17-17501 & 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, and Thomas J. Betlach, in his official capacity as Director of the Arizona Health Care Cost Containment System,
Defendants/Appellants.

On Appeal from the United States District Court for the District of Arizona,
No. 2:15-CV-00185-PHX-ROS

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, BLUHM LEGAL CLINIC, CENTER FOR CHILDREN'S LAW & POLICY, CENTER FOR PUBLIC REPRESENTATION, CHILDREN & FAMILY JUSTICE CENTER, CHILDREN'S ADVOCACY INSTITUTE, CHILDREN'S DEFENSE FUND-NEW YORK, CIVITAS CHILDLAW CENTER, COLUMBIA LEGAL SERVICES, DISABILITY RIGHTS PENNSYLVANIA, HARVARD LAW SCHOOL CHILD ADVOCACY PROGRAM, IMPACT FUND, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL CENTER FOR YOUTH LAW, NATIONAL HEALTH LAW PROGRAM, NATIONAL WOMEN'S LAW CENTER, NEBRASKA APPLESEED, ROBERT F. KENNEDY HUMAN RIGHTS, RUTGERS SCHOOL OF LAW—CAMDEN CHILDREN'S JUSTICE CLINIC, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND YOUTH LAW CENTER IN SUPPORT OF PLAINTIFFS/RESPONDENTS AND AFFIRMANCE

MARSHA L. LEVICK
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

Counsel for *Amici Curiae*

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INTEREST AND IDENTITY OF AMICI[1]

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 is the first non-profit public interest law firm for children in the country. 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 **Bluhm Legal Clinic** of Northwestern Pritzker School of Law is committed to social justice advocacy in the public interest. Home to 14 centers including the Children and Family Justice Center and the Macarthur Justice Center, the Bluhm Legal Clinic is pleased to sign the Juvenile Law Center's amicus brief in B.K. v. McKay. Over-ruling *Parsons* and decertifying the class in B.K. would have a serious, adverse effect on class action impact litigation, would impede efforts to

[1] No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file under the authority of Fed. R. App. P. 29(a). All parties have consented to the filing of this brief.

seek systemic relief generally, and would have a particularly negative impact on access to the courts and appropriate relief for system-involved children.

The **Center for Children's Law and Policy** (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation.

The **Center for Public Representation** is a public interest law firm that has been assisting people with disabilities for more forty years. It is both a statewide and national legal backup center that provides assistance and support to public and private attorneys who represent people with disabilities in Massachusetts, and to the federally-funded protection and advocacy agencies in each of the fifty States. It has litigated systemic cases on behalf of person with disabilities in more than twenty states, and authored amici briefs to the United States Supreme Court and many of the courts of appeals, in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the ADA.

The **Children and Family Justice Center**, part of Northwestern Pritzker School of Law's Bluhm Legal Clinic, was established as a legal service provider for

children and families, as well as a research and policy center. The CFJC provides advocacy on policy issues affecting children, and legal representation in criminal proceedings, immigration/asylum, and fair sentencing practices.

The **Children's Advocacy Institute** (CAI), founded in 1989 and a part of the University of San Diego, is an academic and advocacy institute that trains students in child rights law, operates clinics representing children, publishes state and national studies and advocates for children in Sacramento and D.C. *See* www.caichildlaw.org.

Children's Defense Fund-New York is dedicated to improving conditions for children, combining research, public education, policy development, community organizing and advocacy. A recognized authority in the endeavor to protect children and strengthen families, CDF-NY serves as a resource and partner for children, families and organizations throughout New York City and State.

The **Civitas ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and other professionals to advocate for the well-being of youth, with the ultimate goal of promoting justice for children and their families.

Columbia Legal Services (CLS) is a nonprofit legal services organization based in Washington State that advocates for people who face injustice and poverty and seeks to achieve social and economic justice for all. CLS uses policy reform,

litigation, and innovative partnerships to reveal and end actions that harm the communities we serve. For decades, CLS has pursued litigation to improve opportunities for children and youth, which includes a class action challenging Washington's foster care system. CLS has also used class actions to reform other systems. Thus, CLS has a significant interest in the continued viability of class actions and proper application of Rule 23.

