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United States District Court, N.D. Illinois, Eastern Division.

Peso CHAVEZ, et al. Plaintiffs,
v.
THE ILLINOIS STATE POLICE, et al. Defendants.

No. 94 C 5307. | Aug. 2, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

MANNING, J.

***1** The plaintiffs' objections to Magistrate Judge Bobrick's report and recommendation ("R & R") recommending denial of their motions for reinstatement of their claim for prospective relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.,* and for class certification are before the court. The defendants have also filed a mirror-image motion asking the court not to certify the plaintiffs' claims as a class or to reinstate the plaintiffs' claims for prospective relief, as well as a motion to strike the plaintiffs' experts' reports. For the following reasons, the plaintiffs' motions to reinstate and certify are denied, the corresponding motions filed by the defendants are granted, and the defendants' motion to strike is denied without prejudice.

I. Background

For a detailed recitation of the facts, the reader is directed to the court's opinion addressing the defendants' motion for partial summary judgment and a plethora of related motions. *Chavez v. Illinois State Police,* 27 F.Supp.2d 1053 (N.D.Ill.1998). In a nutshell, the plaintiffs claim that the Illinois State Police have a practice of stopping, detaining, and searching African–American and Hispanic motorists based on their race and without legally sufficient cause or justification. The court also recently denied the plaintiffs' motion to add an additional plaintiff (Christopher Jimenez). *Chavez v. Illinois State Police,* No. 94 C 5307, 1999 WL 515483 (N.D.Ill. July 15, 1999). For the purposes of this order, the court will assume familiarity with its prior orders.

With respect to the plaintiffs' motion to reinstate their claim for equitable relief under Title VI, since the court last considered the plaintiffs' standing to obtain equitable relief, the plaintiffs obtained: (1) additional statistical evidence (which the defendants challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)) relating to their claim that the defendants' practices disproportionately affect Hispanic motorists; and (2) supplemental affidavits from plaintiffs Peso Chavez and Gregory Lee. With respect to the plaintiffs' motion for class certification, the plaintiffs seek to certify a class consisting of "all persons of Hispanic race or color who in the past have been, and in the future will be, unlawfully stopped, detained, and also often searched...." Despite the plaintiffs' reference to past stops in their class definition, the plaintiffs actually seek to certify a class of Hispanic motorists who will be stopped in the future.

II. Discussion

A. Standard of Review

Because motions to certify a class are dispositive and the R & R is dispositive as to the plaintiffs' Title VI claim, the court will conduct a de novo review. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b); *Delgado v. Bowen,* 782 F.2d 79, 82 (7th Cir.1986).

B. The R & R

Magistrate Judge Bobrick found that the demise of the plaintiffs' equal protection claims did not automatically mean that their Title VI claims failed as a matter of law. The defendants do not challenge this conclusion. Magistrate Judge Bobrick also rejected the plaintiffs' new statistical evidence and affidavits and concluded that the named plaintiffs lacked standing to pursue a Title VI claim. Finally, he found that, even if the named plaintiffs had standing, certification of a class would be unwarranted. The plaintiffs filed timely objections.

C. Title VI

***2** Under Title VI, "[n]o person in the United States shall, on the ground of race, color, [or] national origin ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI forbids the use of federal funds in programs that intentionally discriminate based on racial grounds as well as programs which have a disparate impact on racial minorities. *Guardians Association v. Civil Service Commission of the City of New York,* 463 U.S. 582, 589 (1983) (White, J., joined by Rehnquist, J.).

Title VI also provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... [T]itle VI of the Civil Rights Act of 1964" and that remedies against a State are available "to the same extent as such remedies are available for such a violation in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d–7(a)(1) & (2); *see generally Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 119 S.Ct. 2199, 2206 (1999).

Title VI was enacted pursuant to the Spending Clause. It thus rests on Congress' power to set terms upon which federal funds will be made available to state and local governments and private actors. *Guardians,* 463 U.S. at 598–99. This means that it provides an option which potential recipients are free to accept or reject. *Id* . at 599. Because recipients of federal funds can take or leave federal funds, the Supreme Court has concluded that only prospective relief is available under Title VI. *Id.* The parties thus agree that a ruling that the named plaintiffs lack standing to obtain prospective relief sounds the death knell for the plaintiffs' Title VI claims.

D. Standing

To establish a "case or controversy" under Article III, a plaintiff must first "clearly demonstrate that he has suffered an injury in fact." *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). To do this, the plaintiff must allege that he was injured in a direct and palpable way. *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). In addition, the plaintiff's injury must be either actual or imminent, *Clinton v. City of New York,* 118 S.Ct. 2091, 2099–2100 (1998), as opposed to conjectural or hypothetical, *City of Los Angeles v. Lyons,* 461 U.S. 95, 101–02 (1983). Second, the plaintiff must establish causation by showing that his injury "fairly can be traced to the challenged action." *Steel Co. v. Citizens for a Better Environment,* 118 S.Ct. 1003, 1016–17 (1998); *Whitmore,* 495 U.S. at 155, *quoting Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976). Finally, the plaintiffs must show that the requested relief will redress the alleged injury. *Steel Co.,* 118 S.Ct. at 1017, *citing Simon,* 426 U.S. at 45–46.

***3** Even a "probabilistic benefit from winning a suit is enough ... to confer standing in the undemanding Article III sense." *North Shore Gas Co. v. Environmental Protection Agency,* 930 F.3d 1239, 1242 (7th Cir.1991). Thus, if the plaintiff is the object of the defendant's action or inaction, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561–62 (1992).

When the issue is whether a plaintiff has pleaded a sufficient risk of future injury for the purpose of establishing an entitlement to prospective relief, however, the concept of standing blends into questions of ripeness and justiciability. C. Wright, A. Miller & E. Cooper, 13 *Federal Practice and Procedure: Jurisdiction 2d* § 3531.4 (2d ed.1984); C. Wright, A. Miller & E. Cooper, 13A *Federal Practice and Procedure: Jurisdiction 2d* § 3531.12 (2d ed.1984). Thus, when a plaintiff has suffered a past injury and there is "little prospect that this particular plaintiff will be injured again in the future," that plaintiff is said to lack standing, but in fact, he has standing to assert a claim for damages based on the past injury and lacks a justiciable claim for prospective relief. *Id.* at § 3531.12.

The plaintiffs bear the burden of establishing the elements of standing. *See Lujan,* 504 U.S. at 561. "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of litigation." *Id.* The defendants here did not file a motion for summary judgment as to the plaintiffs' Title VI claims, likely due to the court's orders striking the plaintiffs' claims for equitable relief. Nevertheless, the plaintiffs cannot necessarily rest on the allegations of their complaint for two reasons.

First, the less taxing standard for a motion to dismiss, which requires the court to accept the well pleaded allegations of the complaint as true, by definition only applies to well pleaded (as opposed to conclusory) factual allegations. *See Warth v. Seldin,* 422 U.S. 490, 501 (1975). To the extent that allegations in the complaint directed at the plaintiffs' standing are conclusory, therefore, the court may disregard them. Second, as the Seventh Circuit has recently noted, "where standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with 'competent proof.' 'Competent proof' requires a showing by a preponderance of the evidence that standing exists." *Perry v. Village of Arlington Heights,* No. 98–3405, 1999 WL 544630 *3 (7th Cir. Jul. 27, 1999). The plaintiffs have submitted affidavits and statistical evidence, discussed in detail below, in an effort to meet this burden. With these basic principles in mind, the court turns to the parties' arguments.

