ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7152

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IVY BROWN, in her Individual Capacity
and as Representative of the Certified Class,
Plaintiffs-Appellants,

LARRY MCDONALD, *et al.*,
Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, THE CENTER FOR PUBLIC REPRESENTATION, THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, BREAD FOR THE CITY, AND THE NATIONAL HEALTH LAW PROGRAM AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Chinh Q. Le
Jonathan H. Levy
David Carpman
THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA
1331 H Street, NW, Suite 350
Washington DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org

David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
dreiser@zuckerman.com

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amici submit the following information in accordance with D.C. Cir. R. 28(a)(1):

A. Parties and *Amici*. All parties and *amici* appearing before the district court and in this Court are listed in the Appellants' Brief, except that the *amici* joining this brief are the Legal Aid Society of the District of Columbia, the Center for Public Representation, the Sargent Shriver National Center on Poverty Law, Bread for the City, and the National Health Law Program. The Washington Lawyers' Committee for Civil Rights and Urban Affairs and other organizations are also expected to submit a separate brief supporting Appellants in this Court.

B. Rulings under Review. References to the rulings at issue are listed in Appellants' Brief.

C. Related Cases. Related cases are listed in Appellants' Brief.

CORPORATE DISCLOSURE CERTIFICATE

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, counsel certifies that no signatory to this brief has a parent corporation and that no publicly held corporation owns 10 percent or more of the stock of any of the signatories.

D.C. CIR. RULE 29(d) CERTIFICATE

Amici understand that the Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) and other organizations intend to submit a separate brief

in support of Appellants. Separate briefs are necessary to address distinct and important issues presented by this appeal. This brief addresses the district court's application of Fed. R. Civ. P. 23(b)(2) as a basis for dismissing class-wide claims for injunctive relief. We understand that the WLC brief will address the role of transition planning in satisfying the integration mandate under the Americans with Disabilities Act and the Rehabilitation Act.

/s/ *David A. Reiser*
David A. Reiser

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

RULES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

The Legal Aid Society for the District of Columbia was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous individuals living in or close to poverty in the District, including many people with disabilities and many others who rely on public benefits to receive treatment necessary for their health and well-being. Legal Aid and its client community have an interest in ensuring the fair and nondiscriminatory administration of the Medicaid program. In addition, Legal Aid has an interest in the efficacy of class certification under Fed. R. Civ. P. 23(b)(2) to redress unlawful class-wide policies and practices.

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

rights of persons with disabilities, including the right to be free from discrimination under the ADA.

The Sargent Shriver National Center on Poverty Law (Shriver Center) is a national non-profit legal and policy advocacy organization based in Chicago. The Shriver Center provides legal representation and policy advocacy to advance and protect the rights of people experiencing poverty, including by protecting their rights under the Medicaid program. The Shriver Center also convenes the Legal Impact Network, a national consortium legal and policy organizations in 33 states and the District of Columbia that advances the interests of low-income individuals. Class action litigation is a vital advocacy tool for the Shriver Center and its partners' advocacy and the issues in dispute in this matter would impact the effectiveness of this tool.

Bread for the City (BFC) is a non-profit organization that provides food, clothing, medical care, and legal and social services to Washington, DC residents living with low income. Among other things, BFC helps District residents obtain and maintain Medicaid. BFC's medical clinic and social services program have observed the challenges of District residents who receive Medicaid and live in institutional settings versus in the community. BFC and the community members it serves have an interest in this appeal to ensure the rights of Medicaid

beneficiaries with disabilities to have a fair opportunity for community placement in the District of Columbia.

The National Health Law Program (NHeLP) protects and advances the health rights of low-income and underserved individuals and families. NHeLP advocates, educates and litigates at the federal and state levels. For more than 40 years, NHeLP has provided critical expertise on health care and legal issues to the courts, federal and state policymakers, and advocates. Among others, NHeLP provides litigation and advocacy support to federally funded disability rights organizations in the fifty states, DC, and territories. NHeLP has represented thousands of Medicaid beneficiaries in class actions and individual cases, including actions to enforce the guarantees of the ADA and Section 504 of the Rehabilitation Act and protect individuals from discrimination and unjustified institutionalization.

