17-3029

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL POSTAWKO, et al.,

Plaintiffs-Appellees,

v.

MISSOURI DEPARTMENT OF CORRECTIONS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Missouri, Central Division
The Hon. Nanette K. Laughrey, U.S.D.J., Presiding

BRIEF OF AMICI CURIAE THE ARC OF THE UNITED STATES, CENTER FOR CHILDREN'S LAW AND POLICY, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS ARKANSAS, INC., HUMAN RIGHTS FIRST, IMPACT FUND, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, AND MISSOURI PROTECTION & ADVOCACY SERVICES IN SUPPORT OF PLAINTIFFS-APPELLEES

Gavin J. Rooney
Natalie J. Kraner
Craig Dashiell
Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 07068
T: (973) 597-2500
F: (973) 597-2400
grooney@lowenstein.com

February 6, 2018

Attorneys for Amici Curiae

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2/6/2018 201634073.11

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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.

IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici Curiae have a direct interest in the issues before this Court as they utilize class actions as a vital tool to protect the populations that they serve from civil rights violations and rely on the right to classwide relief as a means to prevent and/or remedy such violations. Pursuant to Fed. R. App. P. 29(a)(2), Amici have requested and obtained the consent of all parties to file this brief.[1]

A full list and description of Amici is attached as an Appendix to this brief.

SUMMARY OF THE ARGUMENT

The district court properly certified a class of prisoners diagnosed with chronic Hepatitis C ("HCV") viral infections to challenge Defendants-Appellants' ("Defendants") policy that unlawfully denies them access to medically necessary drugs, thereby putting their health and lives at risk. Rule 23(b)(2) of the Federal Rules of Civil Procedure authorizes class actions by plaintiffs who face such a common, unreasonable *risk* of harm in violation of their constitutional rights by virtue of a 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*, 564 U.S. 338 (2011), federal courts across the country have certified classes of foster children,

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), 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.

incarcerated youth, people with disabilities, immigrants in detention, prisoners, pre-trial detainees, and others when they challenged an unlawful policy or practice that threatened their well-being. Indeed, the use of Rule 23(b)(2) to litigate classwide challenges to unlawful government policies has been a cornerstone of civil rights jurisprudence since the 1960s.

Defendants ask the Court to disregard decades of precedent recognizing that exposure to an unreasonable risk of harm is in and of itself a constitutional injury—and particularly so in the prisoner rights context—that can be remedied in a class action. Amici, as organizations that rely on class actions to challenge unlawful policies, practices, and statutes that harm the populations they serve, have a particular interest in explaining to the Court why Defendants' argument disregards precedent and must be rejected.

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 the classes should not be certified because not every African-American child had been denied admission to an all-white school, and not every African-American resident had been arrested for sitting at a whites-only lunch counter. The courts rejected these arguments, recognizing that the classes in question sought relief from laws and practices that risked harm to all class members. Likewise, here, Plaintiffs-Appellees ("Plaintiffs") seek to protect

themselves and the class from policies and practices that endanger the physical health of all prisoners in the custody of the Missouri Department of Corrections who have been diagnosed with chronic HCV.

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 centralized 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 remedied 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.

In their appeal to this Court, Defendants focus on the existence, degree, and nature of the physical harm the prisoners in their care are alleged to have suffered as a result of inadequate medical monitoring and treatment. This attention to the particular consequences to individual 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* physical harm caused by the challenged policy. Were courts to adopt this mistaken standard, virtually no

Rule 23(b)(2) 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 may be lucky enough to escape harm 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.

Here, an injunction will provide a remedy to the entire class by invalidating Defendants' policy that rules out the use of medically necessary drugs to treat chronic HCV.

ARGUMENT

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

A. Historically, Courts Have Certified Classes Of Persons Seeking Injunctive Relief From A Policy Or Practice That Threatens Harm To Their Group, And That Has Been A Central Principle Of Civil Rights Law For Decades.

Under Rule 23(b)(2), "[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." The Rule was designed to facilitate class actions that take aim at generally applicable policies or practices that may harm class members; nothing in the Rule's text requires that each and every class member manifest either a physical injury or the same physical injury, as Defendants suggest.

