ORAL ARGUMENT IS NOT YET SCHEDULED

No. 14-8001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: DISTRICT OF COLUMBIA,

Petitioner.

On Petition for Permission to Appeal from an Order of the
United States District Court for the District of Columbia

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, BREAD FOR THE CITY, THE CENTER FOR PUBLIC REPRESENTATION, THE NATIONAL DISABILITY RIGHTS NETWORK, THE NATIONAL HEALTH LAW PROGRAM, AND THE NATIONAL SENIOR CITIZENS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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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 Brief for Respondents, except that the amici joining this brief are the Legal Aid Society of the District of Columbia, Bread for the City, the Center for Public Representation, the National Disability Rights Network, the National Health Law Program, and the National Senior Citizens Law Center.

B. Rulings under Review. References to the rulings at issue appear in the Joint Appendix and are listed in the Brief for Respondents.

C. Related Cases. *Amici* are aware of no other related cases.

CORPORATE DISCLOSURE STATEMENT

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.

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GLOSSARY OF ABBREVIATIONS

ADA – Americans with Disabilities Act

IDEA – Individuals with Disabilities Education Act

INTERESTS OF *AMICI*

Amici are organizations that provide assistance to persons with disabilities and have an interest in the effective enforcement of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and the obligations under that law recognized in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), to avoid needless institutional care: Bread for the City, the Center for Public Representation, the Legal Aid Society of the District of Columbia, the National Disability Rights Network, the National Health Law Program, and the National Senior Citizens Law Center.[1]

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a); D.C. Cir. R. 29(b).

SUMMARY OF ARGUMENT

The District's petition for review fails to demonstrate any error in Judge Huvelle's thorough and careful class certification ruling, much less vault the "high bar" it must clear to permit interlocutory review for manifest error. *In re Johnson*, 760 F.3d 66, 72 (D.C. Cir. 2014). See also Class Br. 11-17. Contrary to the

[1] The interests of each of the organizations joining in this brief are further described in the appendix. No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(c)(5). *Amici* filed notice of the intent to submit this brief on October 16, 2014. D.C. Cir. R. 29(b).

District's central argument, Federal Rule of Civil Procedure 23 requires "common questions," not in all cases a common policy. A common policy was required in *Wal-Mart Stores, Inc. v. Dukes*, but that was only because a common question under Rule 23(a)(2) must drive the determination of liability, and the Court ruled that liability under the law in that case required a policy. The Court held, as a matter of Title VII employment discrimination law, that Wal-Mart's practice of delegating employment decisions to lower level supervisors was not a valid theory of nationwide discrimination at the corporate level and therefore did not state a common question about liability. 131 S. Ct. 2541, 2551-52 (2011); *see also In re Johnson*, 760 F.3d at 72-73 (describing commonality analysis in *Wal-Mart*). By contrast, when the District has an affirmative duty as it does under the ADA and *Olmstead*, violations of federal law through maladministration, rather than by design, can present common questions about liability. Before and after *Wal-Mart*, systemic deficiencies in the administration of government programs arising from "widespread practices" as well as deliberate policies permit certification of a class harmed by those deficiencies. *See D.L. v. District of Columbia*, 713 F.3d 120, 130 (D.C. Cir. 2013) (Edwards, J., concurring).

ARGUMENT

THE ORDER CERTIFYING A CLASS OF PERSONS DENIED FAIR CONSIDERATION FOR COMMUNITY-BASED SERVICES WAS NOT ERRONEOUS, MUCH LESS MANIFESTLY ERRONEOUS.

The operative complaint alleges that the District of Columbia confines persons with disabilities in institutional nursing facilities even though they desire to "live in their community" and "could be served in community-integrated settings." (J.A. 622, ¶ 1; *see also id.* at 626, ¶¶ 23-25; *id.* at 627-37, ¶¶ 26-104 (allegations concerning named plaintiffs); *id.* at 640-41, ¶¶ 123-25, 128). The complaint asserts that the District's conduct violates an affirmative duty imposed by federal law and regulations to provide effective transition assistance, resulting in "needless isolation, segregation and institutionalization of individuals with disabilities in nursing facilities," (*id.* at 642, ¶ 133), and that the District's failure to live up to that duty is action or a refusal to act on grounds generally applicable to the class, warranting class-wide injunctive relief. (*Id.* at 650, ¶ 160).