All parties have consented to the filing of this brief, which is therefore authorized by Rule 29(a)(2) of the Federal Rules of Appellate Procedure. [1]

SUMMARY OF ARGUMENT

People with disabilities were languishing in the District of Columbia's nursing homes while funding to treat them in the community went unused because

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

of the District's failure to administer its Medicaid program so as to prevent unnecessary segregation. They sought class-wide injunctive relief to reform what the evidence showed were systemic deficiencies in the District's transition-planning process, invoking federal laws prohibiting discrimination against persons with disabilities (the Americans with Disabilities Act and the Rehabilitation Act) and a provision of the Federal Rules of Civil Procedure (Rule 23(b)(2)) expressly designed for class-wide civil rights litigation. The rate of community placement of class members significantly improved after the litigation began and the District's transition planning fell under judicial scrutiny. These improvements attest to the need for and the value of the systemic reform plaintiffs sought.

The district court committed legal error when it nonetheless dismissed the class-wide claims based on its belief that it could allow them to proceed only if it could enter a single injunction that would de-institutionalize the entire class—something the district court concluded it could not do because of a perceived shortage of housing. But nothing in the substantive law plaintiffs invoked, the basis for class certification they asserted, or the evidence they presented at trial, limited the district court to issuing an injunction that commanded class-wide deinstitutionalization. Plaintiffs were entitled to an injunction that required the District to fix its flawed and unlawful transition planning process to give class

members a fair opportunity for community treatment even if some members of the class might remain in a nursing home because they could not obtain housing.

ARGUMENT

The Americans with Disabilities Act (ADA) and the Rehabilitation Act as construed in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), require the District of Columbia to take "reasonable steps to avoid administering [its] programs in a manner that results in the segregation of individuals with disabilities." Mem. Op., *Brown v. District of Columbia*, No. 10-cv-2250-ESH, ECF 257 at 3 (Sept. 13, 2017). The District's duty to change the way it runs a program is triggered by a "sufficient risk of institutionalization." *Davis v. Shah*, 821 F.3d 231, 262 (2d Cir. 2016) (discussing U.S. Department of Justice, Statement on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*);[2] *id.* at 263 (discussing cases holding "that the risk of institutionalization can support a valid claim under the integration mandate"). Thus, *Olmstead* imposes a duty of care on states to administer federal programs in a way that prevents "serious risk of institutionalization or segregation." *Id.* (citation omitted). Plaintiffs sought to enforce that statutory duty of care towards persons with disabilities confined in nursing homes through an injunction altering the way the District runs its Medicaid program. The district

[2] https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited June 5, 2018).

court dismissed their class-wide claims because it erroneously equated providing class-wide injunctive relief from the District's failure to administer its Medicaid program for persons with disabilities needing nursing home-level care in compliance with federal law with being able to compel the release from nursing homes of all members of the class.

There is no disputing that the District was violating its statutory duty of care—to administer the Medicaid program without needlessly segregating persons with disabilities—at the time plaintiffs filed suit and for years afterward. ECF 257 at 12 ("[T]he undisputed facts demonstrated that the District's *Olmstead* Plan had not been effective."); *id.* at 19; *id.* at 24 n.9 (stating that the District's "failure to transition class members" indisputably persisted through 2013); *see* Appellants' Br. 7-10 (summarizing evidence concerning the inadequacy of transition planning). Hardly any nursing home residents were using slots allotted to pay for treatment in the community. *Id.* at 9-10 (chart showing transitions under "Money Follows the Person" program); *id.* at 36 & n.10 (summarizing testimony about class members who lost opportunities for housing because of delays in transition planning).

