

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division
DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation
GJON JUNCAJ
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
Ben Franklin Station P.O. Box 868
Washington, D.C. 20044-0868
Tel. (202) 307-8514
gjon.juncaj@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al.,

Plaintiffs,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT ("ICE"), et al.,

Defendants.

Hon. Peter G. Sheridan

No. 08-CV-01652- PGS-ES

**Notice of United States
Defendants' Motion To Dismiss
Plaintiffs' Request
For Injunctive Relief**

TO: Baher Azmy, Esq.
Bassina Farbenblum, Esq.
Scott Michelman, Esq.
Seton Hall School of Law

Center for Social Justice
833 McCarter Highway
Newark, NJ 07102-5210
(973) 642-8709

R. Scott Thompson, Esq.
Scott L. Walker, Esq.
Heather C. Bishop, Esq.
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, NJ 07068
(973) 597-2500

Attorneys for Plaintiffs

COUNSEL:

PLEASE TAKE NOTICE that on September 4, 2008, at 11:00 a.m., or as soon thereafter as counsel may be heard, defendants Immigration and Customs Enforcement and, as sued in their official capacities, Julie L. Myers, John P. Torres, Scott Weber, Bartolome Rodriguez, John Doe ICE Agents 1-60, and John Soe ICE Supervisors 1-30 (collectively "United States defendants"), will move before the Honorable Peter G. Sheridan, United States District Judge, at the United States District Court, Newark, New Jersey, for an Order granting dismissal of plaintiffs' equitable relief claims pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

PLEASE TAKE FURTHER NOTICE that in support of this motion,

United States defendants will rely upon the Memorandum of Support submitted herewith, along with the attached exhibits of public record.

PLEASE TAKE FURTHER NOTICE that, pursuant to Federal Rule of Civil Procedure 78, disposition of this motion is requested on the papers in accordance with the proposed form of Order submitted herewith, but that United States defendants will otherwise appear for a hearing on September 4, at 11:00 a.m., or as soon thereafter as counsel may be heard.

Respectfully Submitted,

Dated: June 26, 2008

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division
DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation

/s/ Gjon Juncaj

GJON JUNCAJ
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 307-8514

Attorneys for the United States defendants

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division
DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation
GJON JUNCAJ
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
Ben Franklin Station P.O. Box 868
Washington, D.C. 20044-0868
Tel. (202) 307-8514
gjon.juncaj@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al.,

Plaintiffs,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT ("ICE"), et al.,

Defendants.

Hon. Peter G. Sheridan

No. 08-CV-01652- PGS-ES

**Memorandum In Support of
United States Defendants' Motion
To Dismiss Plaintiffs' Request
For Injunctive Relief**

Return Date: September 4, 2008

TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 2

FACTUAL ALLEGATIONS. 4

 A. Operation Return to Sender 4

 B. Allegations of Plaintiffs Chavez, Galindo, and W.C.. 5

ARGUMENT AND AUTHORITIES..... 7

 I. THE EQUITABLE RELIEF CLAIMS MUST BE DISMISSED.... 7

 A. Legal Standards for Rule 12(b)(1) or (b)(6) Motion to
Dismiss 7

 B. Plaintiffs Have the Burdens of Establishing Standing And That
A Case or Controversy Exist. 8

 C. Plaintiffs’ Equitable Relief Claims Should Be Dismissed
Because Plaintiffs Lack Standing..... 11

 1. Department of Homeland Security Regulations and
Plaintiffs’ Own Exhibits Undercut That There Is A
Concrete Threat of Imminent Future Harm From An
Unlawful Government
Policy..... 11

 2. Plaintiffs Lack Standing Despite Their Allegation That
ICE Agents Will Return And “Next Time It Will Be
Worse.”..... 16

 3. Plaintiffs Lack Standing Because Their Putative Injury
Lacks Redressability. 20

D. Plaintiffs Have Otherwise Failed To State A Claim Upon
Which Equitable Relief Can Be Granted. 22

CONCLUSION. 24

EXHIBIT 1

Excerpt of Federal Law Enforcement Training Center: 2007 and 2008
Catalog of Training Programs

EXHIBIT 2

Mancha v. ICE, 2007 WL 4287766 (N.D. Ga., December 5, 2007)

TABLE OF AUTHORITIES

CASES

Bell Atlantic Corp. v. Twombly,
__ U.S. __ 127 S. Ct. 1955 (2007)..... 7

Brown v. Fauver,
419 F.2d 395 (3rd Cir. 1987). 10

Calvin Klein Cosmetics, Corp. v. Parfums de Coeur, Ltd.,
824 F.2d 665 (8th Cir. 1987). 20