Indeed, the Advisory Committee's Notes 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." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 69, 102 (emphasis added). Because "threatened" conduct precedes physical harm, and the threat need only apply to "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 existing and manifested physical injury to obtain classwide relief from violations of the Eighth Amendment or Americans with Disabilities Act ("ADA").

The history of Rule 23(b)(2) confirms this understanding. The Rule itself was adopted in 1966 in the wake of civil rights class actions that challenged various policies and practices concerning racial segregation. *Dukes*, 564 U.S. at 361. It would be anomalous to require that all class members suffer physical harm, let alone the exact same one, when the very cases that the Advisory Committee cited involved civil rights class actions where plaintiffs challenged an unlawful policy or statute and the courts imposed no requirement of actual harm.

For example, in *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), the court certified a class of African-American schoolchildren who challenged the Fort Worth School District's continued segregation of its schools. The defendant school board opposed certification, arguing 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. 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," which did not require the plaintiff to show that all class members

had, in fact, been denied admission to an all-white school. *Id.* at 289; *see also Bailey v. Patterson*, 323 F.2d 201, 205-06 (5th Cir. 1963) (holding that a class of African Americans properly challenged Mississippi laws requiring segregated public facilities, even if all class members had not themselves been arrested for violating segregation laws; "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 a class of African-American schoolchildren in Memphis—including those who had not sought transfer to all-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 certification on the ground that not all class members had been or would be subject to unlawful discrimination, or had not suffered such discrimination in the same way. These cases were the model for Rule 23(b)(2), as the Supreme Court acknowledged in *Dukes*: "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." 564 U.S. at 361.

B. As Courts Have Recognized Pre- And Post-*Dukes*, The "Same Injury" Requirement Can Be Satisfied When All Class Members Are Exposed To A Common, Unreasonable Risk Of Harm.

Dukes does indeed say that a key consideration under Rule 23 is whether all "class members have suffered the same injury." *Id.* at 350. Here, the "same injury" that unifies the class is the exposure to a common, unreasonable risk of harm. Nothing in *Dukes* requires Plaintiffs to show that all class members have suffered the same physical harm in order to certify a class.

Contrary to the position urged by Defendants, neither the Supreme Court, this Court, nor any other court has interpreted Rule 23 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. Just the opposite is true; courts have consistently found that putative classes meet Rule 23's commonality requirement so long as class members are exposed to the same *risk of harm* created by a defendant's conduct. *See, e.g.*, *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("class 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."); *DG 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").

Dukes did not change this analysis. In *Dukes*, the Supreme Court explained that to certify a class, plaintiffs must show their claims "depend upon a common contention" and that a determination of the truth or falsity of that common contention "will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. at 350. The Court concluded that a putative class comprised of Wal-Mart's female employees did not assert "common" discrimination claims because the alleged injury the class suffered was not the product of a single company policy or practice. Instead, it held that the alleged discriminatory decisions were made by thousands of individual managers making employment and promotional decisions with regard to 1.5 million employees in stores across the United States. The Court reasoned that "[w]ithout some glue holding the alleged *reasons* for all those [employment] decisions together, it w[as] . . . impossible to say that examination of all the class members' claims for relief w[ould] produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352.

Accordingly, *Dukes* held only that class members must be subject to a common institutional policy in order to have suffered the "same injury." *Id.* at 350-52. The Supreme Court did not impose the requirement that the plaintiffs had

to demonstrate that all class members were subject to discriminatory decisions that resulted in lower pay or lost promotions in order to certify a class. *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 th[e commonality] requirement."); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) ("the [*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."). At bottom, the Wal-Mart employees' bid for class certification in *Dukes* failed because Wal-Mart did not propound or implement a "general policy" requiring disparate treatment of female employees. Instead, the putative class presented "literally millions of employment decisions" to the Court. 564 U.S. at 352.

Although *Dukes* clarified that localized decision-making may lack the necessary "glue" to make a policy generally applicable to class members who claim that they were subjected to a common harm as a result of that policy, *id.* at 350-56, subsequent cases make clear that Rule 23's commonality standard is met when a policy is promulgated by a cohesive set of decision-makers who oversee the policy's implementation by individual actors. *See Parsons v. Ryan* (*Parsons I*), 754 F.3d 657, 684 (9th Cir. 2014) ("A clear line of precedent, stretching back long before [*Dukes*] 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"); *accord* 2 William B. Rubenstein, Newberg on Class Actions § 4:28 (5th Ed. & Dec. 2017 Update) ("certification of a Rule 23(b)(2) class is proper despite the fact that not all class members may have suffered the injury posed by the class representatives so long as the challenged policy or practice was generally applicable to the class as a whole.").