Subsequent improvements in the District's record of placing nursing home residents in the community during the pendency of the litigation attest to the salutary—albeit incomplete—effect of judicial oversight on the District's administration of the program and the practical value of improved coordination

among the numerous agencies and contractors responsible for different aspects of the transition process. *See, e.g.,* ECF 257 at 57-61 (reduction in delays); Appellants' Br. 10 (chart showing increase in transitions after 2013). But without an injunction, the District remains free to revert to its woeful (and unlawful) pre-litigation practices. And the evidence showed that even the District's recent efforts to mend its ways fall short of its statutory obligations. *See* Appellants' Br. 11-18 (discussing trial evidence).[3] On the record before the district court, the class would have benefited from, and was entitled to, an injunction that cured the District's violation of its statutory duty of care by giving all class members a fair chance for community placement—thereby reducing the risk of needless segregation and institutionalization—*even if* a housing shortage might limit the rate at which class members could leave nursing homes through an effective and ADA-compliant transition process.

The district court nonetheless dismissed plaintiffs' claims and entered judgment for the District because it misinterpreted *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), as requiring plaintiffs to show that the district court could

[3] Even if the District's post-litigation efforts had cured the violation, the case would not be moot and plaintiffs would still be entitled to adjudication of their statutory claims. As the Supreme Court reiterated a month ago, "[a] party 'cannot automatically moot a case simply by ending its unlawful conduct once sued,' else it 'could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends.'" *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

fashion a single injunction would result in *all class members* moving from nursing homes into the community. ECF 257 at 90 ("[I]t cannot remedy plaintiffs' *institutionalization* through a single injunction.") (emphasis added); *see also id.* at 24 ("The Court also reminded plaintiffs that they have the burden to demonstrate that any injunction would solve class members' institutionalization."). The district court determined it could not enter such an injunction because the available supply of housing was inadequate to accommodate the entire class, and it could not order the District to provide additional housing. ECF 257 at 64; *id.* at 65-71.[4]

Enforcement of the ADA and the Rehabilitation Act did not require the district court to issue an injunction deinstitutionalizing the entire class or to deny the class all relief. What those statutes *do* require is that the District administer its Medicaid program to include a functional transition process that does not place unnecessary barriers and delays in the path of class members seeking placement in the community. *Olmstead*, 527 U.S. at 605-06 (plurality) ("If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard

[4] The district court also briefly alluded to other perceived obstacles to complete de-institutionalization, ECF 257 at 89-90. But those perceived obstacles would be addressed by an injunction to remedy defects in the District's transition process.

would be met."); *accord* ECF 257 at 7-8 (quoting the *Olmstead* plurality). Plaintiffs' trial evidence showed "'concrete[,] systemic deficiencies' in the District's system of transition assistance and that these deficiencies have caused a common harm to class members," satisfying the standard the District Court had set when it granted class certification. ECF 257 at 9 (quoting the district court's earlier class certification describing plaintiffs' burden). The common harm was the common risk of continued segregation and institutionalization because the District did not provide the services necessary to transition class members to appropriate community placements. Plaintiffs were not required to prove that correcting those deficiencies would assure that every class member would leave the nursing home.

A. Rule 23(b)(2) Was Designed for Civil Rights Cases Like This One.

"The Rule 23(b)(2) class action . . . was designed for exactly this sort of suit." *DL v. District of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017). "Rule 23(b)(2) was intended for civil rights cases." *Id.* (quoting an earlier opinion in this case, *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015)). *See also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 389 (1967)

("[S]ubdivision (b)(2) build[s] on experience mainly, but not exclusively, in the civil rights field."). [5]

Although it was careful to say that certification under Rule 23(b)(2) is not limited to civil rights cases, the Advisory Committee note to the 1966 amendment refers to a series of civil rights cases involving the desegregation of public schools as "illustrative" of the intended application of Rule 23(b)(2). The cited cases involved injunctions that would benefit an entire class by outlawing segregative practices affecting the opportunities open to all class members, even though the ultimate effect of the injunction forbidding them might vary from class member to class member. An injunction requiring a school district to submit a district-wide plan for desegregation, such as the one entered in *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), would mean that some black students would transfer to formerly all-

