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 REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

In support of their motion for class certification, Plaintiffs repeatedly identified evidence that ICE New York carried out a series of ongoing home raid operations that ran afoul of the Fourth and Fifth Amendments. Moreover, Plaintiffs linked the challenged ICE conduct, which occurred with striking similarity throughout New York, to numerous official ICE policies and widespread practices. This showing is sufficient to demonstrate commonality under Rule 23(a), the only class certification issue that remains subject to legitimate dispute. To this day, Defendants have not cited a single case like this one, seeking injunctive relief only, where certification under Rule 23(b)(2) was denied, much less where defendants successfully challenged the ascertainability of plaintiffs' membership in a minority group recognized by decades of anti-discrimination law. And Defendants offer only silence in response to the Court's repeated request for case law supporting their arguments regarding "typicality" under Rule 23(a).

Unable to dispute that established policies and practices drive the challenged ICE conduct, Defendants attempt improperly to shift this briefing to the merits. Setting aside that this is improper, Defendants' cited "evidence" merely confirms that the challenged activities were carried out under established policies: as just one example, Defendants cite a C.F.R. provision they admittedly follow which purportedly authorizes the in-home detentive questioning challenged here. This case presents common questions amenable to common answers in a class proceeding, and Defendants have demonstrated no legal basis for certification to be denied.

II. CLASS CERTIFICATION DOES NOT REQUIRE RESOLUTION OF CLASS CLAIMS ON THE MERITS BEFORE CERTIFICATION

The Supreme Court's *Wal-Mart* decision does not require a district court, as a condition of certification, to decide a case on the merits, as the government suggests. Rather, *Wal-Mart* clarifies that a court cannot simply presume that Rule 23 is met, but must determine whether

each Rule 23 factor is satisfied.[1] A recent opinion authored by Judge Posner in an employment class case is instructive: at the certification stage, the role of the court was not to decide whether racial discrimination had in fact occurred, but "whether the plaintiff's claim of disparate impact is most efficiently determined on a class-wide basis rather than in 700 individual lawsuits."[2]

Here, the Rule 23 inquiry focuses on whether Plaintiffs have shown by a preponderance of the evidence that the complained-of conduct arose under ICE policies or an established pattern and practice. The Court is not, at this stage, tasked with deciding whether such policies or practices are in fact unconstitutional.[3] So, for example, the Court should not decide whether the act of surrounding of a home by a team of armed agents to prevent occupants' egress is an unlawful seizure. Rather, the Court need only decide that such conduct was a common practice, or carried out pursuant to policy. Resolution of that issue on the merits is amenable to a class-wide decision ***at trial***.[4] Plaintiffs have satisfied this showing as to several policies and practices.

III. DEFENDANTS MISCONSTRUE THE *WAL-MART* HOLDING, WHICH DOES NOT APPLY WHERE PLAINTIFFS DEMONSTRATE THE EXISTENCE OF SYSTEM-WIDE POLICIES AND PRACTICES

Contrary to Defendants' argument, "the *Wal-Mart* decision did not change the law for all class action certifications. Instead, it provided guidance on how existing law should be applied to expansive, nationwide class actions."[5] Further, the outcome in *Wal-Mart* is specific to the Title VII context and the fact pattern before the court, where plaintiffs could not identify ***any***

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[1] *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This Circuit required such inquiry before *Wal-Mart*. *See, e.g.*, *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *United States v. City of New York*, 276 F.R.D. 22 (E.D.N.Y. 2011) (cited in Pls.' Sup'l Br.).

[2] *McReynolds v. Merrill Lynch*, No. 11-3639, 2012 WL 592745, at *8 (7th Cir. Feb. 24, 2012) (reversing denial of certification of injunctive relief claims under Rule 23(b)(2)).

[3] *Messner v. Northshore Univ. HealthSystem*, No. 10-2514, 2012 WL 129991, at *4 (7th Cir. Jan. 13, 2012) ("In conducting this analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.").

