Court of Appeals Docket No. 13-16396

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR ANTONIO PARSONS, et al.,

Plaintiffs-Appellees,

v.

CHARLES L. RYAN and RICHARD PRATT,

Defendants-Appellants.

On Appeal from the United States District Court for the
District of Arizona
The Hon. Neil V. Wake, Presiding

BRIEF OF AMICI CURIAE AMERICAN FRIENDS SERVICE COMMITTEE, CENTER FOR CHILDREN'S LAW AND POLICY, CHILDREN'S RIGHTS, IMPACT FUND, NATIONAL ALLIANCE ON MENTAL ILLNESS (NAMI), NAMI-ARIZONA, NATIONAL CENTER FOR YOUTH LAW, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, PACIFIC JUVENILE DEFENDER CENTER, THE ARC OF THE UNITED STATES, and YOUTH LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

Mark A. Chavez – SBN 90858
CHAVEZ & GERTLER LLP
42 Miller Ave.
Mill Valley, CA 94941
(415) 381-5599 (phone)
(415) 381-5572 (fax)
mark@chavezgertler.com

Catherine Weiss
Michael Hahn
Jason Halper
Monica Perrette
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, NJ 07068
(973) 597-2500 (phone)
(973) 597-5727 (fax)
cweiss@lowenstein.com

Attorneys for Amici Curiae

October 8, 2013

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Amici Curiae further described below state that they are nonprofit organizations with no parent corporations and in which no person or entity owns stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGES

CASES

RULES

IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici Curiae, described below, have a direct interest in the issues before this Court and seek the Court's leave to file this brief by motion submitted herewith.[1]

The **American Friends Service Committee (AFSC)** is a Quaker organization that offers services to prisoners and their families and immigrants facing deportation or other proceedings. When the State fails in its duty to provide for the basic needs of those it keeps in custody, class action litigation is a vital tool for restoring rights on a system-wide basis.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization that focuses on the reform of juvenile justice and other systems that affect troubled and at-risk children. Through its participation in this matter, CCLP seeks to protect the rights of children in the care or custody of the state to seek classwide relief from unlawful policies and practices that put them at risk of substantial harm.

Children's Rights is a national watchdog group advocating on behalf of abused and neglected children in the United States. Since 1995, the

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel hereby certifies that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than Amici Curiae, or their counsel, made a monetary contribution to fund this brief's preparation or submission.

organization has used legal action and policy initiatives to bring about major systemic reform of the ways in which states care for foster children in state custody. These efforts rely on the children's ability to seek classwide relief to bring about systemic change.

The **Impact Fund** is a nonprofit organization that seeks to achieve economic and social justice by providing counseling, advice, and assistance in complex litigation and organizing amicus efforts in civil rights lawsuits. The Impact Fund has an interest in safeguarding efforts to achieve social justice through class actions in appropriate cases.

National Alliance on Mental Illness (NAMI) is the nation's largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI joins this brief on behalf of the millions of institutionalized individuals affected by mental illness who must seek relief from civil rights violations through class action litigation. **NAMI-Arizona** is NAMI's state organization in Arizona and joins this brief on behalf of thousands of Arizonians with serious mental illness who are incarcerated.

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 poor children who are challenged by abuse and neglect, disability,

or other disadvantage. NCYL relies on class action litigation to advocate for children.

The **National Disability Rights Network (NDRN)** is the nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs (CAP). NDRN's mission is to promote the integrity and capacity of the P&A/CAP national network and to advocate for the enactment and enforcement of laws protecting the rights of people with disabilities. NDRN joins this brief to preserve their ability to seek classwide relief from illegal policies and practices that place them at unreasonable risk, especially in institutional settings.

The **National Immigrant Justice Center (NIJC)** is a nonprofit, legal services organization dedicated to ensuring human rights and access to justice for all immigrants, refugees, and asylum seekers. NIJC provides legal services to and advocates for these groups through policy reform, impact litigation, and public education. NIJC has an interest in preserving the right to classwide relief from civil rights violations for immigrants, especially those in detention.