[5] A Second Circuit decision involving discriminatory employment testing after the adoption of Rule 23(b)(2) illustrates its logic. Before ruling on class certification, the district court preliminarily enjoined the use of a written test for firefighters because it had a racially discriminatory impact. Judge Friendly acknowledged that the district judge was "entirely right in thinking it unnecessary, from the plaintiffs' standpoint, for him to decide on class action designation in order to pass upon" the test, because if "the examination procedures were found unconstitutional as regards the named plaintiffs, they were equally so as regards all eligible blacks and Hispanics, and it would be unthinkable that the municipal defendants would insist on other actions being brought." *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387, 399 (2d Cir. 1973). Rule 23(b)(2) assures mutuality by binding plaintiffs and defendants equally in cases where the invalidity of a practice implies class-wide relief.

white schools, while other class members would remain in their schools.[6] But the injunction would remove a barrier to attending all-white schools common to the class. The simple lesson of the desegregation cases illustrating the intended scope of Rule 23(b)(2) is that a single injunction intended to eliminate a discriminatory practice common to a class need not affect all class members in exactly the same way.

The ADA and the Rehabilitation Act are built on the model of the 1964 Civil Rights Act. *See Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 278-79 (1980) (Rehabilitation Act patterned after Title VI); *Barnes v. Gorman*, 536 U.S. 181, 185

[6] The other cases cited by the Rules Advisory Committee are to the same effect. *See Bailey v. Patterson*, 323 F.2d 201, 204 (5th Cir. 1963) (reversing in part the denial of an injunction against segregative practices in bus terminals and a municipal airport after segregation laws were no longer enforced); *Brunson v. Bd. of Trustees*, 311 F.2d 107, 108-09 (4th Cir. 1962) (per curiam) (reversing the denial of class-wide injunctive relief and permitting only injunctions "requiring the admission of a particular plaintiff to a school of his choice"); *Green v. Sch. Bd.*, 304 F.2d 118, 121 (4th Cir. 1962) (reversing the denial of class-wide injunctive relief with regard to a pupil assignment system that provided various different reasons for rejecting black students' requests for transfer to white schools); *Northcross v. Bd. of Educ.*, 302 F.2d 818 (6th Cir. 1962) (reversing the denial of class-wide injunctive relief on the theory that the school system remained segregated because parents do not invoke voluntary transfer provisions); *Mannings v. Bd. of Pub. Instruction*, 277 F.2d 370 (5th Cir. 1960) (reversing dismissal of class-wide claims for desegregation of public schools notwithstanding uncertainty about the testing regimes that the Board would apply to black students seeking transfers); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 165 (5th Cir. 1957) (affirming injunction desegregating school system notwithstanding statute purporting to give school officials discretion over pupil assignments and the "possible validity of a statute that would merely grant to school officials the power to promulgate rules of attendance, zoning of school population, transfers, and the like").

(2002) (both statutes patterned after Title VI). The particular form of discrimination at issue here is the isolation of persons with disabilities in nursing homes when their treatment needs could be addressed in community placements. The text of Rule 23(b)(2) makes class certification under that subsection applicable when "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Here, the District acted and failed to act on grounds that apply generally to the class by failing to provide the staffing, contractual services and coordination among staff and service providers necessary for transition planning adequate to prevent unnecessary segregation. *See* Appellants' Br. 44-46 (discussing *DL*, 860 F.3d at 727 (upholding certification of analogous transition sub-class under IDEA)).[7]

Rule 23(b)(2) contemplates that the class would seek injunctive relief that covers the entire class ("the class as a whole"), but it has never been construed to require issuance of an injunction that has exactly the same effect on every member of the class. *See Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (holding that class certification was proper to address common risk of harm from state policies even though "the certified ADC policies and practices may not affect every

[7] The district court decision after remand in *DL* illustrates the right level of generality to apply to systemic deficiencies. The court certified sub-classes corresponding to "four distinct administrative functions" at different stages of the Child Find process. 860 F.3d at 719-20. The "components of an effective system of transition assistance for individuals in nursing facilities" (ECF 257 at 78) must work together and are part of the same administrative function.

member of the proposed class and subclass in exactly the same way" because Rule 23(b)(2) "does not require a finding that all members of the class have suffered identical injuries"); *id.* at n.33 (quoting 7AA Charles Alan Wright, *et al.*, Fed. Prac. & Proc. § 1775 (3d ed.) ("All the class members need not be aggrieved by or desire to challenge defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); *Davis v. Weir*, 497 F.2d 139, 146 (5th Cir. 1974) (similar).[8] Courts addressing systemic deficiencies in public programs often issue complex injunctions to remedy the actions and failures to act presenting a risk of harm to the class in violation of legal duties owed to a class, particularly with regard to classes of persons who are held in public institutions or in other forms of public custody or control.

