Case No. 11-40789

In the United States Court of Appeals for the Fifth Circuit

M.D., BY HER NEXT FRIEND SARAH R. STUKENBERG, ET AL.,
Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi Division
No. 2:11-CV-84, Hon. Janis Graham Jack, Judge Presiding

BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, PROFESSOR LUCY S. McGOUGH, PROFESSOR JACQUELINE A. NASH, PROFESSOR CHERYL PRESTENBACK BUCHERT, PROFESSOR RAMONA FERNANDEZ, PROFESSOR BARBARA STALDER, PROFESSOR LONNY HOFFMAN, PROFESSOR ELLEN MARRUS, AND PROFESSOR DAVID CALDER AS AMICI CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF AMICI'S INTEREST IN THE CASE

This brief is filed on behalf of the National Association of Counsel for Children (NACC) and a number of law professors, all affiliated with law schools in this Circuit. Amici have a shared interest in protecting the proper standard that has historically and consistently allowed for Rule 23(b)(2) class actions to be brought in cases seeking injunctive relief to remedy violations of civil rights, including such actions on behalf of children in state foster care custody.

The NACC is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The NACC has 2,000 members representing all 50 states and the District of Columbia, and is comprised primarily of judges and attorneys. It also includes representatives from the fields of medicine, social work, mental health, education, and law enforcement. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children.

The law professors[1] filing this brief are recognized legal scholars who have devoted considerable study to child welfare advocacy and/or civil procedure issues, including class action reform litigation filed on behalf of children in state foster care custody. They are: (1) Lucy S. McGough, Vincent & Elkins Professor of

[1] Institutional affiliations are provided for identification purposes and do not denote any law school's opinion on the issues presented in this appeal.

Law, Louisiana State University Law Center; (2) Jacqueline A. Nash, Professor of Clinical Education, Southern University Law Center; (3) Cheryl Prestenback Buchert, Clinical Professor of Law, Loyola University New Orleans College of Law; (4) Ramona Fernandez, Clinical Assistant Professor of Law, Loyola University New Orleans College of Law; (5) Barbara Stalder, Assistant Clinical Professor of Law, University of Houston Law Center; (6) Lonny Hoffman, George Butler Research Professor of Law, University of Houston Law Center; (7) Ellen Marrus, George Butler Research Professor of Law and Director, Center for Children, Law & Policy, University of Houston Law Center; and (8) David Calder, Visiting Clinical Professor, Child Advocacy Clinic, University of Mississippi School of Law.

Because of their areas of study and their advocacy and policy work, amici present a unique and helpful perspective to the Court. These amici have an interest in ensuring that Federal Rule of Civil Procedure 23(b)(2) is applied to this child welfare reform litigation in accordance with the Rule's traditional and intended purposes and in a manner consistent with the Rule's application outside the child welfare context.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici hereby represent that this brief was written by counsel for amici, and that: (a) no part of the brief was authored by a party's counsel; (b) no party or party's counsel

contributed money intended to fund preparing or submitting the brief; and (c) no person—other than amici, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Half a century of civil rights class litigation stands behind the right of Appellees to challenge the systemic deprivation of their due process and familial association rights in the Texas child welfare system. The position advocated by Appellants and their amici would preclude the historic vindication of civil rights through class-wide remedies under Federal Rule of Civil Procedure 23(b)(2), and establish an unprecedented, heightened standard for wards of the state to protect their rights as a class.

Neither the history of federal class action jurisprudence—in this Court and throughout the federal court system—nor the recent holding of *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), restricts traditional 23(b)(2) class reform litigation to actions challenging desegregation or authorizes the application of a heightened standard of review to certification motions involving children in state foster care custody. *See* Appellants' Br. at 29; State Amici Br. at 33. Such a limitation is contradicted by decades of federal precedent certifying 23(b)(2) classes in analogous cases. *See DG ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188 (10th Cir. 2010); *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994); *see also Olivia Y. ex rel. Johnson v. Barbour*, No. 3:04CV251LN, slip op. (S.D. Miss. Mar. 11, 2005); Appellees' Br. at 22 n.3 (citing twelve district court cases in which class

certification has been upheld in the foster care context). The District Court's class certification order is far from an abuse of discretion, as this is exactly the type of case in which class certification was intended—an injunctive remedy for violations of the civil rights of groups that are uniformly subject to state control.