Disability Rights Pennsylvania (DRP) is a non-profit organization charged with protecting the rights of and advocating for Pennsylvanians with disabilities under U.S.C. §§ 15041-15045, 42 U.S.C. §§ 10801-10827, 29 U.S.C. § 794e. The ability of people with disabilities to secure judicial remedies is often limited, sometimes by their disabilities, their isolation in institutions, and their resources. Efforts to restrict the use of Rule 23(b)(2) in institutional and system reform lawsuits would strip DRP's constituents' of a critical tool to enforce their rights.

The Harvard Law School's **Child Advocacy Program** (CAP) is a premier academic program focused on children's rights. CAP is committed to the highest ethical, professional and scholarly standards in the advancement of children's rights through facilitating productive interaction between academia and the world of policy and practice.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice

for all communities. It provides funding, offers innovative training and support, and serves as counsel for civil rights impact litigation across the country.

Founded in 1977, the **National Association of Counsel for Children** (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; and promoting a safe and nurturing childhood through legal and policy advocacy.

The **National Center for Youth Law** (NCYL) is a nonprofit organization that works to ensure that low-income children have the resources, support, and opportunities they need for healthy and productive lives, with a special focus on children who are challenged by abuse and neglect, disability, or other disadvantage.

For nearly 50 years, the **National Health Law Program** (NHeLP) has engaged in litigation and policy advocacy on behalf of low income people, older adults, people with disabilities, and children. NHeLP also conducts research and provides education on a range of issues affecting these populations. When clients are being harmed, we work through the courts to enforce legal rights that are set forth in public benefits and civil rights laws. As such, we have an interest in the outcome of this case.

The **National Women's Law Center** (NWLC) is a non-profit legal organization that has been working since 1972 to advance and protect women's legal rights. NWLC focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination.

Nebraska Appleseed is a nonprofit organization based in Lincoln, Nebraska that fights for justice and opportunity for all Nebraskans, with over twenty years of experience in litigation and advocacy regarding issues affecting underrepresented groups, including addressing the systemic issues affecting children and families in Nebraska's foster care system.

Robert F. Kennedy Human Rights is a nonprofit organization founded in 1968 to carry on Robert F. Kennedy's commitment to creating a more just and peaceful world. The organization holds the United States accountable before international human rights mechanisms and works with activists on criminal justice reform via policy change, innovative disruptions, and public mobilization.

Based in one of our nation's poorest cities, the **Rutgers School of Law—Camden Children's Justice Clinic** is a holistic lawyering program using multiple strategies and interdisciplinary approaches to resolve problems for indigents facing juvenile delinquency charges. Additionally, the Clinic works with both local and

state leaders on improving the representation and treatment of at-risk children in Camden and throughout the state.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** fights discrimination and endeavors to create legal, economic, and social equity on a broad range of issues. The Committee is engaged in class action litigation that addresses, among other issues, the conditions of confinement for unaccompanied immigrant children, adult prisoners with mental illness, and persons with disabilities seeking government services.

The **Youth Law Center** (YLC) is a public interest law firm that advocates to transform foster care and juvenile justice systems across the nation so that every child and youth can thrive. YLC works to ensure that youth serving systems are informed by research on child and adolescent development and has participated as amicus curiae in cases around the country, written widely on a range of foster care and juvenile justice system issues, and consulted policy issues in almost every state.

SUMMARY OF THE ARGUMENT

Rule 23(b)(2) of the Federal Rules of Civil Procedure authorizes class actions by groups of individuals seeking injunctive relief to remedy a common exposure to an allegedly unlawful policy or practice. Both before and after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), federal courts across the country have certified classes of foster children, incarcerated youth, people with disabilities, immigrants in detention, prisoners, pre-trial detainees, women, and others when they challenged an unlawful policy or practice that threatened their well-being as a group. Indeed, the use of Rule 23(b)(2) to litigate institutional reform cases has been a cornerstone of civil rights jurisprudence since the 1960s.

