08 CV 1034 (SAS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.*,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Linda Donahue
Tel: (212) 788-0892
Fax: (212) 788-9776
ldonahue@law.nyc.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

ARGUMENT

POINT I

PLAINTIFFS FAIL TO SHOW RULE 23(a) COMMONALITY AND TYPICALITY 3

A. The Theory of a Pattern of Suspicionless Stops Relies on Faulty Statistical Analysis 4

B. Plaintiffs' Quota or Deficient Audit Procedure Theories Do Not Establish Commonality/Typicality. 14

POINT II

PLAINTIFFS CANNOT SHOW ASCERTAINABILITY OR NUMEROSITY 16

POINT III

THE NAMED PLAINTIFFS ARE INADEQUATE CLASS REPRESENTATIVES 19

A. The Named Plaintiffs Lack Standing to Pursue Injunctive Relief 20

B. The John Doe Officer Issue Threatens to Play A Major Role in The Litigation 21

POINT IV

PLAINTIFFS DO NOT SATISFY RULE 23(B)(2) FOR AN INJUNCTIVE CLASS 23

POINT V

THE GALVAN DOCTRINE APPLIES 25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Alvarez v. City of Chicago,
649 F. Supp. 43 (N.D. Ill. 1986) 20

Amchem Prod., Inc. v. Windsor,
521 U.S. 591 (1997) 19

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,
222 F.3d 52 (2d Cir. 2000) 21

Brown v. City of Barre,
2010 U.S. Dist. LEXIS 131709 (D. Vt. Dec. 13, 2010) 24

Brown v. Kelly,
244 F.R.D. 222 (S.D.N.Y. 2007) 13, 17, 24

Brown v. Plata,
131 S. Ct. 1910 (2011) 18

Casale v. Kelly,
257 F.R.D. 396 (S.D.N.Y. 2009) 13, 17

Ciralo v. City of New York,
216 F.3d 236 (2d Cir.), *cert. denied*, 531 U.S. 993 (2000) 19

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 20

Cortigano v. Oceanview Manor Home,
227 F.R.D. 194 (E.D.N.Y. 2005) 14

Damassia v. Duane Reade, Inc.,
250 F.R.D. 152 (S.D.N.Y. 2008) 14

Daniels v. City of New York,
198 F.R.D. 409 (S.D.N.Y. 2001) 1, 17

Daniels v. City of New York,
199 F.R.D. 513 (S.D.N.Y. 2001) 25, 26

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006) 19

Dodge v. County of Orange,
103 Fed. Appx. 688 (2d Cir. 2004) 20

D.S. v. New York City Dep't of Educ.,
255 F.R.D. 59 (E.D.N.Y. 2008) 13

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 3

Fair Housing of the Dakotas, Inc. v. Goldmark Property Mgmt. Inc.,
2011 U.S. Dist. LEXIS 106934 (D.N.D. Sept. 20, 2011) 13

Finch v. N.Y.S. Office of Children & Family Servs.,
252 F.R.D. 192 (S.D.N.Y. 2008) 13, 24

Floyd v. City of New York,
739 F. Supp. 2d 376 (S.D.N.Y. 2010) 15

Floyd v. City of New York,
2011 U.S. Dist. LEXIS 99129 (S.D.N.Y. Aug. 31, 2011) 1-2, 5

Forman v. Data Transfer,
164 F.R.D. 400 (E.D. Pa. 1995) 16

Galvan v. Levine,
490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) 25, 26

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) 21

General Tel. Co. v. Falcon,
457 U.S. 147 (1982) 3-4

Gulino v. Bd. of Educ.,
201 F.R.D. 326 (S.D.N.Y. 2001) 14

Haus v. City of New York,
03 Civ. 4915 (S.D.N.Y. Aug. 31, 2011) 4, 6, 24

Hodgers-Durgin v. De La Vina,
199 F.3d 1037 (9th Cir. 1999) 20

In re Flag Telecom Holdings, Ltd. Secs. Litig.,
574 F.3d 29 (2d Cir. 2009) 19

In re IPO Secs. Litig. v. Merrill Lynch & Co.,
471 F.3d 24 (2d Cir. 2006) 3

In re Nassau County,
461 F.3d 219 (2d Cir. 2006 13

Jermyn v. Best Buy, L.P.,
2011 U.S. Dist. LEXIS 104449 (S.D.N.Y. 2011) 13

Kenavan v. Empire Blue Cross & Blue Shield,
1996 U.S. Dist. LEXIS 320 (S.D.N.Y. Jan. 16, 1996), *aff'd*, 1997 U.S. App. LEXIS 2779 (2d Cir. 1997) 19

Landry v. Price Waterhouse Chartered Accountants,
123 F.R.D. 474 (S.D.N.Y. 1989) 21

MacNamara v. City of New York,
275 F.R.D. 125 (S.D.N.Y. 2011) 13, 21

Marisol A. v. Giuliani,
126 F.3d 372 (2d Cir. 1997) 3-4, 13

McBean v. City of New York,
228 F.R.D. 487 (S.D.N.Y. 2009) 13

Morrow v. City of Tenaha,
2011 U.S. Dist. LEXIS 96829 (E.D. Tex. Aug. 29, 2011) 11-13, 23

Norman v. Conn. State Bd. of Parole,
458 F.2d 497 (2d Cir. 1972) 19

O'Shea v. Littleton,
414 U.S. 488 (1974) 20

Penk v. Oregon State Bd. of Higher Educ.,
93 F.R.D. 45 (D. Or. 1981) 19

Rahman v. Chertoff,
530 F.3d 622 (7th Cir. 2008) 18, 25

Ramos v. SimplexGrinnell LP,
2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. June 21, 2011) 13

Reynolds v. Giuliani,
506 F.3d 183 (2d Cir. 2007) 24

Robidoux v. Celani,
987 F.2d 931 (2d Cir. 1993) 4

Sanneman v. Chrysler Corp.,
191 F.R.D. 441 (E.D. Pa. 2000) 16

Shain v. Ellison,
356 F.3d 211 (2d Cir. 2004) 20

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.,
546 F.3d 196 (2d Cir. 2008) 3

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) .... *passim*

Statutes and Rules

Fed. R. Civ. P. 23 .... 3, 9, 16

Fed. R. Civ. P. 23(a) 1, 12, 15

Fed. R. Civ. P. 23(a)(1) 18

Fed. R. Civ. P. 23(a)(2) 3

Fed. R. Civ. P. 23(a)(3) 3

Fed. R. Civ. P. 23(a)(4) 19

Fed. R. Civ. P. 23(b)(2) 1, 7, 21, 23

Fed. R. Evid. 702 6

N.Y. Vehicle & Traffic Law § 375(12-a)(b) 20

Other Authorities

7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1760 16

5 *Moore's Federal Practice - Civil* § 23.24[4] 12

5 *Moore's Federal Practice - Civil* § 23.21[5] 18

PRELIMINARY STATEMENT

Long after the close of fact and expert discovery, and after this Court's ruling on defendants' motion for summary judgment, plaintiffs have now moved to certify a class under Fed. R. Civ. P. 23(a) & (b)(2), which they do not satisfy.[1] Plaintiffs seek to certify the following class, for which a Fourth Amendment violation is a threshold requirement for class membership:

> All persons who since January 31, 2005 have been or in the future will be, subjected to New York Police Department ("NYPD")'s policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.[2]

Instead of commonality and typicality – the keys to class certification analysis -- the putative class presents myriad individualized issues about the decision for each stop that must be determined before any finding of commonality among the stops can be made, including whether a stop was made without reasonable suspicion and caused by a common quota requirement for enforcement activity. No overarching answer can be determined by class certification until

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[1]In opposition, defendants respectfully submit this memorandum of law, and the accompanying declaration of Heidi Grossman, Esq., dated December 19, 2011, ("HG Decl."), as well as incorporate the arguments in Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions, and Testimony of Jeffrey Fagan, Ph.D, dated December 19, 2011 ("*Daubert* Mem.") (which also addresses Fagan's Declaration, dated November 6, 2011).