Carpet Group Int'l v. Oriental Rug Importers Ass'n,
227 F.3d 62 (3rd Cir. 2000). 8

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971). 12

City of Los Angeles v. Lyons,
461 U.S. 95 (1983). 9, passim

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332, 126 S.Ct. 1854 (2006). 9

Danvers Motor Co., Inc. v. Ford Motor Co.,
432 F.3d 286 (3rd Cir. 2005). 9, 20, 21

Dombrowski v. Pfister,
380 U.S. 479 (1965). 10

Dykes v. Southeastern Pennsylvania Transp. Authority,
68 F.3d 1564 (3rd Cir. 1995). 8

Elend v. Basham,
471 F.3d 1199 (11th Cir.2006). 21, 22

Gould v. United States,
220 F.3d 169 (3rd Cir. 2000). 8

Khodara Environmental, Inc. v. Blakey,
376 F.3d 187 (3rd Cir. 2004). 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992). 9, 20

Mancha v. ICE,
2007 WL 4287766 (N.D. Ga., December 5, 2007).. 21

Mortensen v. First Fed. Sav. and Loan Ass'n,
549 F.2d 884 (3rd Cir. 1977). 7, 8

Noh v. INS,
248 F.3d 938 (9th Cir. 2001). 12

O'Shea v. Littleton,
414 U.S. 488 (1974). 10, 11, 23

Packard v. Provident Nat'l Bank,
994 F.2d 1039 (3rd Cir. 1993). 7

Pennsylvania Prison Soc. v. Cortes,
508 F.3d 156 (3rd Cir. 2007). 10

Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.,
998 F.2d 1192 (3rd Cir. 1993). 8, 16

Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.,
913 F.2d 64 (3rd Cir. 1990). 20

SEC v. Warren,
583 F.2d 115 (3rd Cir. 1978). 20

Storino v. Borough of Point Pleasant Beach,
322 F.3d 293 (3rd Cir. 2003). 9

Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc.,
140 F.3d 478 (3rd Cir. 1998). 7

United States Postal Service v. Gregory,
534 U.S. 1, 122 S.Ct. 431 (2001). 11, 12

Warth v. Seldin,
422 U.S. 490 (1975). 7

Whitmore v. Arkansas,
495 U.S. 149 (1990). 9

UNITED STATES CONSTITUTION

U.S. Const. art. III, § 2, cl. 18

STATUTES

Immigration and Nationality Act of 1952; as amended:

Section 287(a)
8 U.S.C. § 1357(a) 13

Section 287(a)(1)
8 U.S.C. § 1357(a)(1). 15

Federal Rules of Civil Procedure

Fed. R. Civ. P. 12(b)(1). 3, 7, 21

Fed. R. Civ. P. 12(b)(6). 3, 22

Fed. R. Civ. P. 65(d). 21, 23

REGULATIONS

8 C.F.R. § 287. 13

8 C.F.R. § 287.5(d). 13

8 C.F.R. § 287.8(f)(2). 11

PRELIMINARY STATEMENT

All plaintiffs in this action seek damages from federal and state agents, as sued in their individual capacities, based on allegations of past violations of plaintiffs' Fourth and Fifth Amendments rights. In addition, plaintiffs request equitable relief from federal defendants Immigration and Customs Enforcement ("ICE") and, as sued in their official capacities, Julie L. Myers, John P. Torres, Scott Weber, Bartolome Rodriguez, John Doe ICE Agents 1-60, and John Soe ICE Supervisors 1-30 (collectively "United States defendants"). Specifically, plaintiffs' Prayer for Relief seeks:

Preliminary and permanent injunctive relief barring all further intimidation of plaintiffs Walter Chavez, Ana Galindo, and W.C., and any and all entry into the home of plaintiffs Walter Chavez, Ana Galindo, and W.C. absent a warrant issued by a judicial officer or informed, voluntary consent by either plaintiff Chavez or plaintiff Galindo[.]

Doc. 15 (First Amended Complaint ("FAC") at p. 62, Prayer for Relief). To support their request for injunctive relief plaintiffs cite to specific allegations of an encounter with federal immigration agents at the home of plaintiffs Walter Chavez ("Mr. Chavez"), his wife Ana Galindo ("Ms. Galindo"), and their son, "W.C." (collectively, "the Chavez family"), that allegedly resulted in their Fourth and Fifth Amendment rights' being violated. Plaintiffs allege that such violations are part of the United States defendants' *modus operandi* when enforcing the nation's

immigration laws. FAC ¶ 4. Specifically, they allege that ICE officials directed, acquiesced, or were indifferent to the risk that such conduct would occur by ICE agents who allegedly lack proper training and are otherwise under the pressure of ICE goals to arrest more illegal aliens. FAC ¶¶ 4-5, 36, 38, 49-54, 191, 195.

