No. 21-2286

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.T., by his parents MICHELLE and JAMIE T., on behalf of himself and all similarly situated individuals; K.M., by his parents DANIELLE and STEVEN M., on behalf of themselves and all similarly situated individuals; THE ARC OF WEST VIRGINIA,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant-Appellant,

and

KANAWHA COUNTY SCHOOLS; RON DUERRING, Superintendent, Kanawha County Schools, in his official capacity,

Defendants.

On Appeal from the United States District Court
for the Southern District of West Virginia
No. 2:20-cv-00057

BRIEF FOR MEMBERS AND ALLIES OF THE NATIONAL EDUCATION CIVIL RIGHTS ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici* certify that *Amici Curiae* are registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

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INTEREST OF A*MICI CURIAE*

The *Amici* organizations are national and state organizations dedicated to advancing and protecting the civil rights of students who have been marginalized. The *Amici* organizations have extensive experience with class action procedures in the context of education rights and other civil rights.

Each organization has given counsel permission to file this *amicus* brief on its behalf.

Convened by the National Center for Youth Law, **Education Civil Rights Alliance ("ECRA")** is a diverse and experienced group of organizers, educator organizations, community groups, professional associations, and civil rights organizations committed to protecting marginalized students' and their parents' civil rights in the education context, including by ensuring courts have authority to remedy violations of those rights. The following organizations are members and allies of ECRA with an interest in this matter.

The **National Center for Youth Law ("NCYL")** is a non-profit organization that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to ensure that children have the resources, support, and opportunities they need, including educational opportunities. NCYL uses class action and individual litigation, legislative advocacy, and other strategies to ensure that all youth receive a high-quality education.

The **American Civil Liberties Union ("ACLU")** is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared both as direct counsel and as *amicus curiae* in numerous cases concerning the rights of students. *E.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Fry v. Napoleon Cmty. Schools*, 137 S. Ct. 743 (2017); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021).

Public Counsel is among the nation's largest providers of pro bono legal services. For over fifty years, Public Counsel has worked with communities and clients to create a more just society through legal services, advocacy, and civil rights litigation. Public Counsel aims to ensure that public schools are engines of equality and opportunity and that all children have equal access to education. Securing civil rights is an American value and class action lawsuits are a singularly important and effective tool to remedy discrimination and civil rights violations.

Education Law Center ("ELC"), a nonprofit organization founded in 1973, serves as a leading voice for public school children and one of the most effective advocates for equal educational opportunity and education justice in the United States. ELC provides research and analyses; assistance to parent and community organizations, school districts, and states; and support for litigation and other efforts

to bridge resource gaps in the nation's high-need schools. As part of its work, ELC has participated as *amicus curiae* in numerous educational opportunity cases in state and federal courts across the nation.

Southern Poverty Law Center ("SPLC") is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. As part of this mission, the SPLC has brought litigation, including class actions, across the south advocating for children with disabilities and other children in public schools. It also participates as *amicus curiae* in cases on these issues throughout the country.

Equal Rights Advocates ("ERA") is a national non-profit civil rights organization that fights for gender justice in workplaces and schools across the country. Since 1974, ERA has stood on the front lines of the struggle for civil rights and social justice, fighting to protect and expand rights and opportunities for women, girls, and people of all gender identities. ERA has served as counsel and participated as *amicus curiae* in numerous class action and individual cases involving the interpretation and enforcement of civil rights laws. ERA knows that preserving plaintiffs' access to injunctive and declaratory relief via class action lawsuits is critical to fulfilling the promise of equal educational opportunity for all.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy

and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The Native American Disability Law Center ("NADLC") is the American Indian Consortium of the protection and advocacy (P&A) system designated by the Navajo and Hopi Nations and serving Native American communities across the Four Corners region of the Southwest. The NADLC provides individual and systemic advocacy for Native American children receiving special education services across multiple educational entities, including the Bureau of Indian Education. Education cases comprise a significant portion of the NADLC's individual cases.

The Georgia Advocacy Office ("GAO") is the designated Protection and Advocacy System for the State of Georgia. Its mission is to work with and for people who experience disabilities to protect against abuse and neglect and to ensure equal access to leading a good life within the community.