1. The Plaintiffs' Proposed Exceptions to *City of Los Angeles v. Lyons*

***4** The plaintiffs contend that their right to seek equitable relief under Title VI is not subject to the standing requirements set forth in *Lyons* because: (1) *Guardians*

authorizes an award of prospective relief in the absence of allegations that the plaintiffs will be subject to the challenged practices in the future, 463 U.S. at 605; and (2) they are within the scope of the "procedural rights" exception to redressability and immediacy enunciated in *Lujan,* 504 U.S. at 572–78. Alternatively, they contend that, even if *Lyons* applies, they have satisfied its standing requirements. The court disagrees.

a. Does *Guardians* Make *Lyons* Inapplicable to the Plaintiffs' Title VI Claim?

In *Lyons,* the leading case on standing in the context of prospective relief, the plaintiff, Adolph Lyons, claimed that a Los Angeles police officer used an illegal chokehold when the officer stopped him for a traffic violation. The Supreme Court found that Lyons lacked standing justifying equitable relief because he failed to allege: (1) that he would have another encounter with the Los Angeles police; and (2) that all Los Angeles police officers always choke any citizens with whom they have an encounter *or* that the City of Los Angeles ordered or authorized police officers to act in such a manner. 461 U.S. at 105–06.

When the court considered the plaintiffs' standing to obtain equitable and injunctive relief in 1996, *Chavez v. Illinois State Police,* No. 94 C 5307, 1996 WL 66136 (N.D.Ill. Feb. 13, 1996), and 1998, *Chavez v. Illinois State Police,* 27 F.Supp.2d at 1080, the court found that the plaintiffs had to establish "continuing, present adverse effects" and a "real and immediate threat" of future injury to allow the court to exercise jurisdiction over the plaintiffs' requests for prospective relief. *See Lyons,* 461 U.S. at 102, 105; *Walters v. Edgar,* 163 F.3d 430, 434–35 (7th Cir.1998), *cert. denied,* 119 S.Ct. 2022 (1999) (to obtain prospective relief, a plaintiff must establish a non-trivial probabilistic harm of future injury).

The plaintiffs now contend that *Lyons* is inapplicable to their Title VI claim. Although the plaintiffs could have raised this argument long ago, the court will consider it due to the defendants' failure to file a motion for summary judgment specifically addressing Title VI. According to the plaintiffs, the standing analysis for a Title VI Spending Clause claim is fundamentally different from the analysis used for constitutional claims in *Lyons.* Thus, citing to *Guardians* and *Lujan,* the plaintiffs contend that they must only allege a concrete past injury to have standing to obtain injunctive relief under Title VI.

In *Guardians,* African–American and Hispanic police officers who had taken and passed New York City's written examination for entry-level appointment to the police force claimed that the examination violated Titles VI and VII of the Civil Rights Act of 1964 because it had a discriminatory impact on them when the police department laid off officers on a "last hired, first fired" basis. 463 U.S. at 585 (White, J., joined by Rehnquist, J.). Pursuant to Title VI, the district court awarded constructive seniority to the plaintiffs and ordered the defendants to consult with the plaintiffs with respect to the preparation and use of future police officer examinations and to provide the plaintiffs with race and ethnicity information regarding the scores of the next scheduled examination. *Id.* at 604.

***5** In splintered opinions, a majority of the Supreme Court held that a violation of Title VI itself requires proof of discriminatory intent and a different majority held that proof of discriminatory effect is enough to establish liability when a suit is brought to enforce the regulations adopted pursuant to Title VI. *See Guardians,* 463 U.S. at 584 n. 2 (White, J., joined by Rehnquist, J.); 463 U.S. at 607 n. 1 (Powell, J., joined by Burger, C.J., and in part by Rehnquist, J.); *see also Smith v. Metropolitan School District, Perry Township,* 128 F.3d 1014, 1028 (7th Cir.1997). Justice White, joined by Justice Rehnquist, also found, among other things, that the prospective portions of the district court's order under Title VI were proper and that retrospective relief under Title VI (*i.e.,* the award of constructive seniority) was improper.

The plaintiffs stress that the Supreme Court affirmed the grant of prospective relief under Title VI even though the plaintiffs had all taken and passed the written examination and thus did not claim that the defendants' future actions with respect to the examination would harm them. Thus, they conclude that the Supreme Court has authorized a grant of prospective relief even when the named plaintiffs do not allege that they will personally be subject to the challenged conduct in the future. This reading of *Guardians* is too broad. It is true that Justice White, joined by Justice Rehnquist, agreed that the portion of the district court's order requiring consultation with the plaintiffs to ensure that future examinations will not have a discriminatory impact constituted "permissible injunctive relief [under Title VI] aimed at conforming respondents' future conduct to the declared law," 463 U.S. at 605, and that the plaintiffs were not planning to retake the police test, since they had already passed it.

With all due respect, however, to the extent that this is a holding and not dicta, two Justices do not constitute a majority. As discussed elsewhere in this order, the absence of a sufficiently likely future harm means that the named plaintiffs cannot establish standing sufficient to support an grant of injunctive relief. Moreover, the Supreme Court has recently criticized the use of "drive by jurisdictional rulings," explaining that a jurisdictional point not specifically discussed by the court has "no precedential effect." *Steel Co.,* 118 S.Ct. at 1001. This is consistent with established law in this Circuit, which tells us that "decisions that fail to remark a jurisdictional issue are not assumed to have resolved it by their silence."

Crawford v. United States, 796 F.2d 924, 928 (7th Cir.1986); *see also Walters v. Edgar,* 163 F.3d at 433 (declining to consider jurisdictional implication of dictum by the Supreme Court as binding because it was unelaborated and "inconsistent with fundamental principles governing federal jurisdiction"). *Guardians* deals with the type of proof necessary to establish a private cause of action under Title VI, not with the personal stake necessary to provide standing to support a grant of prospective relief.

***6** The court also notes that the decisions it has located which specifically address whether a plaintiff who allegedly suffered past discrimination has standing under Title VI to obtain a prospective relief all post-date *Guardians,* unanimously apply *Lyons,* and conclude that speculative claims of future injury are insufficient to support a grant of prospective relief. First and foremost, the Supreme Court itself in *Allen v. Wright,* 468 U.S. 737 (1984), considered a claim that the Internal Revenue Service's grant of tax-exempt status to racially discriminatory private schools violated, among other things, Title VI.

Specifically, in *Allen,* parents of African–American children who were attending public schools in districts undergoing desegregation asserted that the Internal Revenue Service had not fulfilled its obligation to deny tax-exempt status to racially discriminatory private schools, and had thereby diminished their children's opportunity to receive an education in desegregated public schools. The court denied their request for prospective relief, explaining that the plaintiffs had not claimed a "specific threat of being subject to the challenged practices," so they "had no standing to ask for an injunction" under *Lyons. Id.* at 760.

While the Seventh Circuit has not addressed this precise issue, *Allen's* application of *Lyons* to Title VI claims does not stand alone. *See Linton v. Commission of Health and Environment, State of Tennessee,* 973 F.2d 1311, 1316–17 (6th Cir.1992) (plaintiffs who claimed that Tennessee's limited bed policy for Medicaid facilities violated Title VI had standing to seek injunctive relief because they established that the policy would cause them ongoing injury); *Cone Corporation, C.H. v. Florida Dep't of Transportation,* 921 F.2d 1190, 1204–06 (11th Cir.1991) (plaintiff contractors who challenged Florida's set-aside and minority business programs could not obtain prospective relief under Title VI based on a bald claim that the programs would injure them); *Furtick v. Medford Housing Authority,* 963 F.Supp. 64, 68–69 (D.Mass.1997) (plaintiffs who challenged local housing authority's use of residency preferences in distributing federally funded housing vouchers under, among other things, Title VI, lacked standing to obtain declaratory or injunctive relief because the possibility that they would be subject to the preferences in the future was speculative); *Atakpa v. Perimeter Ob–Gyn Assoc., P.C.,* 912 F.Supp. 1566 (N.D.Ga.1994)(pregnant plaintiff did not have standing to seek injunctive relief under Title VI against clinic that required HIV screening, where she sought treatment elsewhere and did not claim that she would go to clinic again and that the clinic would discriminate against her); *Young v. Pierce,* 628 F.Supp. 1037, 1058–59 (E.D.Tex.1985) (African–American applicants and residents of public housing had standing under Title VI to seek injunction directed at Department of Housing and Urban Development's alleged maintenance of racially segregated housing because residents suffered ongoing harm from segregation and applicants were attempting to live there).