Class actions litigated in the wake of the 1966 amendments illustrate the availability of injunctive relief in (b)(2) class actions to remedy the breach of a legal duty owed to the class even when that duty is only one step in a process leading to varying ultimate results. *Wolff v. McDonnell*, 418 U.S. 539 (1974), was a (b)(2) class action on behalf of Nebraska prisoners challenging, *inter alia*, the constitutional adequacy of the prison's disciplinary process. The Supreme Court affirmed in part the Eighth Circuit's ruling that the prison's standard procedures

[8] Unlike the situation in *Jennings v. Rodriguez*, 138 S. Ct. 830, 851-52 (2018), no member of the certified class in this case is constitutionally ineligible for the transition services the District would be required to provide, even if some members may fail to obtain housing as the process unfolds.

were inadequate and should be remedied on remand. But of course, the required procedural changes did not guarantee that a prisoner would win the disciplinary hearing—only that he have a fair chance to do so. *See also Bowen v. City of New York*, 476 U.S. 467 (1986) (affirming class-wide injunction requiring reopening of decisions to terminate eligibility for Social Security benefits denied on the basis of an invalid presumption).[9] *Gerstein v. Pugh*, 420 U.S. 103 (1975), was a (b)(2) class action on behalf of Florida criminal defendants held in lieu of bail without a probable cause determination. The Supreme Court affirmed the determination that a judicial determination of probable cause was required. Here again, the requirement imposed on the State did not guarantee that all class members would be released before trial—only that they would have a fair chance to contest the constitutionally-required basis for pretrial confinement.[10] *See also Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991) ((b)(2) class action challenging delay in making probable cause determination). *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), was a (b)(2) class action by black employees of a paper company

[9] The district court similarly granted class certification under Rule 23(b)(2) to enjoin an alleged secret policy of denying Medicare claims. *Sherman v. Burwell*, No. 3:15-cv-01468, 2016 WL 4197575, at *9 (D. Conn. Aug. 8, 2016).

[10] In *ODonnell v. Harris Cnty.*, No. H-16-1414, 2017 WL 1542457, at *7 (S.D. Tex. April 28, 2017) (the district court certified a (b)(2) class of misdemeanor arrestees who are detained because they cannot satisfy a financial condition of release, although some class members will not be released but will instead be placed in the custody of an agency placing a "hold").

and the union representing their bargaining unit challenging racially discriminatory practices. The Supreme Court remanded for a determination of the job-relatedness of the company's testing regime. An injunction invalidating biased testing would not guarantee class members transfers to the more desirable jobs at the plant—only a fair chance to qualify for them.[11] In all of these cases, the violation of a legal duty to the class as a whole caused a risk of some ultimate harm (wrongful denial of good time or termination of benefits, wrongful pretrial confinement, or wrongful denial of a job transfer) to some, but not all, members of the class. All of them proceeded as (b)(2) class actions.

Brown v. Plata, 563 U.S. 493 (2011), a case decided less than a month before *Wal-Mart*, illustrates the continued application of Rule 23(b)(2) to civil rights actions for injunctive relief against the breach of a duty posing a risk of harm to an entire class.[12] The Supreme Court had before it remedial orders entered in two lawsuits. One involved prisoners with serious medical conditions. The other involved prisoners with serious mental illnesses. In both cases the district court ordered injunctive relief to address constitutional deficiencies in the care the State

[11] Likewise, in *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), eliminating the invalid test for the entire class would not mean that all class members would ultimately be hired as firefighters.