The complaint satisfies the requirements of Rule 23(a)(2) and (b)(2).[2] Whether the plaintiffs can establish liability depends upon common questions that can be summarized as: (a) the legal question of the existence and scope of a duty

[2] The District provides no basis for finding error, much less manifest error, in the district court's typicality determination. (D.C. Br. 29-30; Class Br. 32-35). The proper level of generality for such a determination is a classic matter for district court discretion.

under the ADA to provide effective transition assistance, and (b) the factual question of the District's breach of that duty. (*See* J.A. 233-34 (denying summary judgment on the District's assertion that it has an adequate *Olmstead* plan)). If the plaintiffs prevail on those questions, the district court can issue an injunction to remedy the District's failure to act on grounds applicable to the class and to require the District to provide effective transition assistance that will benefit the entire class.

Courts have consistently granted class certification in this context, and in similar contexts involving the systemic failure of a governmental body to carry out a legal duty to a class.[3] *See also infra* pp. 18-20 and note 11. Indeed, as the

[3] Cases involving breaches of duty specifically under the ADA include *Armstrong v. Davis*, 275 F.3d 849, 854, 871 (9th Cir. 2001) (affirming class certification of prisoners and parolees alleging violations of the ADA and Rehabilitation Act (i.e., the State parole authority's "fail[ure] to make proper accommodations for numerous disabled prisoners and parolees"), and affirming in part the award of "system-wide injunctive relief"); *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 267 (D.N.H. 2013) (certifying class of individuals with mental disabilities alleging a violation of the ADA's integration mandate: the "systemic deficiency in the availability of community-based services . . . follow[ing] from the State's policies and practices . . . [that] expose all class members to a serious risk of unnecessary institutionalization" in state facilities); *Lane v. Kitzhaber*, 283 F.R.D. 587, 601 (D. Or. 2012) (certifying class of individuals with intellectual or developmental disabilities segregated in sheltered workshops for a suit alleging that "structural deficiencies" in State's employment integration program violated the ADA); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 28 (D.D.C. 2006) (certifying class alleging violations of the ADA and Rehabilitation Act because "defendant's alleged action – failure to provide comparable paratransit services to eligible persons with disabilities – constitutes an action 'generally applicable to the

district court noted, "[w]here a private action raises systemic issues" involving the failure of a state or local government to satisfy its duty under *Olmstead*, "courts have uniformly granted class certification to allow plaintiffs to pursue those claims" both before and after the Supreme Court's decision in *Wal-Mart*. (J.A. 1203; *see id.* at 1339 (District's concession to the district court that it cannot cite any contrary case)).[4]

A. There is No Conflict with *Wal-Mart*.

Notwithstanding the long (and apparently unbroken) pedigree of class treatment in such cases, the District argues that Rule 23(f) review for "manifest error" is appropriate here because Judge Huvelle's class certification order "violates the principles of *Wal-Mart*." (D.C. Br. 16). But unlike *Wal-Mart*, this case involves a violation by the defendant of a duty owed to the class as a whole: to *administer its Medicaid program* in "the most integrated setting appropriate to

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class.'") (quoting Fed. R. Civ. P. 23(b)(2)); *Rolland v. Celluci*, No. 98-30208, 1999 U.S. Dist. LEXIS 23814, at *6-7, 28 (D. Mass. Feb. 2, 1999) (certifying class of individuals with mental or developmental disabilities alleging that confinement in a nursing facility and systemic failure to provide transition assistance to community settings, including "specialized services and integrated community living opportunities," constitutes a violation of the ADA).

[4] The District refers to an order decertifying an *Olmstead* class in *Lee v. Dudek*, No. 08-cv-26 (N.D. Fla. filed Jan. 3, 2012) (slip. op.), ECF No. 372. (D.C. Br. 17). But decertification in that case was based on Florida's enactment of new legislation eliminating the principal barrier to integration; therefore, the State could no longer be said to be refusing to act with respect to the class and was no longer interposing as a defense the legal arguments common to the class that relief would require a "fundamental alteration" of the State's service system. (*See* Class Br. 18-19).

the needs" of persons with disabilities. 28 C.F.R. § 35.130(d). The plaintiffs contend that the District's legal obligation to administer its Medicaid program in that way includes a duty to provide effective transition assistance to persons with disabilities who are in nursing homes but want to receive services in a community setting, that the District has failed to do so, and that they are entitled to an injunction requiring the District to comply. The plaintiffs may, on the merits, fail to persuade on any of those propositions, but the common questions will "generate common *answers* apt to drive the resolution of the litigation," as *Wal-Mart* requires, 131 S. Ct. at 2551; and the ensuing relief would benefit the class as a whole. Class certification is proper under *Wal-Mart* because the questions and relief are common to the class.