The **National Juvenile Defender Center (NJDC)** aims to ensure excellence in juvenile defense and promote justice for all children through improved access to counsel and quality representation for children in the justice system. It does so through support for public defenders, appointed counsel, law

school clinical programs, and nonprofit law centers. As part of the technical assistance it offers, NJDC advises the juvenile defense bar in impact litigation to reform failing juvenile justice systems. The class action mechanism is a vital tool to ensure systemic relief from violations that threaten the safety of incarcerated children.

The **Pacific Juvenile Defender Center (PJDC)** is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center and serves the same mission in its region. In connection with its policy and appellate work, PJDC seeks to improve the conditions of confinement for children housed in juvenile and adult facilities, and believes that class action litigation is one way to bring about reform.

The Arc of the United States promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Class action litigation is one important tool for vindicating their rights to live in safe conditions and in the least restrictive setting possible.

The **Youth Law Center (YLC)** is a national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Through its experience in civil rights litigation related to institutional conditions in California and other states, YLC has seen the

importance of class action litigation in addressing conditions that threaten the safety of children in government custody.

SUMMARY OF THE ARGUMENT

In their appeal to this Court, Defendants focus on the variety of injuries the prisoners in their care are alleged to have suffered as a result of failing health care systems and the indiscriminate use of prisoner isolation. This attention to the particular consequences to proposed class members is misplaced. When plaintiffs seek to proceed as a class to obtain relief from an illegal policy or practice, they need not show that all of them have suffered the same *actual* injury. Were courts to apply this mistaken standard, virtually no such class could be certified. An unlawful policy or practice will always cause differing degrees of actual injury to individual class members, depending on their vulnerabilities, and some will be lucky enough to escape injury altogether. One foster child will be placed in a family rife with abuse and another with loving foster parents; one person will have disabilities that necessitate 24-hour support while another is able to live independently; one immigrant in detention will suffer lasting health consequences without regular medication and monitoring while her cellmate will stay healthy. If such variations were sufficient to defeat class certification, system-wide relief from illegal policies and practices would almost always be out of reach, and shifting populations in the custody of the government would have lost a vital tool for vindicating their rights.

But this is not the law. Rule 23 of the Federal Rules of Civil Procedure authorizes class actions by plaintiffs who face a common, unreasonable *risk* of harm by virtue of the policy or practice they ask the court to enjoin. Both before and after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), federal courts across the country have certified classes of foster children, incarcerated youth, people with disabilities, immigrants in detention, prisoners, pre-trial detainees, and others when they challenged a generally applicable policy or practice that threatened their safety.

The history of Rule 23(b)(2) supports the conclusion that courts should certify classes seeking injunctive relief from an unreasonable risk of harm. Rule 23(b)(2) grew out of a series of 1960s civil rights class actions challenging race discrimination. The defendants in those cases, like Defendants here, argued that classes should not be certified because not every African American child had applied to and been barred from a white school, and not every African American resident had been arrested at a white lunch counter. The courts rejected these arguments, recognizing that the classes in question sought relief from laws and practices that denied all of them equal access. Likewise, here, the prisoners seek to protect themselves from policies and practices that endanger the mental and physical health of all, without regard to what injuries each one may have sustained thus far. Moreover, classwide relief in these circumstances aligns with injunctive

relief in non-class cases, where courts have long held that individuals may sue to prevent a threatened deprivation of their constitutional rights without having to sacrifice their health and safety in order to sue.

Once a common risk of injury from an illegal policy or practice is shown, certification of the class is warranted when the injunctive or declaratory relief sought would benefit the entire class. This is accomplished when the class takes aim at a generally applicable policy or practice that is promulgated or enforced by unified decision-makers with control over the class as a whole. Such actions pose a common risk to all class members, and that risk may be alleviated by a single injunction. Moreover, at the class certification stage, Rule 23(b)(2) requires only that an injunction *could* resolve the class claims with sufficient specificity and precision to be enforceable. Such injunctions are routine in cases, like this one, where the plaintiff class seeks to remedy unconstitutional policies and practices.

ARGUMENT

I. COURTS CAN AND SHOULD CERTIFY CLASS ACTIONS UNDER RULE 23 WHEN CLASS MEMBERS CHALLENGE GENERALLY APPLICABLE POLICIES OR PRACTICES THAT EXPOSE THEM TO AN UNREASONABLE RISK OF INJURY.