[12] Unlike *Lewis v. Casey*, 518 U.S. 343 (1996), the decision on which the *Brown* dissent principally relied, 563 U.S. at 553 (Scalia, J., dissenting), in which the Court held there was no duty to provide a law library, the courts in *Brown* were enforcing a duty to provide adequate medical and mental health care.

of California provided. The district courts later consolidated the actions under a provision of the Prison Litigation Reform Act (PLRA) empowering a three-judge court to "order reductions in the prison population." *Brown*, 563 U.S. at 509. The Supreme Court upheld the ensuing order to reduce overcrowding on the basis of an extensive factual record showing that overcrowding was "imped[ing] the effective delivery of care" and "contribut[ing] to significant delays in treatment." *Id.* at 519. The Court also recognized that "the violations were caused by factors in addition to overcrowding and that reducing crowding in the prisons would not entirely cure the violations." *Id.* at 524.

Although the State's challenge to the prisoner release order in *Brown* was based on the especially rigorous standards for such an injunction under the PLRA, not on Rule 23(b)(2), the Court's affirmance of the *Brown* order shows that a district court can enter a single injunction to counter a systemic violation of a duty of care under federal law, even if the ultimate effect of the injunction may vary from class member to class member. Moreover, the Court considered appropriateness of class-wide relief based on systemic deficiencies exposing class members to a common *risk* of maltreatment, but that has different effects on different class members. Justice Scalia's dissenting opinion explicitly disputed the propriety of class-wide relief on that basis. *Id.* at 553. He argued that relief could be based only on individual harm resulting from the prison system's failure to

provide proper medical or mental health care, not on the systemic violation of a duty of care that exposed the entire class to harm. In the view of the dissent, "the only viable constitutional claims consist of individual instances of mistreatment," precluding the systemic remedy ordered by the three-judge court. *Id.*

That Justice Kennedy's opinion for the Court did not dispute that the injunctions were based on systemic deficiencies constituting a breach in a duty of care that poses a common risk of harm to the class shows that this is remains well-accepted basis for granting class-wide relief under Rule 23(b)(2). A remedial injunction to remedy such a class-wide risk of harm may affect class members differently. Under the prisoner release order upheld in *Brown*, for example, some class members may be released, while others will remain in custody. Moreover, the release order, like the prior remedial orders issued in the case would undoubtedly improve some class members' medical or mental health more than others. Such differences in the ultimate effect of the injunction on members of the class do not make certification under Rule 23(b)(2) unavailable.

B. *Wal-Mart* Did Not Change the Standard for Civil Rights Injunctions Under Rule 23(b)(2).

The Supreme Court's decision in *Wal-Mart Stores*, 564 U.S. 338, did not—and could not—change the established meaning of Rule 23(b)(2) as reflected in the Rule's text and its longstanding application. *See Leatherman v. Tarrant Cnty.*

Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("[T]hat is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."). Indeed, neither of the questions presented in *Wal-Mart* concerned the predicate for injunctive relief in a (b)(2) class action.[13]

Wal-Mart addressed Rule 23(b)(2) in the context of an action seeking monetary relief. After first holding that the district court should not have certified a nationwide class of female employees at all for lack of commonality under Rule 23(a)(2), 564 U.S. at 349-60, the Court went on to hold that "claims for monetary relief," such as the backpay sought in *Wal-Mart*, may not be certified under Fed. R. Civ. P. 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." 564 U.S. at 360. The Court noted that individual class members have no right to notice and to opt out of a Rule 23(b)(2) class, so that certifying a (b)(2) class would strip class members of protections necessary in a (b)(3) class action seeking monetary relief. *Id.* at 362-63 (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985)). "[T]he serious possibility that it may be [a violation of due process to certify a class seeking monetary relief without notice and opt-out rights] provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Wal-Mart*, 564 U.S. at 363.

[13] *See* Pet. Br., No. 10-277, *i*.

The Court's focus in its discussion of Rule 23(b)(2) was on whether the text of Rule 23 implicitly authorized (b)(2) classes for monetary relief as long as the monetary relief did not predominate. *Id.* at 363-64. "The mere 'predominance' of a proper (b)(2) injunctive claim," the Court held, "does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of class adjudication over individual adjudication nor cures the notice and opt-out problems." The Court "fail[ed] to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction." *Id.* at 363-64.

