Case Nos. 17-17501 (L) and 17-17502

In the

United States Court of Appeals

for the

Ninth Circuit

B.K., by her next friend Margaret Tinsley, et al.,
Plaintiffs-Appellees,

v.

GREGORY McKAY, in his official capacity as
Director of the Arizona Department of Child Safety, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona (Phoenix), Case No. 2:15-cv-00185-ROS · Honorable Roslyn O. Silver, Senior District Judge

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CIRCUIT RULE 29-2(a) STATEMENT

This brief has been filed with the consent of all parties to this action.

Dated: July 6, 2018

Respectfully submitted,

/s/ Jason L. Lichtman
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STATEMENT OF INTEREST

Amici are professors of civil procedure, administrative law, and federal jurisprudence who offer a unique perspective about how the Federal Rules of Civil Procedure were designed to help courts review unlawful government policies.[1]

[1] No counsel for a party authored any part of this brief, and no person other than Amici and their counsel made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief. Amici are listed in the index and file in their individual capacity as scholars. They provide their institutional affiliation solely for purposes of identification.

SUMMARY OF ARGUMENT

Since the adoption of the modern class action rule, plaintiffs have litigated class actions to obtain injunctive relief from government agencies, institutions, and programs under Rule 23 of the Federal Rules of Civil Procedure. These cases have long included challenges to unwritten policies and practices that often escape review without class-wide fact-finding and declaratory relief. Indeed, the Supreme Court has recognized that civil rights cases are "prime examples" of what Rule 23(b)(2) was designed to address. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 361 (2011). In the process, the Court continued to affirm that plaintiffs may challenge not just express policies but also unstated institutional practices that "manifest[]" through a "subjective decisionmaking process[]." *Id*. at 353.

In this brief, Amici address a number of questions that have been raised about the rules governing standing, class actions and injunctive relief in cases where plaintiffs seek to enjoin unwritten systemwide governmental practices. Defendants ask this Court to overturn *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), where this Court affirmed a class action challenging systemic problems in Arizona's prisons—including inadequate medical treatment and staffing, as well as dangerous, isolating confinement conditions. As we show below, a nearly unbroken line of court decisions have found, as did *Parsons*, that class action

plaintiffs may obtain relief from such unlawful, systemwide governmental practices.

Courts routinely certify class actions where the applicable substantive law recognizes a claim for a defendant's liability and plaintiffs can prove that claim with common, class-wide evidence. This is true in cases, like this one, when government officials are "deliberately indifferent" to the safety of children in their care, and their policies and practices expose those children to a "substantial risk of serious future harm." Such cases typically do not involve an explicit class-wide *policy* but a pervasive *practice* of governmental indifference, mismanagement, and other dysfunctional administration. The drafters of the modern class action rule designed the class action to address these very kinds of governmental practices. Nothing in the Supreme Court's recent engagements with Rule 23 gives any reason to revisit fifty years of class action jurisprudence.

Amici make four points in support of the appropriateness of class certification in such cases.

First, plaintiffs have Article III standing to assert claims that the government violated their constitutional rights by exposing them to a substantial risk of harm. Once their standing is established, and upon a finding that their claim is typical of the class and raises common questions, Fed. R. Civ. P. 23(a)(2)&(3), the court has enough information to find the requisite standing of absent class members, too.

Second, Rule 23's structure and history confirm that Rule 23(b)(2) is intended for precisely the type of case alleged here. The committee that drafted the modern class action rule was determined that courts certify civil rights class actions, especially when defendants claimed that individual factors prevented aggregate challenges to the same root government misconduct.

Third, class plaintiffs raise "typical" and "common" claims when they allege that the same governmental policy or practice violates their substantive legal rights. Class actions for injunctive relief commonly distinguish between ongoing, undifferentiated injuries that all class members face as a result of class-wide policies and practices, on one hand, and specific harms that may materialize for only some class members, on the other. Courts have long held that plaintiffs may challenge class-wide policies in cases, like this one, where a government agency lacks funds, resources or personnel to provide groups of people with adequate health care or protection from abuse.

Fourth, parties need not spell out "every jot and tittle" of the injunctive relief they seek when they ask the court to certify a class action. Because class certification is a preliminary procedural determination, not a finding on the merits, it is neither efficient nor consistent with the law of remedies to require the court to rule on the precise injunctive relief it may order before it has determined the merits. Instead, a district court need determine only whether it has sufficient

information to conclude that it will be able to craft a class-wide injunction after a merits determination, even if its precise contours are not clear at the outset of the litigation.

