

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
BACKGROUND	3
A. Background Facts Regarding Operation at 710 Jefferson Street	3
B. Background Facts Regarding Operation at 15 W. 18 th Street.....	9
ARGUMENT	13
I. Summary Judgment Standard	13
II. The Defendants, Acting in Their Capacity as Federal Agents, Violated Plaintiffs’ Fourth Amendment Rights.....	15
A. The Moving Plaintiffs Had An Expectation Of Privacy In Their Homes And Curtilage	16
B. Defendants Did Not Obtain Consent To Enter or Search.....	17
C. Any Purported Consent Would Have Been Invalid.....	19
1. Defendants Were Not Even in a Position to Obtain Consent From People With Authority or Capacity To Grant It.....	19
2. Any Purported Consent Was Not Free And Voluntary	20
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abdella v. O’Toole</i> , 343 F. Supp. 2d 129 (D. Conn. 2004).....	19, 20, 23
<i>Aguilar v. ICE</i> , Civ. No. 07-8224, 2011 WL 3273160 (S.D.N.Y. Aug. 1, 2011).....	24
<i>Anobile v. Pelligrino</i> , 303 F.3d 107 (2d Cir. 2002)	14, 17
<i>Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	1, 15, 16
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968).....	19
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	14, 15
<i>Djonbalic v. City of New York</i> , No. 99 CIV. 11398, 2000 WL 1146631 (S.D.N.Y. Aug. 14, 2000).....	21, 23
<i>Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entm’t Corp.</i> , No. 08 Civ. 1558, 2009 WL 577916 (S.D.N.Y. Mar. 2, 2009)	15
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991).....	22
<i>Gagnon v. Ball</i> , 696 F.2d 17 (2d Cir. 1982)	16
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004).....	16
<i>Hoffa v. United States</i> , 385 U.S. 293 (1966).....	24
<i>JSC Foreign Econ. Assoc. Technostroyexport v. Int’l Dev. & Trade Svcs., Inc.</i> , 386 F. Supp. 2d 461 (S.D.N.Y. 2005).....	14, 15
<i>Kaupp v. Texas</i> , 538 U.S. 626 (2003).....	22
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	16
<i>LaDuke v. Nelson</i> , 762 F.2d 1318 (9th Cir. 1985)	21, 22

Nextec Applications v. Brookwood Cos., Inc.,
703 F. Supp. 2d 390 (S.D.N.Y. 2010).....14, 15

Payton v. New York,
445 U.S. 573 (1980).....16

People United for Children, Inc. v. City of New York,
108 F. Supp. 2d 275 (S.D.N.Y. 2000).....16

Roybal v. City of Albuquerque,
Civ. No. 08-0181, 2009 WL 1329834 (D.N.M. Apr. 28, 2009).....16

Ruggiero v. Krzeminski,
928 F.2d 558 (2d Cir 1991).....17

Schneckloth v. Bustamonte,
412 U.S. 218 (1973).....21

Silverman v. United States,
365 U.S. 505 (1961).....16

Steagald v. United States,
451 U.S. 204 (1981).....16

U.S. v. Mendenhall,
446 U.S. 544 (1980).....22, 23

United States v. Brown,
961 F.2d 1039 (2d Cir. 1992).....19

United States v. Dunn,
480 U.S. 294 (1987).....16

United States v. Gamez,
389 F. Supp. 2d 975 (S.D. Ohio 2005)20

United States v. Hardin,
539 F.3d 404 (6th Cir. 2008)24

United States v. Hassock,
631 F.3d 79 (2d Cir. 2011).....19

United States v. Heisman,
503 F.2d 1284 (8th Cir. 1974)19

United States v. Hernandez-Juarez,
No. SA-09-CR-19-XR, 2009 WL 693172 (W.D. Tex. Mar. 16, 2009).....24

United States v. Jerez,
108 F.3d 684 (7th Cir. 1997)22

United States v. Mapp,
476 F.2d 67 (2d Cir. 1973).....19, 24

United States v. Montes-Reyes,
547 F. Supp.2d 281 (S.D.N.Y. 2008).....24

United States v. Restrepo-Cruz,
547 F. Supp. 1048 (S.D.N.Y. 1982).....24

United States v. Wilson,
11 F.3d 346 (2d Cir. 1993).....19

RULES

Fed. R. Civ. P. 56.....14

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment IV16

PRELIMINARY STATEMENT

Plaintiffs Sonia Bonilla, Beatriz Velasquez, Dalia Velasquez, Pelagia De La Rosa-Delgado, Christopher Jimenez, Bryan Jimenez, and Anthony Jimenez (the “Moving Plaintiffs”) submit this Memorandum of Law in support of their Motion for Partial Summary Judgment against ICE 18, ICE 19, ICE 20, ICE 21, ICE 22, ICE 23, ICE 24, ICE 25, ICE 26, ICE 39, ICE 40, ICE 41, ICE 42, ICE 45, ICE 46, ICE 47, ICE 48, ICE 50, ICE 51, and ICE 52 (“Defendants”).¹ These women and children were subjected to unconstitutional home entries, searches and seizures by Immigration and Customs Enforcement (“ICE”) agents in home-raid operations carried out under the direction of the New York Regional Office of ICE Office of Investigation (“ICE New York”).² The Moving Plaintiffs seek partial summary judgment on the Third Claim of their Fourth Amended Complaint. Specifically, the Moving Plaintiffs respectfully submit that the Court should conclude, based on the undisputed facts, that the Defendants set forth above are liable for unconstitutional entry into and search of their homes.

The undisputed evidence with respect to these two homes shows that the Defendants did not possess either judicial warrants or exigent circumstance to enter or search the homes, and did

¹ While plaintiffs residing at seven different addresses are currently pursuing *Bivens* Fourth Amendment claims, this motion is limited to the unconstitutional entry at and search of two of these homes, and to the Moving Plaintiffs and the agent defendants who participated in the raids of those homes, because the undisputed facts demonstrate unequivocally that summary judgment in favor of the Moving Plaintiffs is appropriate. The remaining plaintiffs intend to prove their claims at trial against the remaining defendants, just as the Moving Plaintiffs intend to prove their remaining claims at trial.

² As of June 2010, the Office of Investigation (OI) is now Homeland Security Investigations.

not obtain consent to enter or search the homes. The Moving Plaintiffs have testified plainly that they did not grant the Defendants consent to enter or search their homes or curtilage. And not one of the agents involved has been able to provide any evidence demonstrating that they (or anyone else) obtained such consent to enter or search the Plaintiffs' private spaces, much less from whom. Thus, based on undisputed facts, this Court should find that the Defendants participated in an unconstitutional home entry and search in the absence of consent.