The instant motion, brought on behalf of the United States defendants only, seeks dismissal of plaintiffs' equitable relief claims pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction or Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Specifically, plaintiffs lack standing to request injunctive relief because (1) the totality of their First Amended Complaint fails to allege a concrete threat of imminent future harm such that an injunction should be issued, and (2) their request is patently an impermissible “obey the law” injunction that fails to satisfy the redressability requirement for standing, and otherwise fails to state a claim upon which relief can be granted.

Accordingly, the United States defendants respectfully request that the equitable relief claims in the First Amended Complaint be dismissed.¹

¹ In addition to the First Amended Complaint being filed on May 22, 2008, the Chavez family also filed an order to show cause requesting a preliminary injunction. Doc. 16. The parties subsequently appeared for a show cause hearing on May 27, 2008, where the United States defendants stated that a letter relating to the Chavez family's concerns would be provided to Plaintiff's counsel and filed with the Court.

FACTUAL ALLEGATIONS

A. Operation Return to Sender

Plaintiffs' couch their complaint amongst an alleged background of government abuse under a law enforcement initiative titled "Operation Return to Sender" ("the Operation"). See generally First Amended Complaint ("FAC") at ¶ 1-6, 34-54; id. at Exhibits A-E. Plaintiffs describe the Operation as "a practice of unlawful and abusive raids of immigrant homes" conducted as a "predictable consequence of the Department of Homeland Security's arbitrary, exponentially increased quotas for the arrest of immigrants with old deportation orders." FAC ¶ 1. In general, plaintiffs allege that the Operation, which has resulted in an increase in the number of illegal aliens arrested in New Jersey, id. ¶ 38, has also resulted in "the creation of a culture of lawlessness and lack of accountability." Id. ¶ 191.

Doc. 19-2 (Letter of James T. Hayes, Jr., ICE Acting Assistant Director of Enforcement, dated and filed May 28, 2008). At the hearing, the Court also stated, in light of jurisdictional concerns raised by the United States defendants, that it was permitting the filing of the instant dispositive motion. The Court added that, should the instant motion be denied following a hearing on September 4, 2008, discovery relating to the Chavez family's preliminary injunction request would be ordered at that time. See Doc. 22-2 (proposed order). As such, the United States defendants reserve the right to oppose the preliminary injunction after discovery should the instant motion be denied.

B. Allegations of Plaintiffs Chavez, Galindo, and W.C.²

Plaintiffs allege in their First Amended Complaint (“FAC”) that on the morning of April 2, 2008, at approximately 7:15 am, Mr. Chavez was returning to his home in Paterson, New Jersey when “six or more vehicles converged on his house.” FAC at ¶ 77-78. The vehicles were occupied by “John Doe ICE Agents,” and allegedly one of the John Doe ICE Agents grabbed Mr. Chavez by the collar and pulled him out of his vehicle. Id. at ¶ 78. The agents asked to see Ms. Galindo, Mr. Chavez’s wife, and then allegedly pushed Mr. Chavez to the front door of his house where he was told, “If you don’t open the door, we’re going to make things worse.” Id. at ¶ 79-80. Mr. Chavez alleges he opened the door and was shoved into the house, whereby at least seven John Doe ICE Agents “ran inside the house.” Id. ¶ 80. Three other agents allegedly blocked the door. Id.

Once inside the home, a John Doe ICE Agent allegedly ran over to Ms. Galindo and repeatedly yelled at her, “Where are the illegal people?” Id. ¶ 82. Another agent allegedly asked the same of Mr. Chavez, and one of the agents allegedly stated, “It’s illegal to be hiding illegal. If you don’t tell me where they are, things will get worse. If you don’t tell me where they are, we’ll arrest you.”

² Plaintiffs Chavez and Galindo have provided affidavits in support of their request for a preliminary injunction. The affidavits have not been attached as exhibits to their First Amended Complaint.

Id. Thereafter, a female agent asked Ms. Galindo where her sisters were, to which Ms. Galindo replied she had two sisters in Guatemala, and gave their names and her own. Id. ¶ 83. The female agent then said, “This is not the person we’re looking for.” Id.