The Education Law Center-PA ("ELC-PA") is a non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through individual representation, impact litigation, community engagement, and policy advocacy, ELC-PA has worked for over 46 years to eliminate systemic inequities that lead to disparate educational outcomes based on

the intersection of race, gender, gender identity/expression, sexual orientation, nationality, and disability status. ELC-PA joins as amicus in order to preserve the critical role of class actions in securing fundamental educational civil rights and achieving necessary reform for a wide of range of students who are impacted by discriminatory laws, policies, and practices.

For fifty years, **Advocates for Children of New York ("AFC")** has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC provides a range of direct services, and also pursues institutional reform of educational policies and practices through advocacy and impact litigation, including class actions such as *L.V. v. New York City Dep't of Educ.*, 03-cv-9917 (S.D.N.Y.), *D.S. v. New York City Dep't of Educ.*, 700 F. Supp. 2d 510 (S.D.N.Y. 2010), and *E.B. v. New York City Dep't of Educ.*, 255 F.R.D. 59 (E.D.N.Y. 2008). AFC therefore has a strong interest in the continued ability to advocate for the rights of children and their families on a systemic basis under the IDEA.

The **Center for Law and Education** is a national non-profit resource, advocacy, and support center dedicated to advancing the right of all students to high-quality education, particularly for low-income students. Over its fifty-year history, it has successfully brought and participated in a wide variety of class actions to remedy denial of that right, as well as collaborating with educators, families, their advocates, community organizations, and policy-makers to advance it.

Council for Children's Rights ("CFCR") is a non-profit organization committed to protecting and promoting the rights of children and youth in Mecklenburg County, North Carolina through legal representation, policy advocacy, and research. For more than 40 years, CFCR has offered legal representation, as well as local and legislative policy advocacy, for children and youth in the areas of education, mental health, custody, and delinquency. One of CFCR's priorities is to promote a supportive and inclusive school environment for students, including students with disabilities.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Class actions play an essential role in securing fundamental civil and educational rights. In seeking to deny class certification, Appellant in this case applies flawed reasoning that ignores decades of precedent in civil rights cases. Adopting their reasoning here would endanger class actions as a critical tool for securing civil rights generally and for students with disabilities in particular—especially where institutions systemically fail to adhere to their statutory obligations under the very laws intended to preserve such rights. To preserve class actions as a critical tool for enforcing civil

rights, the Court should reject that reasoning and affirm the district court's order certifying the class.

Congress affirmed the essential role of class actions in civil rights cases when it crafted the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure with the express purpose of preventing defendants from undermining civil rights litigation by attacking the basis for class certification. Rule 23(b)(2) was designed to enable plaintiffs to proceed with civil rights class actions by allowing certification 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." Fed. R. Civ. P. 23(b)(2). Since the 1966 amendments were added, Rule 23(b)(2) has enabled class certification in key civil rights cases in the Fourth Circuit and across the federal courts, securing much-needed relief for plaintiffs in protected classes and ensuring a more just, democratic society.

The landmark education civil rights victory in *Brown v. Board of Education,* 347 U.S. 483 (1954) was achieved through a class action. In *Brown*, the Supreme Court reversed the "separate but equal" doctrine and declared racial segregation unconstitutional in a class action brought by the families of thirteen Black children denied enrollment at the school closest to their home in Topeka, Kansas. As a backlash to this civil rights victory, school districts sought to undermine class actions by individualizing their racially discriminatory enrollment decisions. The promulgation of Rule 23(b)(2) allowed plaintiffs to continue to use class actions as an essential tool

to enforce their civil rights. Another landmark civil rights victory followed in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1(1971), a class action on behalf of ten Black students who suffered de facto segregation in central Charlotte, North Carolina, in which the Supreme Court ordered remedies to achieve school integration.

The Individuals with Disabilities Education Act ("IDEA"), the violation of which is at issue in this case, arose from two class actions challenging school districts' denial of free education to children with disabilities.[1] Class actions have subsequently been used to enforce students' rights under IDEA. One of the first cases interpreting a "free appropriate public education" ("FAPE") under the IDEA was a class action affirmed on appeal brought by the families of children with disabilities who successfully challenged a Pennsylvania policy capping the maximum days of instruction at 180. *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).