Further, even if the agents had sought and obtained consent to enter and/or search (which they indisputably did not), the undisputed evidence demonstrates that any "consent" they would have obtained would have been coerced and invalid. Consistent with their operations plan and ICE policy guidance, ICE agents conducted raids in large teams of agents, visibly armed and wearing body armor in the early morning hours. They, with local police, surrounded the homes and entered the properties' curtilage. They pounded on doors and windows and shouted "police" and "open the door!" The ICE agents forced their way into the homes as soon as the doors were opened, in both cases by minor children, without first obtaining lawful consent to do so. At one of the two homes at issue, they announced that "someone was dying upstairs" and entered after encountering only a 12-year-old girl in pajamas.

After gaining entry illegally, ICE agent Defendants swept through and searched each residence without a warrant or any legitimate basis for doing so. They burst into private bedrooms, jarring several residents out of sleep. ICE agents shoved, pushed and pulled residents. Agents drew their weapons or clutched them in their holsters. They corralled residents, many of whom were undressed, and prevented them from moving freely in their own homes, from using their phones, and from obtaining the assistance of their parents.

Thus, the undisputed testimony — of the Moving Plaintiffs, third parties and Defendants alike — demonstrates that the Defendants entered and searched the Moving Plaintiffs’ homes in violation of the Moving Plaintiffs’ constitutional rights.

BACKGROUND

A. Background Facts Regarding Operation at 710 Jefferson Street

On September 24, 2007, between 5:30 and 6:30 a.m., while it was not yet light, plaintiffs Sonia Bonilla, a legal permanent resident, and her minor daughters Beatriz Velasquez (then age 12) and Dalia Velasquez (then age 9), both United States citizens, (collectively, the “710 Jefferson Plaintiffs”) were subjected to an ICE operation at their home located at 710 Jefferson Street, Westbury, New York.³

Ten ICE agents – ICE 18, ICE 19, ICE 20, ICE 21, ICE 22, ICE 23, ICE 24, ICE 25, ICE 26, and ICE 42 (collectively, the “710 Jefferson Defendants”) – together with at least one Nassau County Police officer, descended on the home pursuant to Operation Community Shield, an ICE initiative purportedly designed to target alleged gang members or gang associates.⁴ ICE and the

³ Declaration of Lawrence Hirsh in Support of Pls’ Motion for Partial Summary Judgment, dated October 28, 2011 (“LH Decl.”) Ex. 2 at 79:19-81:12, 90:2-14; LH Decl. Ex. 3 at 33:7-11; LH Decl. Ex. 4 at 90:21-91:9; LH Decl. Ex. 5 at 146:15-23; LH Decl. Ex. 6 at 116:18-25, 143:20-24; LH Decl. Ex. 7 at 152:13-24; LH Decl. Ex. 8 at 216:7-15; LH Decl. Ex. 9 at 91:16-18, 94:22-24, 165:24-166:21; LH Decl. Ex. 10 at 49:11-18; LH Decl. Ex. 11 at 82:25-83:5; LH Decl. Ex. 12 at 100:19-23; LH Decl. Ex. 13 at 91:15-16, 145:4-6; LH Decl. Ex. 14 at 99:4-6, 120:7-11; LH Decl. Ex. 71.

⁴ See LH Decl. Exs. 61, 62, 63; LH Decl. Ex. 1 at 5; LH Decl. Ex. 8 at 205:23-206:20; LH Decl. Ex. 60 at Nos. 16, 21.

agents concede that no agent had any judicial search or arrest warrants.⁵ The agents approached and/or surrounded the home and entered the curtilage of the home, including a fenced-in backyard.⁶ The 710 Jefferson Defendants and officers parked at least seven cars on the street near the front of the house.⁷

While Ms. Bonilla was driving her husband to work, her daughters became aware that agents and officers had surrounded the home.⁸ The agents began knocking so loudly on the door that the residents thought they were trying to force it open.⁹ They identified themselves as

⁵ LH Decl. Ex. 60 at No. 25.

⁶ LH Decl. Ex. 5 at 150:21-151:17; LH Decl. Ex. 6 at 119:13-120:13, 122:9-11; 142:7-19,143:12-16; LH Decl. Ex. 7 at 122:25-123:13; LH Decl. Ex. 8 at 220:19-221:21; LH Decl. Ex. 9 at 91:22-25, 95:16-96:7, 96:18-20, 129:2-12; LH Decl. Ex. 10 at 157:19-24, 160:11-13; LH Decl. Ex. 12 at 101:4-12; LH Decl. Ex. 13 at 89:2-18, 90:10-17; LH Decl. Ex. 14 at 93:12-25; LH Decl. Exs. 65, 66.

⁷ LH Decl. Ex. 5 at 252:3-19; LH Decl. Ex. 6 at 73:19-20, 117:13-119:19; LH Decl. Ex. 7 at 62:19-22, 115:23-25, 117:22-118:12; LH Decl. Ex. 8 at 164:14-17, 207:20-208:12; LH Decl. Ex. 9 at 87:14-88:19; LH Decl. Ex. 10 at 106:2-4, 108:8-19; LH Decl. Ex. 11 at 76:4-20; LH Decl. Ex. 12 at 69:19-70:3, 96:22-97:5; LH Decl. Ex. 13 at 41:4-12, 65:15-23, 66:2-10; LH Decl. Ex. 14 at 88:5-6, 99:10-19, 99:20-23; LH Decl. Ex. 4 at 107:5-12; LH Decl. Exs. 64, 67, 68.

⁸ LH Decl. Ex. 4 at 103:19-104:23, 113:24-115:5, 105:20-106:14; LH Decl. Ex. 3 at 79:6-16, 82:14-22, 87:2-12.

⁹ LH Decl. Ex. 15 at 45:6-24; LH Decl. Ex. 16 at 71:3-72:10.

