12-1853

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ADRIANA AGUILAR, *et al*., on behalf of themselves and all others similarly situated,
Plaintiffs-Petitioners,
— v. —
IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al*.,
Defendants-Respondents

FROM AN ORDER DENYING CERTIFICATION OF A CLASS ENTERED ON APRIL 16, 2012, BY THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,
CIVIL ACTION No. 07-CIV-8224
THE HONORABLE KATHERINE B. FORREST

PLAINTIFFS-PETITIONERS' REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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PRELIMINARY STATEMENT

Defendants-Respondents argue that the district court's use of *Wal-Mart* – and only *Wal-Mart* – to deny class certification does not present novel questions of fundamental importance to the development of class action law. They are mistaken. The district court denied class certification despite named Plaintiffs' extensive proof of ICE's unconstitutional policies and practices; it did so by erroneously interpreting *Wal-Mart* to justify a ruling on the merits that declared the challenged policies lawful without analysis and created unprecedented obstacles for plaintiffs to demonstrate commonality. Such a novel decision cries out for circuit court review and implicates matters of grave public concern, namely the unfettered exercise of law enforcement authority in warrantless home operations that violate the Fourth and Fifth Amendment rights of Latino citizens and others. In the weeks since the district court here issued its decision – the first in the country to use *Wal-Mart* to deny class certification in a challenge to law enforcement policies and practices – two district courts in the Second Circuit have come to just the opposite conclusion: *Wal-Mart* does not impede a finding of commonality where plaintiffs show by a preponderance of the evidence that law enforcement agencies execute policies and practices that may violate the constitution. The instant case is thus not merely appropriate for interlocutory review but exemplary of the very reason for the creation of Rule 23(f).

ARGUMENT

Defendants argue that the instant case represents an uncontroversial application of existing law and thus does not raise novel legal issues; that denial of class certification will have no impact on the outcome of this case; and that special circumstances and the public interest do not favor review. As shown below, Plaintiffs-Petitioners have demonstrated that (1) the district court's decision uses *Wal-Mart* to impose incorrect standards on class action plaintiffs that impede vindication and enforcement of civil rights; and (2) this case is exactly the kind of challenge to government entities that implicates issues of grave public concern and justifies interlocutory review.

I. It is Fundamentally Important To The Development Of Class Action Law To Clarify The Application of *Wal-Mart*, Particularly In Civil Rights Cases Challenging Law Enforcement Policies And Practices

Cited almost 100 times in the Second Circuit courts alone, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) is understood to have caused a "change in the landscape" of class action law. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012). While the Supreme Court provided "guidance on how existing law should be applied to expansive, nationwide class actions," *Connor B. v. Patrick,* 278 F.R.D. 30, 33 (D. Mass 2011), district courts have paid "particular attention" to *Wal-Mart*'s analysis of Rule 23(a)(2) even where the class covers a discrete geographic area. *See, e.g.*, *Stinson v. City of New*

York, No. 10 Civ. 4228 (RWS), 2012 U.S. Dist. LEXIS 56748 at *24 (S.D.N.Y. Apr. 23, 2012). A growing number of circuits dealing with conflicting district court decisions have granted leave for interlocutory review, explicitly or implicitly acknowledging that, as Plaintiffs-Petitioners have asserted, Pls. Br. at 7, commonality issues after *Wal-Mart* "cry out for a 23(f) appeal." *McReynolds*, 672 F.3d at 488*; see also Behrend v. Comcast Corp*., 655 F.3d 182, 200 (3d Cir. 2011) (in review pursuant to 23(f) jurisdiction, affirming grant of class certification with specific attention to commonality); *Cox v. Zurn Pex Inc*., 644 F.3d 604, 619 (8th Cir. 2011) (same); *Conn. Ret. Plans. & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175-76 (9th Cir. 2011) (same).

Granting the instant 23(f) petition for review is particularly crucial here, because post-*Wal-Mart* conflicts among district court decisions implicate the development of class action law as well as the ability of civil rights plaintiffs to vindicate their rights pursuant to Rule 23. Contrary to Defendants' arguments, the instant case does not merely present issues for appeal on the merits, but goes to the very heart of class action jurisprudence in civil rights cases.