The education civil rights community and other civil rights communities have long relied on class actions as an integral part of their pursuit of justice. Class actions enable otherwise marginalized individuals, without the financial means to pursue litigation on their own, to work collectively to challenge unlawful and discriminatory laws, policies, and practices. Appellant's arguments in this case outline an approach to class action certification that, if adopted, would improperly imperil the availability of class actions for these important cases going forward.

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[1] See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180 n.2 (1982) (reciting legislative history of IDEA).

ARGUMENT

A. The Express Purpose of Rule 23(b)(2) Is Strengthening Class Actions as a Weapon Against Discrimination and Oppression.

1. The Backlash against *Brown v. Board of Education*

The landmark civil rights decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) holding that segregating public schools by race is unconstitutional, resulted from a class action of Black students from a racially segregated school district in Kansas, which was consolidated with similar cases from South Carolina, Delaware, Virginia, and Washington, D.C. *Id.* at 486. The backlash to the Court's ruling in *Brown* was severe. In an effort to preserve segregated schools and undermine the ability of African American students to bring future collective actions, officials would individually assign students to schools according to race. These school boards "purposefully manufactured individualized issues via pupil assignment laws, thereby making it difficult for African-American students to collectively act through class actions." Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 334 (2017).

As one element of the backlash to *Brown*, courts routinely denied class certification in civil rights cases, based on technical arguments in opposition to class treatment that are similar to the technical arguments advanced by Appellants here. For example, in *Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956) the Fourth Circuit

denied class certification in a case alleging a racially discriminatory pupil assignment policy:

> There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board.

Carson v. Warlick, 238 F.2d at 729 (citation omitted).

Carson was followed by *Brunson v. Bd. of Trs. of Sch. Dist. No. 1 of Clarendon Cty., S.C.*, in which school children brought a class action against the defendant school district alleging that the defendants denied the plaintiff students admission to schools solely on account of race. 30 F.R.D. 369, 371 (E.D.S.C. 1962). Embracing arguments similar to those made in this case, the trial court denied class certification because "[u]ndoubtedly the plaintiffs reside in different places, they are of different ages, they are of different scholastic attainment." The court further reasoned

> It is the individual who is entitled to the equal protection of the law and if he is denied a facility which under the same circumstances is furnished to another citizen, he alone may complain that his constitutional privilege has been invaded. He has the right to enforce his constitutional privilege or he has the right to waive it. No one else can make that decision for him.

Id. at 372.

2. The 1966 Amendments to Rule 23

Responding to school officials' backlash against civil rights advancements, Congress amended Rule 23 in 1966, pursuant to the Advisory Committee's recommendation, for the express purpose of preventing civil rights defendants from undermining the use of class actions. When amending Rule 23, "the drafters were informed by and motivated to overcome obstructionist procedural barriers erected by legislative and judicial forces" as backlash against the plaintiffs' victory in *Brown v. Board of Education*. Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 333-34 (2017). As a result of this change, Rule 23(b)(2) was added, which allows certification 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." Fed. R. Civ. P. 23(b)(2).

It is clear from both the plain language of the Rule and its legislative history that the new language was expressly designed to allow class action plaintiffs in civil rights cases to overcome factual variations in how discriminatory practices affected individual class members. The Committee found illustrative "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's notes to 1966 amendment. *See e.g. Thorn v. Jefferson–Pilot Life Ins. Co.,* 445 F.3d 311, 330 n.24 (4th Cir. 2006) ("Rule 23(b)(2) was created to

facilitate civil rights class actions."); *Scott v. Clarke*, 61 F. Supp. 3d 569, 591 (W.D. Va. 2014) ("Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy the Rule 23(b)(2) class action criteria.") (citation omitted).[2] Appellant's arguments in this appeal against class certification are similar to the arguments advanced by those opposing class certification in the cases after *Brown,*[3] and run directly counter to the purpose of Rule 23(b)(2).