As the Fourth Circuit has observed, "[*Dukes*] did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. Rather, where subjective discretion is involved, [*Dukes*] directs courts to examine whether all [the defendant's employees] exercise discretion in a common way with [] some common direction." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013) (fourth alteration in original). The Seventh Circuit has also noted that, following *Dukes*, a "[system]-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local [employees] with discretion—at least where the class at issue is affected [by] . . . a uniform policy or process applied to all." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 437 (7th Cir. 2015). And in *Parsons*, the Ninth Circuit cautioned that

adopting the position advocated by Defendants here would "amount[] to a sweeping [determination] that, after [*Dukes*], Eighth Amendment claims can *never* be brought in the form of a class action." 754 F.3d at 675–76.

A cohesive and controlling set of decision-makers who promulgate and enforce an illegal policy creates a common target at which class members may take aim, thus unifying the class members' claims. *See, e.g.*, *Logory v. Cty. Of Susquehanna*, 277 F.R.D. 135, 143 (M.D. Pa. 2011) ("Unlike *Dukes*, where commonality was destroyed where there was no common mode of exercising discretion that pervade[d] the entire company, here there is a solid [prison] policy that applied directly to all potential class members." (internal citation and quotation marks omitted)); *Parsons I*, 754 F.3d at 681 (distinguishing *Dukes* because the prisoner class challenged "uniform statewide practices created and overseen by two individuals who [we]re charged by law with ultimate responsibility for health care and other conditions of confinement in all [correctional] facilities, not a grant of discretion to thousands of managers.").

The authorities cited by Defendants are inapposite to this case, where Plaintiffs have identified "a common mode" by which the Missouri Department of Corrections' employees "'exercis[e their] discretion': in the form of policies applied to all inmates with chronic HCV, *e.g.*, not considering [certain] drug

treatment unless and until an inmate's [AST to Platelet Ratio Index] score is above 2.0 for several months." J.A. 783.

Rouse v. Plantier, 182 F.3d 192 (3d Cir. 1999), did not address whether inmates exposed to a common healthcare policy can bring a class action seeking prospective injunctive relief from the institution that implements that policy. As other courts have recognized, the language Defendants cite from *Rouse* is "totally unremarkable" given the "posture of the case." *Braggs v. Dunn*, 317 F.R.D. 634, 662 (M.D. Ala. 2016). *Rouse* "was an appeal from a denial of qualified immunity (rather than an appeal from a class-certification decision) with respect to class claims for damages stemming from inadequate treatment in the past (rather than, as here, a purely prospective injunctive-relief class action alleging a current substantial risk of serious harm)." *Id.* The Third Circuit expressly stated that "[t]he question of class certification . . . is not before us, and we express no opinion on this issue." *Rouse*, 182 F.3d at 199 n.3. More bluntly stated, Defendants are wrong when they assert that *Parsons* created a circuit split with *Rouse*.

The dissenting opinion in *Parsons v. Ryan* (*Parsons II*), 784 F.3d 571 (9th Cir. 2015), denying rehearing en banc, similarly offers no support for Defendants' position. Those dissenting judges improperly focused their certification analysis on whether the plaintiff class would ultimately be able to state an Eighth Amendment claim (instead of whether that class was unified by a common legal

theory), and refused to recognize what they called an "institutional reform Eighth Amendment Claim." *See id.* at 578. However, as the authorities cited above demonstrate, the availability of such claims is exactly what precipitated the enactment of Rule 23(b)(2), and has been firmly rooted in the American legal tradition: first, to remedy discriminatory practices that denied African Americans equal access to education and public facilities; later, to allow other vulnerable populations to remedy deficiencies in institutional settings.

Indeed, Rule 23(b)(2) has provided "an especially appropriate vehicle for civil rights actions seeking . . . declaratory relief 'for prison and hospital reform.'" *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (quoting 3B James W. Moore, Moore's Federal Practice 23.40(1)); *see also Parsons I*, 754 F.3d at 687 (acknowledging in a prisoners' rights class action that claims "for injunctive relief stemming from allegedly unconstitutional conditions of confinement are the quintessential type of claims that Rule 23(b)(2) was meant to address.").

