12-1853

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 12-1853

ADRIANA AGUILAR, *et al.*,

Plaintiffs-Petitioners,

–v.–

IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants-Respondents.

ON PETITION TO APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DEFENDANTS-RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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I. Preliminary Statement

Defendants-respondents United States Immigration and Customs Enforcement ("ICE") and sixty-three current and former ICE officials sued in their individual capacities (collectively, the "Government") respectfully submit this answer in opposition to the petition for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f) (the "Petition") filed on behalf of the named plaintiffs.

The plaintiffs are twenty-one individuals—citizens, lawful permanent residents, and undocumented aliens—who live or lived in seven buildings in Westchester County and Long Island, and who allege that ICE officials entered their homes without judicial warrants or valid consent in 2006 and 2007. The operations at issue, involving two different ICE law-enforcement components, variously targeted criminal and fugitive aliens or removable gang members, and resulted in approximately 600 arrests. In connection with these operations, plaintiffs allege that government officials, from officers and agents in the field to the former Secretary of the Department of Homeland Security, violated their Fourth and Fifth Amendment rights by entering their homes without valid consent and by discriminating against Latinos. Plaintiffs sought certification of a class of approximately two million Latinos residing in the New York area who "have been, or in the future will be," subject to unconstitutional "home raid operations."

The district court correctly denied plaintiffs' class-certification motion, ruling

that ICE's policies are facially constitutional, and that plaintiffs failed to establish that ICE has a pattern or practice of entering Latinos' homes without consent. Plaintiffs now petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the denial of class certification. But this Court has made clear that "the standards of Rule 23(f) will rarely be met," *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001), and plaintiffs fall far short here.

Rather than presenting a question of "fundamental importance to the development of the law of class actions," *id.*, plaintiffs simply seek to have this Court revisit the district court's application of well-established legal principles to the facts of this case, and re-weigh the merits of their contention that ICE's policies are illegal. These issues shed no light on the application of Rule 23, and if mere disagreement with the merits were enough, parties could always obtain interlocutory review of every class certification decision. Moreover, the questions plaintiffs raise can easily, and more effectively, be reviewed after final judgment, and plaintiffs are just as able to pursue the injunctions and damages they seek without class certification. Finally, plaintiffs have not demonstrated any special circumstances that merit deviation from the well-established general rule that an appeal may be taken only after a final judgment. Accordingly, the Petition should be denied.

II. Procedural History

A. District Court Proceedings

Plaintiffs commenced this action in September 2007, and the operative pleading is the fourth amended complaint (the "Complaint"), dated December 21, 2009. The Complaint alleges eleven causes of action, only two of which are asserted on behalf of a class: first, a "class action claim of Fourth Amendment violations" (Complaint ¶¶ 454-69), and second, a "class action claim of Fifth Amendment Equal Protection violations" (Complaint ¶¶ 470-83). The remaining claims—which seek money damages from the individual defendants under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and from the United States pursuant to the Federal Tort Claims Act—are asserted on behalf of the named plaintiffs only.

In addition to seeking a declaratory judgment that the defendants violated the Fourth and Fifth Amendments (Complaint at 135 ¶ 1), plaintiffs seek various forms of injunctive relief, including an order prohibiting the Government from "conducting raids without performing adequate pre-raid investigations" and "conducting raids without providing effective and/or adequate training" (*id.* at 137 ¶ 2(e)-(h)), as well as an order compelling the Government to "implement and ensure compliance" with law enforcement policies; "implement, maintain, and update internal ICE databases"; "design and maintain adequate training courses"; and "implement corrective measures to prevent any policies [and] practices that teach . . . law enforcement

officers to act in [a] constitutionally deficient manner." (*Id.* at 137-38 ¶ 3(a)-(d)).

Plaintiffs also seek injunctive relief that is specific to Latinos, including an order "permanently enjoining and restraining" the Government from "deploying groups of armed agents to descend upon the homes of Latinos in the pre-dawn hours" (*id.* at 135-37 ¶ 2(a)-(d)), and an order prohibiting the Government from "unlawfully identifying and targeting locations based on the belief that Latino individuals are known to live in or frequent such locations," or "designing raids with the intent to detain, interrogate, and seize Latinos based on their race" (*id.* ¶ 2(e)-(f)).