Following this questioning, W.C. allegedly came out of his bedroom and ran to Ms. Galindo crying. Id. ¶ 84. Upon seeing W.C. emerge from his room, four agents allegedly put their hands on their gun, and one of the agents grabbed his gun and pointed it directly at Ms. Galindo and her son. Id. ¶ 84-85.

In response, W.C. began to cry and an agent came over “and screamed in her face again, ‘Where are the illegal people?’” Id. ¶ 86. The agent allegedly added, “If you’re hiding illegal people here, we’re going to take your son and your residency away.” Id. at 87. After allegedly being accused again of hiding illegal aliens, Ms. Galindo replied that only she, Mr. Chavez, and their son lived in the house. Id. at ¶ 89.

Plaintiffs allege that the agents at no time requested permission for anything they did, including entering their home and allegedly searching through photo albums, nor did they produce a warrant. Id. at ¶ 90. Finally, before leaving, one of the agents allegedly “directly announced, ‘We’re going to come back. And next time it will be worse.’” FAC ¶ 91.

ARGUMENT AND AUTHORITIES

I. THE EQUITABLE RELIEF CLAIMS MUST BE DISMISSED

A. Legal Standards for Rule 12(b)(1) or (b)(6) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(1) allows the court to dismiss a case for lack of subject matter jurisdiction. The burden of establishing subject matter jurisdiction lies with the plaintiff. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3rd Cir. 1993); Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977). In deciding a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. Warth v. Seldin, 422 U.S. 490, 501 (1975); Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 483 (3rd Cir. 1998). However, the plaintiff must allege factual allegations beyond the speculative level, and the court must accept the allegations of the complaint as true and dismiss the case only when a plaintiff fails to meet his obligation "to provide the grounds of his entitlement to relief [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1964-65 (2007) (citations and internal quotation marks omitted).

In deciding a motion to dismiss, a court should generally consider only the allegations contained in the complaint and the exhibits attached to the complaint; matters of public record such as court records, letter decisions of government agencies and published reports of administrative bodies; and "undisputably authentic" documents which the plaintiff has identified as a basis of his claims and which the defendant has attached as exhibits to his motion to dismiss. See Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196-97 (3rd Cir. 1993); Dykes v. Southeastern Pennsylvania Transp. Authority, 68 F.3d 1564, 1567 (3rd Cir. 1995). In addition, "the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction." Gould v. United States, 220 F.3d 169, 178 (3rd Cir. 2000) (citing to Mortensen, 549 F.2d at 891). When a dispute exists as to certain jurisdictional facts alleged by plaintiff, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case." Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3rd Cir. 2000).

B. Plaintiffs Have the Burdens of Establishing Standing And That A Case or Controversy Exist.

It is a fundamental precept of constitutional law that federal courts only have jurisdiction over concrete cases or controversies. U.S. CONST. art. III, § 2, cl.

1. The case-or-controversy requirement under Article III ensures that “the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society.” DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 126 S.Ct. 1854, 1860 (2006) (ROBERTS, C.J.) (internal quotation marks and citation omitted). “A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.” Whitmore v. Arkansas, 495 U.S. 149, 155-56 (1990).

A plaintiff will have standing only where (1) he or she has an injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's conduct, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3rd Cir. 2005) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); Khodara Environmental, Inc. v. Blakey, 376 F.3d 187, 193 (3rd Cir. 2004) (collecting cases)). “Plaintiffs bear the burden of proving standing.” Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3rd Cir. 2003). More particularly, for injunctive relief plaintiffs must show “a real and immediate threat of future injury in order to satisfy the ‘injury in fact’ requirement.” City of Los

Angeles v. Lyons, 461 U.S. 95, 102-05 (1983) (holding that a party has standing to seek injunctive relief only if he alleges a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury) (emphasis added); Pennsylvania Prison Soc. v. Cortes, 508 F.3d 156, 161-62 (3rd Cir. 2007).

Claims for injunctive and declaratory relief are prospective, Dombrowski v. Pfister, 380 U.S. 479, 485 (1965) (“it is fundamental that ‘injunctive relief looks to the future’ ”), and courts are particularly vigilant when determining whether a party has standing to assert such claims. Allegations of past injury alone are insufficient to provide a plaintiff with standing to seek declaratory or injunctive relief. Lyons, 461 U.S. at 102-03; Brown v. Fauver, 419 F.2d 395, 400 (3rd Cir. 1987) (allegations of past exposure to unconstitutional state action not sufficient to secure standing to sue for prospective relief). Thus, even if alleged abuses concerning past events are true, a plaintiff lacks standing to seek injunctive relief unless there is a real threat of imminent future harm. O’Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (finding no standing where county judge previously made discriminatory rulings against members of a class, but none was threatened with a future discriminatory ruling).