“police,¹⁰ shouted that “someone was dying upstairs,”¹¹ and shone flashlights into the window.¹² They also ordered the residents to “open the door” and “tie down the dog.”¹³

In response to the banging, the cries that “someone was dying upstairs,” the shouts of “police!,” and the shining flashlights, then 12-year old Beatriz Velasquez, who admittedly looked “young,”¹⁴ opened the front door and stepped outside, where she saw several agents in the front yard.¹⁵ While in her pajamas, she had a brief discussion with the agents, after having just woken up. None of the agents requested or received consent from her to enter the home.¹⁶ Instead, several of the 710 Jefferson Defendants stepped around her, “went through” the door and spread throughout the house.¹⁷ There is no evidence that anyone else living in the house other than Beatriz was speaking to the agents when they entered through the front door. Not one

¹⁰ LH Decl. Ex. 3 at 79:6-16, 87:2-12; LH Decl. Ex. 6 at 146:22-147:13; LH Decl. Ex. 15 at 40:8-11, 45:6-24; LH Decl. Ex. 16 at 71:3-72:10; LH Decl. Ex. 17 at 53:10-54:2.

¹¹ LH Decl. Ex. 3 at 82:23-83:13; LH Decl. Ex. 4 at 109:4-10; LH Decl. Ex. 17 at 53:10-54:5.

¹² LH Decl. Ex. 3 at 79:6-16; LH Decl. Ex. 4 at 114:3-115:5, 132:2-20.

¹³ LH Decl. Ex. 16 at 76:14-78:10, 80:19-81:24.

¹⁴ LH Decl. Ex. 5 at 167:19-168:4; LH Decl. Ex. 69.

¹⁵ LH Decl. Ex. 3 at 94:4-98:22, 101:25-103:15.

¹⁶ LH Decl. Ex. 3 at 94:4-99:5.

¹⁷ *Id.*

of the 710 Jefferson Defendants claims to have obtained consent to enter the residence from Beatriz or anyone else.¹⁸

Once inside,¹⁹ the agents searched the home, some with their guns drawn and others with their hands on their weapons.²⁰ They looked through closets of the girls' bedroom and then ordered the two girls to go into their room and stay there with the door closed.²¹ The agents then went upstairs, banging and shouting on doors throughout the house²² and ordering and "securing" residents in a living room.²³ Not one 710 Jefferson Defendant could identify any particular danger at the home which existed during the entry of or search at 710 Jefferson.²⁴

¹⁸ LH Decl. Ex. 5 at 196:5-197:7; LH Decl. Ex. 6 at 143:12-16; LH Decl. Ex. 7 at 221:15-222:19; LH Decl. Ex. 8 at 299:5-13, 299:24-300:8; LH Decl. Ex. 9 at 95:12-96:20; LH Decl. Ex. 10 at 160:11-13, 170:15-21; LH Decl. Ex. 11 at 104:2-8; LH Decl. Ex. 12 at 141:20-142:9, 144:16-19; LH Decl. Ex. 13 at 128:11-14; LH Decl. Ex. 14 at 127:2-15, 131:19-22.

¹⁹ ICE 18, 21, 23, 25, and 26 admit to entering the home. LH Decl. Ex. 5 at 169:6-171:24; LH Decl. Ex. 8 at 264:8-265:12; LH Decl. Ex. 10 at 161:5-162:14, 164:11-15, 165:2-166:9; LH Decl. Ex. 12 at 111:20-23, 118:17-119:3; LH Decl. Ex. 13 at 101:12-21, 110:6-16.

²⁰ LH Decl. Ex. 5 at 169:6-171:24; LH Decl. Ex. 10 at 161:5-162:14, 164:11-15, 156:2-166:9; LH Decl. Ex. 4 at 184:6-185:20; LH Decl. Ex. 15 at 61:16-62:2, 63:19-21; LH Decl. Ex. 16 at 123:12-124:11, 125:25-126:9.

²¹ LH Decl. Ex. 5 at 169:4-171:24; LH Decl. Ex. 3 at 111:14-113:7, 105:5-11, 106:4-6, 109:9-11, 133:13-19; LH Decl. Ex. 17 at 53:10-54:10.

²² LH Decl. Ex. 3 at 116:25-117:16; LH Decl. Ex. 16 at 71:3-15, 95:15-19, 109:23-110:12.

²³ LH Decl. Ex. 8 at 264:8-9, 267:16-269:5; LH Decl. Ex. 10 at 161:5-162:14; LH Decl. Ex. 13

Sonia Bonilla, the owner of the home, returned home during the course of the operation.²⁵ She drove into her driveway and saw multiple agents on her lawn, some carrying weapons, as well as agents on the side of her house.²⁶ At least two of the 710 Jefferson Defendants ordered her to leave her van and, despite no specific evidence of any danger, conducted a search of the van.²⁷ Agents, who by then knew she was the owner of the home and was obviously not a target of the raid, at first prevented her from entering her own home.²⁸

Eventually Ms. Bonilla was permitted inside. She found several tenants of her home handcuffed in her living room and went to her daughters' bedroom to make sure they were safe.²⁹ Although she had locked her bedroom door that morning before she left to drive her husband to work, and neither she nor her husband had been present when the 710 Jefferson Defendants arrived and thus could not have given consent to search their bedroom, two of the

at 117:3-23.

²⁴ LH Decl. Ex. 5 at 174:2-175:20; LH Decl. Ex. 6 at 131:25-132:11; LH Decl. Ex. 7 at 213:15-16; LH Decl. Ex. 8 at 227:18-22; LH Decl. Ex. 9 at 66:2-19; LH Decl. Ex. 10 at 162:15-163:11, 179:20-180:4; LH Decl. Ex. 11 at 89:25-90:18; LH Decl. Ex. 12 at 108:23-109:2; LH Decl. Ex. 13 at 236:14-20 ; LH Decl. Ex. 14 at 200:13-201:4.

²⁵ LH Decl. Ex. 2 at 90:2-9.

²⁶ LH Decl. Ex. 2 at 100:22-101:7, 101:25-102:5.

²⁷ LH Decl. Ex. 2 at 90:2-9, 113:22-114:8, 116:7-117:2; LH Decl. Ex. 8 at 256:16-22, 262:8-20.

²⁸ LH Decl. Ex. 8 at 256:19-22; LH Decl. Ex. 60 at Nos. 14 and 68, 69.

²⁹ LH Decl. Ex. 2 at 144:11-17, 146:6-23.

710 Jefferson Defendants were in the process of searching it, attempting to break open a locked closet door and demanding she provide a key.³⁰ Two other 710 Jefferson Defendants joined them thereafter.³¹ No 710 Jefferson Defendant disputes that this entry and search occurred, and there is no evidence that they obtained consent to enter or search Ms. Bonilla's private bedroom.