ARGUMENT

I. PLAINTIFFS' SUBSTANTIAL RISK OF HARM CLAIMS GIVE THEM STANDING.

The proper analysis of standing in injunctive relief class actions requires close attention to the substantive law under which plaintiffs' claims actually arise.[2] Defendants in institutional reform litigation often argue that class members have standing only if each one has experienced all of the specific manifestations of the harm that the system-wide policies and practices inflict. *E.g.*, Def. Brief at 16, 18, 21. This argument fails when the plaintiffs' alleged injury is a government-created "substantial risk of harm." Neither the substantive law governing such claims nor Article III requires each class member to prove that he or she has suffered or is about to suffer every possible manifestation of harm that the government threatens.

[2] Defendants only directly challenge the standing of the Medicaid subclass. As is often the case, however, they make claims about standing and Article III in their class certification discussion. *Cf. Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001) ("[T]he issues of standing, class certification, and scope of relief are often intermingled" in cases seeking "system-wide injunctive relief[.]") *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). We address general standing principles that these claims implicate.

A. Substantial Risk of Harm Claims Do Not Require Each Class Member to Have Suffered Every Particular Harm a Defendant's Practices and Policies Can Inflict.

Any inquiry into whether plaintiffs have standing is "gauged by the specific . . . claims that [they] present[]." *Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Children in foster care have a "protected liberty interest" in "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992); *Tamas v. Dep't of Social & Health Servs.*, 630 F.3d 833, 844-47 (9th Cir. 2010). When government officials are "deliberately indifferent" to their safety, these children can allege claims to challenge the "substantial risk of serious future harm" that these custodians' policies and practices create. *E.g.*, *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (describing foster children's substantive due process and federal statutory rights); *see also Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 162-163 (D. Mass. 2011); *M.D. v. Perry*, 294 F.R.D. 7, 33 (S.D. Tex. 2013). These claims are equivalent to those brought by prisoners when prison mismanagement subjects them to a risk of harm. *E.g.*, *Brown v. Plata*, 563 U.S. 493, 531 (2011); *Parsons*, 754 F.3d at 678, 681 (collecting prisoner's rights cases and describing claims).

A substantial risk of harm claim does not require proof that each class member has suffered every type of harm that a defendant's policies and practices may impose. Arguments in favor of such a requirement confuse particular manifestations of harm—evidence that plaintiffs will use to prove their claim—with the risk of harm itself, the injury-in-fact that gives the class members standing. *Parsons*, 754 F.3d at 675-678 & n.17; *M.D.*, 294 F.R.D. at 45. A standing challenge that "rests on a mistaken view of the injuries alleged" must fail. *Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 409 (S.D.N.Y. 2015).

The substantial risk of harm claims that children in foster care bring are hardly exceptional. When the substantive law permits, plaintiffs commonly use evidence of specific harms that have materialized for some class members to help prove the defendant's liability to the class as a whole. *E.g.*, *Hernandez v. County of Monterrey*, 305 F.R.D. 132, 149 (N.D. Cal. 2015); *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1123 (M.D. Ala. 2016); *Gray v. County of Riverside*, Civ. No. 13-444, 2014 WL 5304915, at *9 (C.D. Cal. Nov. 7, 2014); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 27 (D.D.C. 2006). But, when the substantive law requires plaintiffs to "prove the existence of the forest," a class need not "individually prove the existence of each tree" to obtain certification. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008).

B. Article III Permits Class Actions Alleging Substantial Risk of Harm Claims.

Article III's case or controversy requirement applies to class representatives just as it does to plaintiffs in every case. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). Standing imposes no barrier to class actions bringing substantial risk of harm claims arising from system-wide governmental policies and practices. Two related principles of standing doctrine in these cases permit these cases to proceed.