[2]In *Daniels v. City of N.Y.*, 198 F.R.D. 409, 412 (S.D.N.Y. 2001), plaintiffs sought to certify an almost identical (b)(2) class (it differed only in that it involved stops by only one NYPD unit as opposed to the entire department). There, this Court noted that a suspicionless stop was common to all members of the class and that "those members asserting that they were the victims of racial profiling may be seen as subclass [sic] of those who would assert only a suspicionless stop, regardless of the motive for that stop." *Id.* at 419. Thus, a suspicionless stop was the predicate for all class claims and class membership, just as it is here. *See Floyd v. City of N.Y.*, 08 CV 1034 (SAS), 2011 U.S. Dist. LEXIS 99129, at *65 (S.D.N.Y. Aug. 31, 2011) ("summary judgment decision") ("Because I have found that the officers had reasonable suspicion to stop Floyd, I do not find that the officers impermissibly used race as the determinative factor in deciding to stop him."), *reconsideration granted on other grounds*, 2011 U.S. Dist. LEXIS 135293 (S.D.N.Y. Nov. 23., 2011).

thousands of determinations are made to establish whether there are overarching questions, like the existence, or lack, of a widespread pattern of suspicionlesss stops. Thus, plaintiffs cannot show that there is a glue that holds together the reasons for the stops of the putative class members. Nor does plaintiffs' reliance on the unreliable analyses of their expert provide the glue necessary for class certification:

- Plaintiffs cannot elevate the factual details of the stops to a level of commonality by relying on "statistics" culled by Fagan. These "statistics" amount to mere categorizations of the UF250 forms, which officers fill out to document stop activity, for the years 2004-2009. Moreover, per Fagan, these "statistics" actually show that at least 68% of the stops were justified and at most purport that a mere 6.41% of the stops are unconstitutional.

    - Fagan purports that only 6.41% of the stops made from 2004-2009 were not justified and he concludes this because the officer who completed the UF250 form did not fill out on the form the reasonable suspicion for the stop. Fagan miscalculates this number under his own scheme and it is actually less than 1%. *See Daubert* Mem. at 1. First, by its very nature, this small percentage of stops belies commonality with the vast majority of stops that Fagan categorizes as justified. Second, while a UF250 may not have been completed correctly or completely, such a paperwork deficiency does not equate with a lack of reasonable suspicion for a stop. Fagan does nothing more to ascertain whether reasonable suspicion existed and admits that he cannot know what is in an officer's mind at the time of a stop.[3]

    - Fagan purports that 24.8% of the stops made from 2004-2009 were of "questionable constitutionality for lack of sufficient documentation on which to determination[sic] whether there was requisite reasonable suspicion." Pl. Mem. at 3. As noted above, failure of documentation does not mean that reasonable suspicion did not exist for a stop. Further, this 24.8% "statistic," cannot be relied upon because, *inter alia*, Fagan's legal interpretation of the forms is not within his province or expertise; Fagan fails to consider all the data on the

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[3]HG Decl. Ex. G at 143:17-144:6. This Court found "convincing" plaintiffs' argument that the UF250 was an insufficient basis upon which to determine the constitutionality of a stop "when considered in isolation (without, for example, comparison to the officer's memo book or conversation with the officer)." *Floyd*, 2011 U.S. Dist. LEXIS 99129, at *7. Yet now Fagan relies exclusively on the UF250s to *conclude* that a stop is unjustified or indeterminate (and therefore part of a practice of widespread suspicionless stops). Plaintiffs cannot have it both ways. As for the 69% of the UF250s that Fagan labels as justified, while plaintiffs "do not concede" that those stops were constitutional, they offer no proof that those stops lacked reasonable suspicion. *See* Pl. Mem. at 3 n. 2.

form, particularly the non-checkbox information like the address location of the stop as indicative of a high crime area; and Fagan completely discounts the sufficiency of any form on which the officer indicated "Other" as a reason for the stop, when, in fact, such a notation records the stop and alerts supervisors to inquire about the reason for the stop should they have any questions. *See Daubert* Mem. at 1-10.

- Aside from the ineffectual "statistical" categorizing of the UF250s, which fails to establish commonality, plaintiffs attempt, but fail, to provide a reliable regression analysis to assess defendants' stop activity and to establish race as the common explanation for the stops among class members. Plaintiffs allege that the racial make-up of the individuals stopped is out of proportion to the representation of those minorities in the city population and local crime rates, and conclude through regression analysis that the reason for the over-representation can only be attributed to the fact of their race. However, Fagan's regression formula does not account for the indisputable positive correlation between the racial descriptions of suspects reported by victims and witnesses and of arrestees ("Suspect Descriptions"), and the racial descriptions of individuals who are stopped, questioned and frisked as reflected on the UF250s. They are virtually mirror images of each other; for example, in 2009 and 2010 respectively, Blacks and Latinos represented 84.4% and 83.9% of the people stopped and 81.8% and 81.6% of the suspects and arrestees described as having committed reported crime. *See Daubert* Mem. at 13-15. Additionally, Fagan failed to account for reasonable suspicion in his regression formula and based his conclusion on statistics that included the 70% of the stops which he categorized as justified. *See id.* at 10.

ARGUMENT[4]

POINT I

PLAINTIFFS FAIL TO SHOW RULE 23(a) COMMONALITY AND TYPICALITY

While commonality and typicality are two separate requirements, they "tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3)."

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[4]To certify a class, plaintiff must prove each prerequisite under Fed. R. Civ. P. 23 by a preponderance of the evidence after a rigorous analysis that must be made by the court, which can weigh conflicting evidence even if it overlaps with merits issues. *See Teamsters Local 445 v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *In Re: IPO Securities Litigation v. Merrill Lynch & Co., Inc. ("IPO")*, 471 F.3d 24, 26, 41-42 (2d Cir. 2006); *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Commonality requires a rigorous analysis of any proffered expert proof and its persuasiveness (not just its admissibility), and the Court must resolve any factual disputes necessary to determine if there was a common practice that affected the class as a whole. *See Ellis v. Costco*, 657 F.3d 970, 983 (9th Cir. 2011) (vacating certification where parties staged a battle of experts over the issue of commonality and court failed to undertake a rigorous analysis expert proof beyond finding it admissible under *Daubert*).

Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997). Both requirements ensure that the class action is economical and that the named plaintiffs' claims and the class claims "are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel.*, 457 U.S. at 158 n.13. Commonality is satisfied when plaintiffs' claims share a common question of law or fact. *Id.* Typicality "is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). Neither commonality or typicality will be satisfied if the court must engage in a "case-by-case evaluation of each encounter" in order to establish liability. *Haus v. City of N.Y.*, 03 Civ. 4915 (S.D.N.Y. Aug. 31, 2011) at 274 (attached as Appendix to Pl. Mem.).

The Supreme Court recently explained that "[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011)(denying (b)(2) certification) (quotation omitted) (emphasis in original). Accordingly, what is important is whether the proposed common question is "of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* It is not enough to allege that class members "have all suffered a violation of the same provision of law." *Id.*

A. <u>The Theory of a Pattern of Suspicionless Stops Relies on Faulty Statistical Analysis.</u>

Here, the central question plaintiffs propose as common to all class members is whether the NYPD has a policy and/or practice of conducting stop, questions, and frisks without

reasonable suspicion. Pl. Mem. at 13.[5] First, as this Court found: "The City does not have a written policy requiring or permitting stops and frisks of persons without reasonable suspicion, nor do plaintiffs allege that it does." *Floyd*, 2011 U.S. Dist. LEXIS 99129, at *70-71.[6] Instead, plaintiffs must prove a widespread practice throughout the city of suspicionless stops.

Second, the question about whether a widespread practice of suspicionless stops exists cannot be answered class-wide without examining the facts and circumstances of each stop to determine whether it was made without reasonable suspicion, whether it was made pursuant to a widespread practice and whether it was caused by a quota system. Before determining whether

[5] Plaintiffs allege that commonality exists among class members sufficient to answer four common *Monell* questions. *See* Pl. Mem. at 12-13. The first and central issue is whether NYPD has a policy and/or practice of conducting suspicionless stops; at most, per the class definition, the second issue, whether NYPD has a policy and/or practice of making suspicionless stops based on race, is a subset of the first. The third issue (whether alleged insufficient audit procedures demonstrate deliberate indifference) and the fourth issue (whether quotas are the moving force behind suspicionless stops) come into play, if at all, only if the first issue can be resolved classwide. Notably, plaintiffs do not rely on the alleged failures in NYPD training, supervision or discipline that they argued on summary judgment as bases or common issues on which to certify a class.

[6] In a desperate last ditch attempt to show a policy, plaintiffs disclose and argue for the first time that, in July 2010, before discovery in this case closed and well before summary judgment was briefed, NYPD Commissioner Kelly allegedly told NYS Sen. Eric Adams at a meeting at the office of then Governor David Paterson that, "NYPD targets its stop-and frisk activity at young black and Latino men because it wants to instill the belief in these two populations that they could be stopped and frisked every time they leave their homes so that they are less likely to carry weapons." Declaration of Darius Charney, dated November 7, 2011 ("Charney Decl."), submitted in support of Pl. Mem., Ex. 10 (Declaration of Eric Adams, dated October 28, 2011) at ¶ 5. While Commissioner Kelly did attend the meeting, he did not make the alleged statement, and per Commissioner Kelly, targeting young black and Latino men for stop activity is not and has never been the policy or practice of NYPD; Commissioner Kelly said nothing at the meeting to indicate or imply that such activity is based on anything other than reasonable suspicion. *See* HG Decl. Ex. A (Declaration of Commissioner Raymond Kelly, dated December 9, 2011). The mere suggestion that Commissioner Kelly would make such a statement so contrary to NYPD policies and do so under the circumstances Sen. Adams describes is incredible, and that it has come to light at this late date makes its happening all the more suspect. Moreover, such a statement, if it had been said, would not establish a policy, especially in light of the voluminous evidence submitted on summary judgment that no such policy exists.

all of the stops were made without reasonable suspicion, there is simply no glue holding the alleged class claims together. As such, there is no common answer at the threshold that will help decide claims common to all putative class members "in one stroke." *See, e.g., Haus, supra,* at 279-280 (no commonality or typicality for false arrest class because the court would have to delve into the lawfulness of each arrest).

In *Wal-Mart,* the named plaintiffs attempted to certify a class of female Wal-Mart employees who were allegedly discriminated against in pay and promotional decisions due to their sex. *See* 131 S. Ct. at 2547. Wal-Mart had an explicit policy disfavoring discrimination and no policy to the contrary. *See id.* at 2553. Because these decisions were left to the discretion of the individual stores' managers, respondents were suing about "literally millions of employment decisions at once." *Id.* at 2552. The Court held, "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that an examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*" *Id.* (emphasis in original). The Court then considered the "glue" proffered by the Wal-Mart employees – the testimony of their sociological expert, who opined that Wal-Mart has a strong corporate culture that makes it vulnerable to gender bias through stereotyping. *See id.* at 2553. However, in support of this theory, the expert was unable to say or calculate with any specificity the percentage of employment decisions in which stereotyped thinking played a role – be it .5% of the time or 95% of the time. *See id.* Without deciding whether or not the expert's testimony was admissible under Fed. R. Evid. 702, the Court decided that it could be disregarded since, without his being able to testify to the essential question on commonality, plaintiffs were "worlds away" from showing that Wal-Mart "operated under a general policy of discrimination." *Id.* at 2554.

Plaintiffs argue that *Wal-Mart* is distinguishable from this case on grounds including that NYPD's decision-making is more centralized and less discretionary than Wal-Mart's, and that its holding and application of the significant proof standard generally apply only to Title VII pattern or practice cases. While defendants address these alleged distinctions below, defendants note that there is no basis to narrowly cabin *Wal-Mart* on the fundamental underpinning of the decision: commonality is central for Rule 23(b)(2) class certification.

The commonality problem here is almost identical to that in *Wal-Mart.* Plaintiffs here have not, and cannot, identify any written NYPD policy instructing its officers to act without reasonable suspicion. It is undisputed that NYPD has a written policy *against* racial profiling. Moreover, plaintiffs do not dispute that NYPD trains that officers must stops based on reasonable suspicion per the Fourth Amendment, which ultimately rests on an individual officer's judgment of the facts and circumstances known to him at the time of the stop.

Despite these express policies, plaintiffs argue commonality based on their Fagan's unreliable evidence that, in fact, NYPD has a general practice of conducting suspicionless and discriminatory stops. But the Supreme Court disregarded similar expert conclusions in *Wal-Mart* because the expert could not opine on the thinking involved in the allegedly biased decision-making. *See* 131 S. Ct. at 2553-54.[7] Likewise, Fagan admitted in his deposition that,

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[7] *Wal-Mart* looks at the expert's testimony to determine whether or not plaintiffs proffered "significant proof" of commonality by showing a general policy of discrimination based on an entirely subjective decision-making process. Plaintiffs argue that this analysis is inapplicable and particular to Title VII pattern or practice cases. *See* Pl. Mem. at 15. Even if plaintiffs are correct, which defendants do not concede, *Wal-Mart*'s reasoning and treatment of the expert evidence is, at a minimum, instructive, where plaintiffs proffer of expert proof to show commonality is like that made by the *Wal-Mart* plaintiffs, and because plaintiffs' burden to prove a *Monell* widespread pattern is akin to proving a Title VII pattern or practice. Regardless of whether this standard applies here, *Wal-Mart* found that the expert's failure to opine on the thinking involved in the employment decision-making not only did not meet the "significant proof" standard, but was "*worlds away* from significant proof that Wal-Mart 'operated under a

despite his review of UF250 forms and his regression analysis, he does not know what is in any officer's mind during a stop,[8] a key element to assessing whether officers are making suspicionless stops. For this reason alone, Fagan's analysis should be disregarded and commonality should not be found.