The government admits that the 710 Jefferson Defendants did not have a judicial warrant to enter the Bonilla residence or search it.³² The 710 Jefferson Defendants do not purport to have had exigent circumstances or even probable cause to enter or search the residence.³³ Not one of the 710 Jefferson Defendants who entered the home could recall obtaining consent to enter or search the home from plaintiffs or any of the other residents of the home.³⁴

³⁰ LH Decl. Ex. 2 at 134:13-136:10.

³¹ *Id.*

³² LH Decl. Ex. 60 at No. 25.

³³ LH Decl. Ex. 5 at 174:2-175:20; LH Decl. Ex. 6 at 131:25-132:11; LH Decl. Ex. 7 at 213:15-16; LH Decl. Ex. 8 at 227:18-22; LH Decl. Ex. 9 at 66:2-19; LH Decl. Ex. 10 at 162:15-163:11, 179:20-180:4; LH Decl. Ex. 11 at 89:25-90:18; LH Decl. Ex. 12 at 108:23-109:2; LH Decl. Ex. 13 at 236:14-20; LH Decl. Ex. 14 at 200:13-201:4; LH Decl. Ex. 38 at 48:1-2.

³⁴ LH Decl. Ex. 5 at 196:5-197:7; LH Decl. Ex. 6 at 143:12-16; LH Decl. Ex. 7 at 221:15-222:19; LH Decl. Ex. 8 at 299:5-300:8; LH Decl. Ex. 9 at 95:12-96:20; LH Decl. Ex. 10 at 160:11-13, 170:15-21; LH Decl. Ex. 11 at 104:2-8; LH Decl. Ex. 12 at 141:20-142:9, 144:16-19; LH Decl. Ex. 13 at 105:6-10, 128:11-14; LH Decl. Ex. 14 at 127:2-15, 131:19-22. In fact, many of the agents had no idea who, if anyone, obtained consent. LH Decl. Ex. 5 at 180:22-181:3, 196:5-197:18; LH Decl. Ex. 8 at 299:24-300:8; LH Decl. Ex. 13 at 128:11-14; LH Decl. Ex. 14

The 710 Jefferson Defendants did not find their purported primary target, Luis Mata, or their purported secondary target, Rojar Cruz, at this home. LH Decl. Ex. 77.

B. Background Facts Regarding Operation at 15 W. 18th Street

On September 27, 2007, between 5:00 and 6:30 a.m., plaintiffs Pelagia De La Rosa-Delgado and her minor sons, Christopher Jimenez, Anthony Jimenez, and Bryan Jimenez, all United States citizens, (collectively, “15 W. 18th Street Plaintiffs”) were subjected to an ICE operation at their home at 15 W. 18th Street, Huntington Station, New York.³⁵

Eleven ICE agents – ICE 39, ICE 40, ICE 41, ICE 45, ICE 46, ICE 47, ICE 48, ICE 49, ICE 50, ICE 51, and ICE 52 (collectively, “15 W. 18th Street Defendants”) – together with at least one Suffolk County Police officer, descended on the home pursuant to Operation Community Shield, without any judicial search or arrest warrants.³⁶ At least six of the 15 W. 18th Street Defendants approached and/or surrounded the home and entered its curtilage.³⁷ The remaining agents were also present on the scene, near the home, or cannot dispute their presence

at 127:2-15, 131:19-22.

³⁵ LH Decl. Ex. 19 at 170:20-171:10; LH Decl. Ex. 20 at 251:2-4; LH Decl. Ex. 21 at 214:18-19; LH Decl. Ex. 22 at 244:18-245:5; LH Decl. Ex. 23 at 195:3-4; LH Decl. Ex. 24 at 188:2-7; LH Decl. Ex. 31 at 185:16-186:13; LH Decl. Ex. 25 at 136:14-17; LH Decl. Ex. 27 at 136:17-19.

³⁶ LH Decl. Exs. 61, 62, 63; LH Decl. Ex. 1 at 6 (identifying ICE 39 team members for September 27, 2007); LH Decl. Ex. 60 at Nos.16, 21; LH Decl. Ex. 60 at Nos. 22, 25.

³⁷ LH Decl. Ex. 22 at 258:4-6, 262:5-13; LH Decl. Ex. 23 at 174:18-175:5; LH Decl. Ex. 24 at 151:4-16; LH Decl. Ex. 27 at 171:22-172:7; LH Decl. Ex. 30 at 174:2-6, 181:25-182:5.

at the operation.³⁸ The 15 W. 18th Street Defendants and officers parked their cars, which numbered five or six, on the street near the front of the house.³⁹

Consistent with the conduct of the agents at 710 Jefferson, the 15 W. 18th Street Defendants carried with them the raid gear called for by the applicable operations plan.⁴⁰ The agents and local police surrounded the perimeter of the home, shone flashlights outside and into bedroom windows, and banged on the front door of the home and on other doors inside the home.⁴¹ The agents at the front door insisted that someone “[o]pen the door.”⁴²

In response to the repeated banging and the command to “open the door,” Christopher Jimenez, then 17 years old, who had been unable to sleep that night on account of recovering from leg surgery and being ill, cracked the door open slightly after insisting unsuccessfully that the agents identify themselves.⁴³ One of the agents then pushed the door open, put his hand on

³⁸ LH Decl. Exs. 61, 62, 63; LH Decl. Ex. 1 at 6; LH Decl. Ex. 25 at 135:25-136:13, 139:18-24, 149:6-20; LH Decl. Ex. 26 at 154:20-22; LH Decl. Ex. 28 at 213:9-19; LH Decl. Ex. 31 at 171:9-18; LH Decl. Ex. 32 at 128:22-130:8, 156:5-23, 156:21-23.

³⁹ LH Decl. Ex. 25 at 138:18-139:5; LH Decl. Ex. 27 at 83:2-7.

⁴⁰ LH Decl. Ex. 1 at 15; LH Decl. Ex. 25 at 154:15-19; LH Decl. Ex. 27 at 149:23-150:9; LH Decl. Ex. 32 at 141:16-20.

⁴¹ LH Decl. Ex. 19 at 171:16-21, 175:23-24, 176:11-13; LH Decl. Ex. 21 at 216:19-20, 217:22-218:6; LH Decl. Ex. 20 at 249:5-252:4; LH Decl. Ex. 33 at 36:5-37:13; LH Decl. Ex. 34 at 33:19-25, 34:23-35:7; LH Decl. Ex. 36 at 153:8-154:2; LH Decl. Ex. 36 at 108:8-11.

⁴² LH Decl. Ex. 19 at 213:18-214:10; LH Decl. Ex. 20 at 256:18-22.