First, standing doctrine does not require every class member to show that he or she is at imminent risk of suffering every possible harmful manifestation of the defendant's conduct. It is true that an individual plaintiff must show more than past harm to establish standing for prospective injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Thus named plaintiffs alleging a risk of harm claim must meet an imminence threshold to satisfy Article III's case-or-controversy requirement. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). When named plaintiffs assert injuries inflicted on a class of plaintiffs, courts consider the "context of the harm asserted by the class as a whole . . . to determine whether a credible threat that the named plaintiff's injury will recur has been established." *Armstrong*, 275 F.3d at 861; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985). This is so because, after class certification, "the class . . . acquire[s] a legal status separate from the interest asserted by the named plaintiff." *Genesis*

Healthcare Corp. v. Symczyk, 569 U.S. 66, 74 (2013) (citation and alterations omitted).

Armstrong v. Davis illustrates the point. There, a class of prisoners and parolees with vision, renal, hearing, mobility, and learning impairments challenged the defendants' failures to accommodate their disabilities during the parole and parole revocation processes. 275 F.3d at 854. The Ninth Circuit did not require every class member, regardless of impairment, to show that the defendants' inadequate efforts to provide closed-captioned video imminently threatened him, or to establish that a lack of ramps subjected her to an immediate risk. Rather, standing required the court to determine whether "*the class* . . . establish[ed] a pattern of discrimination that threatens to recur." *Id.* at 864 (emphasis added).

Because of systemic problems in Arizona's foster care system, one third of the children in the Defendants' custody do not have their health needs properly assessed or addressed. Def. Brief at 16. More than a fifth of these children go more than a year before a comprehensive health exam. *Id.* In such instances, a class of children can easily meet the imminence requirement. *Compare DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) (noting that 1.2% of children in a state's foster care system had actually suffered injury or neglect and concluding that the class "live[d] under an imminent threat of serious harm"). Any other version of the imminence requirement would thwart the Supreme Court's

instruction that a "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *accord Farmer v. Brennan*, 511 U.S. 825, 828 (1994). When systemic deficiencies in "staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers." *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

The second principle permits class representatives to challenge systemic policies and practices. A class representative must herself be injured to have standing, and she can challenge only that aspect of the defendant's conduct to which she has been subject. *Simon*, 426 U.S. at 40 n.20; *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). But when a class representative litigates on behalf of herself and others, she can attack the full range of the defendant's misconduct so long as she targets the same root conduct that injures her. *Gratz v. Bollinger*, 539 U.S. 244, 265 (2003); *Armstrong*, 275 F.3d at 867. For example, a class representative denied university admission may seek injunctive relief on behalf of different groups of students because the "same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines." *Gratz*, 539 U.S. at 267; *see also Ang v. Bimbo Bakeries USA, Inc.*, Civ. No. 13-1196, 2014 WL 1024182, at *4 (N.D. Cal. Mar. 13, 2014) (discussing *Gratz*).

In such cases, when the class representative as an individual has standing to sue and the class otherwise meets the requirements for certification under Rule 23, the case may proceed on a class-wide basis. *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) ("Once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met."); *Kirola v. City and County of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017). This is because the requirements of Rule 23(a), especially the requirements that the class claims raise common issues and that the class representative's claims are typical of those presented by the class, assure the court that the absent class members have a similarly genuine controversy to that of the named plaintiff. This approach to class standing has been adopted "in nearly every circuit," including the Ninth. 1 William B. Rubenstein, Newberg on Class Actions § 2:3.

Standing doctrine honors these two principles for substantive and procedural reasons. Substantively, many class actions for injunctive relief involve claims that challenge a pattern of misconduct or a range of illegal practices and "authoriz[e] the court to issue a remedy to benefit these groups and not particular members of them." David Marcus, *The Public Interest Class Action*, 104 Geo. L.J. 777, 811 (2016) (collecting cases); *Disability Rights Council of Greater Wash.*, 239 F.R.D. at 26 (observing that the plaintiffs' ADA claim requires "a comprehensive inquiry

into [the defendant's] systems, patterns, and practices"). A rule requiring each class member to have been exposed to every particular aspect of the defendant's harmful conduct, or a rule requiring each class member to establish his or her own imminent risk of harm apart from the class, would effectively bar such class claims entirely. Nevertheless, in the fifty years since Rule 23's revision in 1966, plaintiffs in institutional reform cases have continued to maintain them successfully. *E.g.*, *Plata*, 563 U.S. at 531 (allowing injured class representatives to pursue injunctive relief for prisoners with "no present physical or mental illness" because they experience the same risk when "the State continues to provide inadequate care").