To be sure, NYPD's department-wide policies generate from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department-wide policies. In this way, NYPD's decision-making structure may be more centralized than Wal-Mart's, but this does not affect the commonality analysis here. As a law enforcement agency, NYPD's policies must comport with the Constitution, and individual officers do not have the authority to act outside of the Constitution. Similarly, Wal-Mart and its supervisors must make their employment decisions in compliance with Title VII. In this way, NYPD and Wal-Mart are similarly situated since the legal standards to which they are held must be met by thousands of decisions by individuals in myriad circumstances.[9] Thus, just as "[d]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's" in *Wal-Mart,* (*id.* at 2555), demonstrating the invalidity of an individual officer's judgment about conducting a stop will do nothing to demonstrate the invalidity of another's.

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general policy of discrimination.'" 131 S. Ct. at 2254 (emphasis added). The Court did more than find a lack of commonality by a showing of significant proof; where the paucity of expert proof is so stunning that it can be disregarded, it can fairly be said that the Court found a lack of commonality under any standard of proof. The same finding is compelled here.

[8] *See* HG Decl. Ex. G. at 143:17-23 (at his deposition Fagan testified: "We don't know what's in the mind of a police officer.").

[9] To the extent that individual officers' decisions to make stops are akin to the Wal-Mart "policy" of allowing discretion to supervisors over employment matters, it is the opposite of a uniform practice that would provide commonality for a class action, and is essentially a policy against having a uniform practice. *See* 131 S. Ct. at 2554.

Nor can plaintiffs rely on Fagan's flawed regression analysis and anecdotal evidence to show a common mode of exercising discretion that results in suspicionless and race-based stops, just as the *Wal-Mart* plaintiffs could not show commonality by relying upon regression analyses by a statistician and labor economist and anecdotal evidence. As for the anecdotal evidence, the inadequacy of the class representatives to represent the claims of the class are addressed *infra* at Point III, where lack of standing and an inability to even identify an NYPD officer as having conducted the alleged stops is highlighted.[10] Moreover, although plaintiffs argue that the anecdotal evidence sufficiently shows a citywide practice of suspicionless stops, this reliance on approximately twenty stops throughout the city is not enough to give rise to an inference of a common practice among the approximately 2.8 million stops made from 2004-2009.[11] *Wal-Mart* made clear that, while no specific number of anecdotes is required to establish commonality for a claim of unconstitutionally discriminatory conduct, when the claim is that a general policy of

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[10] The four declarations plaintiffs submitted from alleged putative class members do not enhance the significance of the anecdotal evidence. *See* Charney Decl. Exs. 6-9 (*e.g.*, declarant Peart alleges that he has been stopped five to ten times in the last seven years, but he does not identify a single NYPD officer and does not identify most dates of the stops; the other three declarants do not state that they have been stopped more than once; declarant Sindayiganza states that he was told that he was stopped because a woman had complained that he was following her in a store). Defendants note that plaintiffs never identified declarant Almonor (Charney Decl. Ex. 6) pursuant to Fed. R. Civ. P. 26.

[11] The *amicus curiae* brief submitted on behalf of five NYC nonprofit organizations does not support a reasonable inference of a common practice of suspicionless stops. Without any supporting declarations or evidence whatsoever, the brief makes broad statements, well after discovery has closed, regarding a "pervasive" system of stops perceived as baseless by their clients and describes the incidence of these baseless stops as "incessant," "constant," and "rampant." The alleged targets of this purported racist policy include males of color, the homeless and lesbian, bisexual, gay transgender, queer and questioning youth of color; yet, no alleged victims are named and no specific details are offered of any alleged incidents. Defendants have not had any opportunity to conduct discovery regarding these broad-based, generalized claims. The *amicus curiae* brief should be disregarded, as it does not support the showing required to satisfy Rule 23.

discrimination is at work, "a few anecdotes selected from literally millions of employment decisions prove nothing at all." 131 S. Ct. at 2556 n. 9.

As for Fagan's flawed regression analysis, his work appears to suffer from even more fundamental flaws than the regression analysis in *Wal-Mart*. *See* 131 S. Ct. at 2555-56. There, the Court accepted *arguendo* the analysis, based on comparisons between the number of women promoted to the percentage of women in the available pool of hourly workers, that there were statistically significant disparities between men and women based on regional and national data that could only be explained by gender discrimination. Yet, the Court still found a "failure of inference" that the finding of a gender disparity at the regional level translated into the necessary uniform, store-by-store disparity. Here, Fagan has failed even in making the proper comparisons to conclude the existence of a racial disparity in the first place because he failed to compare the race of those stopped to the Suspect Descriptions, which all agree is the best benchmark of the available pool of those who commit crimes. *See Daubert* Mem. at 11-13. The racial minorities representing the majority of people stopped essentially mirror the racial make-up of persons who are reported to be committing the crime in the NYPD victim, witness, and arrest report data.[12]

Additionally, despite his own finding that 70% of the stops are justified, Fagan fails to account for reasonable suspicion in his regression analysis. By plaintiffs' own class definition, all putative class members must have suffered a suspicionless stop. Nevertheless, Fagan's regression analysis is based on the entire pool of stops in 2004-2009 and does not excise or control for the 70% of stops that he categorized as justified. *See id.* at 10. This is not unlike the additional failure of the *Wal-Mart* regression analysis. *Wal-Mart* noted that even if the

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[12] In 2009, Blacks and Latinos represented 84.4% of the individuals stopped and 81.8% of the descriptions of the suspects and arrestee; in 2010, Blacks and Latinos represented 83.9% of the stoppees and 81.6% of the descriptions of suspects and arrestees. *See id.* at 14-15.

regression analysis had shown a gender disparity on a store-by-store basis, the statistical proof would still fail because "almost all of [the managers] will claim to have been applying some sex-neutral, performance-based criteria, whose nature and effects will differ from store to store," and no showing was made of a specific employment practice that tied together all of the claims. 131 S. Ct. at 2555-56 ("Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.") Similarly here, Fagan's failure to account for reasonable suspicion (akin to a "sex-neutral performance-based criteria"), renders the regression analysis unreliable and fails to identify a specific practice that ties together all of the alleged claims.