***7** In short, the court remains unconvinced that *Guardians* authorizes it to disregard the long-established precedent regarding the requirements necessary to establish standing to obtain prospective relief generally, as well as in the context of Title VI. The court thus concludes that the plaintiffs have failed to establish that *Guardians* permits an award of prospective relief under Title VI in the absence of allegations of a concrete future harm.

b. Does *Lujan* Make *Lyons* Inapplicable to the Plaintiffs' Title VI Claim?

In another attempt to avoid *Lyons,* the plaintiffs argue that they need not show a likelihood of imminent future injury because Congress has supplied that element in Title VI (*i.e.,* in the statute, not any regulations). In support, they direct the court's attention to note 7 in *Lujan.* Objections at 5, *citing Lujan,* 504 U.S. at 572 n. 7. The plaintiffs appear to be contending that an unspecified portion of Title VI represents Congress' decision to confer standing to obtain prospective relief upon private litigants who cannot establish a concrete threat of future harm.

Footnote seven of *Lujan* notes that procedural rights created by Congress are "special" for standing purposes because a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy." *Id.* The plaintiffs do not explain the basis for their belief that Title VI confers some kind of procedural right on them or absolves them of the obligation to show that they are subject to a concrete risk of future harm to be eligible for prospective relief. The court is not obligated to research and construct a party's arguments, so it need not go any further in rejecting the plaintiffs' argument based on note 7 of *Lujan. See Linc Finance Corp. v. Onwuteaka,* 129 F.3d 917, 921–22 (7th Cir.1997).

In any event, Title VI's non-discrimination provision—"[n]o person in the United States shall, on the

ground of race, color, [or] national origin ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"—appears to create a substantive right to be free from discrimination when Federal funds are used, rather than a procedural right. 42 U.S.C. § 2000d. A procedural right necessarily arises from some kind of rule or regulation governing the way by which something is accomplished. *See Banks v. Secretary of the Indiana Family and Social Services Administration,* 997 F.2d 231, 238 (7th Cir.1993) (claim that the Secretary violated the plaintiffs' rights by failing to enforce federal regulations that allegedly required notice and an opportunity to contest a state agency's denial of a provider's claim for reimbursement was procedural); *Wyoming Outdoor Council v. United States Forest Service,* 165 F.3d 43, 51 (D.C.Cir.1999) (claim that the Forest Service violated its regulations relating to method of allocating oil and gas leases on forest land was procedural).

***8** *Lujan* provides further clarification of the kind of procedural rights envisioned by the Supreme Court. In *Lujan,* the court illustrated the connection between a violation of a procedural right and the presence of a concrete injury necessary to provide standing by contrasting the example of a person living next to a dam with a person living across the county. *Lujan,* 112 S.Ct. at 2142–43 & nn. 7 & 8. It explained that the neighbor would have standing to challenge the dam's construction if the agency in charge failed to provide an environmental impact statement, while the out-of-towner would not have standing to challenge the same procedural violation. *Id.*

An environmental impact statement is one step out of the many procedural requirements necessary to construct a dam. *See id.* Similarly, a regulation specifying a process by which claimants can contest the denial of benefits is a procedural protection for claimants, and a regulation governing the allocation of oil and gas leases is a procedure by which leases are distributed. *See Banks v. Secretary of the Indiana Family and Social Services Administration,* 997 F.2d at 238; *Wyoming Outdoor Council v. United States Forest Service,* 165 F.3d at 51. Title VI's anti-discrimination provision, on the other hand, simply conditions federal funding on non-discrimination.

Moreover, even if a statute creates a right of action, "Article III's [standing] requirement still remains," so a plaintiff must establish that "prospective relief will remove the harm" that will otherwise affect them personally in the future. *Warth v. Seldin,* 422 U.S. at 501, 505–06. Thus, the Seventh Circuit has held that *Lujan* "foreclosed standing based on some sort of 'procedural injury.' " *Rhodes v. Johnson,* 153 F.3d 785, 787 (7th Cir.1998); C. Wright, A. Miller & E. Cooper, 13A *Federal Practice and Procedure: Jurisdiction 2d* § 3531.13 (Supp.1999), *quoting Lujan,* 504 U.S. at 573–74 (Article III limits Congress' power to expand citizen's standing, so "if the requested relief 'no more directly and tangibly benefits [the plaintiff] than it does the public at large,' Article III requirements are not met"); *cf. Wyoming Outdoor Council v. United States Forest Service,* 165 F.3d at 51 (Article III still requires a plaintiff to allege the "constitutional minima" required to establish standing for the type of relief at issue as, at best, it only reduces the showing to support all elements of standing).

In short, it is far from self-evidence that the Supreme Court granted an exemption for the standing necessary for prospective relief in *Lujan's* note 7. This note simply provides an example of a procedural right and discusses the special nature of procedural rights, while the remainder of the court's opinion focuses on (and finds that the plaintiffs did not show) sufficiently imminent injury to have standing. The plaintiffs' conclusory arguments thus do not convince the court that Title VI's anti-discrimination provision is procedural and that, even if it is, it completely exempts them from the obligation to show that they are subject to a concrete risk of future harm.

***9** The court, therefore, finds that *Lujan* does not hold that Title VI grants a person in the named plaintiffs' position a right to prospective relief nor does it somehow override the requirements for Article III standing with respect to the plaintiffs' eligibility for prospective relief. This brings the court to a road it has already traveled several times—the impact of *Lyons* on the plaintiffs' claims for prospective relief.

2. Real and Immediate Future Harm Under *City of Los Angeles v. Lyons*

Under *Lyons,* the plaintiff must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct, and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical." ' 461 U.S. at 101–02. Moreover, past wrongs do not necessarily add up to the "real and immediate threat of future injury" necessary to satisfy the case or controversy requirement of Article III. *See id.* at 107. Thus, past "exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Id.* at 101.

As noted above, *Lyons* conditions the availability of prospective relief on a showing that a named plaintiff: (1) will have another encounter with the Illinois State Police; *and* (2) that all Illinois State Police officers always discriminate against African–American or Hispanic citizens with whom they have an encounter *or* that the

State ordered or authorized its police officers to act in such a manner. *See* 461 U.S. at 105–06.[1] None of the named plaintiffs have ever overcome prong one, which requires at least one named plaintiff to show that he is in real and immediate danger of being stopped by the Illinois State Police due to his race, as the named plaintiffs have, to date, failed to show that they are sufficiently likely to be subject to discriminatory highway stops in the future.