A. The "Same Injury" Requirement Means That Class Members Are Exposed to a Common, Unreasonable Risk of Harm.

A key factor that courts evaluate in deciding whether to certify a class is whether all class members "have suffered the same injury." *Wal-Mart*, 131 S.

Ct. at 2551 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). Contrary to the position urged by Defendants, neither the Supreme Court, this Court, nor any other court has interpreted that requirement to mean that all class members seeking purely injunctive or declaratory relief must suffer an *actual* injury, and suffer it in the same way. Just the opposite, this Court has long held that, "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) ("The 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).").

When a putative class seeks declaratory and injunctive relief, the "same injury" requirement for commonality and the similar injury requirement for typicality must mean that class members are all exposed to a *risk* of harm caused by the same unlawful policy or practice. This conclusion is buttressed by the text and history of Rule 23(b)(2), which was designed to permit challenges to generally applicable policies or practices that put a class of plaintiffs at unreasonable risk of harm. Moreover, whether in a class action or in a suit by an individual, the courts do not require a plaintiff to wait until an injury occurs before obtaining an

injunction; rather, courts issue injunctions to prevent the threatened deprivation of constitutional rights.

1. Since *Wal-Mart*, numerous courts have held that commonality is established when all class members are exposed to a common, unreasonable risk of harm.

Numerous courts have paid due deference to the Supreme Court's decision in *Wal-Mart* and have still held that class members satisfy the "same injury" requirement by virtue of their common exposure to the risks caused by an illegal policy or practice. Several such cases have sought to protect the rights of foster children. In *D.G. v. Yarbrough*, 278 F.R.D. 635 (N.D. Okla. 2011), for example, plaintiffs alleged that the Oklahoma Department of Human Services ("DHS") "has a policy or practice of failing to adequately monitor the safety of Plaintiff Children causing significant harm and risk of harm to their safety." *Id.* at 636. After *Wal-Mart*, Oklahoma moved to decertify the class consisting of children who were in, or in the future would be in, foster care. At issue in the motion was whether *Wal-Mart* altered the Tenth Circuit's prior decision upholding class certification.

In its pre-*Wal-Mart* decision, the Tenth Circuit concluded that plaintiffs satisfied their burden of establishing commonality and typicality because "[t]he injury . . . includes exposure to an impermissible risk of harm due to OKDHS's alleged agency-wide failure to monitor class members adequately."

D.G. v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010). The Tenth Circuit rejected defendants' statistical argument against commonality and typicality, which highlighted that only a small percentage of children in fact reported abuse or neglect in foster care. The court reasoned that, even if "'only' 1.2% of OKDHS foster children actually suffered abuse," that percentage "reveals nothing about how many of those children were not properly monitored and yet survived an unconstitutional risk of abuse or neglect unscathed." *Id.*

The district court, in deciding the post-*Wal-Mart* motion for decertification, held that *Wal-Mart* did not abrogate the Tenth Circuit's holding – namely that exposure to an unreasonable risk of injury resulting from a generally applicable practice was sufficient to establish commonality and typicality. *D.G.*, 278 F.R.D. at 639 (every class member "faces harm or imminent risk of harm if the monitoring practices are insufficient."); *see also M.D. v. Perry*, No. 2:11-cv-84, 2013 U.S. Dist. LEXIS 121557, at *39 (S.D. Tex. Aug. 27, 2013) (granting certification of a class of foster children because their risk of harm from unconstitutional conditions established commonality: "The common practice or policy does not have to injure every class member or injure them in exactly the same manner.").

A similar conclusion was reached in *Connor B. v. Patrick*, 278 F.R.D. 30, 31 (D. Mass. 2011). Plaintiffs there alleged that the Department of Children

and Families ("DCF") exposed children in custody to harm from "overarching systemic deficiencies" within the agency including "excessive caseloads" and "inadequate caseworker and supervisor training." The district court in *Connor* certified a class consisting of children who were in, or in the future would be in, foster care. *Id.*