Defendants ask this Court to disregard these decades of precedent and decertify this class of children in the care and custody of Arizona's child welfare system because some putative class members may escape harm from the systemwide policies and practices to which they are all exposed. Were courts to adopt this mistaken standard, virtually no Rule 23(b)(2) class could be certified. An unlawful policy or practice will almost always cause differing degrees of actual injury to individual class members, and some may be lucky enough to avoid harm altogether. If such variations were sufficient to defeat class certification, systemwide relief from unconstitutional policies and practices would almost always be out of reach, and

populations in the custody of the government would lose a vital tool for vindicating their rights.

Amici advocate for the rights and well-being of children and other vulnerable populations, many of whom rely on class actions to challenge unlawful policies, practices, and statutes that harm them. Amici ask this Court to affirm the grant of class certification to plaintiffs in this case.

ARGUMENT

I. *WAL-MART STORES, INC. V. DUKES* DOES NOT FORECLOSE RULE 23(b)(2) CLASS CERTIFICATION WHERE CLASS MEMBERS ARE EXPOSED TO THE SAME HARMFUL CONDUCT OR POLICY

A. Congress Adopted Rule 23(b)(2) Specifically To Allow Institutional Or Systemic Reform Class Actions

Congress adopted Rule 23(b)(2) specifically to allow institutional and systemic reform class actions for groups of individuals otherwise unable to challenge broad and systemic violations of their constitutional rights. *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58-59, 64 (3d Cir. 1994) ("The writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights."); *see also D.L. v. District of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017) ("The Rule 23(b)(2) class action . . . was designed for" civil rights cases challenging "systemic harms."); *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (noting that Rule 23(b)(2) provides "an especially appropriate vehicle for civil rights actions seeking . . . declaratory relief 'for prison and hospital reform'" (quoting 3B James W. Moore, Moore's Federal Practice 23.40(1) (1980))). As the text, purpose, and history of Rule 23(b)(2) make clear, classes seeking injunctive relief to remedy a common exposure to an unlawful policy or practice fall clearly within the Rule's scope, particularly when, as here, the plaintiffs would otherwise

be without any remedy for a constitutional violation.

Class actions under Rule 23(b)(2) differ in kind from other class actions, as they seek purely injunctive or declaratory relief. Unlike Rule 23(b)(3) damages actions, which require "that the questions of law or fact common to class members predominate over any questions affecting only individual members," FED. R. CIV. P. 23(b)(3), Rule 23(b)(2) focuses the inquiry not on individual class members, but on the class as a whole. Rule 23(b)(2) class plaintiffs must show that "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 a whole." FED. R. CIV. P. 23(b)(2). The Rule does not require that every class member show an actual injury at the class certification stage. Indeed, Defendants concede that "[a] class is certifiable under Rule 23(b)(2) even if the policy in question 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." (Appellants' Joint Opening Br. 41-42. (quoting FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment)).

This view is consistent with the history of Rule 23(b)(2), which was adopted in 1966 in the wake of civil rights class actions that challenged various policies and practices concerning racial segregation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). The defendants in those cases similarly challenged certification on

the theory that not every African-American person had or would experience racial discrimination at school or in their communities. The courts rejected these arguments, recognizing that the classes in question sought relief from laws and practices that potentially exposed all class members to the same harm. *See Potts v. Flax*, 313 F.2d 284, 288-89 (5th Cir. 1963) (class of African-American schoolchildren challenging school segregation policies); *Bailey v. Patterson*, 323 F.2d 201, 205-06 (5th Cir. 1963) (class of African Americans challenging Mississippi laws requiring segregated public facilities); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 824 (6th Cir. 1962) (class of African-American schoolchildren that included those who had not actually sought transfer to all-white schools). The Advisory Committee Note for Rule 23(b)(2) cites to these same cases, reinforcing that the Rule permits class certification in challenges to unconstitutional policies without a showing of actual harm to each class member. *See* FED. R. CIV. P. 23(b)(2) (advisory committee's note to 1966 amendment); *see also Dukes*, 564 U.S. at 361-62 (citing to the Advisory Committee Notes and noting that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture" (alteration in original) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997))). Indeed, to conclude otherwise—requiring proof that all putative class members have been harmed by the challenged policy—would in effect require a full assessment of the merits of each

plaintiff's claims at the class certification stage, which the Supreme Court has made clear is not authorized by Rule 23. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