Plaintiffs' reliance on *Morrow v. City of Tenaha*, 2011 U.S. Dist. LEXIS 96829 (E.D. Tex. Aug. 29, 2011), to distinguish this case from *Wal-Mart* and convert it to a single policy case is misplaced. *See* Pl. Mem. at 19. Quite distinctly, *Morrow* involves a class claim of selective enforcement of an undisputed interdiction program. Plaintiffs alleged a specific, city-wide policy of targeting racial and ethnic minorities for traffic stops and then illegally detaining or arresting them and/or searching or seizing their property. 2011 U.S. Dist. LEXIS 96829, at *5-12.[13] The Court applied *Wal-Mart*'s commonality interpretation and its significant proof requirement because plaintiffs alleged a general policy of discrimination. *See id.*, at *51-61. Based on statistics that showed that traffic stops of minorities had significantly increased in the area since the interdiction program, as well as anecdotes and two evidentiary negative inferences, the Court certified a (b)(2) class and defined its members as minorities stopped for a traffic

[13] Plaintiffs did not challenge the constitutionality of the initial traffic stops under the Fourth Amendment, and alleged that the police and the district attorney acted in concert to seize property from these traffic stops for their own benefit. *See id.* Defendants admitted that an interdiction program based on traffic stops existed, complete with rules and procedures, including that during a stop, whenever a decision was made to seize property and/or make an arrest, the official who made the stop would contact the District Attorneys' office to reach consensus on how to proceed and that there was an agreement as to what percentage of the seizures the District Attorney would get. *See id.*

violation in or near Tenaha from November 2006 forward. *See id.*, at *42-43, *51-61. The Court made clear that the limited issue to be litigated was "whether the interdiction program illegally targeted racial and ethnic minorities for traffic stops," and the Court refused to include any issues concerning resultant detentions or seizures and the individual factual circumstances surrounding each stop. *Id.*, at *71. The singular program at issue, the readily ascertainable class members, the lack of need to analyze the specific facts of each stop, and the selective enforcement question are all materially different from the issues here and much more amenable to class certification.

The alleged pattern of suspicionless stops cannot meet the typicality requirement since it would require the court to delve into the specific claims of each plaintiff before it can establish liability. 5 Moore, *Moore's Federal Practice*, § 23.24[4] at 23-96 (1999). The proposed class members were stopped in different locations, at different times, by different officers, and for a variety of different suspected offenses. The unique facts and circumstances of the stop known to the officer at the time of each stop (*e.g.*, time, place, criminal activity in the area, suspect/crime descriptions) and the unique characteristics of the alleged class members (*e.g.*, behavior, clothing, reactions to the officers) defies finding typicality among the class members' claims.[14]

Contrary to plaintiffs' view, typicality and commonality are not satisfied here on the theory that their allegations involve a unitary course of conduct or single system of the

[14] In this way, commonality and typicality among the putative class members is even more lacking than in *Wal-Mart*. The alleged *Wal-Mart* class members were identified by their sex and status as Wal-Mart employees, but those shared characteristics were insufficient to satisfy Rule 23(a) requirements. Here no such unity exists; those allegedly victimized by suspicionless stops share nothing in common other than being stopped, and the subset of Blacks and/or Latinos share only their race and the fact of being stopped (as the John Doe stops show, it is not at all clear that NYPD made the stops). Their stops occurred at different times and places, by different officers and under different circumstances, unlike the *Wal-Mart* plaintiffs whose alleged harms at least occurred in the context of employment by the same corporation.

defendants. Here, plaintiffs challenge the very way in which NYPD exercises its police power to investigate crime under the broad, yet fact-bound constitutional concept of reasonable suspicion. They are not challenging, *e.g.*, the effects of a specific law enforcement interdiction program as in *Morrow*. There is no trigger-like involvement in a system which subjects the alleged class members to a contested policy/practice (like being an employee or a customer of a particular company, or being in the prison or welfare system). There is no singular policy or practice which is indisputably in effect but fundamentally contested (like strip searches of all prisoners without regard to reasonable suspicion). Here, the allegation is of a disputed practice contradicting an express policy prohibiting suspicionless stops (of some people but not all and of some Blacks and Latinos but not all, none of whom can be identified without mini-trials). The cases plaintiffs rely upon are all materially distinguishable.[15]

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[15]*See* Pl. Mem. at 12, 16, 19. *E.g., Casale v. Kelly,* 257 F.R.D. 396, 413 (S.D.N.Y. 2009) & *Brown v. Kelly,* 244 F.R.D. 222 (S.D.N.Y. 2007) (both consisting of class members who were charged under one of three unconstitutional statutes); *McBean v. City of New York,* 228 F.R.D. 487 (S.D.N.Y. 2009) & *In Re Nassau Cnty.*, 461 F.3d 219 (2d Cir. 2006) (both consisting of class members who were incarcerated at the same facility and subjected to automatic strip search policies); *Marisol A.*, 126 F.3d 372 (class of children who were or should have been in the child welfare system who challenged various aspects of the system); *MacNamara v. City of N.Y.*, 275 F.R.D 125 (S.D.N.Y. 2011) (class consisted of individuals present at the RNC and detained by NYPD in connection therewith); *Jermyn v. Best Buy, L.P.*, 2011 WL 4336664 (S.D.N.Y. Sept. 15, 2011) (class consisting of customers allegedly harmed by Best Buy's failure to adhere to its own price match policy); *Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt. Inc.*, 2011 U.S. Dist. LEXIS 106934, at *11-12 (D.N.D. Sept. 20, 2011) (certification denied; common issue was propriety of undisputed policy of charging fees to residents with assistance animals); *Ramos v. SimplexGrinnell LP*, 2011 U.S. Dist. LEXIS 65593, at *16 (E.D.N.Y. June 21, 2011) (class of employees challenging defendant's alleged failure to pay prevailing wages); *Morrow v. City of Tenaha*, 2011 WL 3847985 (E.D. Tex. Aug. 29, 2011) (class certified under significant proof of commonality standard where class certified challenged a "specific, city-wide policy" regarding a specific interdiction program, not general police investigation and enforcement techniques"); *D.S. v. NYC Dep't of Educ*, 255 F.R.D. 59 (E.D.N.Y. 2008) (settlement class of minority students alleging exclusion from educational services at a specific public high school; class certification and ultimate relief undisputed); *Finch v. N.Y.S. Office of Children & Fam. Serv.*, 252 F.R.D. 192 (S.D.N.Y. 2008) (Scheindlin, J.) (class of individuals in the childcare field and listed on state registry as subjects of indicated reports of child abuse allegedly because their

Also, typicality cannot be met here since all members of the class would not necessarily benefit from the named plaintiffs' actions if an injunction were to issue to address a practice of suspicionless stops in the same way that injunctions in the cases relied upon by plaintiffs at Pl. Mem. at 21 would directly benefit the class members.[16]

Finally, typicality cannot be met because the Court would be required to assess any unique defenses of the defendants before determining liability, which could include a fact-intensive qualified immunity defense. Likewise, the claims of the putative class members who cannot identify an NYPD officer involved in the stop will be subject to unique defenses.

B. Plaintiffs' Quota or Deficient Audit Procedure Theories Do Not Establish Commonality/Typicality.

Plaintiffs primarily rely on snippets of recordings taken during various roll-calls at two NYPD precincts (neither of which is the site of any of the stops of the named plaintiffs), to establish that quotas are a common moving force behind the alleged citywide suspicionlesss stops. While NYPD requires performance goals, they are specifically expected to be set by a command's managers and to be met "within appropriate legal standards," including stop activity. *See* Charney Decl. Ex. 12 at ¶ 3. These performance goals are not necessarily numerical in character and are instead goals to be set and achieved in relation to current crime conditions in an

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right to an administrative hearing challenging the reports was unduly and unconstitutionally delayed); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156-57 (S.D.N.Y. 2008) (class contesting company's undisputed practice of not paying overtime to assistant managers).