//

//

C. Plaintiffs' Equitable Relief Claims Should Be Dismissed Because Plaintiffs Lack Standing

1. *Department of Homeland Security Regulations and Plaintiffs' Own Exhibits Undercut That There Is A Concrete Threat of Imminent Future Harm From An Unlawful Government Policy.*

Plaintiffs' assertions that ICE has and/or continues to permit or authorize the unlawful activities alleged in this case, are speculative and conjectural. Such allegations can not serve as a basis to conclude that plaintiffs have presented a "case or controversy" for prospective equitable relief under Article III. See Lyons, 461 U.S. at 101-02; O'Shea, 414 U.S. at 493-95. Indeed, the United States defendants' own regulations require that immigration officers obey the very laws plaintiffs allege the officers are authorized to violate. Furthermore, plaintiffs' own objective evidence undermines any assertions to the contrary.

First, the Department of Homeland Security's own regulations require that an immigration officer "may not enter . . . a residence . . . for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer either has a warrant or the consent of the owner or other person in control of the site to be inspected." 8 C.F.R. § 287.8(f)(2) (emphasis added). Plaintiffs' speculative assertions do not override the presumption that this regulation is adhered to as a matter of policy. United

States Postal Service v. Gregory, 534 U.S. 1, 10, 122 S.Ct. 431 (2001) (stating that "a presumption of regularity attaches to the actions of Government agencies"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); cf. Noh v. INS, 248 F.3d 938 (9th Cir. 2001) (“there is a presumption that an officer exercising the powers of his office does so lawfully”).

Second, plaintiffs allege that the United States defendants have failed “to provide the agents involved with adequate training (or for some newer agents, any training) on the lawful execution of fugitive operations.” FAC ¶ 5 (emphasis added). They cite as evidence – without reference to any page number – a March 5, 2007, Department of Homeland Security, Inspector General’s Report, and state:

* * * * *

(c) in 2006, DRO began hiring lower-level, less experienced officers for fugitive operations; and (d) some fugitive operations agents have not completed the Fugitive Operations Training Program – 2004 guidelines allow the agents to work for up to two years before receiving the necessary training.

FAC ¶ 53 (citing FAC Exhibit C). Contrary to the assertion that some “newer agents” have not had “any training” (such that Plaintiffs are under a concrete threat of imminent future harm by “untrained agents”) FAC ¶ 5, the Inspector

General's report concludes "[Fugitive Operations] Team Members Have Basic Law Enforcement Training." FAC Exhibit C at 29 (emphasis added). Moreover, the report confirms it is policy that "before a field office director can authorize an officer's participation in fugitive operations, the officer must have completed some basic law enforcement training." Id. at 29-30. Also, "Although not all team members have attended Fugitive Operations Training Program, at a minimum, they all have completed some basic law enforcement training."³ Id. (emphasis added).

The basic law enforcement training course is described as including courses on "immigration and nationality, criminal statutes and statutory authorities, agency operations and procedures, defensive tactics, use of firearms, and drivers training." Id. at 31 (citing DHS, Federal Law Enforcement Training Center Catalog of Training Programs, 2005-2006, and Customs and Border Patrol Academy Courses). The current ICE basic training program, as described in the current

² The report describes basic law enforcement training to be successful completion of the Immigration Officer Basic Training Course or the United States Border Patrol Academy. More importantly, the Court should take notice that the Department of Homeland Security has detailed regulations concerning "Field Officers; Powers and Duties," 8 C.F.R. § 287, *et. seq.*, and explicitly authorizes immigration officers who have successfully completed "basic immigration law enforcement training" to conduct searches pursuant to "[Immigration and Nationality Act section 287(a)" which relates to the "powers without warrant" of immigration officers. 8 C.F.R. § 287.5(d); see also INA § 287(a), 8 U.S.C. § 1357(a).

Federal Law Enforcement Catalog (attached as Exhibit 1), is 63 days in duration. See Exhibit 1 (Excerpt of Federal Law Enforcement Training Center, Catalog of Training Programs, 2007-08, pp. 145-46).⁴ In addition to the items described in the 2007 Inspector General Report, the training includes “Detention and Removal Operation Procedures,” “Interviewing: Cross-Cultural Communications,” “Arrest Techniques,” and “Officer Liability.” Id. Thus, Plaintiffs’ allegations of sanctioned lawlessness by way of lack of training or other institutional apathy, is unsupported by their own evidence.