And to the extent that the *Parsons* dissent was concerned that the class in that case—defined as all 33,000 prisoners incarcerated in the Arizona penal system—could not identify a single policy that put them all at risk because they had "diverse medical needs," 784 F.3d at 580, the class here is far more focused and limited—consisting only of inmates who "have been, or will be, diagnosed

with chronic HCV."[2] J.A. 773. Because that "subgroup" has identified a specific policy that dictates the treatment they receive, common questions of whether that policy impacts the putative class's Eighth Amendment rights and constitutes unlawful discrimination under the ADA "can be answered in one stroke," thereby making "certification of that subclass . . . appropriate under Rule 23." *Parsons II*, 784 F.3d at 580.

C. Requiring Classwide Proof Of Actual Harm Imposes A Requirement Not Necessary To Establish Liability To The Class Under The Eighth Amendment.

Plaintiffs' Eighth Amendment claims do not require that either they or the class prove that their medical condition has deteriorated in order to challenge Defendants' policies as unconstitutional.[3] Surely Defendants cannot demand proof of actual physical harm in order to certify a Rule 23(b)(2) class when the substantive cause of action has no such requirement. By so substituting actual

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[2] Notably, the dissenting judges in *Parsons* conceded that the district court properly certified the subclass of prisoners in isolation units because there were "a number of practices and policies specific to the isolation units." *Id.* at 574 n.3.

[3] The same applies to Plaintiffs' ADA claims. As the district court explained, the thrust of Plaintiffs' ADA claims is not that Defendants caused them physical harm, but rather that they were subject to discriminatory conduct: "Plaintiffs contend that . . . Defendants MDOC's policy or custom of denying DAA drug treatment . . . discriminates against them by denying them lifesaving treatments for HCV where Defendant MDOC does provide lifesaving treatments to inmates with disabilities other than HCV." *Postawko v. Missouri Dep't of Corr.*, No. 2:16-CV-04219, 2017 WL 1968317, at *12 (W.D. Mo. May 11, 2017).

harm for risk of harm, Defendants' position would make it virtually impossible to mount classwide challenges to unlawful government policies and, effectively, would insulate such policies from judicial review.

Decades of Supreme Court precedent has established that "the Eighth Amendment protects against future harm to inmates." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("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."); *see also Farmer v. Brennan*, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."); *Brown v. Plata*, 563 U.S. 493, 506 n.3, 551 (2011) (Prisoners who "rel[ied] on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject[ed] sick and mentally ill prisoners . . . to 'substantial risk of serious harm'" stated a classwide Eighth Amendment claim; the Court "ha[d] no occasion to consider whether . . . any . . . particular deficiency in medical care complained of by the plaintiffs[] would violate the Constitution").[4]

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[4] Importantly, 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

So too, this Court has recognized that "a prison official violates the Eighth Amendment by being deliberately indifferent *either* to a prisoner's *existing* serious medical needs *or* to conditions posing a substantial risk of serious *future* harm." *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995). It is the right "to be free from the unreasonable risk of harm" itself that is protected under the Constitution. *M.D. v. Perry*, 294 F.R.D. 7, 62 n.6 (S.D. Tex. 2013). Indeed, courts have found that "being subjected to a substantial risk of serious harm is an actionable constitutional injury, even when a prisoner's physical or mental condition has not yet been detrimentally impacted." *Braggs*, 317 F.R.D. at 656; *accord Parsons I*, 754 F.3d at 680 (finding that the risk of harm "is, in its own right, a constitutional injury amenable to resolution in a class action").

Accordingly, under *Helling*, *Dukes*, *Plata*, and their progeny, to assert a class challenge against a generally applicable institutional policy, plaintiffs need only "establish that there is a policy or practice on the part of the defendants that is the source of the putative class members'[] alleged injuries, and . . . that the claims arising out of those injuries depends [sic] on common questions of law and fact." *Dockery v. Fischer*, 253 F. Supp. 3d 832, 853 (S.D. Miss. 2015), *motion for leave*

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impending, that is enough."). Like individual civil rights plaintiffs, class members may seek an injunction to prevent a threatened injury without waiting for the risk to materialize into actual harm.

to appeal pursuant to Rule 23(f) denied, No. 15-90110, slip op., (5th Cir. Nov. 2, 2015).