After the Supreme Court decided *Wal-Mart*, Massachusetts moved to decertify the class. The district court explained that *Wal-Mart* did not change the court's prior holding that plaintiffs satisfied the commonality element of Rule 23(a)(2) because class members were all "expose[d] . . . to an unreasonable risk of harm" caused by the allegedly unconstitutional practices of the DCF. *Id.* at 34 (quoting prior class certification decision in the same matter, 272 F.R.D. 288, 295 (D. Mass. 2011)). That exposure to risk, the court held, provided the "glue" necessary to establish commonality for class certification. *Id.* The court went on to explain that the holding was not in any way inconsistent with *Wal-Mart*, which "while generally relevant" was a "much different case." *Id.* at 33; *see also Corey H. v. Bd. of Educ.*, No. 92-C-3409, 2012 WL 2953217, at *5, *7 (N.D. Ill. July 19, 2012) (rejecting school district's motion to decertify a class of children with disabilities who had been deprived of their right to education in the least restrictive environment and observing that *Wal-Mart* did not "'change[]' the law on class certification" but instead "indicate[d] that an illegal policy that applies to the entire

class 'provide[s] the "glue" necessary to litigate otherwise highly individualized claims as a class.'") (citations omitted).

Courts have reached similar conclusions as to other institutional settings. For instance, in *Brown v. Plata*, 131 S. Ct. 1910 (2011), a case decided one month before *Wal-Mart* and analogous in many ways to this one, the Supreme Court affirmed injunctive relief for a class of prisoners based upon "systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to substantial risk of serious harm." *Id.* at 1926 n.3 (internal quotation marks omitted).

In another Eighth Amendment case, *Laurna Chief Goes Out v. Missoula County*, No. 12-155-M-DWM, 2013 U.S. Dist. LEXIS 3947 (D. Mont. Jan. 10, 2013), plaintiffs alleged that the county juvenile detention facility denied incarcerated individuals adequate fresh air and outdoor exercise. The district court certified the proposed class notwithstanding defendants' argument that typicality and commonality could not be satisfied because there was no "evidence that all of the plaintiffs are suffering precisely the same types of injuries." *Id.* at *11. In particular, defendants argued that only eight people complained about a lack of fresh air and outdoor access, and it was not clear that all of the class members had "experienced the negative effects that these plaintiffs are claiming." *Id.* The district court rejected that reasoning in certifying the class: "The commonality and

typicality question is whether the alleged depravation [sic] is common and typical throughout the class, not whether the negative effects are common and typical." *Id.* at *12-13; *see also Olson v. Brown*, 284 F.R.D. 398, 410 (N.D. Ind. 2012) ("Unlike the situation in *Wal-Mart*, where the plaintiffs could not demonstrate that the entire company operated under a general policy of discrimination, or a specific practice that tied all of their claims together, . . . in this case, Mr. Olson has shown that the [jail's] specific practices relative to the handling (or non-handling) of grievances, opening legal mail, and restricting access to the law library, have caused the inmates to suffer the same potential injury, which ties all of their jail standards claims together."); *Gilman v. Brown*, No. S-05-830 LKK/GGC, 2013 U.S. Dist. LEXIS 65194, at *75 (E.D. Cal. May 7, 2013) (declining to decertify a class of prison inmates after *Wal-Mart* because "plaintiffs have shown that there is a common question that will affect every member of both classes: whether the challenged Propositions, as applied, have retrospectively created a significant risk that their punishment will be increased, by retrospectively lengthening their terms of incarceration.").

2. The history and purpose of Rule 23(b)(2) confirm that class actions are proper in challenges to illegal policies or practices that create an unreasonable risk of harm.

Rule 23(b)(2) authorizes the certification of class actions that take aim at generally applicable policies or practices that create a risk of harm to class members. Specifically, Rule 23(b)(2) states:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Nothing in the text of the Rule requires that each and every class member manifest either an actual injury or the same actual injury.

Indeed, the Advisory Committee's Notes, upon which the Supreme Court has repeatedly placed great reliance,[2] explain that "[a]ction or inaction is directed to a class within the meaning of this subdivision *even if it 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." Advisory Committee's Note (1966), Fed. R. Civ. P. 23(b)(2) (emphasis added). Because "threatened"

[2] *See*, *e.g., Wal-Mart*, 131 S. Ct. at 2557-58 (relying upon the cases cited in the Advisory Committee's Notes to highlight that a class action certified under Rule 23(b)(2) must be susceptible to resolution through a single classwide injunction); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citing the Advisory Committee's Notes to show, among other things, that civil rights cases are prime examples of class actions certified under Rule 23(b)(2)).

conduct precedes an actual injury, and the threat need apply to only "one or a few members of the class," *id.*, the Advisory Committee's Notes contradict any asserted requirement that all class members must suffer an actual injury, and all in the same way.