Procedurally, if class members other than the named plaintiffs were required to submit specific evidence to establish their own standing, then a core function of class actions—permitting named plaintiffs to represent a passive group of class members—would be "significantly compromised." *Newberg*, *supra* § 2:3 (collecting cases). Imposing that impractical burden would go well beyond what is needed to assure that Rule 23 class actions involve parties with real stakes in the outcome and to "confine[ ] the Judicial Branch to its proper, limited role." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and in the judgment).

To the extent defendants in such cases believe that the various harms that class members have endured result from a different array of experiences, forces,

and practices, those arguments are best couched in terms of Rule 23(a)'s commonality requirement, not in terms of standing. 7AA Charles Alan Wright et. al, Federal Prac. & Proc. § 1785.1 (3d ed. 2018) ("Wright & Miller"). Unlike the doctrine of standing, which is primarily concerned with ensuring that a real case or controversy exists, Rule 23's requirements are designed to address concerns about the relationship between the class representative's and the class members' claims for relief. So long as plaintiffs show they suffer from the same, undifferentiated risk of harm for the purposes of class certification, they have standing to obtain a judicial remedy tailored to those claims on behalf of a class.[3]

II. THE STRUCTURE AND HISTORY OF RULE 23 SUPPORT CERTIFICATION OF CLASS ACTIONS CHALLENGING GOVERNMENT PRACTICES.

These Arizona children argue that the State's maladministration of its foster care system is at the root of their shared, undifferentiated risk of harm. Once the references to standing and Article III are cleared to the side, the overall thrust of

[3] *Lewis v. Casey* does not hold otherwise. There, the district court issued an injunction to improve court access for prisoners in the Arizona prison system. This injunction required, for instance, the State to make better Spanish-language materials available, even though the class representative spoke English, and even though the only specific harm the class representative proved at trial was his facility's failure to adequately accommodate his illiteracy. 518 U.S. 343, 358-59 (1996). The district court did not find that a set of class-wide policies or practices caused all problems with court access in Arizona prisons. *Id.* at 358-360. Since *Lewis v. Casey*, the Supreme Court has interpreted Rule 23(a)'s commonality requirement to demand that class representatives show with evidence that the question of what causes all class members' injuries has "a common answer." *Wal-Mart*, 564 U.S. at 352. As a result, the sort of problems that arose in *Lewis v. Casey* should rarely, if ever, materialize again.

Defendants' arguments is for an interpretation of Rule 23 that would limit injunctive relief class actions to those that challenge explicit, stated policies, not those that go after pervasive customs or practices that cause class-wide harm. Yet Rule 23's structure and history confirm that it is intended for precisely this type of case, regardless of whether the defendant has articulated an explicit policy in connection with the challenged conduct.

A. The Structure of Rule 23(b) Supports Certification of Classes Alleging Systemic Governmental Action.

Rule 23(b) has three provisions with very different purposes, and these differences are reflected in the text of the rule. The purpose of Rule 23(b)(1), which is rarely used, is to avoid the problem of inconsistent judgments or judgments that affect non-parties, a class action analogue to Rules 19 and 22. The purpose of 23(b)(2), the provision at issue here, is to allow collective litigation when there is one root cause of the plaintiffs' harm which can be remedied by an injunction or declaration by the court. By contrast, the purpose of the more onerous requirements of Rule 23(b)(3) governing money damages class actions is to protect class members who might be better off filing an independent lawsuit.

These differences are evident from the text of the rule. Rule 23(b)(2) focuses on the *defendant's* conduct; it requires that the defendant have "acted or refused to act on grounds that apply generally to the class" and notably does *not* require the court to consider differing individual class member interests as a condition of class

certification beyond those required by Rule 23(a)(4) (adequacy) and the due process clause. *Hansberry v. Lee,* 311 U.S. 32, 43 (1940). Compare that text to Rule 23(b)(3), which focuses on the *class members*' individual claims and injuries; it explicitly requires a finding that common questions "predominate over any questions affecting only individual members" and specifically suggests that courts evaluate "the class members' interests in individually controlling" their own suits. Fed. R. Civ. P. 23(b)(3); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614-16 (1997) (describing the scrutiny required under Rule 23(b)(3) "in which class-action treatment is not as clearly called for as it is in . . . (b)(2) situations") (citations omitted). In other words, the fact that 23(b)(3) specifically singles out individual class members' interests in going it alone should inform the courts' reading of Rule 23(b)(2), which, for good reason, does not have such a requirement.