Similarly, the certification stage is not an opportunity "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Class members are thus not required to prove "that the policies they identified did, in fact, cause the harm they are alleging." *Dockery*, 253 F. Supp. 3d at 848; *see also Braggs*, 317 F.R.D. at 656 (at the class certification stage plaintiffs need only establish that "the policies . . . they challenge are common, not (yet) that the common policies . . . are unconstitutional."). "Put differently, [to certify a class under Rule 23, plaintiffs] need to demonstrate the existence of common questions with common answers, not what those common answers are." *Braggs*, 317 F.R.D. at 656.

After *Dukes*, courts have continued to find that the risk of harm created by a prison policy gives rise to common questions that unify class members, even if that policy might not "injure them in exactly the same manner." *Dockery*, 253 F. Supp. 3d at 848, 854 (recognizing that "whether [the challenged] conditions and health care have either subjected prisoners to an unconstitutionally unreasonable risk of harm or, conversely, were sufficient to provide humane conditions of confinement," were questions common to the class); *see also Lippert v. Baldwin*,

No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) ("The question common to all plaintiffs, then, is whether each of defendants' policies and practices do in fact put inmates with serious medical conditions at risk."); *Braggs*, 317 F.R.D. at 659 (recognizing that whether the State's "policy or practice of understaffing subject[ed] mentally ill prisoners to a substantial risk of serious harm [wa]s one question . . . apt to drive the resolution of th[e] litigation."); *Scott v. Clarke*, 61 F. Supp. 3d 569, 587 (W.D. Va. 2014) (whether a policy places "current and future . . . prisoners at a substantial risk of serious harm to which the Defendants are deliberately indifferent implicates questions of fact and law common to the entire putative class."); *Jones v. Gusman*, 296 F.R.D. 416, 466 (E.D. La. 2013) (whether certain practices create conditions that "put inmates at a substantial risk of harm is amenable to a common answer. . . . Similarly, whether . . . officials have been deliberately indifferent to any such risk can be demonstrated in a manner that is applicable to all class members.").

None of these post-*Dukes* cases required the class proponents to establish actual harm (physical or economic) as a condition precedent to certifying a class under Rule 23. Imposing that requirement would go beyond what is required under the Rule and the Constitution. As the Supreme Court observed in *Plata*, even prisoners "with no present physical or mental illness" can be placed at risk by

an illegal practice "so long as the State continues to provide inadequate care." 563 U.S. at 531.

Other courts—in addition to the district court in this case—have certified classes of prisoners that challenge institutional HCV treatment policies. For example, in *Graham v. Parker*, the court certified a class of prisoners who sought injunctive relief requiring the defendants "to develop and implement a plan to eliminate the substantial risk of serious harm to inmates with Hepatitis C" created by the defendants' existing treatment practices. No. 3:16-cv-01954, 2017 WL 1737871, at *1 (M.D. Tenn. May 4, 2017). The court rejected the defendants' argument that individualized proof was necessary to establish each class member's Eighth Amendment claim, observing that "[i]t [wa]s the official policies and practices applicable to all inmates with Hepatitis C which Plaintiffs allege[d we]re unconstitutional." *Id.* at *4. Thus, the question of whether "Defendants' current protocols and the failure to diagnose and treat Hepatitis C with the most recent and generally accepted community standards of treatment violate[d] the U.S. Constitution" could be resolved for all class members at once. *Id.*

So too in *Hoffer v. Jones*, the court rejected the defendant's argument that the putative prisoner class should not be certified because the class members' "disparity of symptoms" and the varying timeframes "in which it takes for [those] symptoms to occur" precluded the court from making a "one stroke determination"

to resolve their Eighth Amendment claims. No. 4:17-cv-214, 2017 WL 5586877, at *2 (N.D. Fla. Nov. 17, 2017). The court noted that the defendant's argument missed the point. The class's "claims . . . focused on Defendant's policy of non-treatment for HCV, which expose[d] every HCV patient to the same risk, regardless of their symptoms," and the class had not requested that the court "order Defendant to immediately give each member . . . specific medical treatment." *Id.* at *2, 3. As the court explained, "[o]rdering a change in policy (even with specific treatment in mind) is not the same as ordering specific treatment" because "even after the change is enacted, the policy can still take into account inmates' individualized conditions." *Id.* at *3 n.5.