B. Rule 23(b)(2) Class Actions Are Crucial to the Pursuit of Educational Rights.

The Supreme Court consistently recognizes the critical role education plays in our society. *See, e.g.*, *Brown*, 347 U.S. at 493 ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an

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[2] Opponents of the injunctive class argue that it will result in rulings made applicable to individuals who were not a party to the suit, which will lead to inequitable results. However, judges have numerous tools in place to "increase the breadth of interests represented in a suit." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976). For example, a judge may refuse to proceed until new parties are brought in; (2) order such "notice as may be required for the protection of members of the class or otherwise for the fair conduct of the action"; and (3) appoint a guardian for unrepresented interests. *Id.* at 1311-12.

[3] *See* Appellant's Opening Br. 6 (emphasizing that the challenged procedures are "necessarily focused on the personal circumstances of ***individual*** students—not ***groups*** of students") (emphasis in original); *id.* at 33 (claiming "[d]isciplinary removals from the classroom for a whole class of students cannot be logically or legally be deemed 'justified' or 'unjustified' on a class-wide bases" because of the "case-by-case" considerations that are permitted); *id.* at 47 (claiming the class representatives "are unique individuals with unique needs" rendering them not typical of the class).

education."); *Goss v. Lopez,* 419 U.S. at 576 (describing education as "the most important function of state and local governments") (*quoting Brown,* 347 U.S. at 493); *Plyler v. Doe,* 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."). The Fourth Circuit is of the same view. *See Stroman v. Colleton Cty. Sch. Dist.*, 981 F.2d 152, 158 (4th Cir. 1992) ("Public education is recognized as one of the most important public services offered by state government."); *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005) ("As history has shown, a well-educated society is critical to our general welfare and prosperity.").

In light of the undeniable importance of education, courts in the Fourth Circuit have a robust history of certifying classes seeking to vindicate educational rights, going back to the effort to desegregate schools. *See, e.g.*, *Vaughns v. Bd. of Educ. of Prince George's Cty.*, 355 F. Supp. 1034, 1035 (D. Md. 1972) (concluding a class action on behalf of Black children of school age residing in a county accused of segregation "f[ell] precisely within the provisions of Federal Civil Rule 23(b)(2)"), *supplemented,* 355 F. Supp. 1038, 1035 (D. Md. 1972); *see also Jeffers v. Whitley*, 309 F.2d 621, 628-29 (4th Cir. 1962) (concluding, prior to the enactment of Rule 23(b)(2), that students similarly situated to named plaintiffs were entitled to general injunctive relief prohibiting the school district from refusing admission to any school of any pupil because of the pupil's race). More recently, in *Bullock v. Board of Education of Montgomery County*, 210

F.R.D. 556, 557, 561 (D. Md. 2002), a district court certified a class of homeless children challenging violations of the McKinney-Vento Act, which requires local education agencies to continue homeless children's education for the duration of homelessness. The defendant school district argued that the claims in that case were too individualized for class-wide resolution because "each student's situation is peculiarly fact specific and necessitates an individualized inquiry into the factual circumstances of each case." *Id.* at 560. The court disagreed, pointing to the students' allegations that the school district failed to implement policies to ensure students' rights under the McKinney-Vento Act. *Id.* The court therefore concluded that "the proposed class members share common questions of law, specifically whether the policies, patterns, and practices of Defendants have violated their McKinney-Vento Act rights." *Id.*

Just last year, a district court certified a class of "all elementary and secondary students in South Carolina who face a risk of arrest or juvenile referral under the broad and overly vague terms" of a disorderly conduct statute while enrolled in South Carolina public schools. *Kenny v. Wilson*, No. 2:16-cv-2794-MBS, 2021 WL 720449, at *7-8 (D.S.C. Feb. 24, 2021). In *Kenny*, the court explained that the fact that "the potential for injury or precise nature of how the injury will impact an individual student may vary according to circumstance . . . does not preclude a finding of commonality." *Id.* at *5. Ultimately, the court concluded that if the statute *was*

unconstitutionally vague, an injunction prohibiting enforcement of the law would offer redress to and benefit to the entire class. *Id.* at *8.

Congress' express purpose in enacting the IDEA was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Because class actions have long been used to enforce educational rights, it is not surprising that Congress envisioned class-wide injunctive relief as a key means of enforcing the IDEA. *See* 121 Cong. Rec. 37,416 (1975) (Sen. Williams explaining that the IDEA does not "require each member of the class to exhaust [certain] procedures in any *class action* brought to redress an alleged violation of the statute") (emphasis added). Congress's view has not changed, as it has continued to reauthorize and amend the IDEA without adding any language to prohibit or restrict class actions as a means of enforcement.