Defendants wrongly suggest that certifying a class in institutional reform cases such as this one encroaches on the executive and legislative functions. (*See* Appellants' Br. at 6.) By codifying the right to bring a class action for injunctive or declaratory relief when a policy or practice "appl[ies] generally to the class," FED. R. CIV. P. 23(b)(2), Congress ensured that plaintiffs bringing institutional reform cases can secure a judicial remedy for constitutional wrongs. Denying class certification in this case would thus undermine this legislative choice. *Cf. Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 459-60 (1975) (upholding legislative choice to permit judicial remedy in employment discrimination cases).

B. The Supreme Court Has Consistently Interpreted Rule 23(b)(2) To Allow For Class Actions In These Types Of Cases

Numerous statements from the Supreme Court—including in *Wal-Mart Stores, Inc. v. Dukes*—confirm that Rule 23(b)(2) permits class certification when class members are exposed to the same harmful conduct or policy, even when not all class members have actually been injured by the conduct. Supreme Court jurisprudence is replete with examples of cases seeking class-wide relief to remedy systemic or institution-wide policies or practices that expose groups of individuals

to potential harm. *See e.g.*, *Brown v. Plata,* 563 U.S. 493, 545 (2011) (conditions in California prisons); *Rhodes v. Chapman*, 452 U.S. 337, 339-40 (1981) (cell overcrowding); *Ingraham v. Wright*, 430 U.S. 651, 654 (1977) (corporal punishment in schools); *Wolff v. McDonnell*, 418 U.S. 539, 542-43 (1974) (disciplinary and other prison procedures). While class certification may not have been at issue in these cases, the Court's consideration of the substantive merits of the constitutional issues in these cases demonstrates its recognition of the importance of Rule 23(b)(2) remedies. *See, e.g.*, *Brown,* 563 U.S. at 545 (ordering injunctive relief in a class action brought by a class of prisoners with serious mental and medical disorders alleging numerous systemic violations of the Eighth Amendment, not all of whom had necessarily been injured).

Defendants erroneously rely on *Lewis v. Casey,* a case which turned on standing requirements, not class certification rules. In *Lewis*, the named plaintiffs had alleged few actual injuries produced by the challenged policies, and the Court found that the injunction went far beyond the scope of the constitutional harm demonstrated. *See* 518 U.S. 343, 358-59 (1996) (concluding that the two demonstrated instances of harm "were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief"). The Court emphasized that in order to have standing to seek relief from a challenged policy or practice, named plaintiffs who represent a class "must allege and show that they

personally have been injured" by that policy, "not that injury has been suffered by other, unidentified members of the class." *Id.* at 357. The Supreme Court in *Lewis* did *not* require that each of the "unidentified members of the class" *also* show an actual injury; it simply barred plaintiffs from escaping traditional standing requirements by citing to unidentified class members to allege potential injuries from defendants' conduct. *See Melendres v. Arpaio*, 784 F.3d 1254, 1262-64 (9th Cir. 2015) (endorsing the view that "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded," and discussing the limits to *Lewis*'s holding). Here, Defendants do not dispute that the named plaintiffs have produced abundant evidence of their actual injuries from the challenged policies, and thus meet the standing requirements articulated in *Lewis*. Indeed, the *Lewis* Court was explicit in distinguishing standing from class certification: Noting that "[t]he standing determination is quite separate from certification of the class," the Court emphasized that its holding on standing "does *not* amount to a conclusion that the class was improper." *Lewis*, 518 U.S. at 358 n.6 (citing *Blum v. Yaretsky*, 457 U.S. 991, 997 n.11 (1982), as an example of an institutional reform case where class certification was appropriate even though some class members lacked standing with respect to certain claims).