Third, plaintiffs’ citation to the goal-oriented success of ICE does nothing to establish that the Chavez family have standing to pursue their equitable relief claims. FAC ¶¶ 36, 38. Plaintiffs correctly note that Congress has endorsed the success of the ICE Fugitive Operations program by providing funding for additional operational teams, see FAC ¶ 35; FAC Exhibit C at 5 (DHS Inspector General Report), yet imply that such success could only be achieved by an unlawful means or policy. For example, plaintiffs cite to the alleged “pretextual” arrests of nonfugitive or noncriminal aliens during fugitive operation enforcement actions, but fail to explain how such arrests are unlawful. FAC ¶¶ 50, 53. To the contrary, once again, plaintiffs’ own evidence demonstrates Congress has

⁴ Entire catalog available at <http://www.fletc.gov/training/cotp.pdf/view>.

authorized ICE to question any person as to their right to enter, reenter, pass through, or reside in the United States. FAC Exhibit D, at 3 (Letter from ICE Assistant Secretary Julie L. Myers) (citing INA § 287, 8 U.S.C. § 1357(a)(1)). If that person is deemed to be an alien who is in the United States illegally, he or she may be arrested without warrant, and processed accordingly for removal. Id.

Thus, although plaintiffs' citation to a litany of articles or other matters demonstrates the political debate over the increased success of immigration enforcement, FAC ¶¶ 187-90, it does nothing to allege that ICE operates under a policy that violates the law such that this court has jurisdiction over a concrete case or controversy because a realistic and imminent threat of future harm exists.⁵

Similarly, this Court should decline to credit the assertion that "inaccurate" data relied upon by ICE, FAC ¶ 3, necessarily results in unlawful enforcement activity by ICE agents. To clarify, the DHS Inspector General Report upon which plaintiffs rely, states "50% of data is accurate, and there is more incomplete than inaccurate information." FAC Exhibit C at 15. Plaintiffs fail to explain that in

⁵ Plaintiffs cite to several articles but do not include as exhibits the articles in their entirety. It should be noted, however, that several of the article titles indicate that they merely highlight the success of immigration enforcement actions. FAC at 39, fn.10 ("Immigration officials make 137 arrests around N.J."), fn.16 ("Immigration Raid Nets 7"), fn.17 ("18 Reputed Gang Members Arrested"), fn.20 ("Six Arrested in Immigration Raids"), fn.23 ("City Police, federal agents arrest 12 illegal; Critics: Action violates 'Save Haven' measure") (emphasis added).

2006 ICE made efforts to ensure that the data referenced (biographical records, detention records, case records, and jail records), was updated and accurate. More importantly, the report – incorrectly described by plaintiffs as critical of ICE (FAC ¶ 53) – provides nothing to support the speculative conclusion that inaccurate or incorrect data leads to Fourth and Fifth Amendment violations. FAC Exhibit C at 15.

In sum, the United States defendants' regulations and plaintiffs' own objective evidence demonstrates that ICE places an emphasis on carrying out its duties to enforce the nation's immigration laws in a lawful manner. See FAC Exhibits C and D. Plaintiff's pleadings fail to demonstrate otherwise, and are insufficient to establish a case or controversy.

2. *Plaintiffs Lack Standing Despite Their Allegation That ICE Agents Will Return And "Next Time It Will Be Worse."*

Plaintiffs Chavez, Galindo, and W.C., allege that they are under a real and imminent threat of future harm because they were allegedly told by ICE agents "We're going to come back. And next time it will be worse." FAC ¶ 91.

This alleged statement should not be viewed in a vacuum, but rather in the context of the entire First Amended Complaint and its exhibits. Pension Benefit Guaranty Corp., 998 F.2d at 1196-97. Even assuming the statement was made, the First

Amended Complaint does not demonstrate a real and imminent threat of future harm exists to the Chavez family. Lyons, 461 U.S. at 102-05.

First, as explained above, plaintiffs' objective evidence demonstrates ICE seeks to enforce the immigration laws in a lawful manner. Thus, even if it is true that an ICE agent stated “[w]e’re going to come back,” this does not demonstrate a realistic threat of imminent future harm from the United States defendants who operate under a lawful policy.