[4] Defendants' motion to dismiss Plaintiffs' claims for injunctive relief for lack of standing was denied. 2011 WL 3273160, at *17, *21-24 (Aug. 1, 2011).

[5] *Connor B. v. Patrick*, No. 10-CV-30073, 2011 WL 5513233, at *3 (D. Mass. Nov. 10, 2011).

company-wide policy or practice that caused their injuries. Crucially, the *Wal-Mart* Court noted that a "uniform employment practice . . . ***would*** provide the commonality needed for a class action."[6] *Wal-Mart* does not bar certification where "company-wide policies exacerbate" or "enabl[e] sexual and racial discrimination,"[7] or where "the class is limited in geographic scope" and "statistical and anecdotal evidence . . . suggests 'statistically significant disparities'" that demonstrate common questions of fact.[8] Numerous cases decided after *Wal-Mart* demonstrate that the commonality prong is easily satisfied where plaintiffs identify "specific and overarching systemic deficiencies" that place a plaintiff class at risk of injury.[9]

Defendants' arguments are inapplicable to Plaintiffs' Fourth Amendment claims for an additional reason. Unlike claims alleging racial profiling and other equal protection violations, claims of Fourth Amendment violations require no showing of intent or motivation.[10] Because *Wal-Mart*'s holding is "designed for and unique to the context of employment discrimination . . . [where] the employer's motivation is crucial to establishing liability,"[11] it does not apply to claims that ICE engaged in a pattern and practice of surrounding, entering and searching homes without consent and conducting warrantless seizures of Latino occupants within. *Wal-Mart*'s rationale in denying certification does not apply "where the alleged constitutional violations flow from structural infirmities . . . and where there is no requisite showing of common intent."[12]

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[6] *Wal-Mart*,131 S. Ct. at 2554 (emphasis added).

[7] *McReynolds*, 2012 WL 592745, at *6-7.

[8] *Cronas v. Willis Group Holdings, Ltd.*, 2011 WL 5007976, at *3 (S.D.N.Y. Oct. 18, 2011).

[9] *Connor B.*, 2011 WL 5513233, at *1, *5; *see also McReynolds*, 2012 WL 592745; *Ortega-Melendres v. Arpaio*, 2011 WL 6740711, at *19 (D. Ariz. Dec. 23, 2011) (quoting *Daniels v. City of New York*, 198 F.R.D. 409, 418 (S.D.N.Y. 2001); *DL v. District of Columbia*, 277 F.R.D. 38, 45 (D.D.C. 2011) (commonality where class alleged "the same injury: denial of their statutory right to a free appropriate public education," even if caused in "differing ways").

[10] *United States v. Klump*, 536 F.3d 113 (2d Cir. 2008).

[11] *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 175 (S.D.N.Y. 2011).

[12] *Connor B.*, 2011 WL 5513233, at *4.

Defendants' attempts to analogize the facts here to those of the nationwide class of Title VII plaintiffs must therefore fail. Although Defendants argue that no matter the number of specific examples of unlawful conduct, a case-by-case evaluation of constitutional claims is required, that argument misses the mark and ignores years of civil rights jurisprudence. Rather, the specific examples of cited conduct confirm the manner in which ICE carried out its policies, demonstrating that there are several common issues amenable to class resolution.

A. ICE New York's Policies Give Rise to Common Questions of Law and Fact

Wal-Mart's holding rests on the finding that "[t]he ***only*** corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters."[13] Because the *Wal-Mart* plaintiffs could not show that such discretion was either unlawful or applied in a discriminatory manner across a nationwide class, they failed to establish commonality.