Wal-Mart Stores, Inc. v. Dukes reinforces this understanding of Rule 23(b)(2). The class certification decision in *Dukes* hinged on whether class members had been

exposed to the same allegedly unlawful policy or practice. *Dukes*, 564 U.S. at 350. The Supreme Court held that the *Dukes* plaintiffs offered "no convincing proof of a companywide discriminatory pay and promotion policy," and thus had not established a common question, the answer to which could resolve their claims in "one stroke." *Id. at* 350, 359. Had the Court found evidence of an identifiable companywide policy—beyond simply the "policy" of allowing discretion—the plaintiffs could have satisfied the "same injury" requirement that Defendants repeatedly reference. As the *Dukes* Court explained, offering evidence of a discriminatory policy or practice that applies to all class members—such as a biased evaluation procedure—can bridge the "conceptual gap" between an individual claim and "the existence of a class of persons who have suffered the same injury." *Id.* at 353. But *Dukes* did not require that all members of a putative class suffer an injury, much less precisely the same injury, for a class to be properly certified. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015) ("The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet [the commonality] requirement."); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) ("[T]he [*Dukes*] Court nowhere stated that at the class certification stage, every member of the class must establish that he, she or it was *in fact* injured." (citing *Dukes*, 564 U.S. at 348-57)).

C. Lower Courts, Both Before And After *Dukes*, Have Routinely Certified Classes In Institutional And Systemic Reform Cases

Before and after *Dukes*, both this Court and other courts have consistently approved of injunction-only class actions challenging the constitutionality of broadly applicable policies and practices, without requiring that each class member show actual injury at the class certification stage. Prior to *Dukes*, it was well established that "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010); *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1196 (10th Cir. 2010) (certifying class even though "each class member may not have actually suffered abuse, neglect, or the risk of such harm" because "Defendants' conduct allegedly poses a risk of impermissible harm to all children in [State] custody"). Rather, in accordance with the plain text of Rule 23(b)(2), courts considering systemic reform cases certified classes when all class members were exposed to the same harmful conduct or policy, regardless of whether they had all in fact been injured. *See, e.g.*, *Baby Neal*, 43 F.3d at 56 ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice.").

Dukes has neither undermined nor altered this legal analysis. Class

certification in institutional reform cases has been routinely upheld in the years since *Dukes*. As the D.C. Circuit explained in applying *Dukes* to claims by classes of disabled schoolchildren, "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 relief." *D.L.*, 860 F.3d at 726. *See also Yates v. Collier*, 868 F.3d 354, 358, 367 (5th Cir. 2017) (upholding class certification in class action by all inmates challenging climate control policy because "the conditions . . . apply uniformly to the class of inmates as a whole"); *Shelton v. Bledsoe*, 775 F.3d 554, 557, 564-65 (3d Cir. 2015) (vacating lower court's denial of class certification to all inmates in a facility in a conditions of confinement case); *Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014) ("A clear line of precedent, stretching back long before *Wal-Mart* and unquestionably continuing past it, firmly establishes that when inmates provide sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm, Rule 23(a)(2) is satisfied.").

Numerous lower courts have also certified institutional reform class actions post-*Dukes*. *See, e.g.*, *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 638-39 (D. Ariz. 2016) (certifying class of all individuals detained at border patrol facilities because, despite individual variations in the experience of detainees, "their claims