On December 7, 2007, the Government filed a motion to dismiss plaintiffs' claims for injunctive relief, arguing that plaintiffs lacked standing to obtain prospective injunctive relief because their fear of future constitutional violations was overly speculative under the doctrine set forth in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). On July 31, 2008, the district court denied the motion without prejudice after plaintiffs filed their second amended complaint. On May 19, 2010, the Government renewed its standing motion, and on August 1, 2011, the district court denied the motion without prejudice, ruling that plaintiffs had alleged sufficient facts to establish their standing to pursue injunctive relief, while leaving open the possibility that plaintiffs may not be able to prove their standing at trial.

On December 22, 2010, plaintiffs filed a motion to certify a class of "persons who are (1) Latino and (2) reside in the jurisdiction of the New York City regional

office (or field office) of ICE." While that motion was pending, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and plaintiffs later withdrew their class-certification motion. On September 22, 2011, plaintiffs renewed their motion, this time seeking to certify a class of "persons who, because they (1) are Latino; and (2) reside with the jurisdiction of ICE New York, have been subjected to and/or are at imminent risk of home raids by ICE New York." *See Aguilar v. ICE*, 07 Civ. 8224 (S.D.N.Y.) (Docket No. 297). Finally, on February 21, 2012, in a supplemental brief filed after oral argument, plaintiffs again changed their class definition, seeking certification of a class of "persons who are (1) Latino; (2) reside within the jurisdiction of ICE New York; and (3) have been, or in the future will be, subject to a home raid operation." *See id.* (Docket No. 334).

B. The Order of the District Court

On April 16, 2012, the district court issued an opinion and order (the "Opinion") denying plaintiffs' motion for class certification. At the outset, the district court noted that plaintiffs' proposed class "could potentially include approximately two million Latinos residing in the New York area," Opinion at 5, making it even larger than the proposed class in *Wal-Mart*, which the Supreme Court described as "'one of the most expansive class actions ever.'" *Id.* at 7 (quoting *Wal-Mart*, 131 S. Ct. at 2547). The district court also noted that plaintiffs must demonstrate by a preponderance of the evidence that they satisfy the elements of Rule 23(a), *id.* at 6,

and that *Wal-Mart* requires a "rigorous analysis" that frequently "overlaps with an analysis of the merits of plaintiffs' underlying claim," *id.* at 9.

The district court's analysis of plaintiffs' motion fell into two categories. First, the district court considered plaintiffs' allegation that the alleged constitutional violations occurred "under the auspices of nationwide operational plans and consistent with established policies." *Id.* at 11. The district court reasoned that such policies could raise common questions perhaps sufficient to establish commonality under Rule 23(a), but found that plaintiffs had not carried their burden of establishing the existence of such unconstitutional policies. Opinion at 14. For example, with respect to ruse techniques, the district court found that ICE's policies prohibit ruse techniques that are coercive, and officials "may not convince resident[s] that they have no choice but to let [the] officer inside." *Id.* at 18 (internal quotation marks omitted). Similarly, the district court acknowledged that ICE has adopted an "explicit, DOJ-endorsed policy prohibiting discrimination." *Id.* Thus, finding no facial constitutional problems with ICE's policies, the district court rejected plaintiffs' argument that commonality is established by the mere admission that ICE's policies are still in effect. *Id.* at 15 ("because such policies are in compliance with constitutional and legal requirements . . . the fact that the policies have not changed is not proof of an ongoing problem").

The district court then considered whether plaintiffs had nonetheless

demonstrated a "pattern or practice" of constitutional violations. In this regard, the district court noted that in the smaller *Wal-Mart* class, the Supreme Court had found that the plaintiffs' 120 affidavits—one for every 12,500 class members—were insufficient to carry their burden of demonstrating uniform, discriminatory treatment of women in a company with more than one million employees. Opinion at 17. Similarly, the district court found that these plaintiffs could not carry their burden of showing uniform unconstitutional conduct:

> [E]vidence that one home raid in five years had similar alleged misconduct as that described in the complaint (and the home raid took place approximately three years ago) both suggests little evidence of a remaining serious issue and is, in any event, itself insufficient to establish common questions for a class that would include almost two million Latinos in the New York area in 2012.