If adopted, Appellants' and the State amici's reinterpretation of civil rights class litigation and overextension of *Wal-Mart* would arbitrarily bar some classes of civil rights litigants from seeking relief. This would significantly impair the ability of vulnerable children in foster care, mental patients in state custody, and other groups of state wards dependent on state-run executive agencies, to obtain relief concerning their most basic protection and services.

ARGUMENT

I. THE DISTRICT COURT'S CERTIFICATION ORDER IN THIS CASE IS CONSISTENT WITH BOTH THE HISTORIC PURPOSE AND THE WELL-ESTABLISHED APPLICATION OF RULE 23(B)(2) IN PRESERVING THE CIVIL RIGHTS OF CHILDREN IN STATE CUSTODY.

Class-action litigation has historically provided an important remedy for disadvantaged groups to rectify systemic abuse and deprivation of their civil rights by the State. Federal Rule of Civil Procedure 23(b)(2), by allowing courts to address system-wide abuses through the use of specific injunctive relief, has long protected classes of individuals who cannot effectively vindicate their rights on an individual basis.[2] *See, e.g., Jones v. Diamond*, 519 F.2d 1090, 1095 (5th Cir. 1975). As recognized by the United States Supreme Court and nearly every Circuit Court of Appeals to address the issue, including the Fifth Circuit, the class action option has been especially vital to protect the interests of persons in state custody, including mental health patients, prisoners, and the disabled. Several circuits have logically applied the rationale of these custodial civil rights cases to protect the rights of children in State custody—protections that should naturally extend to children in the State of Texas's broken child welfare system.

[2] Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

A. Rule 23(b)(2) Has Historically Been a Crucial Legal Remedy for Systemic Civil Rights Abuses.

The history of civil rights litigation demonstrates the underlying purpose of Rule 23(b)(2) as "an effective weapon for an across-the-board attack against systematic abuse. Indeed, its usefulness in the civil rights area was foreseen by the drafters of the revised rule." *Jones*, 519 F.2d at 1100 (citations omitted).[3] Federal courts have consistently acknowledged the critical importance of Rule 23(b)(2) as a means of vindicating civil rights. *See, e.g., Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) ("[O]ne purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights."); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547 (4th Cir. 1975) ("Rule 23(b)(2) . . . was intended as a vehicle for civil rights attacks on unlawful discrimination against a class whose members might be incapable of specific enumeration."). The propriety of the class device in such cases is illustrated by the large number of class actions that have been certified against governmental agencies at both the state and federal levels. *See e.g.*, 7 Newberg on Class Actions § 23:1 (4th ed. 2002).

This Court has certified classes (or upheld certification) in a large array of similar cases seeking to redress class-wide deprivations of civil rights, including in racial discrimination cases, *e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th

[3] *See* Advisory Committee's Note, Amendments to Rules of Civil Procedure, 39 F.R.D. 69 (1966). The Advisory Committee noted that Rule 23(b)(2) was designed for civil rights cases "where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *Id*. at 102.

Cir. 2004), in gender discrimination cases, *e.g.*, *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000), and in other civil rights actions, *see* Appellees' Br. at 19-20. And the results obtained from this type of litigation in the last half century have been crucial to protecting and advancing civil rights. *See, e.g.*, David Zaring, National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA L. Rev. 1015, 1018-20 (2004) (surveying institutional reform litigation involving constitutional and statutory rights).