The plaintiffs proffer two changed circumstances in support of their claim that this time, things will be different: (1) additional statistical evidence relating to their claim that the defendants' allegedly discriminatory enforcement of the highway laws disproportionately affects Hispanic drivers; and (2) supplemental affidavits from plaintiffs Peso Chavez and Gregory Lee. The defendants, in turn, seek to strike the plaintiffs' statistical evidence under *Daubert* and contend that the named plaintiffs have still not satisfied *Lyons.*

a. Statistical Evidence

The plaintiffs' references to their new statistical evidence appear to be premised on an implied argument that the allegedly high statistical likelihood that Hispanic motorists generally will be the subject of discriminatory highway stops means that the named Hispanic plaintiffs are in imminent danger of being stopped. Specifically, according to the plaintiffs, the Seventh Circuit's holding that "[a] probabilistic harm, if nontrivial, can support standing," *Walters v. Edgar,* 163 F.3d at 434, means that a court may use statistics relating to stops generally to infer that particular motorists are likely to be stopped.

***10** This interpretation of the word "probabilistic" is problematic. Any event in the future is, by definition, probabilistic to one degree or another as it has not yet happened. It can be nearly certain (as in Gilbert and Sullivan's "no probable, possible shadow of doubt, no possible doubt whatever," *The Gondoliers,* W. Gilbert & A. Sullivan (1889)) or simply theoretically possible, but it will always be probabilistic simply because it has not yet occurred.

Thus, in *Walters,* the Seventh Circuit held that prisoners had standing to pursue injunctive relief with respect to their access to courts claims if they could show "that they [were] highly likely to have a meritorious suit in the future that they will not be able to litigate effectively because of the defendants' infringement of the constitutional right of access." 163 F.3d at 434. In other words, the court focused on the likelihood that *these particular plaintiffs* would have meritorious suits in the future and considered facts relating to whether those future suits would be meritorious. The use of the word "probabilistic" did not encompass evidence relating to third parties, such as some sort of statistical analysis of the percentage of prisoner suits based on access to courts claims that are meritorious versus those that are frivolous.

This reading of *Walters* is consistent with precedent specifically addressing a plaintiff's ability to rely on the experiences of third parties to establish standing. The Supreme Court has specifically rejected such an approach, stating that a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties" and thus can only invoke a federal court's jurisdiction when he personally suffered the kind of injury necessary to seek the type of relief at issue. *Warth,* 422 U.S. at 498–99; *see also McKenzie v. City of Chicago,* 118 F.3d 552, 555 (7th Cir.1997).

Thus, in *Warth,* the plaintiffs claimed that a zoning ordinance adopted by a neighboring town prevented persons with a low and moderate income (many of whom were members of racial or ethnic minority groups) from living there. The Supreme Court found that these plaintiffs did not have standing to challenge the ordinance, explaining that:

> [T]he fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'

***11** 422 U.S. at 502, *quoting O'Shea v. Littleton,* 414 U.S. at 494.

The Ninth Circuit has also grappled with the distinction between qualitatively probable and quantitatively possible for purposes of standing for injunctive relief. Specifically, in *Nelsen v. King County,* former residents of an alcohol treatment center filed a suit seeking injunctive relief based on alleged violations of their civil rights while they were at the center. 895 F.2d 1248 (9th Cir.1990). The plaintiffs claimed that there was a "demonstrated possibility" that they would be subject to the center's allegedly unconstitutional conduct, citing testimony that 35% of inpatients like the plaintiffs and 75% of plaintiffs in the "recovery house" portion of the center were recidivists. *Id.* at 1250.

The court, however, found that its "analysis cannot be reduced to considering probability merely in terms of quantitative percentages" because the level of generality

of a statistical showing is "insufficient to establish that serious injury will probably recur to the plaintiff." *Id.* at 1250 (citations omitted). It also stated that a "probable" injury is qualitative rather than quantitative, and hence requires a likely recurrence of injury to an individual plaintiff, not a generalized statistical chance of injury. *Id.* Thus, it concluded that the statistics were irrelevant for standing purposes, explaining that:

> [W]e cannot base a determination of standing upon naked statistical assertion. Our analysis must be individualized and must consider all the contingencies that may arise in the individual case before the future harm will ensue. Therefore, we need not determine whether an asserted 35%, or even 75%, probability of returning to the Center is sufficient to confer standing. Rather, looking beyond these percentages and beyond the conclusory assertions of [the plaintiffs], the district court must make an individualized inquiry into whether there is a credible threat that [they] will again suffer the harm that allegedly occurred to them in the Center.

Id. at 1251–52.

Similarly, the District of Columbia Circuit rejected an effort to establish a threat of imminent future injury based on an alleged "pattern, practice and policy" of racial discrimination by the defendant. *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.,* 28 F.3d 1268, 1274 (D.C.Cir.1994). The court found that generalizations about other people allegedly affected by the defendant's purported discrimination were not germane for standing purposes, as the plaintiffs would have to address the likelihood of future discrimination against the plaintiffs individually to satisfy *Lyons*. *Id.*

Finally, in a very factually analogous case, *Washington v. Vogel,* 156 F.R.D. 676 (M.D.Fla.1994), the plaintiffs challenged a Florida county's alleged policy of targeting African–American and Hispanic motorists on I–95 for pretextual traffic stops. The plaintiffs claimed that a special team on the County's police force were stopping minority motorists to illegally seize their property and sought to certify a class fronted by two motorists who had each been stopped once. In an attempt to establish standing for injunctive relief under *Lyons,* the plaintiffs submitted "evidence of repetitive stops of other minority motorists on I–95 between 1989 and 1993" and contended that these statistics suggested that any minority motorist traveling on I–95 might be repeatedly stopped. *Id.* at 681. The court found that this evidence was not enough to support injunctive relief under *Lyons* as it did not show that the named plaintiffs personally faced a realistic threat of recurring harm. *Id.*

***12** All of these cases share two common themes. First, the decision as to whether alleged future discrimination is "probabilistic" simply refers to whether a particular individual is sufficiently likely to suffer discrimination in the future. The use of the word "probabilistic" does not negate *Lyons* and require the court to become a statistician to calculate if standing for injunctive relief is proper. Second, the imminent harm required by *Lyons* is qualitative, not quantitative. Thus, a plaintiff must establish that he is personally subject to a sufficient risk of future harm to be eligible for prospective relief. The plaintiffs' statistical evidence is obviously not directed at any of the named plaintiffs' specific chance of being wrongfully stopped. For these reasons, the court finds that the plaintiffs' reliance on their statistical evidence to establish standing for prospective relief is unavailing.[2]

b. Have the Plaintiffs Satisfied *Lyons?*

In support of their argument that they have satisfied *Lyons,* the plaintiffs point to Chavez and Lee's supplemental affidavits. Three additional arguments also appear to be interwoven throughout their objections: (1) the immutable nature of the reason underlying the allegedly discriminatory stops—race—means that the court can assume that the named plaintiffs are in imminent danger of future discriminatory stops; (2) denying their motion to reinstate their claims for equitable relief would be improper because it would leave them without a remedy; and (3) since the fear of discrimination has prevented the plaintiffs from placing themselves in a position where they could be stopped, they should be allowed to pursue their claims for equitable relief despite the absence of repeated incidences of discriminatory stops to prevent the defendants from shielding themselves from liability by frightening the plaintiffs out of establishing standing.