The functional reason that injunctive class actions do not require the court to consider individual class member interests in going it alone is that Rule 23(b)(2) was designed to permit collective lawsuits alleging systemic harms to be resolved with systemic solutions. The classic example, as evidenced by the history of the drafting of this rule discussed below, is desegregation litigation. The liability question in desegregation litigation focused on the defendant's operation of its school system, not on the individual educational needs of particular students; and the remedy question similarly focused on how the system had to change, not on the

specific schools, classrooms, or teachers to which a particular child had to be assigned. Indeed, suppose that a court ordered an all-white school to accept a single African American student. That injunction would not create an integrated school; it would not even serve that single student well. The drafters of the rule understood this and drafted the rule with this problem in mind. Similarly, suppose that a court ordered that one child receive dental care; such an injunction would do nothing to address the systemic problem of a chronic denial of dental care to hundreds of children, nor the inter-relationship between the funding for dental care and that for adequate placements within a single department's budget.

This does not mean that a court cannot take into account the existence of different interests among class members in a (b)(2) class. Indeed, courts have permitted many affected persons to be heard in hearings concerning remedies for systemic wrongs. *See, e.g.,* Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of A Special Master*, 78 Colum. L. Rev. 707 (1978). But such differences cannot be a barrier to class certification once plaintiffs have shown that there is a common root cause of the alleged violation of the law.

B. The History of Rule 23(b)(2) Supports Class Certification.

Understanding the history of the modern class action rule and its relationship to unconstitutional governmental action highlights why an injunctive relief class action is appropriate in cases challenging systematic governmental practices as

well as express policies. The effort to revise Rule 23 coincided with efforts after *Brown v. Board of Education,* 347 U.S. 483 (1954) to desegregate racially segregated schools. By the early 1960s, some districts had abandoned crude, overt policies that simply required segregated schools. Instead, school boards gave children a default school assignment, but allowed them to petition to have that assignment changed. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 684-85 (2011). Whether a board would grant any particular child's petition ostensibly depended on a host of individual, facially nondiscriminatory factors specific to each one. *E.g., Joyner v. McDowell Cty. Bd. of Educ.,* 92 S.E.2d 795, 798 (N.C. 1956). As administered, however, these policies kept schools segregated. Boards made default assignments by race, then systematically deployed a set of practices—foot-dragging, pretextual denials, and the like—to reject individual petitions. Marcus, *supra*, at 687-88. When challenged in class actions, governments invoked these individualized remedial processes to argue that no two children's claims to attend desegregated schools depended on common questions of law or fact. At that time (which pre-dated the modern class action rule), such arguments succeeded in derailing desegregation class actions, even as schools remained categorically segregated. *E.g., Brunson v. Bd. of Trustees of Sch. Dist. No. 1 of Clarendon Cnty.,* 30 F.R.D. 369, 370-71 (E.D.S.C. 1962).

The committee drafting the modern class action rule was determined that courts certify classes in such cases.[4] According to the late Charles Alan Wright, one of the lead drafters of the modern class action rule, the Committee members most responsible for the revised Rule 23 were "keenly interested" in these attempts to use individual procedures to defeat desegregation class actions. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Feb. 16, 1963), microformed on CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.). "It is absolutely essential to the progress of integration," Clark wrote the committee reporter Benjamin Kaplan, "'that such suits be treated as class actions . . . .'" Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Feb. 6, 1963), microformed on CIS-6312-65 (Jud. Conf. Records, Cong. Info. Serv.); Marcus, *supra* at 706. Wright then sent Kaplan a letter that quoted extensively from *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), a case in which a school board attempted to defeat a class action on grounds that any particular student's assignment to any particular school required an individualized process. The Fifth Circuit rejected this argument because the claim of individualization was an

[4] The only concern that Rule 23(b)(2) class actions triggered among committee members involved worries that tortfeasors responsible for mass accidents would bring declaratory judgment class actions against victims to extinguish their tort liability on favorable terms. Marcus, *supra*, at 699; *id.* at 708. To "strengthen[] the (b)(2) category," the committee revised Rule 23(b)(2) to address this concern and clarify "the basic principle" that class actions for injunctive relief be available "in civil rights cases." Memorandum from Benjamin Kaplan and Albert Sacks (Dec. 2, 1963), at 7 (on file with authors).

illusion. "Properly construed," the Fifth Circuit reasoned, "the purpose of the suit was not to achieve specific assignment of specific children to any specific . . . school." *Id*. at 288. Rather, the suit "was directed at the system-wide policy of racial segregation." *Id*. After receiving Wright's letter quoting from *Potts*, Kaplan redrafted Rule 23(b)(2) and included *Potts* in the Advisory Committee's note on the revised rule as an exemplar of the Rule 23(b)(2) class action.