are based on alleged Sector-wide conditions of confinement that they claim all overnight detainees are subjected to"); *M.D. v. Perry*, 294 F.R.D. 7, 39-42 (S.D. Tex. 2013) (concluding that *Dukes* did not bar class certification where plaintiffs established policies or practices that do not involve "the sort of free-wheeling discretion that Wal-Mart managers enjoy in making employment decisions"); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418-19 (S.D.N.Y. 2012) (finding commonality after *Dukes* because class members with "diverse disabilities" challenged "a City-wide policy and its alleged failure to take into account the needs of disabled citizens"); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 33-34 (D. Mass. 2011) (noting that "the *Wal-Mart* decision did not change the law for all class action certifications," and upholding certification of a broad class of children who "alleged specific and overarching systemic deficiencies within DCF that place children at risk of harm"). As in *Dukes* and its predecessors, these cases look to whether the class as a whole was exposed to a common policy or practice, not whether each class member suffered an actual injury. *See, e.g.*, *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 157 (N.D. Cal. 2015) ("[A]ll members of the putative class and subclass have in common their alleged exposure to a substantial risk of serious future harm . . . as a result of policies and practices that govern the overall conditions of health care services and confinement. While results of exposure may vary, ranging from no harm to death, each inmate suffers

the same constitutional or statutory injury when exposed to a policy or practice that creates a substantial risk of serious harm."). Notably, Defendants cite no post-*Dukes* cases to the contrary; in each case cited by Defendants, class certification was either not at issue, *see, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 49 (1st Cir. 2014) ("[W]hether this class was appropriately certified is not before us."), or class certification was vacated on appeal due to the absence of a systemwide policy or practice, *see, e.g.*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498, 503 (7th Cir. 2012).[2]

In short, neither the Supreme Court, nor any other court has interpreted Rule 23(b)(2) to require a putative class seeking purely injunctive or declaratory relief to establish that all class members have suffered actual harm in the form of a manifested physical or economic injury, or that they suffered that harm in the same way.

[2] Indeed, even in the cases Defendants point to where they suggest class certification was appropriate, some members of the putative class may have escaped actual or imminent risk of harm. (*See* Appellants' Br. at 29.) For instance, in *Bumgarner v. NCDOC*, the court certified a class of "all present and future disabled inmates of the DOC" who might be discriminated against in the DOC's administration of its sentence reduction credit program. 276 F.R.D. 452, 454 (E.D.N.C. 2011). The alleged discrimination occurred "in a number of different ways," and not all disabled inmates had necessarily been discriminated against or would be in the future. *See id.* at 455. In other words, although the challenged policy may have been quite specific, some putative class members could still have escaped actual injury.

II. DEFENDANTS' INTERPRETATION OF RULE 23(b)(2) WOULD LEAVE CHILDREN IN STATE CUSTODY, AS WELL AS OTHER VULNERABLE POPULATIONS, WITHOUT ANY MEANINGFUL REMEDY FOR CONSTITUTIONAL WRONGS

Defendants' interpretation of Rule 23(b)(2) would leave children in state custody, or other vulnerable populations, without any meaningful legal remedy to redress institutional or systemic constitutional injuries.

Children face particular obstacles to challenging systemic constitutional issues they may experience in state custody, as they are separated from their parents and cannot seek meaningful relief in their ongoing state dependency or delinquency proceedings or through individual lawsuits. This Court should follow the decades of precedent permitting institutional reform class actions under Rule 23(b)(2), and ensure that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979).

A. State Court Dependency And Delinquency Proceedings Cannot Afford Relief For Widespread Constitutional Violations

The scope of child welfare and juvenile justice proceedings is narrow and individualized, making them an inadequate forum to address systemic constitutional concerns. These courts do not have the authority to order individual remedies that do not currently exist, or order class wide injunctive relief for individuals not before the court. Depending on the nature of the concern, these courts may also lack the authority to rule on the constitutionality of particular policies and practices. *See, e.g.*,

Sam M. ex rel. Elliott v. Chafee, 800 F. Supp. 2d 363, 381 (D.R.I. 2011) (noting limits to the Rhode Island Family Court's authority to address constitutional concerns). The courts' jurisdiction is narrow and typically circumscribed by state or federal law.[3] In child welfare matters, federal law requires that state courts review individual cases every six months, but the hearings are limited to review of the individual child's health, well-being, care and the progress that is being made in the family's case plan. *See* 42 U.S.C.A. § 675(5) (2018) ("case review"); *see also* 42 U.S.C.A. § 675(1) ("case plan") (The court ensures that "services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.").