Id. at 21. Thus, the district court rejected plaintiffs' theories that ICE's policies require or permit unconstitutional conduct, or that, in any event, there is a "pattern or practice" of such conduct. *Id.* And having determined that plaintiffs failed to establish commonality, the court found it unnecessary to reach the remaining requirements of Rule 23. *Id.* at 22. The district court did observe, however, that "because there is no evidence that defendants currently engage in ongoing misconduct . . . , plaintiffs cannot show that defendants' actions are generally applicable to the class." *Id.*

III. Argument

A. Petitioners Have Failed to Meet the Standard for Permission to Appeal Under Rule 23(f)

Federal Rule of Civil Procedure 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed . . . within 14 days after the order is entered." Fed. R. Civ. P. 23(f). Rule 23(f) is an exception to the rule that an appeal may only be taken from a final judgment, and therefore leave to appeal is rarely granted; indeed, "the standards of Rule 23(f) will rarely be met." *Sumitomo*, 262 F.3d at 140. Petitioners seeking leave to appeal under Rule 23(f) "must demonstrate *either* (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Id.* at 139. In addition, the Court has "[left] open the possibility" that a petition that fails to establish either of the foregoing requirements "'may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal.'" *Id.* at 140; *accord Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 76 & n.4 (2d Cir. 2004).

The first test is not applicable here, because plaintiffs concede that the district court's order here would not "effectively terminate[]" the litigation. *See* Petition at

5. As to the second test—*i.e.*, whether there is a "compelling need" to resolve a legal question implicated by the district court's order—"a novel legal question will not compel immediate review unless it is of fundamental importance to the development of the law of class actions *and* it is likely to escape effective review after entry of final judgment." *Sumitomo*, 262 F.3d at 140 (emphasis added). This Court's reluctance to intervene absent compelling need reflects the "longstanding view that the district court is often in the best position to assess the propriety of the class," and of the importance of "preventing needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference." *Id.* at 139-40. Thus, immediate review is not appropriate merely because the district court decision implicates a novel legal question. *See Weber v. United States*, 484 F.3d 154, 160 n.5 (2d Cir. 2007) (rejecting argument that "Rule 23(f) may also serve a precedent-creation function"). Rather, as noted above, the legal question at issue must be not only "novel," but also "of fundamental importance" and "likely to escape effective review." *Sumitomo*, 262 F.3d at 140.

1. The Questions Presented Are Not Novel Legal Issues of Fundamental Importance to the Development of the Law of Class Actions

According to plaintiffs, the Petition presents three questions: (1) "Does *Wal-Mart* alter the Second Circuit's 'preponderance of the evidence' standard of proof for meeting the requirements of Rule 23?"; (2) "Does *Wal-Mart* alter the longstanding

prohibition against using the class certification ruling to make a finding on the merits . . . ?"; and (3) "Does *Wal-Mart* mandate denial of certification of a Rule 23(b)(2) civil rights class challenging a law enforcement agency's policies and practices on 'staleness' grounds when defendants concede that those policies remain in force?" Petition at 1-2. These questions—to the extent they are presented in this case at all—are not novel legal issues of "fundamental importance to the development of the law of class actions." *Sumitomo*, 262 F.3d at 140.

As an initial matter, the Petition does not present any "novel legal question." Petition at 1, 7. A "novel" legal question is one that courts have not addressed before. *See Sumitomo*, 262 F.3d at 142 (issue related to common-law fraud claim under New York law had never been addressed by New York Court of Appeals); *Hevesi*, 366 F.3d at 78-79 & 78 n.6 (district court applied fraud-on-the-market theory "in a novel context" because the theory "ha[d] not previously been invoked at the class certification stage"). But far from being "novel," the questions that the Petition purports to raise are settled tenets of class-action jurisprudence. For example, plaintiffs' first question presented—whether *Wal-Mart* alters the Second Circuit's "preponderance of the evidence" standard of proof for meeting the requirements of Rule 23 (Petition at 1)—is not "novel." Rather, the preponderance-of-the-evidence standard is well-established, and this Court continues to apply it after *Wal-Mart*. *Compare Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546