The court begins by observing that, as noted above, standing is not an all or nothing proposition. *See Steel Co.,* 118 S.Ct. at 1011 (jurisdiction "is a word of many, too many, meanings"). Thus, the existence of a "case or controversy" in the Article III sense (for example, injury in fact, causation, and redressability sufficient to support a claim for damages and, therefore, to support a plaintiff's presence in a lawsuit) does not mean that a plaintiff is entitled to pursue all possible avenues for relief arising out of the conduct underlying that hypothetical damages claim. *See Robinson v. City of Chicago,* 868 F.2d 959, 966 (7th Cir.1989). The plaintiffs attempt to blur this distinction by citing to general standing cases in support

of their request for equitable relief. Standing to obtain prospective relief is, however, not synonymous with standing to obtain retrospective relief. *See id.* Thus, much of the authority cited by the plaintiffs in support of their request for equitable relief is inapposite. With this in mind, the court turns to the plaintiffs' specific arguments.

i. The Supplemental Affidavits

***13** According to the plaintiffs, Chavez and Lee's supplemental affidavits show the kind of imminent harm necessary to support prospective relief under *Lyons*. Resolution of this argument, however, requires more than a simple scrutiny of the supplemental affidavits, as the references to Gregory Lee in the plaintiffs' objections are fundamentally inconsistent with the plaintiffs' objections to the R & R.

Specifically, as noted by Magistrate Judge Bobrick, the identity of named plaintiffs upon whose behalf the plaintiffs seek equitable relief and class certification is unclear. In their equitable relief motion, the plaintiffs point to Peso Chavez, Gregory Lee, and Christopher Jimenez (who is not a plaintiff as the court recently denied the plaintiffs' motion to add Jimenez as an additional plaintiff). In their motion for class certification on the equitable relief issue, however, the plaintiffs point to Peso Chavez, Gregory Lee, and Joseph Gomez, and seek to certify a class limited to "persons of Hispanic race or color who in the past have been, and in the future will be, unlawfully stopped, detained and also often searched...."

Magistrate Judge Bobrick found that, because the plaintiffs sought to certify a class of Hispanic motorists, the presence of Lee (who is African–American) as a representative of the putative class was mystifying. He thus stated that "we will assume that the mistake plaintiffs' counsel made was including Lee as a named plaintiff, and we will proceed to analyze these matters assuming the putative class is limited to Hispanic individuals." R & R at 7–8. For this reason, he did not consider Lee's supplemental affidavit.

The plaintiffs did not specifically object to this ruling, although they do, without explanation, direct the court's attention to Lee's supplemental affidavit in their objections. As this court noted in its decision addressing the defendants' motion for partial summary judgment, the court must review portions of the R & R addressing dispositive matters to which the parties have made specific objections de novo. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b); *Delgado v. Bowen,* 782 F.2d 79, 82 (7th Cir.1986). With respect to the remaining parts of the R & R addressing dispositive matters, the court may review any issue presented de novo, even if no party has objected. *Delgado v. Bowen,* 782 F.2d at 82. If a timely objection is not filed, however, the court must only satisfy itself that the R & R is not clearly erroneous to accept the recommendation. *See* Fed.R.Civ.P. 72 advisory committee's note to the 1983 amendment, *citing Campbell v. U.S. Dist. Court,* 501 F.2d 196, 206 (9th Cir.1974); *Rajatnam v. Moyer,* 47 F.3d 922, 924 n. 8 (7th Cir.1995) (the court must give "fresh consideration to those issues to which specific objections have been made").

Due to the absence of specific objections to the magistrate judge's ruling regarding Lee (and, indeed, to any discussion of Magistrate Judge Bobrick's discussion of the consequences flowing from seeking to front a Hispanic class with an African–American plaintiff), it appears that the clearly erroneous standard is applicable. Magistrate Judge Bobrick's position regarding Lee was unambiguous and explicit. Yet, the plaintiffs opted not to attack it directly in their objections. Instead, the only indication that the plaintiffs may be seeking to challenge the ruling as to Lee are the references to his affidavit in their objections. This indirect challenge is a far cry from a "specific objection," especially in light of the dearth of argument explaining the basis of the purported indirect "objection." *See Rajatnam v. Moyer,* 47 F.3d at 924 n. 8.

***14** The court should not have to pore over a party's objections to ascertain what arguments it is trying to raise. It also should not have to decide what claims a party is indirectly raising and then research and craft arguments supporting those claims. This role is fundamentally inconsistent with the adversarial process. For these reasons, the court finds that the plaintiffs have failed to properly preserve any objections to the exclusion of Lee's affidavit at this stage of the proceedings.

Nevertheless, in the interests of completeness and because it is clear that the plaintiffs still believe that Lee's request for equitable relief is relevant despite their class definition limited to Hispanic motorists, the court will review Lee's affidavit de novo to determine if he has standing to pursue an individual claim for equitable relief. In addition, due to the plaintiffs' failure to respond to the magistrate judge's inquiry regarding the identify of the named plaintiffs fronting their putative Hispanic class and the confusing nature of their submissions, the court will also consider whether any of the plaintiffs listed in either the equitable relief or class certification motions (Peso Chavez, Gregory Lee, and Joseph Gomez) have the necessary connections with Illinois highways to support an award of prospective relief.

a. Peso Chavez

Peso Chavez, who is Hispanic, was stopped once on

February 18, 1993 when he was driving east on I–80. When he was stopped, Chavez was recreating the conditions under which a white motorist had been stopped. *See Chavez v. Illinois State Police* 27 F.Supp. at 1061–62. Chavez's stop occurred as he made his fourth pass past Illinois State Police troopers on I–80 over a two day period. These excursions on I–80 were not the only times Chavez drove on interstate highways in Illinois, as he also drove (and was not stopped) on I–80 when he was in Illinois from February 25, 1993 through February 27, 1993.

In November of 1995, Chavez testified that he had no plans to return to Illinois in the future, and no business in Illinois that would require him to travel to Illinois. November 20, 1995 Deposition of Peso Chavez at 168–69 (Exhibit 1 to Defendants' Response). In December of 1996, Chavez stated that he "expect[ed] to have occasion to return to Illinois in the future." December 23, 1996 Affidavit of Peso Chavez at ¶ 2 (Ex. 7 to Defendants' Response). In January of 1997, Chavez again stated that he expected to be called upon "in the near future for additional work in Illinois." January 17, 1997 Affidavit of Peso Chavez at ¶ 3 (Ex. 8 to Defendants' Response). Most recently, in his undated supplemental affidavit, Chavez stated that he is "confident" that he will travel to Illinois in the future. Supplemental Affidavit at ¶ 6 (Ex. 6 to Defendants' Response).

Thus, Chavez was stopped once, over six years ago. In addition, while he has stated that he expected to travel in Illinois for almost three years, he has never done so.[3] As the plaintiffs acknowledge, the critical standing inquiry for purposes of prospective relief is the presence of a "showing that [a plaintiff] is realistically threatened by a repetition of his experience." *Lyons,* 461 U.S. at 109. This threat must be "real and immediate" rather than "conjectural" or "hypothetical." *Id.* at 101–02.

***15** An expectation that an individual will travel on an interstate highway in Illinois or confidence that this event will occur represent conjectural rather than concrete intentions. *See Stewart v. McGinnis,* 5 F.3d 1031, 1037–38 (7th Cir.1993) (lack of indication that prisoner would in fact be transferred back to institution where allegedly discriminatory conduct occurred meant that plaintiff lacked standing to obtain prospective relief); *Fair Employment Council of Greater Washington v. BMC Marketing Corp.,* 28 F.3d at 1273–74 (employment testers lacked standing for prospective relief where they did not assert that they would return to allegedly discriminatory employer in the reasonably near future; claim that their return was "possible" was insufficient). A person who is "confident that [he] will travel to Illinois in the future" is speculating as to whether he will, in fact, travel to Illinois—he believes that he will do so at some indefinite time, but has no definite plans. This inchoate intention simply does not establish that Chavez will even be on an Illinois highway at a definite point in the future, let alone that he will experience the kind of "real and immediate" injury contemplated by *Lyons.*

b. Gregory Lee

Gregory Lee, who is African–American, alleges that he experienced three unjustified stops when he was driving on either I–55, I–57, or I–80.[4] The last of these stops occurred in August of 1993. Since then, Lee has driven to Wisconsin, Georgia, Florida, and Indiana on interstate highways. In his affidavit, Lee states that he travels on interstate highways in Illinois at least 60 times per year, and that he intends to continue to travel at least this frequently in the future. While Lee does not state whether he has consistently traveled on interstate highways in Illinois at this rate over the past years, the plaintiffs state (in the Fourth Amended Complaint, filed in July of 1996), that Lee travels regularly on Illinois interstate highways, including from his home to Orland Square shopping mall and Joliet. Fourth Amended Complaint at ¶ 67. Thus, it appears that the 60 times per year travel estimate does not represent a change in travel patterns for Lee.