[3] Children in state custody also may lack access to counsel who could assist them in raising constitutional concerns in these proceedings. In many states, children are not entitled to representation in child welfare matters. Indeed, appointment of an attorney for a child in child welfare matters is mandatory in about 63% of the states. A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children 8 (2nd Ed. 2009). In many jurisdictions, the right to representation in delinquency matters ends after disposition, and many states do not provide court oversight after a disposition is ordered. In these cases, there is no court oversight of a youth's treatment and progress even when he or she is placed in the most restrictive facilities, severely limiting a child's access to any forum to address concerns over treatment and care. *See, e.g.*, *State ex rel. O.S.*, 2011 WL 1469399, at *3 (N.J. Super. Ct. App. Div. Apr. 19, 2011) (the family court judge's jurisdiction is limited to determining whether incarceration is the proper disposition).

While a court may be able to modify case plans or order a particular service in an individual case, it is still constrained by the array of service options available—even if the court is confronted with claims that implicate constitutional violations. *See Sam M.*, 800 F. Supp. 2d at 380 (declining to abstain due to potential interference with family court proceedings because "[t]he proposed remedies of caseload caps and adequate training for DCYF workers, as well as an increase in the array and types of available placements, are not within the province of the Family Court"); *see also* Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 528-29 (2009) ("[J]udges who take their oversight responsibilities seriously feel constrained by the limits of case-by-case intervention. They can order additional analysis, reject proposed placements, and mandate services, but the efficacy of these alternatives depends on the larger system. Where workers are overwhelmed, available placements tend to be unsatisfactory, and service options are narrow, judges may accept as 'reasonable' efforts that would not be reasonable in a more adequate system.").

For example, in response to an individual child's challenge to her treatment in a facility housing other children, as a consequence of a claimed unconstitutional policy or practice, the court—assuming it could address the claim at all—could only provide relief to the individual child before it. The court could neither provide

declaratory relief on whether a constitutional violation had occurred nor injunctive relief to halt the practice or policy. *See* *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 287 (N.D. Ga. 2003) ("The juvenile court, however, as a court of limited jurisdiction, lacks the power to grant such relief. Georgia juvenile courts have no equitable powers and thus cannot grant injunctive relief. Nor can that court order class-based relief. Even in individual cases, the juvenile court cannot order [the child welfare agency] to provide a particular placement for a child, develop new placements, or enter orders regarding staff training, caseloads, the creation of new resources or other issues affecting what happens to children who come before it." (internal citation omitted)). In a class action challenging system-wide policies or practices, on the other hand, potential injunctive relief could include systems-level changes. *See, e.g.*, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1362-64 (N.D. Ga. 2005) (permitting plaintiffs to seek injunctive relief to remedy systemic deprivations of the right to effective assistance of counsel).

B. The Mootness And Scope Of The Remedy Doctrines Can Create Barriers To Relief For Constitutional Harms In Individual Federal Cases

Children in state custody are also limited in their ability to address systemic issues in individual federal lawsuits. The risk of mootness poses a significant limitation to bringing constitutional claims outside of a class action. Because of the

instability and mobility of system-involved children,[4] as well as the simple fact that children will naturally age out of the child welfare system, there is a persistent possibility that individual youth will be moved from harmful situations while other children may remain, subject to the same harms. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (finding moot the claims of two youth because they had been adopted from the foster care system and were no longer in state care); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 (10th Cir. 1999) (finding the claims of multiple class members moot due to aging out and leaving state care). As the Supreme Court recently made clear, the exceptions to mootness that apply in class actions[5] do not extend beyond that context, and even inherently transitory claims may be dismissed as moot when brought by individual plaintiffs. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1541 (2018) (dismissing as moot the claims of four inmates challenging the use of restraints during pretrial proceedings).