F.3d 196, 202 (2d Cir. 2008) ("the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.") *with Novella v. Westchester Cnty.*, 661 F.3d 128, 148-49 (2d Cir. 2011) (decided post-*Wal-Mart*) ("well-established rule that a plaintiff must satisfy all of the requirements of Rule 23, by a preponderance of the evidence."). And every district court to have considered the issue, including the district court here, has applied the same standard post-*Wal-Mart*. *See, e.g.*, *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2012 WL 1450553, at *6 (S.D.N.Y. Apr. 23, 2012) (citing *Wal-Mart*); *Poplawski v. Metroplex on the Atl.*, No. 11-CV-3765 (JBW), 2012 WL 1107711, at *5 (E.D.N.Y. Apr. 2, 2012) (citing *Wal-Mart*); *Kowalski v. YellowPages.com, LLC*, No. 10 Civ. 7318 (PGG), 2012 WL 1097350, at *12 (S.D.N.Y. Mar. 31, 2012) (citing *Wal-Mart*); *Lewis v. Alert Ambulette Serv. Corp.*, No. 11-CV-442 (JBW), 2012 WL 170049, at *8 (E.D.N.Y. Jan. 19, 2012) (citing *Wal-Mart*).

Likewise, there is nothing novel about the other legal issues that plaintiffs seek to appeal. Plaintiffs' second question presented—whether *Wal-Mart* "alter[s] the longstanding prohibition against using the class certification ruling to make a finding on the merits" (Petition at 1)—suffers from multiple defects. First, prior to *Wal-Mart*, there was no "longstanding prohibition" against considering the merits on a motion for class certification; rather, in 2006 the Court "align[ed] [itself] with . . . all of the other decisions . . . that have required definitive assessment of Rule 23

requirements, notwithstanding their overlap with merits issues." *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). Further, to the extent anything "novel" remained about the question of whether a merits analysis is appropriate, it was resolved by *Wal-Mart* itself, which made clear that a district court's "rigorous analysis" of the Rule 23 requirements "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551; *see id.* at 2552. And again, district courts within this Circuit—including the district court here—have faithfully followed *Wal-Mart*'s instruction that district courts must consider the merits when they are implicated in a Rule 23 analysis. *See, e.g.*, *Stinson*, 2012 WL 1450553, at *6 (citing *Wal-Mart*); *In re Bank of America Corp. Secs., Derivative & Emp. Ret. Income Sec. Act Litig.*, No. 09 MD 2058 (PKC), __ F.R.D. __, 2012 WL 370278, at *2 (S.D.N.Y. Feb. 6, 2012) (citing *Wal-Mart*); *Lewis*, 2012 WL 170049, at *8 (citing *Wal-Mart*); *accord* Opinion at 9 (Rule 23 analysis "frequently . . . overlaps with an analysis of the merits"). In sum, the first two "novel" questions presented have been addressed repeatedly by this Court and the lower courts, and resolved in a uniform and consistent fashion. Accordingly, they are not appropriate subjects for Rule 23(f) review.

Plaintiffs' third question presented—whether *Wal-Mart* "mandate[s] denial of certification of a Rule 23(b)(2) civil rights class challenging a law enforcement agency's policies and practices on 'staleness' grounds when defendants concede that

those policies remain in force"—has no relation to the issues decided below. The district court did not deny class certification because *Wal-Mart* "mandates" dismissal of Rule 23(b)(2) class actions on "staleness" grounds. Rather, the district court, after weighing the "voluminous" record on the class certification motion, concluded that plaintiffs had failed to "demonstrate the existence of a policy—let alone an ongoing one—of intentional targeting and intentional misconduct." Opinion at 12, 17; *accord id.* at 19 (finding "substantial evidence that no policy in fact condones the constitutional and other misconduct alleged"). The district court further found that plaintiffs' allegations of eight separate incidents of alleged unconstitutional misconduct—*i.e.*, one for every 250,000 proposed class members (where *Wal-Mart* had found one for every 12,500 to be inadequate)—were insufficient to meet Plaintiffs' burden of demonstrating commonality by a preponderance of the evidence. *Id.* at 17. And what plaintiffs describe as "staleness" is more aptly described as the district court's conclusion, reached after weighing a voluminous record, that the named plaintiffs whose homes were allegedly entered without consent five years ago have little in common with unknown putative class members who may "in the future" be the subject of an ICE operation for unknown and unknowable reasons. *Id.* at 20.