Indeed, courts in this Circuit have long understood the need for, and appropriateness of, adjudicating class claims to address systemic violations of the IDEA. *See, e.g.*, *Reusch v. Fountain*, No. MJG-91-3124, 1994 WL 794754, at *1 (D. Md. Dec. 29, 1994) (certifying class of special education students and ordering the schools'

compliance with the IDEA's requirements regarding extended school year services).[4]

And courts around our nation have long agreed that class actions are an important and appropriate means for enforcing the IDEA:

- *J.G. ex rel. F.B. v. Mills*, 995 F. Supp. 2d 109, 115-22, (E.D.N.Y. Dec. 28, 2010) (certifying class of students with disabilities challenging school re-enrollment policies);
- *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty*, 516 F. Supp. 2d 1294, 1304 (S.D. Fla. 2007); ("There is…little dispute that claims of generalized violations of the IDEA lend themselves well to class action treatment.");
- *Barr-Rhoderick as Next Friend of May v. Bd. of Educ. of Albuquerque Pub. Sch.*, No. CIV 04-0327 MCA/ACT, 2006 WL 8444291 (D.N.M. Apr. 11, 2006) (certifying class of special education students alleging IDEA violations);
- *J.S. ex rel. N.S. v. Attica Cent. Schs.* No. 00 CV 513S, 2006 WL 581187, *1 (W.D.N.Y. Mar. 8, 2006) (certifying class action alleging violations of IDEA and corresponding state laws "designed to ensure an appropriate public education or reasonable accommodation at public expense for disabled school children");
- *LV v. N.Y. City Dep't of Educ.*, No. 03 Civ. 9917(RJH), 2005 WL 2298173, at *4, 8 (S.D.N.Y. Sept. 20, 2005) (granting motion for class certification to enforce timely implementation of settlements of claims brought under IDEA and citing cases granting relief under IDEA on class-wide basis);
- *D.D. v. N.Y. City Bd. of Educ.*, No. CV-03-2489 (DGT), 2004 WL 633222 (E.D.N.Y. Mar. 30, 2004) *rev'd in part on other grounds by* 465 F.3d 503, 515 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007) (certifying class of preschool children bringing claims for violation of IDEA; denial of preliminary injunction vacated and remanded on appeal);

[4] *Cf. Medley v. Ginsberg*, 492 F. Supp. 1294, 1297 (S.D.W. Va. 1980) (certifying class of institutionalized mentally disabled persons under Rule 23 alleging deprivations of rights under federal statutes including the Education for All Handicapped Children Act).

- *Blackman v. District of Columbia*, 185 F.R.D. 4, 5-8 (D.D.C. 1999) (after granting class certification for claims alleging IDEA violations, court appointed special master to assist in resolving requests for immediate injunctive relief, explaining: "time is of the essence with these motions. When the physical or emotional health and safety of a child is threatened, the matter cannot wait for the Court's calendar to clear");

- *Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900, 903-04 (N.D. Ill. 1998) (concluding the trial record compelled judgment in favor of the certified class of public school students with disabilities and their parents because defendants were violating the IDEA by failing to educate the certified class in the least restrictive educational environment);

- *Petties v. District of Columbia*, 881 F. Supp. 63, 64, 70 (D.D.C. 1995) (after certifying class of students, court granted plaintiffs preliminary injunction and ordered District of Columbia to make timely payments for private placements and related services as required by the IDEA); *Jones v. Schneider*, 896 F. Supp. 488 (D.V.I. 1995) (similar);

- *Evans v. Evans*, 818 F. Supp. 1215, 1220, 1223 (N.D. Ind. 1993) (certifying a class of students with disabilities challenging the lengthy delays between development of an IEP requiring residential placement and the actual placement and concluding the delays violated the IDEA);

- *Louis M. by Velma M. v. Ambach*, 113 F.R.D. 133, 135, 138 (N.D.N.Y. 1986) (certifying class of all "handicapped individuals age 5 to 21" who are at risk or are not receiving an appropriate education as a result of defendants' conduct).