The frequency of Lee's travels on interstate highways means that Lee is a step ahead of Chavez as he will be in a position where he could be stopped in the future, since he drives on Illinois highways at least 60 times per year and has definite plans to continue to do so. This assumes, of course, that Lee has actually been driving on interstate highways in Illinois consistently since the inception of this case. *See Perry v. Village of Arlington Heights,* 1999 WL 544630 at *4. The Seventh Circuit very recently stressed that "[i]t is not enough for [a plaintiff] to attempt to satisfy the requirements of standing as the case progresses." as "[t]he requirements of standing must be satisfied at the outset." *Id.*

For the reasons set forth in the court's prior orders striking the plaintiffs' claims for equitable relief due to lack of standing, Lee has failed to meet this requirement. The court nevertheless concludes that it may consider whether Lee has standing to obtain prospective relief as the court clearly had standing over Lee's damages claims when this suit was filed. Claims for damages provide Article III standing to seek an injunction. *See Lyons,* 461 U.S. at 111. Accordingly, regardless of whether standing for a claim for equitable relief must exist throughout the pendency of a lawsuit, Lee's damages claims have existed since this suit was filed, so he can seek prospective relief.

***16** This brings the court to the key standing question under *Lyons:* Do Lee's frequent trips on interstate highways in Illinois mean that he is in danger of sustaining a real and immediate threat of injury as a result of the defendants' challenged conduct? *See id.,* 461 U.S. at 101–02. *Lyons* requires the court to break this question

down into two parts. First, Lee must show that he will have another encounter with the Illinois State Police. Second, he must allege that all Illinois State Police officers always discriminate against minority citizens with whom they have an encounter *or* that the State ordered or authorized its police officers to act in such a manner. *See* 461 U.S. at 105–06.

It is far from certain that Lee will have another encounter with the Illinois State Police, let alone that he will have another encounter and that they will discriminate against him or continue to perpetrate an official policy of discrimination.[5] According to Lee's affidavit, he drives on interstate highways in Illinois approximately 60 times per year, and he appears to have done so for quite some time. Yet, the last time he was stopped was in 1993, when he experienced the last of his three allegedly improper stops.

The Seventh Circuit has held that three allegations of constitutional violations which occurred more than two years ago cannot establish a pervasive pattern of discrimination sufficient "to establish a reasonable probability that future violations will occur." *Daniels v. Southfort,* 6 F.3d 482, 485–86 (7th Cir.1993). Where three incidences two years ago are insufficient, three incidences six years ago must also be insufficient. *See also Lyons,* 461 U.S. at 108 (Lyons did not establish an imminent threat where five months elapsed between the defendants' alleged chokehold and the filing of the complaint, and Lyons did not allege any "further unfortunate encounters" with the police during this period). In short, *Daniels* compels the conclusion that, where a plaintiff has not been stopped in six years despite numerous opportunities to be stopped, a realistic threat of imminent harm does not exist.

The Seventh Circuit has also compared the frequency of alleged incidences of discrimination against the number of chances for discrimination to occur in considering whether a realistic threat of imminent harm exists. Thus, in *Stewart v. McGinnis,* shakedowns occurred every sixty days and a prisoner alleged that he was the victim of two illegal shakedowns in one year. 5 F.3d at 1038. The Seventh Circuit held that this rate of incidence did not support a conclusion that the prisoner was under an immediate threat of harm. *Id.* Shakedowns every sixty days translates into approximately 6 shakedowns per year. Two incidences of discrimination out of six opportunities is a 1/3 incidence of discrimination.

In this case, the approximate total of trips on interstate highways in Illinois from 1993 through 1999 is unclear. Even if the court uses the least possible number of trips—60 plus the three prior incidences of discrimination—this translates into a 1/21 incidence of discrimination. The court notes that this percentage is artificially high, as based on the allegations in the fourth amended complaint (filed in 1996), it appears that Lee traveled on interstate highways in Illinois more than 63 times between 1993 and 1999. If the 1/3 rate of alleged discrimination in *Stewart* was not enough to establish an imminent threat of harm, a rate of alleged discrimination that is, at best, 1/21 cannot be enough.

***17** Because the three alleged incidences of alleged discrimination occurred in 1993 and Lee has not been stopped since, despite ample opportunity, cases which primarily focus on the number of incidences of alleged discrimination are inapposite. It is true that repeated incidences of discriminatory confrontations constitute a "continuing present adverse effect[ ]" which in turn create[s] a sufficiently immediate risk of future harm. *O'Shea.* 414 U.S. at 496; *Thomas v. County of Los Angeles,* 978 F.2d 504, 508 (9th Cir.1993). Here, however, any continuing present adverse effect flowing from the three 1993 stops has dissipated to the point that it is not genuinely imminent, given the passage of six stop-free years. *See Washington v. Vogel,* 156 F.R.D. at 680 (passage of four years since plaintiff's allegedly discriminatory traffic stop suggested "diminished likelihood" that she would be wrongfully stopped in the future).

For this reason, many of the cases cited by the plaintiffs on the future harm attributable to an incident of past discrimination are factually distinguishable because they rest on an express finding that the threatened harm was concrete. For example, in *Adarand Constructors v. Pena,* 515 U.S. 200 (1995), a subcontractor who was not awarded a portion of a federal highway contract due to the contract's subcontractor compensation clause sought prospective relief. The Supreme Court held that it had standing to do so because it had a "certainly impending" injury since it established that it would bid on a future contract with the same clause. 515 U.S. at 210–11.

On the other hand, in *Lujan v. Defenders of Wildlife,* also cited by the plaintiffs, environmental groups sought an injunction requiring the Secretary of the Interior to find that a portion of the Endangered Species Act applied to foreign nations as well as the United States and the high seas. The plaintiffs hoped or intended to see endangered species outside the United States in the future, but did not have specific plans to do so. *Id.* at 563. The Supreme Court held that, " 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564; *see also O'Shea v.. Littleton,* 414 U.S. at 495–96 (plaintiffs who claimed that bond hearings were racially tainted were not entitled to injunctive relief because allegations of future harm were speculative and depended on a string of contingencies). In short, this court is not free to disregard the Supreme Court's focus on the existence (or lack thereof) of a concrete future opportunity for a non-speculative future

injury and its holding that past injuries do not, as a matter of law, provide standing for prospective relief.

With respect to the fact that six years has passed since Lee's last stop, the court acknowledges that the passage of time has not necessarily been kind to Lee, as his claims were more immediate in 1994 when this case was filed than they are today in 1999. To the extent that the plaintiffs are contending that this is unfairly prejudicial, the court notes that it has attempted to afford the plaintiffs ample opportunity to pursue and develop their claims, has granted numerous extensions to the plaintiffs, including a lengthy stay of proceedings when the plaintiffs sought to redo Dr. Shapiro's statistical analysis, and has permitted the plaintiffs to recast their arguments repeatedly (indeed, this is the third time that the court has considered standing). In other words, since the lengthy pretrial proceedings in this case are largely attributable to the plaintiffs and generally inured to their benefit, they cannot be heard to complain that the passage of time has prejudiced them.