Put simply, the Government never argued—and the district court did not hold—that *Wal-Mart* mandates denial of certification of *all* "stale" Rule 23(b)(2) civil rights classes; rather, the Government argued (and the district court held) that *Wal-Mart*

mandates denial of *this* class certification. The district court is in the best position to weigh the "voluminous" record and decide whether plaintiffs have complied with the Rule 23 requirements. *See Sumitomo*, 262 F.3d at 139. Plaintiffs' disagreement with the district court may be the basis for an appeal after final judgment; but disagreement is not sufficient under Rule 23(f).

2. The Questions Presented Are Not Likely to Escape Review After Final Judgment

The legal questions raised in the Petition are fully capable of review after entry of final judgment, and, therefore, are not likely to "escape effective review." *Sumitomo*, 262 F.3d at 140. Plaintiffs make no attempt to explain why their disagreements with the district court's decision cannot be reviewed after entry of final judgment. Instead, they bluntly assert that the class certification decision "cannot be reviewed fully on appeal from final judgment" because "class certification is intertwined with claims for injunctive relief." Petition at 7.

Plaintiffs are incorrect. By definition, Rule 23(b)(2) class actions always seek injunctive relief, and therefore injunctive claims will always be somewhat "intertwined" with class certification; thus, under plaintiffs' interpretation, the grant or denial of a Rule 23(b)(2) class would always be immediately appealable, which is clearly not contemplated by either Rule 23(f) or this Court's decisions in *Sumitomo* and *Hevesi*. Moreover, the district court's decision to deny class certification does

not preclude plaintiffs from seeking injunctive relief; the district court has already ruled that plaintiffs "have pleaded facts that, if proven, would support their standing to seek injunctive relief." *Aguilar v. ICE*, 811 F. Supp. 2d 803, 827 (S.D.N.Y. 2011). Although the Government disagrees with that decision, it is the law of the case at present, and the Petition does not identify a single form of relief, injunctive or otherwise, that plaintiffs cannot seek as a result of the denial of class certification.

Courts have identified two types of cases where a class-certification order will effectively preclude appellate review. The denial of certification may "make[] the pursuit of individual claims prohibitively expensive," or the grant of certification may "force[] the defendants to settle." *Sumitomo*, 262 F.3d at 138; *see Hevesi*, 366 F.3d at 80-81. Plaintiffs have not alleged that they will be unable to pursue their claims absent class certification, nor is there any reason to believe that their ability to litigate will be even slightly compromised. *See In re IPO Sec. Litig.*, 471 F.3d at 41 ("the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge"). As noted above, despite the denial of class certification, plaintiffs retain the ability to pursue prospective injunctive relief—the same relief they would seek in a class action. In addition, the Complaint's requests for compensatory and punitive damages have never been asserted on behalf of a putative class, and, therefore, are unaffected by the denial of class certification.

Finally, the courts of appeals have often reviewed class-certification decisions in Rule 23(b)(2) class actions after final judgments have been entered. *See, e.g.*, *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 224 (2d Cir. 2006); *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983) (Friendly, J.); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942 (9th Cir. 2011); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333 (3d Cir. 2010); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys., Inc.*, 622 F.3d 1307 (11th Cir. 2010). Thus, there is no reason to conclude that the district court's denial of class certification will prevent plaintiffs from litigating this case to final judgment and seeking appellate review.

3. Plaintiffs' Complaints About the Merits Are Not a Basis for Review Under Rule 23(f)

The Petition expresses plaintiffs' many disagreements with the district court's opinion as to the merits of their claims. Plaintiffs complain, for example, that the district court "erred in appearing to declare ICE's ruse policy lawful" (Petition at 13); "erred in appearing to find operations plans directing shows of force and the surrounding of homes lawful" (*id.* at 15); "erred in appearing to hold ICE's protective sweep policy lawful" (*id.* at 16); and "erred in concluding that warrantless in-home detentions . . . are lawful" (*id.* at 17).