⁴³ LH Decl. Ex. 19 at 165:16-166:8, 172:4-6; LH Decl. Ex. 20 at 256:20-257:9; LH Decl. Ex. 18

Christopher's chest and pushed passed him, following which other Defendants barged into the home and someone ordered Christopher to open the back door of the home.⁴⁴ Additional agents entered through the back, sliding door, one of whom ordered Christopher to stop using his cell phone.⁴⁵ There is no evidence that any occupant of the house other than Christopher was at the front door at the time of entry. Not one of the 15 W. 18th Street Defendants, nor the Suffolk County police officer who accompanied them, claims to have obtained consent to enter the residence from anyone.⁴⁶

at 269:11-272:14, 298:10-299:8.

⁴⁴ LH Decl. Ex. 19 at 171:18-172:16, 197:6-16, 200:21-201:7; LH Decl. Ex. 20 at 257:4-9, 264:9-265:23.

⁴⁵ LH Decl. Ex. 19 at 172:9-23.

⁴⁶ LH Decl. Ex. 22 at 264:9-16, 267:22-268:2, 270:19-22, 279:2-8, 325:12-21; LH Decl. Ex. 23 at 129:25-130:3, 182:17-24; LH Decl. Ex. 24 at 141:18-142:4, 175:4-21; LH Decl. Ex. 25 at 168:19-169:2; LH Decl. Ex. 26 at 154:20-22, 170:9-12; LH Decl. Ex. 27 at 145:3-7, 184:22-24; LH Decl. Ex. 28 at 215:16-216:16; LH Decl. Ex. 29 at 146:9-22, 164:7-14, 174:24-175:2; LH Decl. Ex. 30 at 171:22-24, 180:15-19; LH Decl. Ex. 31 at 171:19-22, 172:9-12, 217:21-25, 218:6-11; LH Decl. Ex. 32 at 153:21-154:8, 162:11-20; LH Decl. Ex. 36 at 127:7-13; LH Decl. Ex. 19 at 262:16-21.

Once inside,⁴⁷ agents grabbed and pulled Plaintiffs Anthony Jimenez and then 14-year-old Bryan Jimenez and refused to let Anthony get appropriate clothing.⁴⁸ Agents swept through all floors of the home, including closets, banged on and shouted through doors throughout the house and ordered and secured residents, at least some of whom were still in their pajamas, in the living room.⁴⁹ The 15 W. 18th Street Plaintiffs (and other residents of the home) were instructed not to move, and agents stood guard to ensure that they did not. Indeed, Anthony, Christopher and Bryan were not even permitted to retrieve their mother.⁵⁰ The agents banged on the doors and entered the rooms of sleeping residents, including that of Plaintiff Peggy De La Rosa-Delgado, the owner of the home, without consent.⁵¹

⁴⁷ At a minimum, ICE 39, 40, 41, 47, 49, and 50 entered the home. LH Decl. Ex. 22 at 262:5-263:15; LH Decl. Ex. 23 at 174:18-175:12; LH Decl. Ex. 24 at 144:3-4, 162:2-15; LH Decl. Ex. 27 at 133:13-25, 145:3-7. ICE 40 testified, moreover, that when he entered the home, there were at least six agents inside. LH Decl. Ex. 23 at 175:8-176:9.

⁴⁸ LH Decl. Ex. 20 at 257:10-21, 266:11-269:9; LH Decl. Ex. 21 at 227:6-20, 231:24-233:14.

⁴⁹ LH Decl. Ex. 19 at 185:18-186:7; LH Decl. Ex. 20 at 268:4-269:9, 270:16-271:4, 273:5-10, 287:23-294:7; LH Decl. Ex. 21 at 233:11-14, 236:17-237:11, 255:8-17, 266:15-267:9.

⁵⁰ LH Decl. Ex. 19 at 173:13-174:2; LH Decl. Ex. 20 at 277:10-17, 279:17-25, 294:21-297:6; LH Decl. Ex. 21 at 236:12-16, 240:3-13, 262:9-263:19.

⁵¹ LH Decl. Ex. 19 at 174:23-175:10; LH Decl. Ex. 20 at 287:23-294:7; LH Decl. Ex. 21 at 240:14-24; LH Decl. Ex. 24 at 176:23-179:9, 183:8-11, 270:24-271:7.

The government admits that the 15 W. 18th Street Defendants did not have a judicial warrant to enter or search the home.⁵² The 15 W. 18th Street Defendants do not purport to have perceived a particularized fear of danger, an emergency, or even probable cause to enter or search the residence.⁵³ Not one of the 15 W. 18th Street Defendants who entered the home could recall obtaining consent to enter or search the home from anyone.⁵⁴

The 15 W. 18th Street Defendants did not find their purported target, Miguel Quintanilla, at this home. Not one person in the home was taken into custody.

ARGUMENT

I. Summary Judgment Standard

The Court should grant the Moving Plaintiffs' motion for partial summary judgment finding the Defendants liable on their Third Claim for the violation of their Fourth Amendment rights on the basis that the Defendants participated in an operation involving the entry into and

⁵² LH Decl. Ex. 60 at Nos. 22, 25.

⁵³ LH Decl. Ex. 38 at 48:1-2; LH Decl. Ex. 36 at 171:14-22; LH Decl. Ex. 30 at 198:6-10; LH Decl. Ex. 24 at 192:23-193:15; LH Decl. Ex. 25 at 167:19-24; LH Decl. Ex. 27 at 174:16-22; LH Decl. Ex. 32 at 179:21-180:3; LH Decl. Ex. 31 at 262:12-16; LH Decl. Ex. 29 at 190:18-191:6; LH Decl. Ex. 28 at 88:23-89:7.

⁵⁴ Although one agent testified that, once inside the house, she asked Christopher whether the agents could go to the basement, she expressly stated at other points of her testimony that she did not ask for consent to search at any point during the week of September 24, 2007. *Compare* LH Decl. Ex. 22 at 291:11-20 *with* LH Decl. Ex. 22 at 270:19-22.

search of the Moving Plaintiffs' homes without judicial warrants, exigent circumstances, or valid consent.⁵⁵

The Moving Plaintiffs bear the initial burden of informing the district court of the basis for their motion and identifying the matters on which they contend the evidence demonstrates the absence of a genuine issue of material fact. *JSC Foreign Econ. Assoc. Technostroyexport v. Int'l Dev. & Trade Svcs., Inc.*, 386 F. Supp. 2d 461, 463-64 (S.D.N.Y. 2005) (Koeltl, J.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once "the moving party meets its initial burden of showing a lack of a material issue of fact, the burden shifts to the nonmoving party to come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)). Specifically, the "nonmoving party must produce evidence in the record and may not rely simply on conclusory statements . . ." *Id.* (internal quotations and citations omitted); *see also Nextec Applications v. Brookwood Cos., Inc.*, 703 F. Supp. 2d 390, 400 (S.D.N.Y. 2010).