The District strains to analogize this case to *Wal-Mart* on the basis that the District currently relies on more than one agency and one pot of resources to provide assistance to nursing home residents who want to return to the community. (D.C. Br. 5-8, 23-25).[5] That, of course, is a far cry from the sprawling class action

[5] All of the agencies to which the District points (D.C. Br. 6)—the Department of Health Care Finance, the Department of Behavioral Health, and the Office on Aging—are within the Office of the Deputy Mayor for Health and Human Services (DMHHS). *See* Office of DMHHS: DMHHS Agencies & Bds., *available at* http://dmhhs.dc.gov/page/dmhhs-agencies-and-boards (last visited Nov. 18, 2014). The mission of DMHHS is to "support[ ] the Mayor in coordinating a comprehensive system of benefits, goods and services across multiple agencies to ensure that children, youth, and adults, with and without disabilities, can lead

before the Court in *Wal-Mart* challenging decisions by thousands of local supervisors concerning 1.5 million plaintiffs employed in different jobs at different levels of pay and skill by 3400 stores across the country. 131 S. Ct. at 2547.

But even if this case were factually closer to *Wal-Mart*, it is legally different in a critical way. In *Wal-Mart* the Court rejected the legal validity of the plaintiffs' theory that the company had an affirmative duty under Title VII to administer employment decisions to prevent discrimination by store-level supervisors exercising delegated authority. 131 S. Ct. 2548, 2554-55. In this case the District has an affirmative duty under *Olmstead* to administer its programs to prevent persons with disabilities from being segregated in nursing homes. The rejection of the plaintiffs' legal theory in *Wal-Mart* eliminated the common question—the "glue"—said to unite decisions made with regard to over a million employees by thousands of supervisors. But the Title VII holding of *Wal-Mart* has no effect on the District's affirmative obligation under the ADA.

The Supreme Court was explicit that its holding that the employees had failed to satisfy the Rule 23(a) commonality standard rested on a conclusion about Wal-Mart's corporate obligations under substantive Title VII law: "proof of commonality necessarily overlaps with [the employees'] merits contention that Wal-Mart engages in a pattern or practice of discrimination." 131 S. Ct. at 2545.

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healthy, meaningful and productive lives." Office of DMHHS: About DMHHS, *available at* http://dmhhs.dc.gov/page/about-dmhhs (last visited Nov. 18, 2014).

After noting that Wal-Mart did not use any common selection process that discriminated and had not adopted any express policy of discrimination, the Court dismissed the employees' evidence from a sociologist that Wal-Mart's corporate culture made the company vulnerable to gender bias as insufficient to establish a general policy of discrimination. *Id.* at 2554-56. That left only the question of whether Wal-Mart's "policy of allowing discretion by local supervisors over employment matters" was a corporate policy of discrimination under Title VII that could unite the millions of employment decisions by thousands of decisionmakers as a common question under Rule 23 in light of statistical evidence of disparate impact on women. *Id.* at 2554 (emphasis and internal quotation marks omitted). The Court held—as a matter of Title VII liability—that it was not. *Id.* at 2556-57. The crux of the dissent was disagreement with the majority's view of Title VII liability. *Id.* at 2562-67 (Ginsburg, J., dissenting).

The District's affirmative duty under the ADA to manage its programs, including Medicaid, so that the outcomes for persons with disabilities are consistent with *Olmstead* is apparent from the Justice Department's regulations interpreting the ADA. The District of Columbia is a "public entity" for purposes of the ADA. 28 C.F.R. § 35.104. As a "public entity," the District must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Id.* § 35.130(d).