This historic and correct application of Rule 23(b)(2) remains unchanged by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011), which held that claims for backpay under Title VII were improperly certified under Rule 23(b)(2), because Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant" or "an individualized award of monetary damages." (Emphasis in original.) The Supreme Court emphasized that claims for

monetary relief under Title VII are different than "[c]ivil rights cases against parties charged with unlawful, class-based discrimination" which "are prime examples of what (b)(2) is meant to capture." *Id.* at 361 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) (internal quotation marks omitted).

After *Wal-Mart*, Rule 23(b)(2) remains a robust vehicle for enforcing civil rights violations.[5] Indeed, the D.C. Circuit recently upheld a district court's certification of subclasses under Rule 23(b)(2) alleging violations of the IDEA. *See D.L. v. District of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017). Quoting *Wal-Mart*, the D.C. Circuit explained that to certify a class under Rule 23(b)(2), "a single injunction must be able to 'provide relief to each member of the class.'" *Id.* at 726 (quoting *Wal-Mart*, 564 U.S. at 360). The court concluded that "[t]he district court's comprehensive order"—which set compliance benchmarks and required annual improvement in the numbers of children identified as needing, evaluated for, and offered special education and related services—"does just that." *Id.* at 719, 726. Reiterating the importance of Rule 23(b)(2) in enforcing rights under the IDEA, the D.C. Circuit explained: "Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive

[5] While the Supreme Court found that the proposed class in *Wal-Mart* did not satisfy that standard, many employment discrimination actions remain viable. *See Brown v. Nucor Corp.* 785 F.3d 895, 909 (4th Cir. 2015); *Scott v. Fam. Dollar Stores Inc.*, 733 F.3d 105, 113-114 (4th Cir. 2013).

relief. . . . The Rule 23(b)(2) class action, in other words, was designed for exactly this sort of suit." *Id.* (internal citations omitted).

Similarly, in *J.N. v. Oregon Dep't of Educ.*, 338 F.R.D. 256, 261 (D. Or. 2021), the court certified a class of students with disabilities who alleged that a lack of state-level monitoring, enforcement, and assistance for school districts led to a statewide pattern among school districts of misusing shortened school day schedules for students with disability-related behaviors in violation of IDEA, The Americans with Disabilities Act[6] ("ADA"), and Section 504 of the Rehabilitation Act of 1973 ("Section 504")[7]. The defendants argued that because plaintiffs, in essence, challenged the adequacy of their IEPs, the alleged injuries could not be remedied without consideration of each student's individual IEP, rendering certification inappropriate under *Wal-Mart*. *Id.* at 274. The court disagreed, explaining:

> Again, plaintiffs do not allege harm from individually faulty IEPs. They allege harm from defendants' statewide policies and practices. As explored in detail above, plaintiffs have identified six state policies and practices, which they allege create a significant and uniform risk that the proposed class members will be subjected to a shortened school day because of their disability-related behaviors, in violation of their rights under the IDEA, ADA, and Section 504. . . . Because plaintiffs have adequately described the general contours of an injunction that would provide relief to the whole class, [Rule 23(b)(2)] is satisfied.

Id.

[6] 42 U.S.C. 12101.
[7] 29 U.S.C. 794.

In *R. A-G* ex rel. *R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12-CV-960S, 2013 WL 3354424, at *1, 13 (W.D.N.Y. July 3, 2013), *aff'd.*, 569 F. App'x 41 (2d Cir. 2014), another district court granted a motion for class certification where the plaintiffs alleged a school district's policies and procedures violated rights of disabled children under the IDEA. With respect to Rule 23(b)(2), the court explained that certification was proper because the plaintiffs specifically alleged that "Defendants' policy *precludes* individualized assessment, as well as sufficient parental involvement and the implementation of services, and should therefore be discontinued, not that prior individualized assessments with respect to related services were improper." *Id.* at *12 (emphasis in original). Therefore, "[a] determination that such declaratory and injunctive relief is warranted" did not "require consideration of the sufficiency of the services included in the individual IEPs of the student class members"; rather, "the ordered relief, if warranted, would be equally applicable to all members of the proposed class." *Id.*