B. Rule 23(b)(2) Extends to Protecting the Civil Rights of Custodial Plaintiffs.

Class action treatment under Rule 23(b)(2) has been particularly useful in aggregating and permitting the prosecution of injunctive and declaratory claims by *custodial* plaintiffs—individuals such as institutionalized psychiatric patients, detained juveniles, and prisoners. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (prisoners); *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977) (detainees); *Jones*, 519 F.2d at 1090 (prisoners); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (mental health patients). In these cases, the plaintiffs were confined in state institutions that actually or potentially infringed their constitutional rights. *See, e.g.*, *Miller*, 563 F.2d at 745 (citing poor food, overcrowding, and inadequate medical treatment as violations of constitutional rights); *Wyatt*, 503 F.2d at 1310-11 (citing overcrowding, inadequate medical treatment, and insufficient medical and support staff as violating the patients' civil rights). Federal courts have recognized that

injunctive class-wide relief—rather than piecemeal litigation—may be the only effective way to protect the constitutional rights of the affected individuals. *See Wyatt*, 503 F.2d at 1316 (discussing the shortcomings of individual lawsuits to correct system-wide failures).

For example, in *Jones*, prisoners sought class certification for unsanitary and unsafe conditions, physical abuse, inadequate medical treatment, and other constitutional violations stemming from system-wide problems. 519 F.2d at 1093 & n.2. In reversing the district court's denial of class certification, this Court reasoned that denying an injunction would prevent the prisoners from effecting any institutional change. *Id*. at 1093, 1099-1100; s*ee also Miller*, 563 F.2d at 748 (affirming an injunction to correct "offensive[] . . . prison conditions" that violated the detainees' rights).

Thus, the characteristics of custodial plaintiffs—their status as wards of the state, the systemic deprivations of their civil rights, and the injunctive relief they seek—make Rule 23(b)(2) the traditional and appropriate remedy for their claims.

C. Other Circuits Have Allowed Class Treatment under Rule 23(b)(2) in Civil Rights Cases Regarding Child Welfare Systems.

Systemic problems in child welfare systems have the same underlying factors that make 23(b)(2) certification crucial to the vindication of other custodial plaintiffs' rights. Several circuit courts have affirmed the certification of classes of

children in foster care to correct systemic deficiencies. *DG ex rel. Stricklin v. Devaugh*, 594 F.3d 1188 (10th Cir. 2010); *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (per curiam); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994); *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983). *See also* Appellees' Br. at 22 n.3 (citing twelve district court cases in which class certification has been upheld in the foster care context).

In *DG*, the plaintiffs sought certification of a class of 10,000 children who were exposed to harm by being in Oklahoma's foster care system. 594 F.3d at 1192. The plaintiffs alleged that "agency-wide foster care policies" leading to excessive caseloads, poor monitoring, and a lack of safe homes, among other deficiencies, created an "impermissible risk of harm" that violated the plaintiff children's constitutional rights. *Id*. at 1192-93. In affirming the class certification, the Tenth Circuit reasoned that the entire class suffered the same harms as a result of these systemic deficiencies, and that therefore the injunction sought after "applies to the proposed class as a whole." *Id*. at 1201.

In *Baby Neal*, children in Pennsylvania's care alleged that system-wide problems, including insufficient caseworkers and staff, violated their due process rights. 43 F.3d at 53. The children sought to certify a Rule 23(b)(2) class in order to obtain an injunction to force the state to provide adequate care. *Id*. at 55-56. In reversing the denial of class certification, the Third Circuit held that "the injunctive

class provision was 'designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.'" *Id*. at 59 (citation omitted).

The suitability of 23(b)(2) actions for these claims was acknowledged by a district court in this Circuit in *Olivia Y. ex rel. Johnson v. Barbour*, No. 3:04CV251LN, slip op. (S.D. Miss. Mar. 11, 2005). In *Olivia*, the court certified a class of 3,000 children on the basis that system-wide problems "pose a significant risk of similar harm to all . . . children in [the state's] custody." *Id.* at 6-7. The court concluded that injunctive relief may be the appropriate remedy if violations were proven. *Id.* at 8.