That is a duty to choose administrative means to promote the legally mandated end of integrating persons with disabilities. The District must designate someone to coordinate its responsibilities—there is no room to avoid responsibility by diffusing it. *Id.* § 35.107(a). Nor can a public entity escape responsibility "through contractual, licensing, or other arrangements." *Id.* § 35.130(b)(1); *see also id.* § 35.130(b)(3) (addressing, *inter alia*, public agencies under common administrative control or of the same State).[6] As the district court recognized, *Olmstead* requires a "measurable commitment to deinstitutionalization." (J.A. 242). Unlike Wal-Mart, the District cannot avoid liability under federal law so long as it does not affirmatively adopt a discriminatory policy. It must administer its programs to *prevent* segregation of persons with disabilities in violation of the ADA.

It is also irrelevant to whether the case presents common questions of law or fact and whether the class as a whole would benefit from common injunctive relief

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[6] This provision states:

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration— (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or (iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

that an injunction to provide effective transition assistance would not guarantee the placement of all class members or particular class members in community settings. *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994) ("While it is true that not all of the orders issued will immediately benefit every plaintiff, every plaintiff will benefit from relief designed to assure DHS [Department of Human Services] compliance with the applicable standards."). Effective transition assistance would remove some barriers to community placement. The existence of those barriers is harmful to the class. Even if other barriers to placement remain for some class members, an injunction requiring effective transition assistance would redress a concrete injury and benefit the entire class. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658 (1993) (Article III standing to challenge barrier to consideration for public contract does not require proof that, absent the barrier, contract would have been awarded); *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1016 (D.C. Cir. 1997) (same); *see also Sierra Club v. EPA*, 755 F.3d 968, 976 (D.C. Cir. 2014) (plaintiffs asserted concrete injury under Article III of contamination threat when challenging regulation which gave industry the "opportunity" to use gasification process without particular limitations); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1103 (D.C. Cir. 2005) (plaintiff challenging denial of representation at parole

hearing need not show he would have been paroled but for the denial of representation).

B. There is No Conflict with this Court's Decision in *D.L.*

The class certification problem in *D.L.* was that the plaintiffs had identified distinct sets of common questions and forms of injunctive relief, each relating to a different stage of the "child find" process mandated by the Individuals with Disabilities Education Act (IDEA). 713 F.3d at 127-28. Whether the District was meeting its legal obligations with regard to each stage posed different common questions about the scope of the District's duty and its adherence to that duty in practice. Also, each stage involved a different injunction. *See In re Johnson*, 760 F.3d at 73 (describing *D.L.*). Indeed, the plaintiffs had proposed certification of subclasses to the district court in response to the District's motion to de-certify, but that court declined. *Id.* at 128. On remand, the district court certified four subclasses, and this Court then denied Rule 23(f) review. *D.L. v. District of Columbia*, No. 05-1437, 2013 U.S. Dist. LEXIS 160018 (D.D.C. Nov. 8, 2013); *In re District of Columbia*, No. 13-8009, 2014 U.S. App. LEXIS 1919 (D.C. Cir. Jan. 30, 2014).

The District tries to analogize this case to *D.L.* through a kind of Zeno's paradox of motion, by which every governmental (and presumably private) duty can be endlessly subdivided into smaller and smaller stages so that no breach of

duty could ever be amenable to class certification. But *D.L.* does not adopt the extreme position that class members must be identically situated in all respects. A "good deal of commonality" is enough. *In re Johnson*, 760 F.3d at 73.[7] No doubt there is a way to characterize any widespread failure to provide federally-mandated assistance as involving many different violations. That approach would eliminate class actions across the board because there will always be slight variations among individual members of even the most homogenous class, but those variations do not negate the gains in efficiency, efficacy and consistency from class treatment of common questions and common relief. The precise degree of similarity among class members that is appropriate in any particular case is a classic matter for trial court discretion, not sweeping appellate declarations of manifest error.

C. Rule 23 Requires "Common Questions," Not a Common Policy.

The District contends that there is a requirement in every class certification case to identify a conscious policy responsible for the violation of the legal rights asserted, and therefore that a systemic failure to carry out a legal obligation that may result from neglect rather than design is insufficient. (D.C. Br. 21-22, 25-26). This position is inconsistent with a plain reading of Rule 23 which requires a

[7] If it were otherwise and commonality under Rule 23(a)(2) meant class members had to be identically situated in all respects, there would be no purpose for the predominance requirement for money damages class actions under Fed. R. Civ. P. 23(b)(3) ("questions of law or fact common to class members predominate over any questions affecting only individual members").

common question, not a common policy, and is unsupported by the long line of cases both before and after *Wal-Mart* certifying classes alleging systemic deficiencies under Rule 23(b)(2).