A. The District Court's Application Of *Wal-Mart* Creates An Erroneous New Standard for Class Action Claimants That Conflicts With District Court Decisions In Similar Cases

The district court justified its denial of class certification exclusively by citing to *Wal-Mart*'s analysis of Rule 23(a)(2), failing to reach other prongs of

Rule 23.[1] Yet despite the focus on commonality, the court declined to apply any Second Circuit precedent on commonality or to cite a single case in any circuit or district court applying *Wal-Mart* to a commonality analysis. *Wal-Mart* reversed a grant of class certification for a nationwide class where plaintiffs could not identify a common illegal policy, and numerous courts have recognized that its reasoning does not apply where plaintiffs can identify a common policy that may drive common answers. *See* Pls. Br. at 8. But even though Plaintiffs demonstrated the existence of unlawful ICE policies and practices that apply to a class in a discrete geographic area, the district court viewed *Wal-Mart*'s reversal of class certification as the sole lens through which to view injunctive relief classes. A10-17.

The district court's view of *Wal-Mart* directly conflicts not only with the language of *Wal-Mart* itself and with analysis in other circuits, but also with two district court decisions within the Second Circuit, both issued after the decision in the instant case. In *Stinson v. City of New York*, 2012 U.S. Dist. LEXIS 56748 at *28, Judge Sweet certified a class of plaintiffs challenging a New York Police Department practice of issuing summons without probable cause, stating that *Wal-Mart* "supports a finding" of commonality where the plaintiffs demonstrated evidence of an unlawful policy in a discrete geographic area. Similarly, in *Floyd v*

[1] The district court did not reach the requirements of 23(b)(2), but stated that plaintiffs would not have been able to meet them "for the same reasons that plaintiffs are unable to satisfy the commonality requirement." A22.

City of New York, 08 Civ. 1034 (SAS), 2012 U.S. Dist. LEXIS 68676 (May 16, 2012), Judge Scheindlin certified a class of Black and Latino New York City residents – a class that could number in the millions – who in the future could be subject to the New York Police Department's pattern and practice of unlawful stop and frisks. In doing so, she noted that a "centralized policy" of unlawful conduct within New York distinguishes such cases from Wal-Mart's "exercise of discretion in formulating local store *policy* or practice." *Floyd*, 2012 U.S. Dist. LEXIS 68676 at *54 (emphasis in original).

As Judge Scheindlin pointed out in distinguishing *Floyd* from the instant case, "Judge Forrest did not emphasize that the lack of commonality [in *Wal-Mart*] was based on the company's de-centralized approach. . . . [which is] worlds away from centralized and hierarchical policing practices." 2012 U.S. Dist. LEXIS 68676 at *56, n. 134. But the district court here, while acknowledging ICE's concession that the challenged centralized policies remain in force today, nonetheless failed to analyze or quote a single one, impermissibly relying instead on Defendants' conclusory arguments that challenged policies were lawful and thus not relevant to Plaintiffs' claims. A14. The district court's application of *Wal-Mart* not only fails to conduct the required "rigorous analysis," 131 S. Ct. at 2551, but also imposes a wholly new standard of proof on class action plaintiffs, whereby non-factual assertions by lay witnesses and individual defendants that their

practices are "legal" on the merits is enough to defeat Plaintiffs' overwhelming evidence and case support that they are not. *See* Pls. Br. 11-13. This incorrect expansion of *Wal-Mart* raises fundamental questions regarding class action law.

Similarly, the district court makes novel use of *Wal-Mart* to hold that the lapse of time between named Plaintiffs' injuries and the court's decision defeats commonality. A12, 20. This reasoning cites no doctrine or case support and conflicts with similar cases involving challenges to law enforcement conduct. In December 2011, in *Ortega-Melendres v. Arpaio*, No. CV-07-2513, 2011 U.S. Dist. LEXIS 148223 (D. Ariz. Dec. 23, 2011), the district court in Arizona certified a class of Latinos in Maricopa County who alleged violations of their Fourth and Fourteenth Amendment rights in 2007. In August 2011, in *Morrow v. Washington*, 277 F.R.D. 172, 192-93 (E.D. Tex. 2011), a district court in Texas certified a class of racial and ethnic minorities challenging the City of Tenaha's unconstitutional traffic stops that occurred in 2007 and 2008. Nowhere does *Wal-Mart* speak to or otherwise undermine a defendant's burden to show that unlawful conduct may have ceased; indeed, here the Defendants did not even attempt to meet their burden, instead conceding that the challenged policies "have remained in place." A14. Notwithstanding this admission, the district court cited *Wal-Mart* to impose a new requirement, unsupported by any legal doctrine, that imposes on Plaintiffs the burden of finding witnesses to ICE's misconduct after the close of discovery in

order to meet the commonality prong. This is simply not, as Defendants contend, a "faithful" application of either *Wal-Mart* or Second Circuit precedent. Defs. Br. at 13. Rather, it is a rejection of *Wal-Mart*'s admonition against using class certification to rule on the merits and an erroneous application of *Wal-Mart*'s analysis of nationwide classes to a completely different context.