Similarly here, the plaintiff children seek a system-wide injunction to correct institutionalized violations of their due process and associational rights. Roughly 12,000 children in Texas suffer from the same alleged harms or risk of harms due to the system-wide failures of the child welfare system, including (1) an insufficient number of caseworkers, (2) inadequate oversight, and (3) a lack of stable foster care placement opportunities. The Plaintiffs seek a class-wide injunction to remedy these systemic failures. In fact, the non-individualized relief they seek—(1) reduced social worker caseloads, (2) increased contractor oversight, and (3) increased placement and service arrays—is precisely the type of

"injunctive relief or corresponding declaratory relief . . . respecting the class as a whole" authorized by Rule 23(b)(2). *See* Fed. R. Civ. P. 23(b)(2).

II. *WAL-MART V. DUKES* DID NOT ALTER THE GROUNDS FOR CERTIFYING TRADITIONAL 23(B)(2) CIVIL RIGHTS CLASS ACTIONS OR OTHERWISE UNDERMINE THE GROUNDS FOR CLASS CERTIFICATION.

This appeal arises from the State trying to improperly expand the Supreme Court's recent *Wal-Mart* opinion into something it is not—a wholesale rejection of the traditional approach to class certification. The Supreme Court in *Wal-Mart* upheld the historic use of Rule 23(b)(2) to obtain targeted injunctive relief for civil rights litigation, while rejecting the expansion of 23(b)(2) to massive classes seeking millions of dollars in monetary damages. Appellants here attempt to use *Wal-Mart* to foreclose exactly the type of litigation that *Wal-Mart* deemed a particularly appropriate use of the class-action approach—traditional, injunction-based civil rights actions. *Wal-Mart*, 131 S. Ct. at 2557 (noting that these civil rights suits are the "prime examples of what (b)(2) is meant to capture").

But even if this Court were to disregard *Wal-Mart*'s limitation on its own holding, *Wal-Mart* presents no barrier to Plaintiffs' claims. In *Wal-Mart*, a class of 1.5 million class members alleged Title VII violations and sought countless millions of dollars in back pay—a case the Supreme Court called "one of the most expansive class actions ever." *Wal-Mart*, 131 S. Ct. 2546-47. In its decision, the Court addressed two deficiencies in the plaintiffs' class action: (1) their claims

arose from individualized acts of managerial discretion; and (2) they attempted to shoehorn a Rule 23(b)(3) damages case into a Rule 23(b)(2) case for injunctive relief. The claims presented here do not suffer from either of these deficiencies.

A. This Lawsuit Seeks to Correct System Issues in the Foster Care System, not Discretionary Decisions of Caseworkers.

The *Wal-Mart* 23(a)(2) "commonality" analysis clarified that the relevant inquiry is the establishment of a "common contention . . . of such a nature that it is capable of classwide resolution." *Wal-Mart*, 131 S. Ct. at 2551. As stated by the Court: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (omission in original) (internal quotation marks omitted).

The Court determined that the plaintiffs failed to meet the commonality requirement primarily because of the sprawling nature of the class, the individualized nature of the claims, and the targeting of managerial discretion as opposed to a unifying set of policies or practices. *Id.* at 2555-57. The Court observed that "in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision." *Id.* at 2552 (internal quotation marks omitted). The Court concluded, therefore, that commonality was destroyed

because the *Wal-Mart* plaintiffs were "wish[ing] to sue about literally millions of employment decisions at once." *Id.*