Therefore, the Supreme Court's enunciation of the "same injury" requirement can only mean, in the context of a class action seeking injunctive or declaratory relief under Rule 23(b)(2), that all class members must suffer an unreasonable *risk* of harm from a generally applicable policy or practice – not that all class members must suffer the same *actual* harm or have the same exact exposure to it.

The history of Rule 23(b)(2) confirms this understanding. "The entire purpose behind Rule 23(b)(2) is to resolve disputes concerning the existence of a policy and practice of discrimination against a broad class of individuals." *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 357 (D. Conn. 1998). The Rule itself was adopted in 1966 in the wake of civil rights class actions that challenged various policies and practices concerning racial segregation. *Wal-Mart*, 131 S. Ct. at 2557-58. It would be anomalous to require that all class members suffer an actual injury, let alone the exact same one, when the cases that the Advisory Committee cites involved civil rights class actions where the courts imposed no such requirement.

For example, in *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), plaintiffs filed a class action lawsuit challenging the Fort Worth School District's continued segregation of the school system. The defendant school board challenged the maintenance of the lawsuit as a class action, arguing that "each student is admitted, assigned and transferred as an individual." *Id.* at 288. The school board urged that "the Court ought not to take any action until, as to any individual Negro students who might seek admission to formerly all-white schools, it was actually demonstrated that the School authorities would not fulfill their duties." *Id.* at 287. Thus, the school board effectively argued that the case should not have been allowed to proceed as a class action because all the class members had not suffered and would not suffer an actual injury until they were in fact denied admission. The Fifth Circuit soundly rejected that argument, holding that a class action was proper because "[b]y the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination." *Id.* at 289; *see also Bailey v. Patterson*, 323 F.2d 201, 205-06 (5th Cir. 1963) (holding that a class action was properly brought by users of Mississippi's segregated facilities, even those that had not themselves been arrested for violation of the unconstitutional laws, because "the very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated"); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 824 (6th Cir. 1962) (granting relief to

public school students in Memphis – including those who had failed to seek transfer to white schools – by "instruct[ing] [the District Court] to restrain the defendants from operating a biracial school system").

Thus, educational and other institutional defendants in 1960s civil rights class actions tried – and failed – to defeat class certifications on the ground that not all class members had been or would be injured. These cases were the model for Rule 23(b)(2), as the Supreme Court acknowledged in *Wal-Mart*: "In particular, the Rule [23(b)(2)] reflects a series of decisions involving challenges to racial segregation – conduct that was remedied by a single classwide order." 131 S. Ct. at 2558. Nothing in *Wal-Mart* eliminates the historic availability of the class action mechanism to challenge a general policy or practice that creates an impermissible risk of violating the plaintiffs' fundamental rights.

3. The requirement that class members suffer the "same injury" must be understood in light of the underlying rule in non-class action cases that an injunction will lie to prevent a threatened, and not yet actual, deprivation of constitutional rights.

Plaintiffs who seek injunctive or declaratory relief from unconstitutional or otherwise illegal conduct need not wait to sue until they have suffered the injury they have reason to fear. Just as an individual may obtain a court order enjoining unconstitutional conduct before the injury occurs, so may

members of a class who face a common risk of harm from a generally applicable policy or practice.

In *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court decided whether the plaintiff stated an Eighth Amendment claim based upon his cell assignment with a prisoner who smoked five packs of cigarettes a day. The Court held that defendants had, with deliberate indifference, exposed the prisoner to a risk of future harm from exposure to high levels of tobacco smoke:

> That the Eighth Amendment protects against harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. . . . We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

Id. at 33-34 (internal citations omitted); *see also Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (holding that prisoners were entitled to injunctive and declaratory relief from Eighth Amendment violations caused by exposed electrical wiring, deficient firefighting measures, and mingling of healthy inmates with those who had contagious diseases); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) ("Prisoners have the right not to be subjected to the unreasonable threat of injury or

death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions.").