The drafters of 23(b)(2) specifically sought to avoid an analysis focusing only on *individual outcomes* rather than *systemic causes*. Kaplan recognized that a Rule 23 without (b)(2) would "leave open the distinct possibility that a Negro child may apply on his own behalf for admission to school and would be entitled to a decree in his favor alone. . . . There are plenty of Boards who would be very happy to be engaged in what you call 'incompatible standards."' Transcript of Session on Class Actions 9 (Oct. 31, 1963-Nov. 2, 1963), microformed on CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.) (*quoted in* Marcus, *supra* at 706). This history has been repeatedly recognized by federal courts from the Supreme Court on down in affirming certification of class actions seeking injunctive relief where the plaintiff class challenged a systemic practice or policy. *See, e.g., Wal-Mart*, 564 U.S. at 361 ("'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture.") (quoting *Amchem Prods.,* 521 U.S. at 614).

III. COURTS ROUTINELY FIND COMMON AND TYPICAL QUESTIONS IN INJUNCTIVE RELIEF CLASS ACTIONS AGAINST GOVERNMENTAL PRACTICES.

Plaintiffs seeking class certification must show that "there are questions of law and fact common to the class." Fed. R. Civ. P. 23(a)(2). Just as the drafters of Rule 23(b)(2) anticipated, courts have consistently and liberally construed this language to permit injunctive relief against the government. Conduct "appl[ies] generally to the class" when the government (1) establishes a "regulatory scheme common to all class members," or (2) acts in a "consistent manner toward members of the class" such that its "actions may be viewed as part of a pattern of activity." 7AA Wright & Miller, *supra* § 1775 (collecting cases).

Courts have long certified classes when plaintiffs offered proof of an unwritten, unlawful practice, particularly where class discovery and trial might be the only way for parties to challenge governmental action that otherwise would escape detection or redress. *See, e.g., Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (class challenging heating conditions in prison); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 256 (S.D.N.Y. 2006); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (challenging foster care conditions). Injunctive relief class actions are particularly important in civil rights cases because those cases "often involve classes which are difficult to enumerate but which involve allegations that

a defendant's conduct affected all class members in the same way." *Newberg*, *supra* § 4.40 (collecting cases).

The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* is not inconsistent with this long-standing approach. In *Wal-Mart*, a putative class of 1.5 million female employees sued their retail employer alleging gender discrimination in violation of Title VII. 564 U.S. at 343. The Court rejected certification of the *Wal-Mart* class because, among other things, while the plaintiffs may have suffered a Title VII injury, it found their collection of individualized claims did not rely on a "common contention." *Id*. at 350 (noting that "Title VII, for example, can be violated in many ways"). In so doing, *Wal-Mart* expressly distinguished such sprawling nationwide damage class actions from challenges to systemic governmental abuse. Recounting the history of the class action rule, the Court in *Wal-Mart* recognized that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Id*. at 361 (citation omitted). The Court reaffirmed that plaintiffs may continue to challenge unwritten and unlawful common practices that "manifest[]" in a "subjective decisionmaking process[]." *Id*. at 353.

Since *Wal-Mart*, appellate courts have continued to endorse class actions that challenge unstated governmental policies and practices in cases seeking injunctive relief. *See, e.g, Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017) (class of

prisoners challenging excessive heating in prison); *DL v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017) (class of former pre-school age children challenging implementation of learning plans under IDEA); *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016) (class of plaintiffs challenging practice of sweeping streets of pedestrians in the morning hours); *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015) (class of citizens challenging failure of municipality to provide community-based care under Medicaid); *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) (class of inmates challenging a policy of housing, in the same cells, inmates known to be hostile to one another); *Parsons*, 754 F.3d 657 (class of prisoners challenging policies related to their medical and dental care). In two appellate cases decided since *Wal-Mart*, district courts re-certified classes after their respective courts of appeal had vacated and remanded their certification orders in light of *Wal-Mart*.[5]

In only two cases against government defendants since *Wal-Mart* have courts of appeals rendered decisions that left timely injunctive relief classes uncertified. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012);

[5] *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012); *M.D.*, 294 F.R.D. at 7 (class of children challenging Texas placement practices within child protective services); *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013); *DL v. District of Columbia*, 302 F.R.D. 1 (D.D.C. 2013) (class of children challenging failure to provide required education under IDEA).

