V. THE NATURE OF ANTICIPATED RELIEF

Although complete delineation of the appropriate injunctive relief is premature before a trial on the merits, the relief plaintiffs seek is more than simply an admonition to "follow the law." Defendants admit that the legality of the questioned operations hinged on agents obtaining lawful consent. But contrary to law enforcement best practices, agents do not have a practice of recording the nature of the consent allegedly received; agents do not even record the locations of homes that they approach or enter. Tellingly, at deposition, when asked under oath to explain the circumstances of consent obtained, time and time again agents could not recount the details of these home operations, much less who granted consent, or who asked for it. A large part of the requested injunctive relief would be to ensure that administrative policies are put into place to require documentation of this type of basic information.

In addition, a number of other examples of specific injunctive relief may be appropriate:

- Revision of the ruse policy to ensure compliance with current case law, especially with respect to the effect on lawful consent.
- Revision of policies and implementation of training governing protective sweeps to ensure compliance with current case law.
- Establishment of a policy that a show of force is inconsistent with voluntary consent.

(affirming, post-*Wal-Mart*, injunctive relief class of black firefighters) (quoting *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)) (emphasis added).

[55] Briefing and the January 2012 hearing confirm that numerosity and adequacy of representation are not subject to material dispute; although typicality may be presumed here, evidence cited in Plaintiffs' briefing demonstrates that the claims of named plaintiffs are typical of the class.

- Establishment of a policy requiring that, where there are allegations of misconduct, complainants are interviewed before the investigation is closed.
- The requirement of refresher constitutional training for ICE.
- Establishment of a mechanism to ensure that judicial findings of misconduct are communicated to agents and their supervisors.
- Establishment of a requirement that law enforcement databases be updated to reflect the results of any operations.

The Defendants' cavalier attitude that "consent need not be knowing and intelligent" is precisely what led to the abuses here.[56] Consent-based home operations demand that agents comply with the stringent constitutional protections afforded to the home. If agents have articulable safety concerns demonstrating the need to surround and seize a home with a team of armed agents in tactical gear, including in pre-dawn hours, they can first secure a judicial warrant.

VI. CONCLUSION

Class certification is warranted here. Defendants do not dispute that ICE New York's challenged policies and practices remain in place, and that warrantless home operations consistent with those policies continue. The constitutionality of those policies and practices are common questions amenable to common answers through class action litigation. Plaintiffs have demonstrated compliance with each of the Rule 23 factors. Certification of the injunctive relief claims under Rule 23(b)(2) is consistent with established precedent, and a denial of certification would be the outlier, underscored by the fact that Defendants have failed to identify any denial of certification in a similar case.

[56] *See* 12/23/2011 Dfts' Mem. of Law in Opp'n to Summary Judgment at 20.

Dated: New York, New York
January 25, 2011

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