***18** The plaintiffs also direct the court's attention to *Honig v. Doe,* 484 U.S. 305 (1988), in an attempt to distinguish *Lyons* with respect to Lee. In *Honig,* public school officials unilaterally removed an emotionally disturbed student from the classroom based on misconduct caused by the student's mental condition, and did not comply with all of the procedural requirements necessary to do so. The Supreme Court found that, given the student's prior history of behavior problems, it was "certainly reasonable" that he would "again engage in classroom misconduct" and "equally probable" that the school officials would attempt to remove him without complying with the applicable laws. *Id.* at 602–03.[6]

The plaintiffs draw an analogy between the immutable behavioral problems in *Honig* and the immutable fact that Lee is African–American, and ask the court to conclude that the fact that he is African–American and drives on interstate highways in Illinois is enough, in and of itself, to confer standing upon him. While this argument is facially appealing, it is structurally unsound. To see why, we will break down the *Honig* court's analysis.

The *Honig* court held that the student's irremediable behavioral problems meant that he would engage in classroom misconduct, and that it was unreasonable to suppose that his future educational placement would so perfectly suit him that further disruptions would be improbable. *Id.* at 320. The student's ongoing behavioral problems are analogous to the fact that Lee is African–American, as both are immutable characteristics. The foreseeable classroom misconduct is analogous to Lee driving on interstate highways in Illinois, as they both place the plaintiffs in a position where the defendants can violate the law based on the fact that plaintiffs with an immutable characteristic are participating in an activity that allegedly leads to the defendants' wrongful conduct. So far, so good.

The analogy breaks down when the court reaches the last step of the *Honig* court's analysis. The court noted that the student was eligible for public educational services but was not seeking placement in a school. *Id.* at 318. It then concluded that it was "probable" that, if the student again sought placement and engaged in misconduct, he would "again be subjected to the same unilateral school action for which he initially sought relief." *Id.* at 321. In other words, in the absence of direct experience (unavailable because the student was not seeking placement) the court created a presumption that the school would repeat its allegedly wrongful action based on the plaintiff's immutable behavioral problem.

Here, however, there is no need to create a presumption flowing from the defendants' anticipated reaction to the immutable fact that Lee is African–American. Lee, unlike the student in *Honig,* has provided the defendants with ample opportunities to stop him and discriminate against him. Yet, despite his numerous trips on interstate highways in Illinois over the past six years, Lee has not been stopped a single additional time. Creating a presumption under *Honig* thus is contrary to the facts supplied by Lee. Thus, to paraphrase *Honig,* the court cannot find that it is probable that, should Lee drive on interstate highways in Illinois again, that he will be subject to the same allegedly discriminatory action for which he initially sought relief, since Lee has repeatedly done this very thing and has not been stopped, let alone stopped wrongfully. *See id.* at 322.

***19** Accordingly, the court cannot conclude, based on the record before it, that Lee is "immediately in danger of sustaining some direct injury" as a result of the defendants' conduct. *See Lyons,* 461 U.S. at 101–02. As the Supreme Court stated in *Lyons,* "[a]bsent a sufficient likelihood that [the plaintiff] will again be wronged in a similar way, [the plaintiff] is no more entitled to an injunction than any other citizen ... a federal court may not entertain a claim by any or all citizens who [do] no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.* at 111. Because Lee's claims are based this kind of assertion and his experiences in 1993, and his travels on interstate highways in Illinois do not establish a "sufficient likelihood" of imminent harm, he lacks standing to obtain prospective relief.

c. Joseph Gomez

It is undisputed that Gomez is incarcerated after pleading guilty to state and federal drug charges. As the record establishes that Gomez will not be driving anywhere on his own volition for at least seven years, the court finds that he cannot satisfy *Lyons'* imminent harm requirement.

ii. Availability of a Remedy

The plaintiffs contend that, if the court finds that they lack standing to pursue their claim for equitable relief, they will have suffered an injury for which there is no redress. This argument breaks down into two parts: first, that they must have standing because this situation is inherently unfair, and second, that their alleged past injuries somehow give them standing to pursue their Title VI claims so that they will have a remedy for the defendants' alleged discrimination.

The court must begin by pointing out a fundamental flaw with the major premise underlying the plaintiffs' lack of a remedy argument. Even where a plaintiff lacks standing to pursue injunctive relief due to the absence of a sufficiently certain future harm, he still has a claim for damages based on previously incurred injuries. *See, e.g., Robinson v. City of Chicago,* 868 at 967. The viability of this claim for damages, in turn, depends on whether the plaintiff can satisfy the elements necessary to show that he is entitled to relief.

In other words, the demise of the plaintiffs' claim for equitable relief does not leave the plaintiff without a remedy for the defendants' alleged discrimination unless they cannot establish an entitlement to damages. The plaintiffs' entitlement to damages is, of course, wholly unconnected from whether the plaintiffs have standing to pursue their claim for equitable or injunctive relief. The court must thus reject the plaintiffs' contention that their inability to survive summary judgment as to other claims arising out of the alleged discrimination (*i.e.,* their equal protection claims) can somehow serve as a basis for crafting an exception to the well-established principles governing Article III standing for prospective relief. The plaintiffs' request for prospective relief must stand or fall on its own merits.

***20** The plaintiffs also couch their unfairness argument in terms of their alleged past injuries. They appear to be claiming that these alleged past injuries somehow give them standing to pursue their Title VI claims. However, it is well-established that the presence of a past wrong does not, in and of itself, show a present case or controversy meriting injunctive or declaratory relief. *Lyons,* 461 U.S. at 102. Indeed, the Seventh Circuit has expressly rejected a reading of *Lyons* espoused by the Ninth Circuit which is virtually identical to the plaintiffs' "past wrongs" argument. *Robinson v. City of Chicago,* 868 F.2d 959 (7th Cir.1989).

According to the Ninth Circuit, "plaintiffs need not allege a credible threat of future injury in order to seek injunctive relief as long as they also have a claim for damages involving the same operative facts and legal theory." *Smith v. University of Washington Law School,* 2 F.Supp.2d 1324, 1339 (W.D.Wash.1998), *citing Smith v. City of Fontana.* 818 F.2d 1411, 1423 (9th Cir.1987). The Seventh Circuit, however, held that this approach was inconsistent with *Lyons*. *Robinson v. City of Chicago,* 868 F.2d at 967.

Specifically, in *Robinson v. City of Chicago,* the Seventh Circuit considered a challenge to the City's investigatory detention policy. The court noted that the plaintiffs had failed to show a "real or immediate threat that they will be wronged again" and pointed out that *Lyons* carefully distinguished between standing for damages claims (which is based on past events) and standing for injunctive relief (which is based on concrete allegations of future harm). *Id.* This delineation between past and future events as the basis for relief, as well as *Lyons* itself, essentially dooms the plaintiffs' attempt to piggy-back their equitable relief claims on alleged past wrongs.

With respect to the plaintiffs' difficulties satisfying *Lyons* and their claim that the *Lyons* test leaves them without a remedy, it is important to note that the court's position on standing and equitable relief is not new, and has been known to the plaintiffs since 1996, well before the close of discovery. *See Chavez v. Illinois State Police,* 1996 WL 66136. Nevertheless, the plaintiffs did not make an appreciable shift in response.[7] Instead, they opted to continue to pursue their equitable relief claims with substantially the same evidence, despite their claims that "literally thousands" of minority motorists are regularly stopped by the Illinois State Police solely due to their race. Reply in Support of Objections at 1. "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan,* 497 U .S. at 897. The plaintiffs, who are vigorously represented by able counsel, chose a litigation strategy. The ramifications of that strategy cannot serve as the basis for standing for prospective relief.