This Court has held that the exercise of "discretionary jurisdiction" in an interlocutory appeal is particularly appropriate where a decision involves "a controlling question of law as to which there is substantial ground for difference of opinion," because such review is likely to ease "congestion in the courts" and "foster the development of coherent . . . precedent." *Weber v. United States Tr.*, 484 F.3d 154, 158-59 (2d Cir. 2007) (internal citations and quotations omitted). Despite the striking similarity between the instant challenge to law enforcement policy and practice on the one hand and the claims in *Stinson* and *Floyd* on the other, these cases demonstrate just such a "substantial difference of opinion" within this circuit. In light of the confusion that *Wal-Mart* will likely continue to generate, granting the instant petition is especially necessary.

B. Immediate Resolution Is Appropriate Because Denial Of Class Certification Will Prevent Vindication Of Class Members' Rights

Defendants are wrong to assert that the denial of class certification here is more appropriate for final rather than interlocutory review. Defs. Br. at 14-16. The district court's decision prevents an entire victim class from seeking

accountability for ICE's widespread constitutional misconduct. Pls. Br. at 19-20. Class status provides class members with the ability to enforce injunctive relief orders; without the ability of class members – not just named Plaintiffs – to enforce remedies, any order issued by the court will be toothless. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (noting that the class action device provides for robust litigation of mass claims in part through "court supervision"), *cert. denied*, *Murray v. Sullivan*, 132 S. Ct. 1876 (2012).

Further, the district court's erroneous interpretation of *Wal-Mart* has significant implications for Plaintiffs' injunctive relief claims in ways that compel immediate resolution. *In re Sumitomo Copper Litigation*, 262 F.3d 134, 139-40 (2d Cir. 2001). The district court has an obligation to analyze the legality of ICE policy by examining specific policies and case law rather than by simply accepting Defendants' arguments without citation to evidence or constitutional law. Its failure to do so before declaring ICE's unlawful common policies "lawful," A15, suggests a misunderstanding of the parties' burdens to prove the merits of their claims and defenses. In addition, the district court wrongly holds that the lapse of time between Plaintiffs' allegations and the court's decision erases Defendants' burden to prove that its conduct has ceased. This unsupported reasoning undermines Plaintiffs' meritorious claims for injunctive relief. Because the district court's misapplication of *Wal-Mart* demonstrates a mistaken understanding not

only of Rule 23, but also of the standards for evaluating the parties' burdens of proof, it is impossible to separate the court's analysis of class certification from the merits. Delaying review of whether classwide treatment is appropriate will therefore impose additional and prohibitive costs of appeal, remand and retrial on a class of limited-means Plaintiffs being represented *pro bono publico*.

II. Imposition Of Unprecedented Barriers To Class Certification In This Civil Rights Case Is A Special Circumstance Meriting 23(f) Review

Because the instant case involves widespread violations of fundamental rights by one of the most powerful agencies in the country, it implicates important public interests and thus falls squarely within the special circumstances that favor immediate appeal. *In re Sumitomo*, 262 F.3d at 139. Contrary to Defendants-Respondents' argument, Defs. Br. at 18-19, the availability of individual suits for damages simply does not undermine the necessity for prospective injunctive relief on a classwide basis. "The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. . . . [that] provide for structural, procedural and substantive fairness." *Sullivan*, 667 F.3d at 340 (J. Scirica, concurring). Where such private attorneys general challenge governmental entities, grants of 23(f) petitions are of "particular importance and urgency." *Prado-Steinman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000).

The district court's misapplication of *Wal-Mart* to deny class certification thus presents exactly the kind of special circumstance that justifies immediate

review. As *amici* point out, the district court's decision requires plaintiffs to demonstrate "up-to-the-minute evidence" of defendants' misconduct even after the close of discovery and to meet "a specific, numerical quota" of unlawful incidents even where defendants concede the continued existence and enforcement of challenged policies. Br. of *Amici Curiae*, at 4-5, 7-8. This unsupported reading of *Wal-Mart* imposes unprecedented barriers to civil rights claimants, particularly those of limited means who seek redress and prospective relief for violations of their fundamental constitutional rights.

In this context, denial of review will not serve principles of efficiency and deference. Defs. Br. at 20. To the contrary, this circuit is "noticeably less deferential to the district court when the district court has denied class status than when it has certified a class." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003) (internal citations and quotations omitted). Interlocutory review here is thus more than appropriate; it is necessary to preserve the class action mechanism for civil rights plaintiffs challenging law enforcement misconduct.

CONCLUSION

For all these reasons, Plaintiffs-Petitioners respectfully request that the Court grant their petition to appeal the district court's denial of class certification.

Dated: New York, New York
May 29, 2012

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