[16] Typicality also cannot be met here since all class members would not necessarily benefit from the named plaintiffs' actions if an injunction were to issue in the same way that the class members would benefit from the kinds of injunctions that could issue in the cases relied upon by plaintiffs at Pl. Mem. at 21. *E.g., Gulino v. Bd. of Ed.*, 201 F.R.D. 326, 332 (S.D.N.Y. 2001) (injunction could issue eliminating use of standardized teacher licensing exams if they are proven to have a discriminatory disparate impact on minorities); *Cortigano v. Oceanview Manor Home*, 227 F.R.D. 194, 206 (E.D.N.Y. 2005) (injunction could issue requiring adult day care facility transmit state funds directly to residents without imposing conditions).

officer's command. *See id.* Plaintiffs have made no showing that numerical goals for enforcement activity exist and/or are uniform throughout the NYPD. Further, the decision to engage in stop activity is ultimately within the judgment of the thousands of officers who interact with the public daily. Plaintiffs have proffered no proof to support that numerical requirements were the common cause of these thousands of alleged stops among the putative class members.[17] Not even the putative class representatives who have identified NYPD officers have shown that quotas caused their stops, *see* n.25, *infra;* and certainly they are unable to do so for the stops for which they have not identified an NYPD officer (and for which no UF250s have been identified) – as there is no proof beyond speculation that the unidentified officer got credit toward a quota for the stop. *See* Point III.B., *infra.*

Likewise, plaintiffs cannot meet Rule 23(a) requirements on the theory that NYPD's department-wide auditing and self-inspections of stop activity demonstrate a deliberate indifference to the need to monitor officers adequately to prevent a widespread pattern of suspicionless stops. First, this theory assumes notice of the need to prevent a widespread pattern that plaintiffs fail to establish. Second, the seven audits through 2009 show satisfactory ratings or above for the 136 commands reviewed, belying any commonality evidencing the deficiency of the audit procedures. *See* Defs.' 56.1 Stmt of Undisputed Facts, dated February 2, 2011 ("Defs.' 56.1") at ¶¶ 44-46. Third, the declining trend of unjustified and indeterminate stops along with the increasing trend of justified stops shows that NYPD monitoring through its audits has

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[17]"[F]or plaintiffs to prove their quota theory, they must establish not only the existence of quotas, but also that such conditions generate or otherwise lead to impermissible stop, question and frisks." *Floyd v. City of N.Y.*, 739 F. Supp. 2d 376, 378 n.2 (S.D.N.Y. June 24, 2010) (Scheindlin, J.).

improved the quality of the content of the UF250 forms and refutes plaintiffs' claims of deliberate indifference. *See Daubert* Mem. at 6.

POINT II
PLAINTIFFS CANNOT SHOW ASCERTAINABILITY OR NUMEROSITY

That the class be ascertainable is an implicit requirement of Fed. R. Civ. P. 23. *See IPO*, 471 F.3d at 45. A court must determine, as a threshold matter, whether a class definition is workable. *See* 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1760 at 115-132 (1986). The description of the class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* at §1760 at 121. Courts reject class definitions that "require addressing the central issue of liability" in a case to determine membership since the membership inquiry "essentially require[s] a mini-hearing on the merits of each [plaintiff's] case." *Forman v. Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995). Furthermore, the need to hold mini-hearings defeats the economic-savings of a class action. *See Sanneman v. Chrysler Corp. n/k/a DaimlerChrysler Corp.*, 191 F.R.D. 441, 446, 454-57 (E.D. Pa. 2000).

Here, plaintiffs define the class as all individuals who were or will be subjected to NYPD customs or practices of stopping in the absence of reasonable articulable suspicion. *See* Pl. Mem. at 1. To determine whether reasonable suspicion exists for a stop, an individualized inquiry must be made into the facts and circumstances surrounding the stop; as this Court's two summary judgment-related decisions show, this analysis is highly specific and unique in every case and is replete with factual questions. As discussed *supra,* Point I, there is no commonality or typicality among the class members that enables them to be identified without examining the specifics of their stops – plaintiffs' expert evidence does not provide the necessary glue; the

failing of commonality here necessarily makes ascertainability of class members fact-intensive.[18] Accordingly, the Court will have to hold mini-trials of each putative class member's allegations and exclude those who were stopped with reasonable suspicion.

The case law plaintiffs rely upon is inapposite. In *Casale*, the Court found that there would not be a need for mini-hearings to address ascertainability since the proposed class was defined as individuals who were arrested, charged, or prosecuted in connection with two loitering statutes which had previously been held unconstitutional. *See* 257 F.R.D. at 413.[19] Membership in *Casale* was easily ascertainable because it was limited to the mere fact of whether an individual had been charged with the specific unconstitutional statutes – an act that in and of itself may have established a claim. However, here, it is not the mere fact of a stop that establishes class membership but a stop without reasonable suspicion, which is dependent upon a review of the facts and circumstances surrounding the stop. There is no easily identifiable objective factor upon which to base class membership as there was in *Casale*.

In *Daniels,* 198 F.R.D. at 415, this Court did not outright reject the mini-trial argument, but instead found that "the absence of a claim for money damages eliminate[d] the need for individualized assessments of liability and harm." Consequently, the Floyd plaintiffs now broadly assert that "ascertainablity" is not a factor in a case where a putative class challenges a custom, practice or policy and seeks only injunctive or declaratory relief. *See* Pl. Mem. at 8. Plaintiffs disregard that *Daniels* was more narrow in scope, as it involved stops made by one unit of NYPD and not by the entire department. Here, given the breadth of the challenged stop activity and the scope of plaintiffs' proposed class relief, ascertainability is significant,

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[18] *Wal-Mart* did not specifically address the implied requirement ascertainability, but based on its holding of no commonality, it follows that the class would not have been ascertainable.

[19] *Brown,* 244 F.R.D. 222, is a class action related to *Casale* involving a third unconstitutional loitering statute. It is inapplicable here for the same reasons as *Casale.*

particularly as it is so intertwined with the presence, or lack, of commonality. Ascertainability serves the important function of ensuring that the defendant is on notice of who is bound by the judgment and who is entitled to the injunctive relief ordered. *See* 5 Moore's Federal Practice – Civil § 23.21[5]. Without being able to ascertain the class, including its "future" membership, it is not possible to assess the scope of the alleged constitutional problem or the need for or scope of a remedy. For example, a proven constitutional deficiency occurring in a small percentage of stops would not necessitate or justify widespread, generalized injunctive relief.

Certifying the proposed class without first ascertaining its membership and determining whether a widespread practice of suspicionless stops exists, is akin to certifying disfavored "across-the-board" classes seeking injunctive relief for persons who now are and in the future will be subjected to unspecified practices. *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008) (reversing (b)(2) certification of a class whose members have been or will be detained and subjected to special screening upon reentry to the U.S. because they appear on a government watch list; across-the-board classes are a "relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible.").[20]

Finally, in the absence of ascertainability plaintiffs cannot establish numerosity under Fed. R. Civ. P. 23(a)(1).