In contrast, Plaintiffs here have identified numerous official policies that establish commonality, and seek class certification for a much narrower geographic region, the jurisdiction of ICE New York. Such policies include operational plans mandating the use of multiple team members in tactical gear for purportedly consent-based operations; written plans to secure a "perimeter" that are consistently interpreted as instructions to surround the home; written memoranda permitting and encouraging ruses that vitiate consent; regulations permitting the use of in-home detentive stops during consent-based operations; and training manuals that permit protective sweeps regardless of whether agents can articulate a reasonable suspicion of danger.[14] Thus unlike in *Wal-Mart*, Plaintiffs' injuries result not from discretionary "decisions delegated to local managers" but from policy decisions "by top management."[15]

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[13] 131 S.Ct. at 2554 (emphasis added).

[14] *See* Pls.' Opening Br. at 13-14; Pls.' Reply Br. 2-3; Pls. Sup'l Br. at 4.

[15] *McReynolds*, 2012 WL 592745, at *7.

As they must, Defendants concede the existence of many of these policies, and instead engage in a merits argument regarding whether these policies are unlawful.[16] As shown in Part II above, this merits analysis is not appropriate at this stage. But in any case, in briefing on class certification and Defendants' motion to dismiss injunctive relief claims, Plaintiffs have repeatedly provided evidence that many of these policies are plainly unlawful, while others are systematically implemented in ways that violate constitutional guarantees.[17] Indeed, Judge Koeltl held that documentary evidence indicates that "the conditions under which the raids were conducted, in accordance with the operational plans and memos, could plausibly be found to have undermined the voluntariness and validity of any consent given."[18] Thus, "to the extent Plaintiffs are required to identify a specific, illegal . . . policy rendering Defendant liable to all the class members, they have manifestly done so" several times over, and commonality is established.[19] Examples of such policies follow.

1. The Constitutionality of the ICE Ruse Policy Is a Common Question

Written ICE policy encourages agents to employ ruses without "advis[ing] that use of such ruses might undermine a claim of valid consent."[20] As written and amended, the ruse memoranda authorize the same conduct whether or not agents possess a judicial warrant, paying no heed to whether a ruse may undermine voluntary consent.[21] The memoranda include one narrow prohibition — agents cannot claim that they represent another government agency (i.e.,

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[16] *See, e.g,* Defs.' Sup'l Opp'n Br. at 7-8 (admitting that agency-wide regulations and training permit agents to conduct detentive *Terry* stops within the home).

[17] *See, e.g.*, Pls.' Opp'n. to Defs.' MTD Inj. Relief.

[18] 2011 WL 3273160, at *13-14 (citing as examples: ICE's policies regarding ruses, deployment of multiple officers at a home, and approach of the home in the early morning hours).

[19] *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 175 (S.D.N.Y. 2011).

[20] 2011 WL 3273160, at *13. *See* Pls.' Sup'l Br. at 4; *id.* at Ex. 2.

[21] *See* Pls.' Sup'l Br. at 4 n.14; Defs.' Sup'l Opp'n Br., Exs. 6-7.

OSHA) without prior authorization.[22] They do not bar agents from falsely suggesting, as they did here,[23] that a medical emergency requires immediate entry or that they possess a judicial warrant, even though courts "universally agree" that such ruses invalidate consent.[24] ICE's willingness to promulgate policy changes to protect its public image,[25] but not to prevent unconstitutional conduct, underscores the need for judicial intervention.

Defendants effectively concede that these policies remain in force. Their citation to a post-litigation 2009 training document does nothing to overturn the challenged policy, and is DRO-specific and thus inapplicable to OI/HSI agents or ICE New York as a whole.[26] Indeed, DRO's 30(b)(6) designee admitted that the training materials do not supersede the ruse memoranda.[27] The constitutionality of these policies, therefore, is amenable to class treatment.

2. In-Home Detentive Questioning Occurs Under an Established Policy

ICE engaged in a widespread practice of performing in-home detentive questioning of residents absent constitutional authority to do so.[28] Defendants not only concede that such

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[22] *See, e.g.*,Pls.' Opening Br., Ex. 90. By including broad language encouraging ruses, while listing only one prohibition, the policy effectively endorses all other conduct.