A plaintiff's right to seek injunctive relief from illegal conduct before an injury materializes is not limited to the Eighth Amendment. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (holding that plaintiffs who challenged Arizona's farm labor statute as unconstitutional under the First and Fourteenth Amendments did "not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154-55 (9th Cir. 2000) (holding that plaintiffs had standing to seek an injunction based on a First Amendment challenge to a California law because "[i]t is sufficient . . . that the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff") (quoting *Babbitt*, 442 U.S. at 298); *Western Tradition P'ship v. City of Longmont*, No. 09-cv-02303, 2009 U.S. Dist. LEXIS 103438, at *12 (D. Col. Oct. 21, 2009) (holding that plaintiff who challenged a local ordinance's regulation of electioneering as inconsistent with the First Amendment "need not expose himself to actual arrest or prosecution to be entitled to challenge a statute or ordinance that he claims unlawfully infringes on his First Amendment rights."); *Cyberspace, Commc'ns, Inc. v. Engler*, 55 F. Supp.

2d 737, 745-46 (E.D. Mich. 1999) (holding that in plaintiffs' First Amendment challenge "[n]o one should have to go through being arrested for a felony, publicly shamed, and pay for a defense only to have a court find that the newly enacted statute is unconstitutional. This can, and should, be determined before such injury occurs."); *M.D.*, 2013 U.S. Dist. LEXIS 121557, at *61-62 (recognizing Fourteenth Amendment right "to be free from an unreasonable risk of harm while in the State's custody. . . . Plaintiffs do not need to wait until they are actually abused or suffer from unsafe living conditions.").

Like individual civil rights plaintiffs, class members may seek an injunction to prevent a threatened deprivation of their rights without waiting for the risk to materialize into actual harm.

B. Class Certification Is Appropriate When the Challenge Is Aimed at an Unlawful Policy or Practice That Is Promulgated or Enforced by a Unified Set of Decision-Makers with Authority over the Class.

A second key factor that courts consider in deciding whether to certify a class seeking injunctive or declaratory relief is if the policy or practice emanates from a unified set of decision-makers who exercise control over the class. The Supreme Court's decision in *Wal-Mart* helped clarify where courts should draw the line in discerning whether class members meet the commonality requirement of Rule 23(a). In that case, plaintiffs sought to certify a class of 1.5 million female employees who alleged that Wal-Mart engaged in gender discrimination in

violation of federal law. In particular, they alleged that Wal-Mart had a corporate policy that gave discretion to local supervisors in thousands of stores to make employment decisions. According to the plaintiffs, that localized discretion, when combined with the company's corporate culture permitting bias, resulted in discriminatory pay and promotions. 131 S. Ct. at 2553-55. The Court reversed and decertified the class. It reasoned that plaintiffs failed to satisfy the commonality requirement because, among other reasons, there was no company-wide policy that could explain the disparate treatment of all female employees: "Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 2552 (emphasis in original). At bottom, the Court held that Wal-Mart did not propound or implement a "general policy" that caused discrimination, but instead there were "literally millions of employment decisions." *Id.* at 2552.

While *Wal-Mart* clarifies that localized decision-making lacks the necessary "glue" to make a policy or practice generally applicable for the purpose of establishing commonality, subsequent cases make clear that when a policy or practice is promulgated by a unitary or cohesive set of decision-makers and they oversee implementation, the commonality standard is met. These subsequent cases

also recognize that commonality is not defeated by the exercise of some judgment or discretion at a local level in implementing a general policy.

In *McReynolds v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 672 F.3d 482, 488-89 (7th Cir. 2012), plaintiffs, 700 current and former African American brokers, alleged that Merrill Lynch implemented: (i) a "teaming" policy whereby brokers could self-select teams from within their office for business development; and (ii) an "account distribution" policy for assigning the accounts of departing brokers, based upon performance, to those brokers or teams who remained. Plaintiffs alleged that these policies created "fraternities" that disparately disadvantaged African American brokers. The Seventh Circuit reversed the district court and granted certification. Judge Posner, writing for the panel, explained that after *Wal-Mart*, a policy or practice satisfies the commonality requirement if it "implement[s] a uniform policy established by top management to govern local managers." *Id.* at 488. He further explained that while *Wal-Mart* involved local managers independently exercising their discretion over employment decisions, Merrill Lynch's corporate management established the teaming and account distribution policies company-wide. *Id.* at 488-89. Importantly, class certification was not defeated just because middle-level local managers had some discretion in implementing the policy through their power to

veto team formations or supplement the criteria for account distribution. *Id.* at 489, 491.