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[20]*Rahman* further explained that certifying a "class of all persons in the United States who have been, or ever will be, stopped without probable cause" is an "attempt to take control of how the police investigate crime and make arrests. Improper arrests are best handled by individual suits for damages (and potentially through the exclusionary rule), not by a structural injunction designed to make every error by the police an occasion for a petition to hold the officer (and perhaps the police department as a whole) in contempt of court." *Id.* at 626-27. *See also Brown v. Plata,* 131 S. Ct. 1910, 1955 (2011) (Scalia, J., dissenting) (where majority upheld prison population limit injunction ordering Governor of California to reduce overcrowding in its prisons, the dissent criticized the nature of the injunction: "But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge incompetent policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.").

POINT III
THE NAMED PLAINTIFFS ARE INADEQUATE CLASS REPRESENTATIVES

Named plaintiffs lack standing to serve as class representatives because the possibility of future injury is too speculative, and their stops involving unidentified John Doe officers raise unique defenses that will likely consume the litigation. Additionally, none of the named representatives are Latino, so they cannot represent the alleged Latino class members who make race-based claims.[21]

Adequacy demands that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequacy is twofold: the proposed class representative must have an interest in vigorously pursing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). The inquiry focuses "on uncovering conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Indeed, to defeat a motion for certification, any such conflicts must be "fundamental," threatening to become the focus of the litigation. *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009).

[21] Because the named plaintiffs are all African-American men, (*see* Pl. Mem. at 5), they are ineligible to represent the Latino members of their suggested class. A class representative must be a member of the class or subclass he purports to represent. *See Norman v. Conn. State Bd. of Parole*, 458 F.2d 497, 499 (2d Cir. 1972). Where a named plaintiff does not satisfy the class definition, leaving certain members of the class unrepresented, the proposed class representatives are deemed inadequate. *See, e.g., Kenavan v. Empire Blue Cross & Blue Shield*, No. 91 Civ. 2393, 1996 U.S. Dist. LEXIS 320, at *12 (S.D.N.Y. Jan. 16, 1996) (dismissing ERISA claim of subclass where named plaintiffs were not members of the subclass); *Penk v. Or. State Bd. of Higher Educ.*, 93 F.R.D. 45, 53 (D. Or. 1981) (requiring "improvement of representation" where certain subclasses did not have a class representative).

A. The Named Plaintiffs Lack Standing to Pursue Injunctive Relief.

A §1983 plaintiff cannot obtain injunctive relief unless he can show that he is likely to be subjected to the same conduct in the future, "a showing that can be very difficult to make." *Ciralo v. City of N.Y.*, 216 F.3d 236, 248 (2d Cir. 2000) (citation omitted). Named plaintiffs themselves must have standing to seek injunctive relief for the class. *See Dodge v. Cnty. of Orange*, No. 03-7958, 103 Fed. Appx. 688, 690 (2d Cir. July 14, 2004). Plaintiff has the burden of establishing that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983); *see also Shain v. Ellison*, 356 F.3d 211, 26 (2d Cir. 2004). This possibility of future injury must be particular and concrete. *See O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974). And where a stop has occurred only once or twice in several years, a plaintiff lacks standing to pursue injunctive relief because it is unlikely that he will be stopped again. *See, e.g., Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (motorists stopped by Border Patrol once in roughly ten years had no standing); *Alvarez v. City of Chi.*, 649 F. Supp. 43, 45 (N.D. Ill. 1986) (no injunction where only two incidents of police misconduct in approximately six years).

Here, both Clarkson and Dennis allege that they were stopped improperly only once in the class period.[22] As such, their assertion that they will again be stopped and deprived of their

[22]*See* Charney Decl. Ex. 2 at ¶¶ 6-16 (Clarkson describing a stop on a weekday in January 2006); Charney Decl. Ex. 3 at ¶¶ 5-23 (recounting Dennis's stop and subsequent arrest on January 12, 2008). Even though Clarkson notes that he was stopped in 1996 and in 2007, he testified that on both occasions, the officers acted appropriately. *See* HG Decl. Ex. B at 184:7-189:1. Since Clarkson is not contending that these stops were unconstitutional, they cannot be considered for purposes of assessing whether there is a credible threat that he will be stopped in the future. Similarly, although Dennis testified that he has been stopped while driving over 150 times since 2005, because his car had tinted windows in violation of N.Y. Veh. & Traf. Law § 375(12-a)(b), these stops are valid and not relevant. *See* HG Decl. Ex. C at 68:2-77:14. And while Dennis asserts that he was stopped improperly twice in 1986 and 1987, *see* Charney Decl. Ex. 3 at ¶¶ 26-27, these are too remote in time to be relevant to the alleged practice.

constitutional rights is wholly speculative. More critically, Dennis and Floyd no longer live in New York, and their conclusory statements that they still consider New York City home and intend to return to New York are too vague to show a credible threat of being stopped in the future.[23] On point is *MacNamara,* 275 F.R.D. 125, where individuals arrested during the 2004 Republican National Convention sought relief under as a (b)(2) class to prevent the unconstitutional arrest and detention of protestors pursuant to NYPD policies and/or practices. *See id.* at 140. Plaintiffs contended that the likelihood of future harm existed because several of the class representatives "plan[ned] to attend demonstrations in New York in the future." *Id.* The court refused to certify a Rule 23(b)(2) class because the "chain of inferences required to find a sufficient threat of future injury" based on plaintiffs' indefinite plans to participate in New York City protests was "simply too speculative and conjectural to supply a predicate for prospective injunctive relief." *Id.* at 141 (citation omitted). Likewise, Dennis's and Floyd's indeterminate plans to relocate to New York in the future "do[] not translate into a real and immediate threat of future injury" to establish standing. *Id.* Based on named plaintiffs' own statements, it is highly unlikely that NYPD will have occasion to stop Clarkson, Dennis, or Floyd again, affording them no standing to seek injunctive relief.

B. The John Doe Officer Issue Threatens to Play A Major Role in The Litigation.

Named plaintiffs cannot represent the class adequately because the issue of whether they were stopped by an unnamed John Doe officer gives rise to unique defenses that could overwhelm the litigation to the detriment of the class. While the mere existence of individualized factual questions concerning a class representative's claim will not defeat class

[23]*See* Charney Decl. Ex. 3 at ¶¶ 2, 3 (Dennis states that he moved to Sumter, South Carolina in October 2008); Charney Decl. Ex. 4 at ¶ 3 (Floyd states that he currently lives in Cuba while attending medical school). *See also* Pl. Mem. at 5-6 (named plaintiffs "[a]ll live in New York City, or recently did so, frequently visit relatives and friends, and intend to return as full-time residents.").

certification, barring certification is appropriate where a putative class representative is subject to unique defenses that threaten to subsume the litigation. *See Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). "Regardless of whether the issue is framed in terms of the typicality of the representative's claims or the adequacy of its representation, there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (citations omitted). At the certification stage, a defendant need not demonstrate that the unique defense will prevail, simply that it is meritorious enough to require the plaintiff to devote considerable time to rebut the unique defense. *See Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989).