Here, by contrast, the lawsuit seeks to address system-wide deficiencies in the Texas foster care system that are depriving children of their constitutional rights, not discretionary decisions of individual case managers. In fact, Appellees' Complaint does not challenge any decisions in individual cases. While some individual discretion is inevitable in any institutional setting, any discretion in the Texas system has no bearing on the claims raised by the class in this lawsuit. Contrary to Appellants' suggestion, *Wal-Mart* did not abrogate the use of class actions to address systemic deficiencies simply because individuals in the system exercise some discretion on some decisions. *See Morrow v. Washington*, No. 2-08-cv-288-TJW, 2011 WL 3847985, at *2 (E.D. Tex. Aug. 29, 2011) (certifying a class challenging the city's failure to address the police's practice of making discriminatory traffic stops, even though the decision to make such stops was discretionary).

To hold otherwise would make class action treatment impossible in any institutional setting. Under the Appellants' approach, state agencies would be effectively immunized against claims for systemic failures like understaffing and lack of supervision, as long as lower-level employees had "discretion" to make decisions with the system. Such an interpretation would produce absurd results.

For example, a prison with inmate neglect owing to inadequate staffing would be immune from class action claims as long as the guards exercised some discretion in the performance of their jobs. *But see Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980) (largely upholding Rule 23(b)(2) class action and order requiring jail-wide changes to address a variety of individual injuries). This interpretation is neither the actual holding nor the intended consequence of the *Wal-Mart* opinion.

Moreover, Appellees have been clear from the outset regarding the common questions and answers at issue in this case. To take only one example, the first question of fact listed in Appellees' initial complaint asks: "Whether Defendants fail to maintain a caseworker staff of sufficient size and capacity to perform the tasks critical to Plaintiff Children's safety, permanency, and well-being." USCA5 85-88. The answer to this question would clearly apply to the entire class of children, as inadequate staffing leads to increased caseloads for every worker. And an injunction requiring Defendants to ensure that caseloads do not exceed nationally recognized standards would be an individual injunction benefiting all members of the class at once. Accordingly, this single common question (with its accompanying answer) is sufficient to satisfy Rule 23(a)(2). *See Wal-Mart*, 131 S. Ct. at 2556 (reaffirming that, to satisfy Rule 23(a)(2), "[e]ven a single [common] question will do") (internal quotation marks and citation omitted).

B. The Claims Do Not Attempt to Recast a Rule 23(b)(3) Action into a Rule 23(b)(2) Lawsuit.

The *Wal-Mart* plaintiffs purported to bring a civil rights claim under Rule 23(b)(2), but asked for millions of dollars in backpay to remedy each claim among the 1.5 million plaintiffs.[4] The Court rejected this attempt to shoehorn a Rule 23(b)(3) damages case into Rule 23(b)(2), holding that "claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule." *Wal-Mart*, 131 S. Ct. at 2557.

In stark contrast to the *Wal-Mart* plaintiffs, Appellees here bring a claim solely for a class-wide injunction, applying to a narrowly defined class. The claim has never included individualized monetary damages,[5] but only a request for the sort of injunctive relief that courts have long deemed appropriate for civil rights actions brought under Rule 23(b)(2).

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[4] The plaintiffs also originally sought punitive damages, seeking up to a half *trillion* dollars ($300,000 per class member), but the Ninth Circuit remanded this claim to the district court before the Supreme Court granted *certiorari*. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 622 (9th Cir. 2010).

[5] Appellants rely heavily on *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521 (5th Cir. 2007), but *Maldonado* and this case are very different. The *Maldonado* plaintiffs—like the *Wal-Mart* plaintiffs—sought monetary damages, making their Rule 23(b)(2) claim inappropriate. *Id.* at 525. They also sought injunctions asking for "mutually affordable health care" and "reasonable" prices without any definition of those terms. *Id.* at 524. This Court held that the claim failed to meet the standards of Rule 23. *Id.* Here, plaintiffs seek no monetary damages, and list readily ascertainable standards to address the problems plaguing the Texas child welfare system.