C. Rule 23(b)(2) Has Been Used to Remedy a Wide Variety of Civil Rights Violations

Because "Rule 23(b)(2) was drafted *specifically* to facilitate relief in civil rights suits," *Scott v. Clarke*, 61 F. Supp. 3d at 591 (emphasis added) (quoting 8 Alba Conte & Herbert Newberg, Newberg on Class Actions § 25.20 at 550 (4th ed. 2002)), as described above, "Rule 23(b)(2) has been liberally applied in the area of civil rights[.]" *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457 (E.D.N.C. 2011). The language of Rule

23(b)(2) applies to situations where the defendant has "*refused* to act on grounds that apply generally to the class," thereby sweeping beyond affirmative conduct to include the *absence* of policies as well. Fed. R. Civ. P. 23(b)(2) (emphasis added). Courts have certified classes even when the policy or lack thereof does not result in across the board harm. *See Yates v. Collier*, 868 F.3d at 368.

Injunctive class actions under the Rule have played an enormous role in advancing civil rights in virtually every context in which they arise, allowing marginalized populations who would not otherwise have the resources to bring individual actions to protect their collective rights. In a wide variety of civil rights cases, courts have liberally certified 23(b)(2) classes where the primary relief sought is injunctive relief, both before and after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.

Courts in this Circuit and throughout the country have also recognized that Rule 23(b)(2) is designed to vindicate discrimination against disabled persons under such laws as the ADA, Section 504, and similar state statutes—claims for which the instant class was certified in addition to the IDEA.

For example, a court in the District of Columbia certified a class under Rule 23 (b)(2) seeking injunctive relief to enforce the "integration mandate" under the ADA and Section 504, applying the *Wal-Mart* analysis. *Thorpe v. District of Columbia,* 303 F.R.D. 120, 125-26, 147 (D.D.C. 2014), *appeal denied*, 792 F.3d 96, 98 (D.C. Cir. 2015). On appeal from the district court's post-trial dismissal of the class ADA and Section

504 claims, the D.C. Circuit affirmed the court's class certification decision. *See Brown v. District of Columbia*, 928 F.3d 1070 (D.C. Cir. 2019).

In *Californians for Disability Rts. v. Cal. Dep't of Transp.,* 249 F.R.D. 334, 345-46 (N.D. Cal. 2008), a class was certified of persons with mobility and vision disabilities alleging a failure to make certain transportation facilities accessible as required by the ADA and Section 504. The court noted that: "Indeed, Rule 23(b)(2) was designed specifically for civil rights cases like this, where plaintiffs seek system wide injunctive relief for a large class." *Id.*

And in *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg,* 290 F.R.D. 409, 420 (S.D.N.Y. 2012) (internal quotation and citation omitted), the court certified a class of people with disabilities alleging that New York City's emergency preparedness plans fail to account for their needs, in violation of the ADA and local law, noting that certification under Rule 23(b)(2) is "particularly appropriate in civil rights litigation." *See also Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd.* 197 F.R.D. 522, 529 (S.D. Fla. 2000) ("Rule 23(b)(2) has been liberally applied in the area of civil rights[,]" especially "where, as here, that vindication can be remedied through injunctive relief.") (citation omitted).

Rule 23(b)(2) class actions have also been instrumental in vindication of prisoners' civil rights. In *Lee v. Washington*, twelve years after *Brown*'s watershed ruling, a prisoner class action resulted in the Supreme Court's affirmation that the segregation of races in prisons was unconstitutional as a violation of the Fourteenth

Amendment. 390 U.S. 333, 334 (1968). The case affirmed a trial court decision, *Washington v. Lee*, 263 F. Supp. 327, 328-29 (M.D. Ala. 1966), which stated that "[s]ince *Brown v. Board of Education* . . . and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Id.* at 331.

Lee v. Washington encouraged other prisoners to use the class action, specifically Rule 23(b)(2), as a vehicle to enforce their civil rights. For example, in *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980), former criminal defendant inmates of an Arkansas state mental hospital sought to represent a class challenging certain discriminatory commitment procedures. *Id.* at 1366. The district court denied class certification not due to factual differences among the class but because the case would involve "so many variations of remedy [for each inmate] that any sort of class relief would be impossible." *Coley v. Clinton*, 479 F. Supp. 1036, 1041 (E.D. Ark. 1979).