That unidentified John Doe officers carried out many of the stops named plaintiffs rely upon implicates a host of factual and legal issues that will distract from their representation of the class. Of their eight alleged stops, officers are identified in only three of them. Indeed, in the five remaining stops, only John Doe officers are alleged to be involved: Clarkson's January 2006 stop; Floyd's April 20, 2007 stop; Ourlicht's February 21, 2008 stop; Ourlicht's June 6 or 9, 2008 stop; and Ourlicht's January 2010 stop.[24] Defending against these claims will necessitate eliciting testimony concerning defendants' efforts to ascertain the identities of these officers, including the production and review of photo arrays, and plaintiffs' attempts to winnow down the pool of potentially involved officers to select those who allegedly stopped them. *See, e.g.*, Defs. 56.1 at ¶¶ 496-518 (documenting the procedures used to locate any officers who may have participated in Ourlicht's June 6 or 9, 2008 stop). In addition to an inquiry as to whether the stop was predicated on reasonable suspicion, these claims will be subject to unique defenses since a

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[24] *See* Charney Decl. Ex. 2 at ¶¶ 7-16; Charney Decl. Ex. 3 at ¶¶ 7-12; Charney Decl. Ex. 5 at ¶¶ 11-21.

showing has not been made by a preponderance of the evidence that a stop even occurred, let alone one that lacked the requisite reasonable suspicion. Moreover, where there are no officers or UF250 associated with an alleged stop incident, plaintiffs cannot show that a quota policy motivated the stop.[25] Because more than 60% of the named plaintiffs' supposedly unconstitutional stop-and-frisks involve unidentified officers, these issues surely will engulf the litigation.

POINT IV
PLAINTIFFS DO NOT SATISFY RULE 23(B)(2) FOR AN INJUNCTIVE CLASS

To certify a (b)(2) class, plaintiffs must show that defendants "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The citywide injunctive relief sought related to the entire NYPD would be inappropriate since the proposed class representatives do not have standing to seek injunctive relief, *see* Point III, *supra*, and have only been stopped within the confines of six precincts.

Plaintiffs also cannot maintain a Rule 23(b)(2) class because defendants have not "acted or refused to act on grounds generally applicable to the class." The proposed class has been stopped by different officers, for different offenses, in different places and at different times. The diverse circumstances surrounding each stop cannot be the basis for uniform conduct on the defendants' part to act or refuse to act on grounds generally applicable to the class. "Certification is improper if the merits of the claim turn on the defendant's individual dealings with each plaintiff." *Morrow*, 2011 U.S. Dist. LEXIS 96829, at *71 (citation omitted).

[25] Notably, for the three incidents where officers were connected to a stop, none of the officers testified to the existence of a quota or to having been encouraged to increase the number of stops, questions, and frisks performed. *See* Defs.' 56.1 at ¶¶ 469-473; HG Decl. Ex. D at 75:8-23; HG Decl. Ex. E at 167:5-168:13; HG Decl. Ex. F at 189:16-190:6.

Finally, a (b)(2) class should be denied because plaintiffs fail to identify an official policy, or its equivalent, and seek a broad-based structural injunction. Like damages, prospective injunctive relief against a municipality cannot be awarded unless the alleged misconduct is attributable to a municipal policy or custom. *See Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007); *see also Haus, supra,* at 280 ((b)(2) class not recommended since "there would seem to be little or no rationale for a suit designed to enjoin false arrests" absent evidence of an NYPD policy/practice). As discussed *infra* at 12 & n.15, this is not a case involving a unitary course of conduct or a single system. *Cf., Brown v. City of Barre*, No. 5:10-cv-81, 2010 U.S. Dist. LEXIS 131709 (D. Vt. Dec. 13, 2010) (constitutionality of state statute and its application challenged by class of tenants whose water was disconnected because landlord defaulted on water bill); *Finch,* 252 F.R.D. 192 (the common issue was whether the practices in holding hearings result in undue or unconstitutional delay); *Brown,* 244 F.R.D. 222. Instead, plaintiffs are seeking sweeping injunctive relief regarding NYPD's exercise of its police power to investigate crime (not a discrete particularized program as in *Morrow*).

Given the nature of plaintiffs' complaints, even if they prove a widespread practice of suspicionless stops and *Monell* causation, it is not at all clear that an injunction would be a useful remedy. Certainly, no injunction could guarantee that suspicionless stops would never occur or would only occur in a certain percentage of encounters, just like no injunction could guarantee that arrests will always be made on probable cause. This is not a scenario where, as in *Morrow*, a specific police interdiction program with rules and procedures can be ordered to be dismantled. Here, plaintiffs essentially seek an injunction guaranteeing that the Fourth Amendment will not be violated when NYPD investigates crime. If a court could fashion an injunction that would have this effect, then it is likely that lawmakers would have already passed laws to the same

effect and police departments would have already employed similar measures. An injunction here is exactly the kind of judicial intrusion into a social institution that is disfavored and would improperly elevate the error of every officer and police department into a petition for contempt. *Rahman*, 530 F.3d 622, 626-27; *see* n.20, *supra*.

POINT V
THE GALVAN DOCTRINE APPLIES

In *Daniels*, defendants offered in lieu of class certification to enter into a stipulation pursuant to *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973), agreeing, without admitting liability, to apply any declaratory or injunctive rulings in the action to all persons similarly situated to the named plaintiffs. *See Daniels v. City of N.Y.*, 199 F.R.D. 513, 514 (S.D.N.Y. 2001). Defendants made this offer after class certification discovery but before merits discovery was complete or *Monell* discovery was underway. Here, defendants have offered the same *Galvan* stipulation as offered in *Daniels*. Plaintiffs' primary reason for rejecting the stipulation is that defendants deny the existence of any violative policies. While this is – and has always been – defendants' position, it has no bearing on the viability of the *Galvan* stipulation, which is concerned with the reach of the remedy, should plaintiffs prove their case. Plaintiffs also argue that the limitations of the *Galvan* stipulation pointed out by the Court in *Daniels* are valid grounds for rejecting the stipulation here, which, of course, is not the case. Unlike in *Daniels*, plaintiffs here have waited until after discovery was complete to move for class certification. Here, fact discovery has been complete since August 2010, and lasted for almost three years, giving plaintiffs every opportunity to develop their record. The body of proof upon which plaintiffs chose to and may rely has been defined for quite some time. They do not need putative class members' identifying

information[26] or a blanket grant of attorney-client privilege with all putative class members in order to develop their proof, which were concerns in *Daniels*.[27] That they chose to proceed at this late stage is their doing. They cannot now expand their case and, thus, have no need for the information and protections which they claim are available.

Finally, plaintiffs' concern that the stipulation does not specifically state that defendants will apply any relief granted to NYPD city-wide is premature at best. Defendants' offer of a stipulation is not a waiver of any rights to contest the propriety of any equitable relief that is granted, once the relief is granted and all appeals have been exhausted, there is no reason not to read the proposed stipulation at face value. It is unclear what plaintiffs will obtain from class certification or why the court needs to grant it in light of the *Galvan* stipulation offer.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

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Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 788-0892

By:
Linda Donahue, Esq.

Of counsel:
Heidi Grossman, Esq.
Cecilia Silver, Esq.
Judson Vickers, Esq.

[26]Since July 2010, per New York State statute, the NYPD UF250 database must not contain identifying information of the people stopped.
[27]Defendants will be severely prejudiced if, after the passage of years and defendants good faith participation in discovery, plaintiffs are entitled to rely at trial on proofs not previously disclosed.