Second, any realistic substance that could be attributed to the alleged statement is undercut by the fact that plaintiffs allege that ICE operates its alleged unlawful policy under the pretext that it is seeking fugitives, and that much of the information relied upon by ICE is inaccurate or incorrect. FAC ¶ 49-53, 54 (“The raids on plaintiffs’ homes exemplify the extraordinary level of inaccuracy.”). If this allegation is assumed to be true, then it must also follow that ICE would have no interest to return and enforce the nation’s immigration laws (unlawfully or not) at the Chavez family home because, as plaintiffs allege:

(1) ICE agents “repeatedly” stated they were seeking “illegal people” (FAC ¶ 82, 87, 89), however;

(2) the Chavez family are not “illegal people” and they informed the ICE agents that they are not “hiding illegal people” (FAC ¶ 77, 87, 89 (stating Ms.

Galindo informed ICE only the Chavez family lives in the house));

(3) Ms. Galindo's two sisters are allegedly in Guatemala (FAC ¶ 83), and;

(4) an ICE agent concluded, "This is not the person we're looking for." FAC ¶ 83.

With these conflicting allegations, and absent anything but a speculative assertion that an unlawful "policy" or "*modus operandi*" (FAC ¶ 4) exists, the Chavez family has not met their burden to demonstrate a realistic threat of imminent future harm at the hands of ICE. Lyons, 461 U.S. at 102-05. The Supreme Court's decision in Los Angeles v. Lyons requires this result.

Lyons alleged he was placed in a "chokehold" during a routine traffic stop and thereafter sought to enjoin Los Angeles police officers from employing "chokeholds" in the future. Lyons, 461 U.S. at 97-98. However, the Supreme Court held that the plaintiff lacked standing to seek this prospective relief because he failed to show that "he was likely to suffer future injury from the use of the chokeholds by police officers." Id. at 105. The Court emphasized that the plaintiff's prior injury did nothing to establish a "real and immediate threat" that he would again be subjected to an illegal use of a chokehold by a law enforcement officer. Id. The Court also made clear in Lyons that "a real and immediate threat" of future injury could not be demonstrated merely through broad and conclusory

allegations, noting that the allegation of “routine” use of chokeholds in situations where they were unnecessary “f[ell] far short of the allegations that would be necessary to establish a case or controversy between the parties.” Id.

The Court emphasized and summarized that:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy.

Lyons, 461 U.S. at 105-06 (underlined emphasis added, italicized emphasis in original).

Likewise, even though the Chavez family has alleged that an ICE agent threatened them with future harm (leaving aside the conflicting deduction that ICE would have no interest in returning to the home as it was determined that the person sought did not reside there), they have not realistically alleged that (1) all ICE agents violate Fourth and Fifth Amendment rights when conducting fugitive enforcement operations, or (2) that ICE orders or authorizes such activity. Id.

3. *Plaintiffs Lack Standing Because Their Putative Injury Lacks Redressability.*

Plaintiffs also fail the standing requirement because their putative injury lacks redressability. Redressability is established by a more than “merely speculative” showing that a court can grant relief to redress the plaintiff’s injury. Danvers, 432 F.3d at 291 (citing Lujan, 504 U.S. at 560-6). Here, the Chavez family seeks as relief from future harms, that the Court “bar all further intimidation of plaintiffs . . . and any and all entry into the home . . . absent a warrant . . . or informed, voluntary consent.” FAC at 62, Prayer for Relief (c). In sum, plaintiffs seek an injunction requiring the United States defendants to obey the law. This type of injunction is impermissible.

Specifically, the injunction requested here is too vague and overbroad to be permitted. Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 83 (3rd Cir. 1990) (“Overbroad language in an injunction that essentially orders a party to obey the law in the future may be struck from the order”); SEC v. Warren, 583 F.2d 115, 121 (3rd Cir. 1978) (affirming district court’s decision to dissolve an injunction that “merely require[d] defendants ‘to obey the law’ in the future . . . a requirement with which they must comply regardless of the injunction”); cf. Calvin Klein Cosmetics, Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1987); See generally Fed.R.Civ.P. 65(d)

(requiring that an injunction “be specific in terms” and “describe in reasonable detail . . . the act or acts sought to be restrained”). Although these cases speak in terms of a court’s ability to enter an injunction pursuant to Federal Rule of Civil Procedure 65(d), the end result is the same. If this Court is precluded from entering the injunction that Plaintiffs Chavez, Galindo, and W.C. seek, it necessarily follows that plaintiffs’ equitable relief request can not be redressed by the injunction they seek.