III. THE DISTRICT COURT'S CERTIFICATION ORDER FOLLOWS A LONG LINE OF SIMILAR SUCCESSFUL CHILD WELFARE REFORM LITIGATION.

This case is not a novel use of federal class action law. For decades, child welfare reform litigation under Rule 23 has achieved critical improvements in the treatment and life prospects of children in state custody throughout the country. This appeal, as made clear by amici for Appellants, is simply an attempt to overextend the reach of *Wal-Mart* and turn back the clock on these successful reforms by establishing a heightened class certification standard for this particular category of civil rights plaintiffs.

The State amici devote nearly half of their brief to a description of "grave problems" asserted to have arisen following the certification and settlement or trial of 23(b)(2) child welfare reform cases outside of the Fifth Circuit. *See* State Amici Br. at 21-34. But the problems so stressed by the State amici have little to do with questions of class certification. Rather, they concern such issues as the scope, modification, and exit mechanisms of consent decrees reached in such lawsuits, and the federalism implications of foster care reform cases. These issues are a detour, far outside the bounds of this appeal.[6] Similarly, the concerns expressed by

[6] Those issues are addressed by the Supreme Court and other federal courts in distinct bodies of case law which cannot and should not be injected into this Court's Rule 23 analysis. *See, e.g.*, *Horne v. Flores*, 129 S. Ct. 2579, 2594-95 (2009) (modification and exit); *Frew v. Hawkins*, 540 U.S. 431, 438 (2004) (scope); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 385 (1992) (modification and exit); *Younger v. Harris*, 401 U.S. 37 (1971) (abstention). *See also* Fed. R. Civ. P. 60(b)(5).

the State amici regarding child welfare reform litigation discovery burdens and supposed attendant "undue settlement pressure" on governmental defendants[7] are simply beyond the issues presently before the Court.

Nevertheless, two aspects of the amici's child-welfare commentary bear further response.

A. Class Action Child Welfare Litigation Has Been Instrumental in Reforming Failing Foster Care Systems.

The State amici's characterizations of certain class action child welfare reform cases and the discovery and other excesses they perceive in them are selective and one-sided. To the extent that the Court were to give attention to the extraneous matters raised by the State amici in their brief (which respectfully, it should not), the Court should also consider that concrete and substantial improvements have been achieved as a direct result of these and similar child welfare reform class actions.

The issue in this appeal is whether the federal courts are available to these plaintiffs seeking class-based relief to protect their constitutional rights. Well-settled federal law shows that class litigation is not only available, but can be a powerful vehicle for achieving structural improvements and better outcomes for

[7] The "undue settlement pressure" claim is particularly dubious. Even if as amici claim only one of "nearly two dozen" identified child welfare class actions proceeded to trial, this is hardly suggestive of undue pre-trial settlement pressure given that less than 2% of all civil cases are ultimately tried. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, Journal of Empirical Legal Studies, Vol. I, Issue 3, 459-570 (Nov. 2004).

children in state foster care custody. Such litigation gives voice to the complaints of these children by aggregating their claims in a public judicial forum before an Article III judge duty-bound to enforce their federal rights on a class-wide basis. The discovery and expert reporting process focuses attention on the failures of the child welfare systems at issue and the aggregate consequences of those failures for the plaintiff children. And such litigation provides a mechanism—a narrowly tailored remedial order, usually agreed to by the parties—that can compel reform of a sustained and systemic nature.

The value of child welfare reform class actions has been demonstrated repeatedly by the very real improvements that certified class actions have achieved, both in terms of system infrastructure developments and outcomes in the lives of children. Although a full-fledged policy analysis of the efficacy of child welfare reform is beyond the scope of this brief and this appeal, a few examples are warranted.