The Moving Plaintiffs have shown the absence of a genuine dispute as to any material fact concerning the unconstitutional entry into their homes.⁵⁶ There is an utter absence of

⁵⁵ While Moving Plaintiffs believe that the undisputed facts establish liability for each of the Defendants, at a minimum, the Court should hold that consent to enter or search was not obtained at either home. *See* Fed. R. Civ. P. 56(a) (a party "may move for summary judgment, identifying each claim or defense—or *the part of each claim or defense*—on which summary judgment is sought") (emphasis supplied).

⁵⁶ Defendants must show they obtained valid consent to enter and search the homes. *See, e.g., Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002) (in section 1983 action officials seeking to rely on consent to justify a warrantless entry and search of a home bear the burden of proving

evidence to show that any of the Defendants obtained any consent whatsoever, much less valid consent, to enter or search the Moving Plaintiffs' homes. *See Nextec*, 703 F. Supp. 2d at 400 (quoting *Celotex*, 477 U.S. at 325) (holding that a moving party who does not bear the burden of proof discharges his or her burden on summary judgment "by 'showing'—that is, point out to the district court—that there is an absence of evidence to support the nonmoving party's case."⁵⁷).

Courts in this district have not hesitated to grant plaintiffs summary judgment where defendants counter sworn testimony with unsubstantiated denials, conjecture, or otherwise fail to rebut plaintiff's sworn testimony. *See, e.g., Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entm't Corp.*, No. 08 Civ. 1558 (RMB) (THK), 2009 WL 577916, at *6 (S.D.N.Y. Mar. 2, 2009) ("Plaintiffs [were] unequivocally entitled to summary judgment" where defendants "fail[ed] to rebut [plaintiff]'s sworn statement . . . beyond offering . . . 'unsubstantiated conjecture' . . ."); *JSC Foreign Econ. Assoc.*, 386 F. Supp. 2d at 463-64.

II. The Defendants, Acting in Their Capacity as Federal Agents, Violated Plaintiffs' Fourth Amendment Rights

Under *Bivens* and its progeny, federal courts can hear suits against federal government officials accused of violating constitutional rights and/or failing to intervene in the face of such violations. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S.

valid consent). Irrespective of who has the ultimate burden of proof, once Movants have, as here, shown the lack of consent by undisputed evidence, the burden shifts to the Defendants to rebut that showing with admissible evidence.

⁵⁷ Although the Moving Plaintiffs believe they have done so, they need not "produce evidence affirmatively establishing the absence of a genuine issue of material fact with respect to an issue on which the nonmoving party bears the burden of proof." *Nextec*, 703 F. Supp. 2d at 400.

388, 396-97 (1971); *Gagnon v. Ball*, 696 F.2d 17, 21 (2d Cir. 1982) (holding officer liable under § 1983 for false arrest where the officer “not only declined to intercede on [plaintiff’s] behalf but also assisted [the other defendant] in detaining her.”). The Moving Plaintiffs respectfully submit that there is no genuine dispute of material fact that Defendants are liable to them under *Bivens*. Defendants’ warrantless entries into and searches of the Moving Plaintiffs’ homes violated the Fourth Amendment, which protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” U.S. Const. amend. IV.

A. The Moving Plaintiffs Had An Expectation Of Privacy In Their Homes And Curtilage

The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Payton v. New York*, 445 U.S. 573, 585-86 (1980) (internal citations and quotation marks omitted); *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 299 (S.D.N.Y. 2000). “Because the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment, [the Supreme Court has] firmly established the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Payton*, 445 U.S. at 586). This principle extends equally to the curtilage of a home. *See United States v. Dunn*, 480 U.S. 294, 307-08 (1987); *Roybal v. City of Albuquerque*, Civ. No. 08-0181, 2009 WL 1329834, at *15-18 (D.N.M. Apr. 28, 2009). A law enforcement agent can overcome the presumption that a warrantless entry was unreasonable only by showing (i) the presence of exigent circumstances, or (ii) that he or she obtained valid consent to enter or search. *See, e.g., Steagald v. United*

States, 451 U.S. 204, 216 (1981); *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir 1991) (defendant in § 1983 action may have duty of “producing evidence of consent . . . or other exceptions to the warrant requirement.”). It is the agents’ burden to demonstrate that “consent was given freely and voluntarily.” *See Anobile*, 303 F.3d at 124.

Here, it is undisputed that Defendants who participated in these two operations entered and searched the Moving Plaintiffs’ homes, private bedrooms, and private yards. But Defendants do not purport to have had warrants authorizing them to do so. Nor do Defendants claim the existence of exigent circumstances. Rather, counsel for Defendants in this case has made the conclusory assertion that the Defendants obtained consent from the residents of the homes and bedrooms that they entered and searched.

Any reliance on purported consent to avoid liability, however, fails, for two independent reasons. First, after dozens of depositions and thousands of pages of documents produced in this case, Defendants have not come forward with *any* evidence whatsoever that they obtained consent to enter or search the Moving Plaintiffs’ homes, private rooms, and/or curtilage. In fact, they admit that they did not have consent to enter the private yards of the Moving Plaintiffs, even where, as at 710 Jefferson Street, those yards were surrounded by a closed backyard fence, further demonstrating the expectation of privacy. Second, even if the Defendants could point to words or actions that purportedly signified “consent” (which they do not), any such consent would be invalid as a matter of law given the undisputed circumstances in which the operations were conducted.

B. Defendants Did Not Obtain Consent To Enter or Search

None of the Defendant agents testified that he or she personally obtained consent to enter either 710 Jefferson Street, 15 W. 18th Street, or the curtilage surrounding those homes.

Likewise, not one of the Defendant agents has testified that he or she personally obtained consent to search Sonia Bonilla's bedroom at 710 Jefferson Street or Peggy De La Rosa's bedroom at 15 W. 18th Street. Indeed, none of the Defendants was even able to testify that they heard or observed anyone else obtain consent to enter or search at either home. *See supra* at pp. 6, 8, 11, 13. This complete inability to identify any facts supporting the bald assertion that consent was obtained is fatal to Defendants' "consent" defense.