[23] *See infra* note 35; Pls.' MSJ Br. at 5, 18-20; Pls.' MSJ Reply Br. at 7-8; D. Drohan Dep. Tr. at 110:24-111:2; 210:22-24 (Ex. 1); Pls.' Opp'n. to Defs.' MTD Inj. Relief at 29 n.88.

[24] *United States v. Montes-Reyes*, 547 F. Supp. 2d 281, 287-88 (S.D.N.Y. 2008). The court cited express prohibitions on ruses in consent-based operations from three circuit courts. *Id.* at 287 n.7 (citing *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 1984); *SEC v. ESM Gov't Secs. Inc.*, 645 F.2d 310, 316 (5th Cir. 1981); *United States v. Escobar*, 389 F.3d 781, 786 (8th Cir. 2004)).

[25] *See* Defs.' Sup'l Opp'n Br. at 6.

[26] *See* Defs.' Sup'l Opp'n Br., Ex. 3 at 1 ("Refresher for DRO FUG OPS"). DRO (now ERO) and OI (now HSI) are separate branches within ICE. Defendants' cited OI policy manuals do not caution against impermissible ruse techniques in consent-based operations either.

[27] 6/22/2010 DRO 30(b)(6) Tr. 178:14-20; 185:7-21 ("Q. Can you take a moment to locate for me where in this Fourth Amendment training refresher the ruses we've been discussing are prohibited during [consent] searches? . . . A. No, it's not mentioned.") (Ex. 2).

[28] Defendants ignore case law holding that warrantless home entries and searches require probable cause under *Payton v. New York*, 445 U.S. 573 (1980), not the lesser "reasonable suspicion" permitted by *Terry v. Ohio*, 392 U.S. 1 (1968) (brief detentive stops in public). Thus, contrary to Defendants' merits argument, in-home *Terry* stops are unlawful. *See United States v. Washington*, 387 F.3d 1060, 1067 (9th Cir. 2004) (the Supreme Court has "never expanded *Terry*

questioning is their ***practice***, but reference the ***policy*** driving the complained-of conduct.[29] That concession is alone sufficient to find commonality under *Wal-Mart*. Whether in-home detentive stops are constitutional is a question to be decided at trial, and the existence of a policy driving that conduct confirms that the question is amenable to class resolution.

3. Existing "Follow the Law" Policies Do Not Defeat Commonality

Even if one were to believe that "follow the law" policies could theoretically ensure compliance with the Fourth Amendment, the facts in this case demonstrate that they have not had that effect with respect to ICE agents. And Defendants offer no legal authority for their position that generic policies urging constitutional compliance are sufficient to defeat certification, or any response to the litany of cases in which courts certified classes for police misconduct notwithstanding such policies.[30]

B. Plaintiffs' Evidence of ICE New York's Common Practices Toward Latinos During Home Raid Operations Satisfies Rule 23(a)(2)

Defendants appear to argue, erroneously, that where no official policy orders agents to violate the constitution, Plaintiffs cannot demonstrate commonality.[31] Post *Wal-Mart*, it is still clear that commonality is satisfied where plaintiffs allege harm from "the same unconstitutional ***practice*** or ***policy*** that allegedly injured or will injure the proposed class members."[32] Nothing in *Wal-Mart* or any other case undermines the principle that plaintiffs providing evidence of "systemic deficiencies" meet the requirements of Rule 23(a)(2).[33]

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to allow a *Terry* stop at a home"); *Harman v. Pollock*, 586 F.3d 1254, 1262 n.1 (10th Cir. 2009).

[29] Defs.' Sup'l Opp'n Br. at 8 (citing 8 C.F.R. Sec. 287.8(b)(2)). Defendants' cited case law (*Terry* and *Illinois v. Wardlow*, 528 U.S. 119 (2000)) do not address in-home detentive stops.