Similarly, in *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012), plaintiffs moved to certify a class alleging that the New York City Police Department engaged in an unconstitutional policy or practice of stopping and frisking people based upon their race. The district court granted class certification and, in addressing commonality, explained that the stop and frisk program was "centralized and hierarchical" in that the policy "generate[s] from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department-wide policies." *Id.* at 173 (internal quotation marks omitted). The district court further explained that "[p]recinct commanders are not given leeway to conduct stops and frisks if, when, and how they choose; instead, they are required to use the tactic as a central part of the Department's pro-active policing strategy." *Id.* Additionally, class certification was not defeated simply because individual officers made certain judgment calls when applying the policy. *Id.* at 174. Thus, a cohesive and controlling set of decision-makers who promulgate and enforce an illegal policy or practice thereby create a common target at which class members may take aim.

II. CERTIFICATION UNDER RULE 23(b)(2) IS APPROPRIATE AND ROUTINE WHERE CLASSWIDE INJUNCTIVE OR DECLARATORY RELIEF CAN BE CRAFTED TO REMEDY UNLAWFUL POLICIES AND PRACTICES.

A typical Rule 23(b)(2) class seeks institutional reform in the form of injunctive relief. *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994). As explained above, the federal courts, both before and after *Wal-Mart*, have certified classes under Rule 23(b)(2) where the relief sought is injunctive and would benefit all class members. Indeed, "[t]he 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." *Id.* at 64-65 (citing Advisory Committee's Notes (1966), Fed. R. Civ. P. 23(b)(2)).

The key in Rule 23(b)(2) cases is that the injunctive or declaratory relief sought should benefit the entire class. That is accomplished when the plaintiff class seeks an order requiring the defendants to remedy an unlawful policy or practice, because such relief serves each and every member of the class regardless of what specific injury a particular class member has suffered or is at risk of suffering. As this Court has held, "it is sufficient" to meet the requirements of Rule 23(b)(2) if the "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. That standard is typically met in cases challenging illegal policies and practices because,

when such policies and practices are changed to eliminate an unreasonable risk of harm, every class member benefits. *See, e.g.*, *Scarpino v. Grosshiem*, 852 F. Supp. 798, 807 (S.D. Iowa 1994) (certifying Rule 23(b)(2) class action by prisoners challenging constitutionality of alcoholic rehabilitation program); *Bradley v. Harrelson*, 151 F.R.D. 422, 427 (M.D. Ala. 1993) (certifying class action where prisoners sought injunctive relief with respect to mental health services and concluding that Rule 23(b)(2) "is particularly applicable to suits such as the one *sub judice* which involve conditions of confinement in a correctional institution"); *see also Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of individuals who were deaf in challenge to accessibility of municipal 911 and street alarm box system); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 454-55 (N.D. Cal. 1994) (certifying class under Rule 23(b)(2) in action by persons with disabilities against movie theater chain for violation of California Disabled Persons Act, even though not all members of the class visited theaters or were directly harmed by defendants' conduct).

This does not suggest that Rule 23(b)(2) is automatically satisfied regardless of what type of injunction is sought, the scope of the injunction, or the wording of the contemplated order. Injunctive relief must be crafted in a specific and cohesive manner, such that the injunction is not overbroad and does not suffer

from ambiguity or vagueness. Thus, as in any other case, the injunction order must contain sufficient detail to meet the requirements of Rule 65(d). But as this Court has explained: "Injunctions are not set aside under Rule 65(d) unless they are so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327, 1344 (9th Cir. 1992).

In any event, at the class certification stage, Rule 23(b)(2) merely requires that an injunction *could* be formulated in a way that would resolve the class claims. *See Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 522 (N.D. Cal. 2011). In *Gray*, a class was certified under Rule 23(b)(2) where the plaintiffs sought injunctive relief to require certain state and federal parks to provide adequate accommodations for persons with vision and/or mobility limitations. The defendants argued that a single injunction could not be crafted to provide each individual class member relief. The district court disagreed. The court held that the challenged barriers to access "might conceivably be remedied by an injunction" that required changes to the defendants' written policies and training procedures. Thus, the district court held that class certification was appropriate under Rule 23(b)(2) because "it appear[ed] that an injunction could be formulated that would be sufficiently specific and would resolve the class claims." *Id.* at 522.