II. CERTIFICATION SHOULD BE GRANTED UNDER RULE 23(B)(2) WHEN CLASSWIDE INJUNCTIVE RELIEF CAN BE CRAFTED TO REMEDY AN UNLAWFUL POLICY

When deciding whether to certify a class under Rule 23(b)(2), courts must consider whether "a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. "Courts have held that the (b)(2) requirement is met when the party opposing the class has acted in a consistent manner towards members of the class so the actions may be viewed as part of a pattern of activity." *Ellis v. O'Hara*, 105 F.R.D. 556, 563 (E.D. Mo. 1985). So long as class members' claims "turn[] on a single question that uniformly applie[s] to all class members" and "[r]esolution of that question as to

one of the plaintiffs necessarily resolve[s] the issue for the entire class," certification under Rule 23(b)(2) is warranted. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010).

The cohesiveness standard is typically met "in prisoner actions brought to challenge various practices or rules in the prisons on the ground that they violate the constitution [sic]," including "prison policies or procedures alleged . . . to violate the prisoners' Eighth Amendment rights to be free from cruel and unusual punishment." 7AA Wright & Miller, Fed. Prac. & Proc. Civ. § 1776.1 (3d Ed. & Apr. 2017 Update); *see also Parsons I*, 754 F.3d at 689 (certifying class where "every inmate in the proposed class [wa]s allegedly suffering the same (or at least a similar) injury and that injury c[ould] be alleviated for every class member by uniform changes in statewide . . . policy and practice."); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847–48 (5th Cir. 2012) (observing that class claims can "be based on an allegation that the State engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency. . .—with respect to the class" if "declaratory or injunctive relief settling the legality of the [State's] behavior with respect to the class as a whole is appropriate." (quotations omitted)).

Thus, in *Graham*, the court rejected the defendants' argument that individualized relief would be required to redress each class member's injury,

noting that the plaintiffs' claims all "involve[d] the constitutionality of [the State's] treatment protocols, policies and practices regarding Hepatitis C." 2017 WL 1737871, at *6. "[I]f Plaintiffs succeed[ed] in obtaining injunctive and declaratory relief for themselves, the claims of all class members w[ould] also succeed and the class members w[ould] all benefit from the same injunctive and declaratory relief." *Id.* at *5. Similarly, in *Hoffer*, the court certified the prisoner class under Rule 23(b)(2) because "if th[e] Court enter[ed] an injunction forcing Defendant to change [the department of corrections'] policies and practices with respect to HCV treatment, then each member of the proposed class w[ould] be able to enjoy those changes." 2017 WL 5586877, at *4.

Moreover, at the class certification stage, a court is not required to decide the "precise terms of the injunction . . . , only that the class members' claim is such that a sufficiently specific injunction can be conceived." *Dockery*, 253 F. Supp. 3d at 851 (quotations omitted); *see also Morrow v. Washington*, 277 F.R.D. 172, 198 (E.D. Tex. 2011) ("The precise terms of the injunction need not be decided at th[e certification] stage, only that the allegations are such that injunctive and declaratory relief are appropriate and that the class is sufficiently cohesive that an injunction can be crafted that meets the specificity requirements of Rule 65(d)."). Plaintiffs need only "present evidence and arguments sufficient to allow the district court to see how it might satisfy Rule 65(d)'s constraints and thus

conform with Rule 23(b)(2)'s requirement" to warrant certification. *Dockery*, 253 F. Supp. 3d at 851 (internal quotation marks omitted).

As the Ninth Circuit explained in *Parsons*, requiring plaintiffs to formulate injunctive relief with specificity at the certification stage is "particularly" inappropriate in prisoners' rights cases because: (1) "an injunction in any such case must closely track the violations established by the evidence at trial"; (2) "any such relief must comply with the [Prison Litigation Reform Act's] extensive requirements"; (3) "prison officials must play a role in shaping injunctions"; (4) "ultimate proof of some violations but not others might easily change the structure of a remedial plan"; and (5) "conditions in prisons might change over the course of litigation." 754 F.3d at 689 n.35.