[30] *E.g.*, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002); *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001); *Rice v. Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974); *Morrow v. Washington*, No. 2:08-cv-288, 2011 WL 3847985 (E.D. Tex. Aug. 29, 2011).

[31] Defs.' Sup'l Opp'n Br. at 2-8.

[32] *Ortega-Melendres*, 2011 WL 6740711, at *19 (internal quotation omitted) (emphasis added).

[33] *Connor B.*, 2011 WL 5513233, at *5.

Thus, even if all of ICE New York's written policies abided on their face to constitutional requirements — which they plainly do not — Defendants' argument must fail. Plaintiffs have produced significant proof, through the testimony of Plaintiffs, Defendants, third-party witnesses, and experts that ICE New York engaged in a pattern and practice of violating Latinos' Fourth and Fifth Amendment rights.[34] Defendants' isolated examples of ICE agents' beliefs neither rebut that showing, nor supersede what the identified policies actually say.[35] Testimony of ICE agents consistently establishes that the actions challenged under the Fourth Amendment are examples of pattern and practice conduct.[36] Further, Plaintiffs have provided ample evidence, through testimony by law enforcement officers as well as expert reports, that ICE engaged in a pattern and practice of racial profiling and other discriminatory conduct.

As with ICE's official policies, these practices are condoned and approved at the highest levels of the Department of Homeland Security. They are not, as in *Wal-Mart*, the result of "decisions delegated to local managers" but the consequence of decisions "by top

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[34] *See* Pls.' Opening Br. at 4-6, 9-19; Pls.' Reply Br. at 2-6.

[35] *See* Defs. Sup'l Opp'n Br. at 9. For example, Defendants cite Mr. Knopf's testimony that ICE cannot use a "medical emergency" ruse to obtain consent, but Plaintiffs at one home heard agents state that "someone was dying upstairs," Pls.' Opening Br. at 5 n.12, and at least one Defendant admitted that agents in other operations have falsely stated they were responding to a 911 call. ICE 21 Tr. 229:19-230:25, 250:14-252:13. (Ex. 3). Further, agents' understanding of what they can or cannot do, even if consistent with ICE policy, often does not comport with the law. Not one of the agents quoted in Defendants' brief testified that a protective sweep requires specific, articulable suspicion of danger at the time of the sweep. *Maryland v. Buie*, 494 U.S. 325, 336 (1990). *See, e.g.*, ICE 34 Tr. 35:6-24 (Ex. 4); ICE 20 Tr. 371:6-11 (Ex. 5); ICE 24 Tr. 103:13-16 (Ex. 6); W. Smith Tr. 44:8-45:2 (Ex. 7). And ICE 29 restates ICE's policy regarding *Terry* stops without exhibiting any understanding that no court has authorized *Terry* stops within a home. *See supra* note 28.

[36] It is a practice in consent-based operations to surround homes, including to prevent occupants from leaving, pursuant to ICE's policy to "form a perimeter." *E.g.*, ICE 19 Tr. 168:7-10 (Ex. 8); ICE 25 106:9-107:5 (Ex. 9); ICE 26 90:2-18 (Ex. 10). Once inside, agents automatically conduct a "security sweep," which may include questioning and relocating residents to "control the events." *E.g.*, OI 30(b)(6) Tr. 134:7-22, 167:19-168:15 (Ex. 11); ICE 18 Tr. 206:20-22 (Ex. 12).

management."[37] Indeed, one Arizona-based ICE employee detailed to New York affirmed not only that he observed a home entry without consent, but that the circumstances caused him to believe that such behavior "may have been common practice for [the New York] office."[38]

Plaintiffs have thus provided significant proof that Defendants engaged in a pattern and practice of both Fourth and Fifth Amendment violations and therefore satisfy Rule 23(a)(2).