The Court addressed the predicate for class-wide injunctions only as another reason Rule 23(b)(2) did not generally cover claims for monetary relief:

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id. at 360-61. In drawing an analogy between "different injunctions" for each class member and individualized monetary relief along the way to its holding that (b)(2) certification is categorically unavailable for monetary relief, the Court provided little guidance to district courts about the right level of generality to apply in

deciding whether a class is seeking a single injunction. No such question was presented, and the Court's earlier holding that the class could not be certified at all mooted any possible issue about injunctive relief with regard to a policy of sex discrimination the majority had found unproven for purposes of the commonality requirement. The four justices concurring in part and dissenting in part agreed that a (b)(2) class was not properly certified on the narrower ground that monetary relief was not merely incidental to injunctive relief. *Id.* at 367-68 (Ginsburg, J., concurring in part and dissenting in part).

Nothing in *Wal-Mart* suggests, however, that the Court had any intention of questioning historic practice under Rule 23(b)(2) in cases seeking injunctions (but not monetary relief) to remedy civil rights violations that redress the same action or failure to act but that have different impacts on individual class members. To the contrary, the Court endorsed that history as a guide to interpreting Rule 23(b)(2):

> As we observed in *Amchem* [*Prods. v. Windsor*, 521 U.S. 591 (1997)], "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. 521 U.S., at 614. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction.

564 U.S. at 361 (citations omitted). This reference to the history of Rule 23(b)(2) confirms that *Wal-Mart* did not aspire to change the standards for injunctive relief, especially in civil rights cases like this one.

In fact, the *Wal-Mart* Court's discussion of the commonality issue shows why it is proper to issue an injunction in a class action certified under Rule 23(b)(2) that remedies the defendant's unlawful action with respect to the entire class but that does not have the same effect on all class members. The Court distinguished the facts in *Wal-Mart* from a case in which "the employer 'used a biased testing procedure to evaluate both applicants for employment and incumbent employees'" as the basis for establishing a pattern or practice with regard to a class. 564 U.S. at 353 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)). Surely in such a case, the class would be entitled to seek an injunction against the use of the biased testing procedure, even though that remedy would not guarantee that all of the applicants would be hired or that all of the incumbent employees would be promoted. The injunction would eliminate the unlawful process that was depriving the class as a whole of a fair chance to be hired or promoted, just as the injunction that plaintiffs sought in this case would have eliminated the unlawful process that prevented even class members who had or could obtain housing from being treated in the community rather than in a nursing home.

Insofar as *Wal-Mart* distinguishes individualized from class-wide relief, it uses "individualized relief" to refer to injunctive relief equivalent to an individualized award of damages. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012) ("special expert panel" to review individual foster-care cases is individual relief). There is nothing in the rejection of individualized relief that is inconsistent with granting class-wide injunctive relief that may affect members of the class differently. *See id.* (rejecting claim that a class could not be certified under Rule 23(b)(2) "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, such as insufficient staffing"); *Braggs v. Dunn*, 317 F.R.D. 634, 667-68 (M.D. Ala. 2016) (Rule 23(b)(2) certification is proper to address "systemic deficiencies that create a substantial risk of serious harm" to the class even if members could seek relief as to the adequacy of particular treatment); *M. H. v. Berry*, No. 1:15-cv-1427, 2017 WL 2570262, at *7-8 (N.D. Ga. June 14, 2017) ((b)(2) certification proper to address general policies and practices of denying medically necessary skilled nursing hours, not to determine the hours for each class member).