Thus, even if a district court might be required to *modify* the proposed injunctive relief sought by class members "when fashioning the ultimate relief on the merits," an "injunction entered can still apply to the Class as a whole" within the meaning of Rule 23(b)(2) so long as the "proposed Class . . . is subject to the exact same policy." *Decoteau v. Raemisch*, 304 F.R.D. 683, 690 (D. Colo. 2014). This suit is the classic type of action authorized under Rule 23(b)(2)—the policies and practices of the Missouri Department of Corrections are generally applicable to all members of the class, and final injunctive and declaratory relief would benefit the entire class.

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,

Dates: February 6, 2018

By: /s/ Gavin J. Rooney

Gavin J. Rooney
Natalie J. Kraner
Craig Dashiell
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
T: (973) 597-2500
F: (973) 597-2400
grooney@lowenstein.com

Attorneys for Amici Curiae

APPENDIX

LIST AND DESCRIPTION OF AMICI CURIAE

The Arc of the United States (The Arc) is the nation's largest organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with I/DD receive the protections and supports to which they are entitled by law. Class action litigation is an important tool to ensure that the rights of people with I/DD are enforced to the fullest extent possible.

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.

The **Judge David L. Bazelon Center for Mental Health Law (Bazelon)** is a national legal-advocacy organization representing people with mental disabilities throughout the United States. Bazelon has successfully used class actions to secure legal precedents expanding and protecting the civil rights for people with

mental disabilities in matters relating to, among other subjects, education, housing, and the right to live and work in the community.

Disability Rights Arkansas, Inc. (DRA) is a private, non-profit organization which is the designated Protection and Advocacy System for Arkansas, and has authority under federal law to pursue legal, administrative, and other remedies on behalf of persons with Disabilities. DRA's mission is to vigorously advocate for and enforce the rights of people with disabilities. DRA has an interest in preserving the right to classwide relief from civil rights violations for persons with disabilities.

Human Rights First (HRF) is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. HRF operates one of the largest programs for pro bono legal representation of refugees, working to provide legal representation without charge to thousands of indigent asylum applicants, including some detained in immigration detention facilities across the United States. HRF joins this brief to protect class action challenges to illegal government policies and actions for both our clients and thousands of detained asylum seekers who are unable to retain individual counsel.

The **Impact Fund** is a nonprofit organization that seeks to achieve economic and social justice by providing representation, counseling, funding, and other

assistance in complex litigation. The Impact Fund has an interest in safeguarding efforts to achieve social justice through class actions in appropriate cases.

The **National Disability Rights Network (NDRN)** is the nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

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.

Missouri Protection & Advocacy Services (Mo P&A) is the state-designated protection and advocacy system for people with disabilities in Missouri. Mo P&A protects the rights of persons with disabilities in Missouri through legally-based advocacy. Mo P&A has successfully used class actions to secure legal precedents expanding and protecting the civil rights for people with mental disabilities in matters relating to, among other subjects, accessible mental health services for deaf and hearing impaired consumers. Through its participation in this matter, Mo P&A seeks to preserve and protect the right to classwide relief from civil rights violations for people with disabilities, including those in detention.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

U.S. Court of Appeals Docket Number: 17-3029

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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.

By: /s/ Gavin J. Rooney

Gavin J. Rooney
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
T: (973) 597-2500
F: (973) 597-2400
grooney@lowenstein.com

Attorneys for Amici Curiae

Dated: February 6, 2018

ECF CERTIFICATE OF COMPLIANCE
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I hereby certify that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program, is free of viruses.

By: /s/ Gavin J. Rooney
Gavin J. Rooney
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
T: (973) 597-2500
F: (973) 597-2400
grooney@lowenstein.com

Attorneys for Amici Curiae

Dated: February 6, 2018

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 17-3029

I hereby certify that on February 6, 2018, 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 Eighth Circuit by using the appellate CM/ECF system.

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By: /s/ Gavin J. Rooney

Gavin J. Rooney
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
T: (973) 597-2500
F: (973) 597-2400
grooney@lowenstein.com

Attorneys for Amici Curiae

Dated: February 6, 2018