IV. STATISTICAL EVIDENCE CONFIRMS THAT ICE NEW YORK DISPROPORTIONALLY TARGETED AND ARRESTED LATINOS

In support of their Equal Protection class claims, Plaintiffs cited several sources, including the expert analysis of Professor Andrew Beveridge. Although Defendants dispute Professor Beveridge's findings, they never filed a *Daubert* challenge nor have they offered any persuasive evidence rebutting Professor Beveridge's analysis or results. Further, Defendants' argument ignores the facts. Only 15% of the arrests for the OI operations were of targets, and among non-targets across all operations, Latinos were grossly over-represented.[39] Moreover, Defendants' brief does not dispute the analysis performed by Peter Markowitz that found a widespread practice of targeting and seizing individuals based on Latino appearance, as reflected in his expert report and in *Constitution on ICE*.[40] Unchallenged statistical evidence demonstrating a statistically significant and even shocking over-representation of Latinos among collateral, non-target arrests, confirms that certification of the proposed class is warranted. [41]

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[37] *McReynolds*, 2012 WL 592745, at *7.

[38] Pls.' Opening Br., Ex. 65 at US48667.

[39] Pls.' Opening Br., Ex. 45 ¶¶ 14a, 15.

[40] Pls.' Opening Br., Ex. 46 ¶¶ 51-58.

[41] *E.g.*, Pls.' Opening Br., Ex. 45 ¶ 29; Ex. 46 ¶ 32 (*Constitution on ICE* data set largely represents DRO), ¶¶ 55-58. Defendants' argument that operations "that target members of predominately Hispanic gangs will disproportionately affect 'Latinos.'" Defs.' Sup'l Opp'n Br. at 11. First, the DRO operations did not target gangs. Second, neither ICE's target prioritization lists nor those responsible for directing the operations say anything about targeting ***Hispanic*** gangs to the exclusion of all others. *E.g.*, 8/11/2010 Palmese Tr. 157:20-158:9 (Resident Agent in Charge testified that operations targeted "transnational gangs" without focus on particular gangs) (Ex. 13); 8/12/10 M. Forman Tr. 121:17-123:12 (not soley focused on Hispanic gangs,

V. DEFENDANTS MISSTATE THE PROCEDURAL POSTURE

In response to the Court's inquiry regarding mootness concerns, Plaintiffs provided an overview of the proceedings to date, and documentary evidence that the challenged home raid operations are ongoing. ICE apparently concedes that this case is not moot, having admitted that the operations are ongoing and the policies unchanged, and leaving the vast bulk of Plaintiffs' cited evidence unchallenged.

Surprisingly, however, Defendants paint a misleading picture of the posture of this motion by asserting that "plaintiffs themselves asked for leave to renew their class certification motion."[42] The complete picture shows that the Defendants themselves asked for, and were granted, a delay in responding to Plaintiffs' class certification motion, filed in December 2010, in the hope that they would never have to deal with that motion if Judge Koeltl dismissed Plaintiffs' claims for injunctive relief. The court denied Defendants' motion to dismiss in his August 1, 2011 decision. In an August 11, 2011 conference, Judge Koeltl asked Plaintiffs to withdraw their December 2010 class certification motion, and then re-file the motion to account for his decision and intervening case law. Plaintiffs obliged. Therefore, any delay in the hearing of this class certification motion is not attributable to the Plaintiffs.

VI. CONCLUSION

ICE New York executes official policies and engages in system-wide practices that give rise to common questions amendable to common answers: whether such policies and practices violate the Fourth and Fifth Amendment rights of named Plaintiffs and the putative class. Having demonstrated commonality and each of the other Rule 23 factors, Plaintiffs respectfully request certification of their class claims for injunctive relief.

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but also Jamaican gangs, Asian gangs, and others) (Ex. 14).

[42] Defs.' Sup'l Opp'n Br. at 13.

Dated: New York, New York
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