***21** With respect to the plaintiffs' claim that *Lyons* sets an unfairly high hurdle and unjustly thwarts them in their effort to obtain injunctive relief, the court notes that a number of judges have expressed similar sentiments. For example, Justice Marshall, joined by Justices Blackmun and Stevens, expressed frustration with the majority opinion in *Lyons,* stating: "The Court today holds that a federal court is without power to enjoin the enforcement of the City's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy." 461 U.S. at 113 (Marshall, J., dissenting, joined by Blackmun and Stevens, JJ.).

Similarly, Judge Aspen has noted that *Lyons* and its progeny renders federal courts impotent to order the cessation of allegedly unconstitutional practices where the plaintiff cannot show a real threat of future injury. *Williams v. City of Chicago,* 609 F.Supp. 1017, 1020 n. 7 (N.D.Ill.1985). Unfortunately for the plaintiffs, however, the position of a majority of the Supreme Court Justices is different. Thus, any disagreement that this court or the plaintiffs may have with the standard set forth in *Lyons* and similar Supreme Court cases is irrelevant, as the court is not free to strike out on its own. *See Washington v. Vogel.* 156 F.R.D. at 681. For these reasons, the court is unpersuaded by the plaintiffs' arguments regarding the alleged lack of a remedy.

iii. Fear of Future Harm

The plaintiffs also argue that the fear of discrimination has prevented them from placing themselves in a position where they could be stopped. Thus, they contend that the court should permit them to pursue their claims for equitable relief, to prevent the defendants from shielding themselves from liability by frightening the plaintiffs out of establishing standing.[8] This "unclean hands" standing argument squarely conflicts with the Supreme Court's position on whether the fear of discrimination affects the showing necessary to establish standing for prospective relief.

Specifically, "[t]he emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant." *Lyons,* 461 U.S. at 107 n. 8; *see also Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.,* 28 F.3d 1268, 1273 (D.C.Cir.1994) (to pursue prospective relief, the tester plaintiffs must allege future violations of their rights, "not simply future effects from past violations"). Thus, the plaintiffs' "unclean hands" argument based on their fear of traveling on interstate highways in Illinois is unavailing.

E. Injunctive Relief

The plaintiffs' request for injunctive relief is distinct from their request for equitable relief as the pending claims which survived the defendants' motion for partial summary judgment provide Article III standing to seek an injunction. *See Lyons,* 461 U.S. at 111. The presence of standing to request an injunction is, however, a Pyrrhic victory for the plaintiffs, as an injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is not a showing of any real or immediate threat that the plaintiff will be wronged again—'a likelihood of substantial and immediate irreparable injury." ' *Id.* at 111, *quoting O'Shea,* 414 U.S. at 502. Thus, the court finds that the plaintiffs are not entitled to an injunction.

F. The Plaintiffs' Motion for Class Certification

***22** A class cannot be certified unless a named plaintiff has standing at the moment of certification. *Robinson v. City of Chicago,* 868 F.2d at 968. Because the plaintiffs seek to certify a class of Hispanic motorists in connection with their Title VI claims and the court has found that none of the named plaintiffs have standing to front a putative class of Hispanic motorists seeking prospective relief, the plaintiffs' motion to certify a class must be denied.

III. Conclusion

"The litigant must clearly and specifically set forth facts sufficient to satisfy ... Article III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore,* 495 U.S. at 155. Because the court finds that the plaintiffs have failed to establish that they are entitled to equitable or injunctive relief, their objections to Magistrate Judge Bobrick's June 11, 1999 R & R addressing their Title VI claim [478–1] are overruled. The plaintiffs' motions for leave to reinstate their claim for equitable and injunctive relief and to certify a class [428–1] are denied, and the defendants' motion that the plaintiffs' claims not be certified as a class and that the plaintiffs' claims for prospective relief not be reinstated [416–1] is granted. The defendants' motion to strike the plaintiffs' experts' reports under *Daubert* [496–1] is denied without prejudice.

Footnotes

1 The court must note at this juncture that it shares Magistrate Judge Bobrick's confusion as to "which class, fronted by which set of named plaintiffs, plaintiffs seek to have certified as a class, and on whose behalf they hope to gain equitable relief." R & R at 7. The plaintiffs did not attempt to clarify this issue in their objections, nor did they object to Magistrate Judge Bobrick's recommendation limiting consideration of the plaintiffs' claims to alleged discrimination against Hispanic drivers. The references to Gregory Lee (who is African–American) in the plaintiffs' objections are thus rather incongruous. As the plaintiffs unambiguously limit the putative class to Hispanic drivers and did not object to Magistrate Judge Bobrick's decision to only

consider the standing of the Hispanic plaintiffs, the court will likewise consider whether any of the named Hispanic plaintiffs have standing to seek prospective relief and hence can front the putative Hispanic class defined by the plaintiffs. The court will also consider Lee's claims for prospective relief on an individual basis as he is African–American and thus cannot front a class comprised of Hispanic motorists. This issue is discussed in greater detail in connection with the court's analysis of Lee's supplemental affidavit.

2 Because the plaintiffs' statistics would not help them establish standing for prospective relief, even if these materials were properly before the court under *Daubert,* the defendants' *Daubert* motion is denied without prejudice.

3 As discussed above, where (as here) standing is challenged as a factual matter, that plaintiff must support the allegations necessary for standing with 'competent proof' (*i.e.,* a showing by a preponderance of the evidence that standing exists). *Perry v. Village of Arlington Heights,* 1999 WL 544630 at *3; *see also Warth,* 422 U.S. at 501–02. Thus, the court need not accept the plaintiffs' conclusory claim that there is a "substantial likelihood" (Fourth Amended Complaint at ¶ 38) that Chavez will use the interstate highways in Illinois again.

4 The deposition excerpts provided by the defendants indicate that the Illinois State Police appear to have stopped Lee one additional time between 1980 and 1985. Lee acknowledges that this stop was justified and does not appear to be claiming that it was connected to his race. Accordingly, the court will not consider this additional stop. The court will also not address the discrepancy between Lee's deposition testimony (where he stated that he was stopped on 1–80) and his affidavit (where he stated he was stopped on 1–55 and 1–57), as it is not properly before the court at this time.

5 This is especially true in light of the plaintiffs' apparent position that the source of the alleged discrimination are the officers in the Operation Valkyrie program, rather than the Illinois State Police generally.

6 The *Honig* court couched the jurisdictional question as one of mootness rather than standing. Mootness, however, is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Church v. City of Huntsville.* 30 F.3d 1332, 1338 n. 2 (11th Cir.1994), *quoting United State Parole Comm'n v. Geraghty.* 445 U.S. 388, 397 (1980). Thus, *Honig's* references to mootness are readily translatable into the language of standing and justiciability more directly applicable to this case.

7 The plaintiffs' recent attempt to add Christopher Jimenez as an additional named plaintiff years after the close of discovery does not represent an appreciable shift, for the reasons stated in the court's July 13, 1999 order denying the plaintiffs' motion to add a new plaintiff.

8 As part of their "unclean hands argument," the plaintiffs also suggest that the defendants are preventing them from exercising their constitutional right to travel. The plaintiffs' comments on the right to travel are, however, irrelevant as there is no pending right to travel claim in this case.