Not only are these issues not of "fundamental importance to the development of the law of class actions," *Sumitomo*, 262 F.3d at 140, they do not concern the "granting or denying [of] class-action certification" at all. Fed. R. Civ. P. 23(f). Rather, they are questions about the Fourth Amendment that are fully capable of review after final judgment. Put another way, plaintiffs believe ICE's policies on ruses, operations plans, protective sweeps, and detentive stops are unlawful; ICE disagrees. These issues have not yet been resolved, and, given that the district court has ruled that plaintiffs have standing to seek injunctive relief, nothing about the denial of class certification prevents them from continuing to litigate the merits of their position. The Petition makes no attempt to demonstrate how the district court's decision that ICE's policies are facially constitutional is of "fundamental importance" to the threshold requirements of Rule 23—numerosity, typicality, commonality, adequacy of representation, and predominance. *Cf. Hevesi*, 366 F.3d at 77-78 (granting Rule 23(f) petition, noting "close connection" between issue on which appeal was sought and predominance requirement). Rather, plaintiffs seek this Court's review of merits questions—whether ICE's policies encourage unconstitutional conduct—that have yet to be adjudicated. This cannot qualify for Rule 23(f) review. *See, e.g.*, *In re Vivendi Universal, S.A.*, No. 11-908 (2d Cir. July 20, 2011) (Docket No. 19) (denying Rule 23(f) petition "because the issues raised by the petition do not relate to the class certification requirements of Rule 23").

B. There Are No Special Circumstances that Merit Review Under Rule 23(f)

Plaintiffs suggest that immediate review under Rule 23(f) is appropriate because they seek to "vindicate fundamental rights" and "ensure accountability from a law enforcement agency whose victims have limited means to challenge misconduct," which, according to plaintiffs, creates "special circumstances that favor granting leave to appeal." (Petition at 20); *see also Sumitomo*, 262 F.3d at 140 ("leav[ing] open the possibility" that petition that does not otherwise meet standards of Rule 23(f) may "nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal"). But this case does not present "special circumstances" because, at bottom, its efforts to seek money damages and reform law enforcement practices make it substantially similar to any number of *Bivens*, § 1983, and injunction actions that are frequently filed against law enforcement agencies.

As noted above, the effect of *Wal-Mart* on the questions that plaintiffs present—relating to the standard of proof required, whether district courts should consider the merits on class certification, and the extent to which named plaintiffs who have allegedly suffered the effects of aberrational deviations from policy can satisfy the commonality requirement—has been extensively addressed by both this Court and the district courts. In addition, the denial of class certification does not affect plaintiffs' ability to "vindicate fundamental rights"; they remain entitled to pursue

money damages to redress any discrete wrong done to them, and they remain free to pursue every form of injunctive relief they have sought from the beginning. The district court's denial of class certification merely reflects the sensible principle that "[i]mproper arrests are best handled by individual suits for damages," *Rahman v. Chertoff*, 530 F.3d 622, 626-27 (7th Cir. 2008), and that "it is important that [the district court] not casually certify an injunctive class that could impose significant cost and burden on governmental entities." Opinion at 23.

Finally, although a detailed discussion of ICE's policies is beyond the scope of the Rule 23(f) standards, contrary to plaintiffs' assertions, the district court engaged in a careful review of the challenged ICE policies, and concluded that "there is substantial evidence that no policy in fact condones the constitutional and other misconduct alleged." Opinion at 19. The court relied on more than 2,800 pages of exhibits accompanying the parties' six briefs, as well as ICE's anti-discrimination policy, 12,000 pages of training materials, and ICE guidance concerning ruse techniques, permissible uses of force, curtilage, protective sweeps, and detentive questioning. *Id.* at 18-19 (*see also* B-106-109). The court also relied on deposition testimony demonstrating that ICE officers understand these materials, and ICE's policies "do not condone the complained of techniques alleged to have been used during the 2007 raids." *Id.* at 19 (*see also* B-110). Thus, to the extent review of the specific policies is warranted, the Court should reject plaintiffs' contention that the

district court did not "evaluate any challenged policy or cite any evidence," Petition at 12, and instead defer to its careful analysis. *See Sumitomo*, 262 F.3d at 139-40 (reluctance to intervene is matter of "efficiency and deference").

CONCLUSION

The petition for permission to appeal should be denied.

Dated: New York, New York
May 17, 2012

Respectfully submitted,

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