In a case containing substantially identical allegations against ICE where an “obey the law” injunction was sought, the district court concluded plaintiffs lacked standing, in part, because their claims lacked redressability. See Mancha v. ICE, 2007 WL 4287766, at *2-3 (N.D. Ga., December 5, 2007) (attached as Exhibit 2). Although not published, the Mancha case, which is also cited by plaintiffs in an attempt to support the allegation of nationwide abuse by ICE (FAC ¶ 187), persuasively explains that “[e]ven if Rule 65(d), by itself, is not a concern at the pleadings stage, standing is always a concern at any stage of the case.” Id. at *3. Furthermore, the decision goes on to highlight the inherent case-by-case fact specific contents of a Fourth or Fifth Amendment assessment, and the inability to enforce an “obey the law” injunction in that context. Id. (citing Elend v. Basham, 471 F.3d 1199, 1209 (11th Cir.2006) (“Plaintiffs also fail the standing requirements

because the putative injury lacks redressability. First, the inchoate nature of the claim provides an insurmountable obstacle for a court to fashion an injunction that accomplishes anything beyond abstractly commanding the Secret Service to obey the First Amendment.”).

In sum, plaintiffs’ request for an injunction requiring the United States defendants to obey the law fails to meet the redressability requirement for standing.

D. Plaintiffs Have Otherwise Failed To State A Claim Upon Which Equitable Relief Can Be Granted.

Even assuming plaintiffs have somehow satisfied the "case or controversy" requirement, the equitable relief request should nonetheless be dismissed under Rule 12(b)(6). Specifically, assuming arguendo that plaintiffs have asserted a sufficient likelihood of future injury to satisfy the "case or controversy" requirement of Article III standing to seek equitable relief, plaintiffs have failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In Lyons, the Court held that equitable relief is not available "absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again -- a 'likelihood of substantial and immediate irreparable injury.'" Lyons, 461 U.S. at 111 (quoting O'Shea, 414 U.S. at 502).

As discussed above, plaintiffs have failed to adequately allege that they face a “likelihood of substantial and immediate irreparable injury” in this case. Lyons, 461 U.S. at 111. Even if taken as true, Plaintiff Chavez, Galindo, and W.C.’s, substantive allegations amount to nothing more than an incident of a past injurious event and the speculative allegation that unlawful ICE agents will return to violate their constitutional rights again. Id. (stating equitable relief is not available absent a showing "plaintiff[s] will be wronged again."). Plaintiffs’ own objective evidence renders their allegations insufficient to confer standing. See FAC ¶ , Exhibits C and D. Furthermore, Fed.R.Civ.P. 65(d) prevents the entry of the broad injunction that they seek.

Therefore, plaintiffs have also failed to state claims sufficient to support the granting of injunctive relief, and that request must be dismissed. Lyons, 461 U.S. 95, 105 (“That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation . . .”).

//

//

//

CONCLUSION

For the reasons set forth above, the United States defendants' motion to dismiss should be granted. and plaintiffs' request for injunctive relief should be dismissed.

Dated: June 26, 2008

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division

DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation

/s/ Gjon Juncaj
GJON JUNCAJ
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 307-8514

Attorneys for the United States defendants

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division
DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation
GJON JUNCAJ
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
Ben Franklin Station P.O. Box 868
Washington, D.C. 20044-0868
Tel. (202) 307-8514
gjon.juncaj@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al.,

Plaintiffs,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT ("ICE"), et al.,

Defendants.

Hon. Peter G. Sheridan

No. 08-CV-01652- PGS-ES

CERTIFICATE OF SERVICE

I, **GJON JUNCAJ**, do hereby certify that:

1. I hold the title of Senior Litigation Counsel with U.S. Department of Justice, Civil Division, and am counsel for United States defendants Immigration

and Customs Enforcement and, as sued in their official capacities, Julie L. Myers, John P. Torres, Scott Weber, Bartolome Rodgriguez, John Doe ICE Agents 1-60, and John Soe ICE Supervisors 1-30.

2. On June 26, 2008, I caused true copies of the following documents to be filed electronically with the Court's CM/ECF system:

- (1) Notice of United States Defendants' Motion To Dismiss Plaintiffs' Request For Injunctive Relief
- (2) Memorandum In Support of United States Defendants' Motion To Dismiss Plaintiffs' Request For Injunctive Relief, with Exhibits 1 and 2.
- (3) Proposed Order

3. I also certify that on June 26, 2008, I caused one (1) true and correct courtesy copy of the above documents to be delivered via Federal Express Service to the Honorable Peter G. Sheridan at:

Honorable Peter G. Sheridan, U.S.D.J.
United States District Court, District of New Jersey
King Fed. Bldg. & U.S. Courthouse
50 Walnut Street, Room 4040
Newark, N.J. 07101

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 26, 2008

s/ GJON JUNCAJ
GJON JUNCAJ
Senior Litigation Counsel