The Moving Plaintiffs have, conversely, testified that they did not grant the Defendants consent to enter, much less search their homes. *See supra* at pp. 5, 7-8, 11, 12. At 710 Jefferson Street, then-12 year old Beatriz Velasquez, who answered the door after hearing someone shout "someone is dying upstairs," testified that she did not grant consent to enter or search the home, and that the agents simply stepped around her to enter the home. Moreover, when Sonia Bonilla – the owner of the home – arrived home, she found agents already searching her home and bedroom and attempting to open her locked bedroom closet, and therefore could not have granted them consent to do so. Likewise, at 15 W. 18th Street, as soon as then 17-year-old Christopher Jimenez opened the door, one of the Defendants put his hand on Christopher's chest and pushed past him. Other Defendants then entered. *See supra* at pp. 10-11. After following the Defendants into his own home, Christopher was instructed by a police officer to open the back door of the home, at which point more agents entered the home. None of the agents asked Christopher for permission to enter or search the home. *See supra* at pp. 10-12.

In short, the resolution of this motion does not require the Court to reach whether a specific individual voluntarily granted consent and possessed the requisite authority or capacity to do so because Defendants have produced *zero* evidence of consent – voluntary or not – to enter or search the Moving Plaintiffs' homes and curtilage.

C. Any Purported Consent Would Have Been Invalid

It is well settled that “[c]onsent must be a product of that individual’s free and unconstrained choice, rather than a mere acquiescence in a show of authority.” *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993) (internal citations omitted); *see also Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *United States v. Mapp*, 476 F.2d 67, 77 (2d Cir. 1973) (“[W]here there is coercion there cannot be consent.”) (internal citations and quotation marks omitted). It is likewise well-settled that consent must also be obtained from someone with authority to grant it. *See United States v. Brown*, 961 F.2d 1039, 1041 (2d Cir. 1992). Here, even if Defendants could offer admissible evidence tending to show that consent was obtained, based on the undisputed facts adduced in discovery, any such consent would not have been valid as a matter of law.

1. Defendants Were Not Even in a Position to Obtain Consent From People With Authority or Capacity To Grant It

The Defendants who entered and searched the Moving Plaintiffs’ private dwellings did not even confront any individual at the front door of the two homes who had the authority or capacity to grant consent to enter or search, had it been obtained (which it indisputably was not). *See United States v. Hassock*, 631 F.3d 79, 88 (2d Cir. 2011) (search invalid where agents failed to ascertain that resident had authority to grant consent); *see also Brown*, 961 F.2d at 1041 (landlady cannot consent to entry of tenant’s dwelling); *United States v. Heisman*, 503 F.2d 1284, 1288-89 (8th Cir. 1974) (holding that co-tenant did not have authority to consent to search of other co-tenant’s private office to which he “normally” did not have permission to enter); *Abdella v. O’Toole*, 343 F. Supp. 2d 129, 135 (D. Conn. 2004) (stating that child may not have authority to grant access to parent’s room).

It is undisputed that Defendants' only contact at the front door of 710 Jefferson was with a 12-year-old, Beatriz Velasquez. Thus, even if Defendants were to manufacture a claim at this late date that they received "consent" from Beatriz (and there is no evidence that they did), such a claim would be misplaced. No court has ever found that a child aged twelve can grant consent to enter and search in the absence of exigent circumstances, an emergency, or a parent immediately nearby, where, as here, the 12-year-old was falsely told that the agents needed to come in because "someone is dying inside." *See Abdella* 343 F. Supp. 2d at 135 (summary judgment denied to Government on issue of "consent" by preadolescent); *see also United States v. Gamez*, 389 F. Supp. 2d 975, 979 (S.D. Ohio 2005) (factors to determine validity of duress-free consent include "the age, intelligence, and education of the individual").

Likewise, at 15 W. 18th Street, 17-year old Christopher Jimenez answered the door. He, like Beatriz, however, was not of the age of majority and could not grant valid consent under the coercive circumstances of the raids at issue. *Id.*; *see also* LH Decl. Ex. 82 at 9-10.

With respect to search, there was no one present with authority to consent to the search of Sonia Bonilla's or Peggy De La Rosa-Delgado's bedrooms. When Ms. Bonilla was allowed into her home, she found her bedroom filled with agents. Likewise, Ms. De La Rosa-Delgado was asleep when her bedroom was entered and searched. *See supra* at p. 12. Under the undisputed facts, the Defendants simply could not have obtained consent to enter the bedroom from anyone with authority to grant it, because no one with such authority was present.

2. *Any Purported Consent Was Not Free And Voluntary*

Assuming for the sake of argument that agents had taken steps to ascertain that Beatriz and Christopher did have the authority and capacity to grant the Defendants consent to enter and search the entirety of their homes, including private bedrooms, which they did not, any purported

consent obtained from them cannot, as a matter of law, have been free and voluntary, as required by the Fourth Amendment. *See LaDuke v. Nelson*, 762 F.2d 1318, 1329 (9th Cir. 1985) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)).

Duress-free consent must be determined through an examination of the “totality of the circumstances.” *Schneckloth*, 412 U.S. at 226; *Djonbalic v. City of New York*, No. 99 CIV. 11398 SHS/AJP, 2000 WL 1146631, at *9-11 (S.D.N.Y. Aug. 14, 2000) (report and recommendation by Magistrate Judge Peck denying government’s motion for summary judgment on grounds that officers obtained consent where plaintiffs provided evidence that the entry was made and the police knocked on their doors late at night, encountered people with poor command of the English language, the police were in riot gear carrying weapons, the officers threatened to use force and began breaking down the door). An examination of the undisputed facts in this case leads inexorably to the conclusion that any consent that would have been obtained would be “a mere acquiescence in a show of authority” and therefore not valid. This is so for at least five reasons.

First, the Defendants admitted to preventing the free movement of residents within their homes. Agents surrounded the homes with the purpose of preventing residents from leaving, ordered residents into common areas, *supra* at pp. 4, 6-7, 9, 12, ordered a mother not to enter her own home, *supra* at p. 7, ordered two little girls to their bedroom, *supra* at p. 6, demanded that a resident of the home hang up his telephone, *supra* at p. 11, and refused to permit minors to retrieve their mother and the owner of the home, *supra* at p. 12. It is clear that there is no genuine dispute that no plaintiff in either home was free to move, leave, or refuse the agents’ demands. Such conduct rendered these operations nonconsensual, and therefore unlawful. Encounters become non-consensual “when, in view of all the circumstances, a reasonable person

would believe that he or she was not free to leave” or that his or her “freedom of movement is restrained.” *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also Florida v. Bostick*, 501 U.S. 429, 434, 437 (1991) (seizure occurs when a law enforcement officer “by means of physical force or show of authority” restrains liberty and where law enforcement “conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’”) (internal citation omitted).