C. The Class Was Entitled to an Injunction That Removed Needless Barriers to Community Placement.

The district court was wrong to dismiss the claims for class-wide relief because of its perception that there was not enough housing available for all class members. Even if limited housing availability precluded a de-institutionalization injunction, it did not prevent the district court from entering an injunction that would redress the violation of the District's duty to administer the Medicaid program to prevent a risk of needless segregation under the ADA and the Rehabilitation Act. The district court could have entered an injunction requiring the District to remove the barriers to de-institutionalization within the District's control under the Medicaid program

As this Court recognized in *DL,* 860 F.3d at 727, the existence of independent obstacles to achieving an ultimate objective does not preclude injunctive relief. The district court in *DL* determined that the District had breached a statutory duty under IDEA to make eligibility determinations within a statutory deadline. In *DL*, the injunction to timely determine a child's eligibility for IDEA services "excuses the District from compliance where it is unable to meet its deadlines through no fault of its own," such as a parent's refusal to consent to a required evaluation. *Id.* The district court could have achieved the same result, not by mandating a deadline directly and excusing noncompliance when the District was not at fault, but by requiring the District to employ staff and processes

designed to meet the statutory deadline. There would be no violation of such an injunction the District failed to meet the deadline because a parent refused to consent. A district court has the remedial discretion to frame an injunction in terms of an ultimate outcome (in *DL*, an eligibility determination) or by correcting systemic deficiencies in the process for achieving the outcome.

In this case, the District's legal duty was to administer its program so as to avoid unnecessary segregation of disabled persons in nursing homes. While the district court could have, as a matter of equitable discretion, enforced that duty by setting numerical goals for community placement and excusing the District's non-compliance if independent factors (such as the perceived housing shortage) intervened, it was not required to do so. The evidence adduced in the liability trial justified the entry of a class-wide injunction requiring the District to fortify the efforts it began to take after the lawsuit was filed to increase the resources devoted to the steps involved in the process of transitioning a nursing home resident to a community placement. That is enough under Rule 23(b)(2). *See Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017) (sufficient for certification that there be a class-wide injunction that would redress the violation); *Chi. Teachers Union v. Bd. of Educ.*, 797 F.3d 426, 443 (7th Cir. 2015) (class sought common injunctive relief, even if later determinations of individual relief might be required); *Borum v. Brentwood Village, LLC*, No. 16-cv-1723 (D.D.C. Feb. 12, 2018) (differences

between effect of policy on families with 3-bedroom apartments compared to those with 4 or 5-bedroom apartments does not mean that policy cannot be remedied by a single injunction). Nothing in the law justified the denial of all relief because some class members might not find housing and complete deinstitutionalization might not be accomplished; the point is that all class members would receive the transition assistance to which they are entitled and an appropriate *opportunity* for treatment in the community. *See Nio v. Dep't of Homeland Sec.*, 323 F.R.D. 28, 34-35 (D.D.C. 2017) (Huvelle, J.) (holding "single injunction" requirement satisfied by order with respect to common screening requirements, even though ultimate eligibility for naturalization depends on "individualized determinations").

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter an appropriate remedial injunction.

Respectfully Submitted,

/s/ *David A. Reiser*
David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
dreiser@zuckerman.com

/s/ *Chinh Q. Le*
Chinh Q. Le
Jonathan H. Levy
David Carpman
THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA
1331 H Street, NW, Suite 350
Washington DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because it contains 6,256 words, excluding the parts of the brief exempted by 32(a)(7)(B)(iii), and

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using MS Word in Times New Roman 14 Point Font.

/s/ *David A. Reiser*
David A. Reiser

CERTIFICATE OF SERVICE

I certify that on June 11, 2018, I caused a true copy of the foregoing brief of *Amici Curiae* to be delivered electronically via the Court's CM/ECF system to:

Sonya L. Lebsack
Loren L. AliKhan
Stacy Anderson
Office of the Attorney General for the District of Columbia
441 4th Street, N.W., Suite 600 South
Washington, DC 20001
Phone: (202) 727-6295
Counsel for Defendants/Appellants

Sasha Samberg-Champion
Ryan Downer
Michael G. Allen
Relman, Dane & Colfax PLLC
1225 19th Street, N.W., Suite 600
Washington, D.C. 20036
Phone: (202) 728-1888

Kelly Bagby
Maame Gyamfi
Iris Y. González
AARP Foundation
601 E Street, NW
Washington, DC 20049
Phone: (202) 434-2103
Attorneys for Plaintiff-Appellant

/s/ *David A. Reiser*
David A. Reiser