Phillips v. Sheriff of Cook Cnty., 828 F.3d 541 (7th Cir. 2016).[6] In *Philips,* the court found that the plaintiffs' claims were isolated instances, not systemic, while in *Jamie S.*, the court found that individualized hearings were required to determine class membership. These cases differ from lawsuits, like this one, which allege that systemic governmental neglect exposes plaintiffs to serious harm. *Compare Parsons*, 754 F.3d at 680 n. 23 ("Even if some . . . are exposed to *a greater or idiosyncratic* risk of harm by the policy and practice of not hiring enough staff to provide adequate medical care to all inmates, that single policy and practice allegedly exposes every single inmate to a serious risk of the same basic kind of harm.") (emphasis in original).

Federal courts do require plaintiffs to adduce more robust evidence where there is reason to ask whether a common thread indeed connects all of their experiences. But all that means is that plaintiffs can no longer rely on unsupported allegations that their various harms all flow from a defendant's informal but systemic common practice. In such cases, they need only establish with evidence that this may be so. *Wal-Mart*, 564 U.S. at 351.

Plaintiffs should be able to establish a common thread connecting the class members with traditional evidentiary tools, including declarations, photographs,

[6] In one other case, *Truesdell v. Thomas*, 889 F.3d 719 (11th Cir. 2018), the plaintiff never sought class certification under Rule 23(b)(2) in the district court.

and videos. *See, e.g., Braggs*, 317 F.R.D. at 663 (plaintiffs' evidence demonstrated that prisoners' procedural due process challenge can be "answered in one stroke—namely, by determining whether [] involuntary-medication practices adequately protect due-process rights."). As noted, particular instances of government misconduct also may serve as evidence of a larger policy or practice. *E.g.*, *Armstrong*, 275 F.3d at 871 (describing "individual items of evidence as representative of larger conditions or problems"); *Disability Rights Council of Greater Wash.*, 239 F.R.D. at 27 ("individual experiences with the [defendant's] service" will serve as evidence to resolve "a comprehensive inquiry into [the defendant's] systems, patterns, and practices"). A higher bar would perversely limit class-wide challenges to illegal unwritten governmental practices, where class discovery and trial may be the only way for parties to demonstrate the merits of their challenge to unlawful government action. In sum, class certification does not require an adjudication of the merits; instead, it only requires—in the absence of an express policy or practice—that plaintiffs proffer some "glue" holding together the alleged reasons for the activity they challenge. *Wal-Mart*, 564 U.S. at 352. *See also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013) (a putative class "need not, at that threshold, prove that the predominating question will be answered in their favor").

The claims that these children bring require them to prove that Defendants are deliberately indifferent, and that this deliberate indifference creates a substantial risk of harm for children in the Arizona foster care system. These two elements pose common questions. In other words, the Arizona children claim that the State's actions with respect to any individual child have a root cause in the overall management of the foster care system. The common question is: are Defendants deliberately indifferent to the safety and wellbeing of children in the Arizona foster care system? Defendants here, like other government agencies, must make choices about how to operate the Arizona foster care system—how many caseworkers to employ, how to determine appropriate placements, how to monitor the provision of medical care, etc. An agency does not typically single out a particular foster child but instead employs a set of customs and practices that are the same for all children, and that may be deliberately indifferent to the safety of all children. Aggregate, common evidence can show that such deliberate indifference creates a substantial risk of harm for all class members. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (observing that the relevant substantive law, not the form a proceeding takes, determines the permissibility of aggregate evidence).

IV. COURTS HAVE FLEXIBILITY TO DETERMINE CLASS-WIDE INJUNCTIVE RELIEF AFTER A DECISION ON THE MERITS.

Before a court can issue an injunction, it must decide whether there is a violation on the merits, as well as the scope of any relief. Neither Rule 23 nor Rule 65 of the Federal Rules of Civil Procedure requires the parties to precisely identify the precise scope of injunctive relief they seek at the class certification stage. Federal courts have both the authority and the responsibility to fashion appropriate injunctive remedies *after* a decision on the merits.