Second, Defendants admit – and ICE documents confirm – that the operations at the Moving Plaintiffs’ homes occurred in the early morning hours, before 6:30 a.m. *See supra* at pp. 3, 9. It is, moreover, undisputed that, at 710 Jefferson, Beatriz Velasquez was wakened from sleep and answered the door in her pajamas. *See supra* at p. 5. And, at 15 W. 18th Street, the Defendants entered the rooms of individuals who were still in bed, in some cases, pulling them out of bed. *See supra* at p. 12. These factors are of great import when deciding whether consent is voluntary. *See, e.g., LaDuke*, 762 F.2d at 1329 (searches “during early morning or late evening hours” a factor in invalidating consent); *Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (“a group of police officers rousing an adolescent out of bed in the middle of the night with the words ‘we need to go and talk’ presents no option but ‘to go’”); *see also United States v. Jerez*, 108 F.3d 684, 690-92 (7th Cir. 1997) (“when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution”; where police continuously knocked on door late at night, until occupants finally opened door, they were “submitting to the deputies show of authority” since a “[r]easonable person in their situation could conclude only that the deputies would not leave unless the door was opened”). In fact, Janice Nadler, the Moving Plaintiffs’ expert in social psychology, has opined in this case that peer-reviewed studies demonstrate that individuals who

are called upon to make important decisions shortly after being awoken from sleep suffer cognitive impairment. (See LH Decl. Ex. 82 at 3-4.) Accordingly, it is her expert opinion that “most if not all of the Plaintiffs . . . who were awoken suddenly by the presence of the ICE agents and who were requested shortly after awakening to grant permission to enter or search their residence, were likely experiencing a reduced ability to process information fully, which would call into question the extent to which a grant of permission was made voluntarily.” *Id.* at 4.

Third, at both 710 Jefferson and 15 W. 18th Street, there is no dispute that ten and eleven agents, respectively, plus local law enforcement, participated in the operations. The Defendants admit to having secured a “perimeter” around the homes, and to having parked their cars in a manner that was visible to and from the front door of the homes. The Moving Plaintiffs have, moreover, testified that they were aware of the fact that multiple agents surrounded the house, that they opened the door in response to demands by the Defendants to do so, and in response to banging by individuals announcing themselves as “Police!” *See supra* at pp. 4-5, 10. Such a display of force vitiates valid consent. *See Mendenhall*, 446 U.S. at 554 (holding that the “threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled” are all hallmarks of nonconsensual encounters); *see also Abdella*, 343 F. Supp. 2d at 143; *Djonbalic*, 2000 WL 1146631, at *10; LH Decl. Ex. 82 at 5-7.

Fourth, according to the Operations Plan for OCS, each of the Defendants was required to wear “Raid jackets, Bulletproof Vest, Service Issued Firearm, Baton/O/C, Flashlight, Handcuffs.” (See LH Decl. Ex. 1 at 15.) The Defendants do not dispute that they complied with

this requirement, and it is undisputed that the Defendants shone flashlights at the Moving Plaintiffs and/or through doors and windows, and visibly bore firearms, in some cases brandishing them. *See supra* at pp. 5, 6, 10. These factors all undermine voluntariness. *See United States v. Mapp*, 476 F.2d 67, 78 (2d Cir. 1973); *United States v. Restrepo-Cruz*, 547 F. Supp. 1048, 1057 (S.D.N.Y. 1982).

Fifth, at 710 Jefferson Street, consistent with ICE's unconstitutional ruse policies, the Defendants used a ruse which would vitiate the voluntariness of any alleged consent. At that home, the Defendants falsely yelled that "someone is dying upstairs" in the process of gaining entry. *See supra* at pp. 4-5. It is well-established that these types of ruses vitiate valid consent. *See United States v. Montes-Reyes*, 547 F. Supp.2d 281, 288 (S.D.N.Y. 2008) (consent invalid if gained by falsely claiming lawful authority or falsely claiming exigent circumstances); *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *United States v. Hardin*, 539 F.3d 404, 424-25 (6th Cir. 2008) (consent invalid if obtained by trick or deception); *see also United States v. Hernandez-Juarez*, No. SA-09-CR-19-XR, 2009 WL 693172, at *4 (W.D. Tex. Mar. 16, 2009).

In sum, as this Court recently noted,⁵⁸ courts have held that each of the practices in which the Defendants engaged at 710 Jefferson Street and 15 W. 18th Street "tends to undermine voluntary, duress-free consent, rendering it more likely that a search purportedly based on consent, like the ones at issue here, has been conducted in an unconstitutional manner." These two homes involved not just one of those practices, but all of them. Because the Defendants have failed to come forward with *any* evidence indicating that they obtained consent to enter or search and have failed to show that any expression of consent under these circumstances, even if it had been given (which it was not) was voluntary, and because they have no other basis for the

⁵⁸ *See Aguilar v. ICE*, Civ. No. 07-8224, 2011 WL 3273160, at *13 (S.D.N.Y. Aug. 1, 2011).

constitutionality of their conduct, the Court should respectfully grant the Moving Plaintiffs' motion for partial summary judgment finding that these Defendants violated the Moving Plaintiffs' Fourth Amendment rights.

CONCLUSION

For all of the foregoing reasons, the Moving Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment on the Third Claim of their Fourth Amended Complaint.

Dated: New York, New York
October 28, 2011

DEWEY & LEBOEUF LLP

s/Aldo A. Badini

By: Aldo A. Badini

abadini@dl.com

Kelly A. Librera

klibrera@dl.com

Lawrence S. Hirsh

lhirsh@dl.com

Jennifer Opheim Whitener

jwhitener@dl.com

1301 Avenue of the Americas

New York, NY 10019

Tel.: (212) 259-8000/8191

Fax: (212) 649-0919

s/Ghita Schwarz

LATINOJUSTICE PRLDF

Ghita Schwarz

gschwarz@latinojustice.org

Foster Maer

fmaer@latinojustice.org

99 Hudson Street, 14th Floor

New York, New York 10013

(212) 739-7504

Attorneys for Plaintiffs