Class action child welfare reform litigations have significantly reduced social worker caseloads and increased the quality of case worker training in many jurisdictions.[8] Such lawsuits have also reduced "abuse in care" rates, the

[8] *See* Child Welfare League of America, Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005, p. 7 (2005) (*available at* http://www.cwla.org/advocacy/consentdecrees.pdf) (last checked Oct. 23, 2011); Julie Farber & Sarah Munson, *Strengthening the Child Welfare Workforce: Lessons from Litigation*, Journal of Public Child Welfare, Vol. 4:2, pp. 132-157 (2010); Erik Eckholm, *Once Woeful, Alabama Is a Model in Child Welfare*, N.Y. Times, A22 (Aug. 20, 2005). *See also Kenny A. v. Perdue* Period

percentage of children in foster care that are subject to further abuse and neglect while in state custody.[9] Reform cases have succeeded in significantly increasing the placement of children in family homes as opposed to group homes or other congregate settings[10] and in reducing harmful and unnecessary placement moves for children in foster care.[11] Child welfare class actions have also spurred systems to move children through the supposedly temporary state of foster care to permanency more rapidly, either through reunification with their biological families, adoption or through other appropriate permanent homes.[12]

Class action litigation, though certainly more efficient than individual constitutional challenges seeking systemic injunctive relief, is not inexpensive (in the child welfare context as in other practice areas), and achieving timely and full compliance with remedial court orders has proven challenging for many systems.

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10 Monitoring Report ("*Kenny A.* Report"), p. 126 (June 3, 2011) (*available at* http://aysps.gsu.edu/images/Kenny_A_Period_X.pdf) (last checked Oct. 23, 2011); *Brian A. v. Bredesen* Technical Assistance Committee Monitoring Report ("*Brian A.* Report"), pp. 5, 20 (Nov. 3, 2010) (*available at* http://www.tn.gov/youth/dcsguide/fedinitiatives/TACMonitoringReport11.10.10.pdf) (last checked Oct. 23, 2011); Period VII Monitoring Report for *Charlie H. v. Christie* ("*Charlie H.* Report"), pp. 152-156 (June 1, 2011) (*available at* http://cssp.trilogyinteractive.com/publications/child-welfare/class-action-reform/cfakepathnj-final-monitoring-report-june-1-2010.pdf?1289583546) (last checked Oct. 23, 2011).

[9] *See, e.g., Charlie H.* Report p. 102; *Kenny A.* Report pp. 19-20; *Braam* Settlement Monitoring Report #10, p. 65 (March 11, 2011) (*available at* http://www.braampanel.org/MonRptMar11.pdf) (last checked Oct. 23, 2011).

[10] *See, e.g., Brian A.* Report pp. 3, 33-38; *Charlie H.* Report pp. 95-96.

[11] *See Brian A.* Report p. 44; *Kenny A.* Report pp. 86-87. *See R.C. v. Walley*, 475 F. Supp. 2d. 1118, 1176-77 (M.D. Ala. 2007), *aff'd*, 270 Fed. Appx. 989, 2008 WL 816679 (11th Cir. 2008).

[12] *See, e.g., Brian A.* Report pp. 3, 17; *Kenny A.* Report pp. 5-6, 14-16; *Charlie H.* Report pp. 106-122.

Yet despite these challenges, to date a number of foster care systems have exited class action consent decrees having made substantial and far-reaching improvements in the lives of children. *See R.C. v. Walley*, 475 F. Supp. 2d at 1184 ("The court finds that the Consent Decree has served its useful and critical purpose in successfully effectuating the overhaul and reform of DHR's child welfare system."), *aff'd*, 270 Fed. Appx. 989, 2008 WL 816679 (11th Cir. 2008); *Kenny A. v. Sonny Perdue*, N.D. Ga., Case 1:02-CV-01686-MHS, Docket No. 706 (April 4, 2011) (terminating jurisdiction over Fulton County, Georgia pursuant to consent decree regarding child representation "in light of the enormous strides the County has made in improving the quality of representation provided to the Class Member Children").[13] And child welfare administrators and other agency staff, child advocates, experts, and other stakeholders are working diligently to continue the progress made in other pending court-ordered reforms.[14]