Similarly, in *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), a class of immigrants challenged the government's policy and practice of detaining them for over six months without a bond hearing. The plaintiffs did not seek monetary damages; rather, they sought injunctive and declaratory relief requiring the government to provide the class with "constitutionally-adequate individual hearings before an immigration judge." *Id.* at 1112 (internal quotation marks omitted). This Court held that the requirements of Rule 23(b)(2) were satisfied, even though the individual issues at each bond hearing would be different for each class member, because all class members had been or would be affected by the same government conduct – *i.e.*, prolonged detention in violation of their statutory and constitutional rights without a procedurally proper hearing. *Id.* at 1125-26. Specifically, this Court held that certification was appropriate because "all class members seek the exact same relief as a matter of . . . constitutional right." *Id.* at 1126. Because an injunction could be formulated that would be sufficiently specific and would resolve the class claims, the case was appropriate for classwide injunctive relief. *Id.* at 1125-26.

In this case and other similar challenges to generally applicable policies and practices, the injunction will not relate to providing particular care to specific individuals. Instead, if Plaintiffs prove their claims, the resulting injunction will remedy the unconstitutional policies and practices at issue. For

instance, the injunction might address the number and qualification of health care staff required to serve specified numbers of inmates, the speed of responses to urgent and routine medical needs, the standards for filling prescriptions, the screening protocols for placement and monitoring of inmates in isolation, and the like. Thus, this suit is the classic type of action authorized under Rule 23(b)(2) – the policies and practices of the Arizona Department of Corrections are generally applicable to all members of the class, and final injunctive and declaratory relief would benefit the entire class.

It is for this reason that injunctive challenges to unlawful policies and practices proceed as class actions. In a case where inmates who were deaf challenged the failure of prison officials to accommodate their special needs, the district court said the following:

> The class action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population. Prisoners frequently come and go from institutions for a variety of reasons. Veteran prisoners are released or transferred, while new prisoners arrive every day. Nevertheless, the underlying claims tend to remain. Class actions therefore generally tend to be the norm in actions such as this.

Clarkson v. Coughlin, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (citations, internal quotation marks omitted). Certification under Rule 23(b)(2) is therefore appropriate and commonplace when, as here, transient class members seek an injunction to protect themselves from system-wide, illegal policies or practices.

CONCLUSION

For these reasons, and in reliance on Plaintiffs' arguments showing that the class at issue satisfies the factors discussed above, Amici respectfully urge the Court to affirm the district court's order granting Plaintiffs' motion for class certification.

Respectfully submitted,

/s/Mark A. Chavez
Mark A. Chavez – SBN 90858
CHAVEZ & GERTLER LLP
42 Miller Ave.
Mill Valley, CA 94941
(415) 381-5599 (phone)
(415) 381-5572 (fax)
mark@chavezgertler.com

Catherine Weiss
Michael Hahn
Jason Halper
Monica Perrette
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, NJ 07068
(973) 597-2500 (phone)
(973) 597-5727 (fax)
cweiss@lowenstein.com

Attorneys for Amici Curiae

Dated: October 8, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

U.S. Court of Appeals Docket Number: 13-16396

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point type.

Signed: /s/Mark A. Chavez

Mark A. Chavez
CHAVEZ & GERTLER LLP
42 Miller Ave.
Mill Valley, CA 94941
(415) 381-5599 (phone)
(415) 381-5572 (fax)
mark@chavezgertler.com

Local Counsel for Amici Curiae

Dated: October 8, 2013

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 13-16396

I hereby certify that on October 8, 2013, I electronically filed the foregoing:

BRIEF OF AMICI CURIAE

IN SUPPORT OF PLAINTIFFS-APPELLEES

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signed: /s/Mark A. Chavez

Mark A. Chavez
CHAVEZ & GERTLER LLP
42 Miller Ave.
Mill Valley, CA 94941
(415) 381-5599 (phone)
(415) 381-5572 (fax)
mark@chavezgertler.com

Local Counsel for Amici Curiae

Dated: October 8, 2013