Rule 23(b)(2) says that it applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." Since its adoption, Rule 23(b)(2) has facilitated timely and well-tailored injunctive relief following a hearing on the merits. In much of the desegregation litigation that motivated the 1966 amendments to Rule 23, it was unclear at the outset what remedy a court would ultimately order, and class members sometimes disagreed as to which remedial measures would be most desirable or appropriate. Some favored busing; some sought the creation of magnet schools; some called for improvements to their existing neighborhood schools; and some preferred different approaches entirely. As the Supreme Court noted, "[t]he reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have

traditionally employed." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31 (1971). Then and now, this reconciliation properly occurred after a full merits inquiry, and long after the court determined whether to certify a class under Rule 23(b)(2).

In a class action, or in any other case, it is the court's findings on the merits that "provide[] the necessary predicate for the entry of a remedial order," "impose[] a duty on the District Court to grant appropriate relief," and define the nature and scope of the relief that is appropriate to the circumstances. *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id*.

In keeping with the need to eventually tailor equitable relief to the specific circumstances of a case, courts continue to recognize that "Rule 23(b)(2) does not require that every jot and tittle of injunctive relief be spelled out at the class certification stage; it requires only 'reasonable detail' as to the 'acts required.'" *Yates*, 868 F.3d at 368. At the class certification stage, the plaintiffs need only show that they satisfy Rule 23(b)(2), not Rule 65(d)(1)—which in any event is directed to judges, not parties. If the district court has sufficient information to conclude that it will be able to craft a class-wide injunction after it determines the merits, even if the precise contours of that injunction are not yet clear, the

requirements of Rule 23(b)(2) have been met. *Parsons*, 754 F.3d at 689 (Rule 23(b)(2) permits the details of an injunction "to be determined by the district court if, after a trial, it ultimately concludes that the defendants engaged in unlawful conduct"); *Devaughn*, 594 F.3d at 1201 ("Rule 23(b)(2) demands class members' injuries alleged by Named Plaintiffs at the certification stage appear 'sufficiently similar that they can be addressed in a single injunction that need not differentiate between class members.'" (quoting *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008)).

Indeed, the structure of Rule 23 supports the practice of waiting until after the merits stage to determine the specifics of injunctive relief. Class certification occurs early in the litigation, Fed. R. Civ. P. 23(c)(1)(A), and may be revisited at any time before final judgment, Fed. R. Civ. P. 23(c)(1)(C). *See China Agritech, Inc. v. Resh*, No. 17-432, 138 S.Ct. 1800, 1802 (U.S. June 11, 2018) (the rule "instruct[s] that class certification should be resolved early on"). At that early stage, the only merits determinations appropriate to make are those necessary to proving the requirements of Rule 23. *Amgen*, 568 U.S. at 468 (stating that at the class certification stage, plaintiffs need not "prove that the predominating question will be answered in their favor"); *Wal-Mart*, 564 U.S. at 351 (stating that the analysis of class certification requirements may "overlap with the merits of the plaintiff's underlying claim"). Any merits determinations that are considered at

class certification are provisional only. *Amgen*, 568 U.S. at 477 (stating that "[i]f the class is certified, materiality might have to be shown all over again at trial"); *Wal-Mart*, 564 U.S. at 351 n.6 (explaining that in securities cases, plaintiffs will have to prove that their shares were traded on an efficient market once at certification and again at trial).

Because class certification may be revisited, it is neither efficient nor consistent with the law of remedies to require the court to opine on the precise injunctive relief it will order before it has determined the merits.[7] *See Parsons*, 754 F.3d at 689.

CONCLUSION

Certification of injunctive relief class actions like this one challenging governmental policies and practices is consistent with Rule 23(b)(2)'s text, structure, and history, as well as with a long and unbroken line of case law.

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[7] Preliminary injunctions are an exception to this rule, but even there the party seeking the injunction must demonstrate that it is "likely to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because it contains 6893 words, which is less than one-half the permissible word count of principal briefs (Fed. Circ. R. 32-1(a)), excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System on July 6, 2018.

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