B. There Is No Basis for Application of a Heightened Class Certification Standard to Child Welfare Reform Lawsuits.

The assorted complaints of the State amici regarding systemic child welfare reform litigation must be viewed for what they are—an appeal for a heightened class certification standard for a particular category of civil rights plaintiffs. *See*

[13] *See, e.g., G.L. v. Stangler, Sheila A. v. Whiteman, Joseph and Josephine A. v. Bolson, David C.* and *R.C. v. Walley* tabs at National Center for Youth Law, Foster Care Reform Litigation Docket, Concluded Cases (*available at* http://www.youthlaw.org/publications/fc_docket/status/concluded_cases/).

[14] *Id.* at Pending Settlement Agreement tab.

State Amici Br. at 33 ("The best way to avoid overly broad consent decrees is to require rigorous adherence to Rule 23 and Article III's requirements, thus avoiding overly broad classes that serve to expand the litigation inappropriately beyond what is strictly necessary to cure violations of federal law."). But the breadth of the current and historic national child welfare class action docket[15] and the length of time that struggling systems have remained under federal court jurisdiction are not the product of any broad-based misinterpretation on the part of the nation's circuit and district courts of Rule 23(b)(2). Rather, they are a reflection of (i) the unfortunate prevalence in this country of failing state-run child welfare systems that further harm the children they are meant to protect, and (ii) the depth of the problems presented in those systems. *See* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. C.R.-C.L. L. Rev. 199, 205-11 (1988). *See also* U.S. Dept. of Health and Human Services, Administration for Children & Families, Child Welfare Outcomes 2004-2007: Report to Congress, Executive Summary (2008) (*available at* http://www.acf.hhs.gov/programs/cb/pubs/cwo04-07/executive.pdf) (last checked Oct. 23, 2011); U.S. Dept. of Health and Human Services, Administration for Children & Families, Child and Family Service Reviews, 2001-

[15] *See* Child Welfare League of America, Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005 (2005), *supra*.

2004 (http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/genfindings04/ch1.htm) (last checked Oct. 23, 2011).

As no doubt well-meaning public servants charged with defending systems that have far too often failed some of the nation's most vulnerable children, it is perhaps understandable that the Attorneys General represented as amici would like to extend *Wal-Mart* beyond its intended application so as to inoculate their clients against further such legal challenges.

But it is axiomatic that federal class action law, and in particular the civil rights-focused Rule 23(b)(2) certification provision, applies equally to all individuals, regardless of age, political power, custodial status, and especially past litigation results. Having been unsuccessful in a number of past efforts to defeat at the outset class action challenges by children placed into the legal custody of deficient foster care system, the State amici should not be permitted to indirectly disrupt this lawsuit and ongoing and future reform efforts in this and other circuits by undermining one of the most powerful tools available to children in state foster care custody: the 23(b)(2) class certification mechanism. Certainly, there is nothing in *Wal-Mart*, the basis for the interlocutory appeal before the Court, which in any way supports such an unjust result.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order certifying the class.

Dated: October 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

With Type-Volume Limitation, Typeface Requirements
and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5,350 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 Microsoft Word 2003 in 14-point Times New Roman font.

Dated: October 27, 2011

/s/ Kurt Kuhn
Kurt Kuhn

CERTIFICATE OF SERVICE

I certify that **Brief of The National Association of Counsel for Children, Professor Lucy S. McGough, Professor Jacqueline A. Nash, Professor Cheryl Prestenback Buchert, Professor Ramona Fernandez, Professor Barbara Stalder, Professor Lonny Hoffman, Professor Ellen Marrus, and Professor David Calder as Amici Curiae in Support of Appellees** was filed with the Court via the Court's electronic filing system, on the 27th day of October, 2011 and an electronic copy of the Motion was served on all counsel of record, as listed below, via the Court's electronic filing system on the same date:

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