On appeal, the Eighth Circuit Court of Appeals held that the district court had abused its discretion in denying certification because the allegedly discriminatory commitment procedures and conditions of confinement presented common issues to each member of the class, and the relief sought included a declaration that the procedures were unconstitutional. *Coley*, 635 F.2d at 1378. In language particularly relevant to this case, the Court of Appeals concluded:

> Because one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule must be read liberally in the

> context of civil rights suits. This principle of construction limits the district court's discretion. . . .

Id. (internal citations and quotation marks omitted). *See also Baxley v. Jividen*, 508 F. Supp. 3d 28 (S.D.W. Va. 2020) (involving a class action of pretrial detainees and convicted inmates seeking appropriate medical and mental health treatment); *Yates v. Collier*, 868 F.3d at 358 (certifying class of inmates challenging prison conditions under the ADA and the Rehabilitation Act); *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004) (upholding a permanent class wide injunction requiring the Mississippi Department of Corrections to improve conditions).

Class actions under Rule 23(b)(2) have also been successfully employed to enjoin every variety of civil rights violations. The rule has been used to advance voting rights, attack housing discrimination, and protect the civil rights of immigrants. *See, e.g., Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (voting rights); *Lopez v. City of Santa Fe*, 206 F.R.D. 285 (D.N.M. 2002) (voting rights); *Frank v. Walker*, 196 F. Supp. 3d 893 (E.D. Wis. 2016) (voting rights); *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301 (S.D.N.Y. 1990) (housing discrimination); *Heights Comty. Cong. v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975) (housing discrimination); *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (immigration rights); *Hamama v. Adducci*, 342 F. Supp. 3d 751 (E.D. Mich. 2018) (immigration rights); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (immigration rights); *Doe 1 v. Shenandoah Valley Juv. Ctr. Comm'n*, No.

5:17-cv-00097, 2018 WL 10593355, at *1-2 (W.D. Va. June 27, 2018) (immigration rights).

CONCLUSION

Rule 23(b)(2) class actions are a vital tool in the enforcement of civil rights. The Rule "opened the courthouse doors to certain types of litigants—those seeking to prospectively modify another party's behavior at more than an individualized level—who had previously lacked an effective form of relief." Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 764 (2012). A denial of class certification on the grounds advanced by Appellants in this case could undermine an essential tool for civil rights enforcement established through decades of precedent in class action civil rights enforcement cases beginning with *Brown v. Board of Education*. For the foregoing reasons, we urge that this Court consider, and appropriately affirm, the trial court's class certification in such a manner consistent with, and recognizing the importance of, Rule 23(b)(2) class actions in remedying civil rights violations.

Dated: March 7, 2022

Respectfully Submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeal for the Fourth Circuit.

Executed this 7th day of March 2022

/s/ Kenneth L. Schmetterer
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 29 AND 32

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). It contains 6,446 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: March 7, 2022

/s/ Kenneth L. Schmetterer
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

Counsel for *Amici Curiae* certifies that on March 7, 2022, I electronically filed the foregoing with the Clerk of Court for the United States District Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 7, 2022

/s/ Kenneth L. Schmetterer
Counsel for *Amici Curiae*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2286 Caption: G.T. et al. v. Board of Education of the County of Kanawha

Pursuant to FRAP 26.1 and Local Rule 26.1,

Members and Allies of the National Education Civil Rights Alliance as Amici Curiae
(name of party/amicus)

See list of Amici Curiae on additional sheet

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Kenneth L. Schmetterer Date: March 7, 2022

Counsel for: Amici Curiae

CORPORATE DISCLOSURE LIST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, the following Amici Curiae, Members and Allies of the National Education for Civil Rights Alliance as Amici Curiae in Support of Plaintiffs-Appellees:

Education Civil Rights Alliance

National Center for Youth Law

American Civil Liberties Union

Public Counsel

Education Law Center

Southern Poverty Law Center

Equal Rights Advocates

Juvenile Law Center

The Native American Disability Law Center

The Center for Law and Education

The Georgia Advocacy Office

The Education Law Center-PA

Advocates for Children of New York

Center for Law and Education

Council for Children's Rights