The *Katie A.* lawsuit is an example of a class action that achieved systemic change that would have been elusive in any individual action in part due to the risk

[4] In 2010, only 40% of the state met targets for placement stability. Joan M. Blakey et. al., *A Review of How States are Addressing Placement Stability*, 34 *CHILDREN & YOUTH SERVICES REVIEW* 369, 369 (2012).

[5] Class actions may continue even if the named plaintiffs' claims become moot during the pendency of the litigation if a "live controversy . . . continue[s] to exist" based on the interests of the unnamed class members. *See Genesis HealthCare v. Symczyk*, 569 U.S. 66, 74 (2013) (citing *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975)).

of mootness of the claims of individual children. First Amended Complaint, *Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. December 20, 2002) (No. 2:02-cv-5662), ECF No. 33, *rev'd on other grounds, Katie A., ex rel. Ludin v. Los Angeles County*, 481 F.3d 1150 (9th Cir. 2007). The action challenged the denial of necessary mental healthcare and appropriate placements on behalf of a class of thousands of foster youth with serious mental health concerns. Named plaintiff Mary B., who had 28 placements in her 12 years in child welfare custody, would likely have failed to withstand a mootness challenge to her individual claims; on behalf of the class, the lawsuit led to a settlement that barred the needless institutionalization of young people and ensured that they receive intensive, individually-appropriate mental healthcare in the most home-like settings possible. Stipulated Judgment Pursuant to Class Action Settlement Agreement, *Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. December 1, 2011) (No. 2:02-cv-5662), ECF No. 776.

In addition to the risk of mootness, the limitation on the scope of the remedy available in individual cases may also prevent meaningful systemic relief. As the Supreme Court explained in *Lewis v. Casey*, the remedy in a case "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." 518 U.S. at 357 (citing *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995). Plaintiffs in individual actions will rarely be able to demonstrate a systemwide injury, as their constitutional challenges will be limited to their particular

circumstances. *See, e.g.*, *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977) ("[O]nly if there has been a systemwide impact may there be a systemwide remedy." (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 213 (1973)). For instance, an inmate bringing an individual Eighth Amendment claim based on his exposure to excessive heat might obtain relief providing for his removal from his cell or his transfer to a different facility, but he would be unable to secure an injunction ordering the facility to remedy the excessive heat conditions for all of his fellow inmates similarly situated. *See Graves v. Arpaio*, 623 F.3d 1043, 1049-50 (9th Cir. 2010) (affirming grant of relief to class of all pre-trial detainees on certain medications who were especially harmed by the excessive heat conditions); *see also Dayton Bd. of Ed.* at 417 (reversing Court of Appeals grant of systemwide remedy when only three specific violations had been demonstrated). Similarly, although courts can remove one child from danger or harm in an individual action, their capacity to address the cause of the danger is limited where courts lack the authority to grant widespread injunctive or declaratory relief.

CONCLUSION

The use of Rule 23(b)(2) to litigate institutional and systemic reform cases remains a vital avenue for redress of constitutional violations which children suffer while in the custody of the state. Rule 23(b)(2) has consistently allowed plaintiffs to seek injunctive relief to remedy a common exposure to unlawful policies or

practices. These actions ensure diligent enforcement of legal and constitutional mandates that cannot otherwise be remedied in individual actions. Disregarding decades of precedent will leave systemwide relief from unconstitutional policies and practices out of reach for many children, especially those who are system involved, and deny them an essential tool for vindicating their rights.

For the foregoing reasons, *Amici* respectfully request that this Court affirm the district court.

/s/ Marsha L. Levick
Marsha L. Levick, Esq.
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
T: (215) 625-0551
F: (215) 625-2808
mlevick@jlc.org
PA Attorney No. 22535

Dated: July 6, 2018

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Pursuant to Fed. R. App. P. 25(d) and 9th Cir. R. 25-5(f), I certify that on July 6, 2018, 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.

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MARSHA L. LEVICK

DATED: July 6, 2018