1. Rule 23(a)(2) and (b)(2) do not require a policy for certification.

Rule 23(a)(2) requires a "common question of law or fact" to bind the class, and Rule 23(b)(2) requires an action or failure to act justifying class-wide injunctive relief. Neither the text nor logic of Rule 23 requires a court to find a *policy* to flout the law in all cases. The Supreme Court in *Wal-Mart* looked to whether there was a corporate policy of discrimination, but that was because of the requirements of Title VII, not because of Rule 23. *See* discussion *supra* pp. 7-8. The Court reasoned that the millions of distinct employment decisions challenged in that case could present a common question only if joined or glued together by a policy at the corporate level. But *Wal-Mart* does not (and could not) rewrite Rule 23(a)(2) to require in all circumstances a common policy rather than a common question.

Rule 23(b)(2) does not require a policy, either. What it requires is a common action or failure to act justifying class-wide injunctive relief. Inaction especially need not reflect a policy—it can be a result of incompetence, lack of resources, or other factors independent of any policy or design. A single judicial

"stroke" in the form of a class-wide injunction can remedy such institutional derelictions even in the absence of any need to correct an errant policy; that is all Rule 23(b)(2) requires.

This reading of Rule 23 is borne out by the caselaw in this Circuit and around the country, both before and after *Wal-Mart*. Pre-*Wal-Mart*, courts nationwide explicitly predicated class certification under Rule 23(b)(2) on allegations of systemic deficiencies, not policies, in the administration of public programs that result in breaches of a legal duty. *See, e.g., D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1192 (10th Cir. 2010) (affirming class certification of children in state foster care for 42 U.S.C. § 1983 action alleging that "agency-wide deficiencies" in foster care system "expose all class members to an impermissible risk of harm"); *Baby Neal*, 43 F.3d at 61 (reversing and remanding denial of class certification of children in state foster care alleging "systemic deficiencies"). Such class actions were also commonplace in this Circuit. During the protracted *LaShawn A.* litigation, a class action of abused and neglected children "revealed the District of Columbia's deficient and inept administration of its foster care system" and "showed that District officials had consistently failed to carry out responsibilities imposed on them by federal and local laws." *LaShawn A. v. Barry*, 87 F.3d 1389, 1391 (D.C. Cir. 1996). This Court affirmed the finding of liability based on the District's breach of its affirmative statutory duty to these children. *Id.*

at 1392 (citing *LaShawn A. v. Kelly*, 990 F.2d 1319, 1324 (D.C. Cir. 1993)). Later, in *Petties ex rel. Martin v. District of Columbia*, this Court remanded for reconsideration a motion to vacate a injunction and related orders in a Rule 23(b)(2) class action concerning the District of Columbia's "fail[ure] to timely pay private providers of special education services[,] . . . thereby jeopardizing students' special education placements," in violation of the IDEA, on the ground that the District had "cured the systemic violations of law" and no longer required judicial supervision. 662 F.3d 564, 565 (D.C. Cir. 2011).[8]

Similarly, post-*Wal-Mart*, other courts have consistently certified classes of individuals alleging the breach of a state's affirmative duty, such as in the prison and foster care context, under Rule 23(b)(2). In *M.D. ex rel. Stukenberg v. Perry*, which involved a class of children alleging "class-wide injuries caused by systemic

[8] *See also Barnes v. District of Columbia*, 242 F.R.D. 113, 123 (D.D.C. 2007) (certifying class of D.C. inmates because "allege[d] systemic failure that results in overdetention . . . do[es] not appear to be isolated instances but instead represent[s] part of a consistent pattern of activity on the part of defendant"); *Bynum v. District of Columbia*, 214 F.R.D. 27, 37 (D.D.C. 2003) (certifying class of inmates alleging systemic deficiencies of the Department of Corrections and rejecting defendant's argument that "it has no policy of detaining inmates after their scheduled release dates, and . . . the circumstances of each alleged overdetention vary," because "courts have never required such a demonstration to turn on whether [defendant] has adopted such a formal policy"); *Blackman v. District of Columbia*, No. 97-1629, 1998 U.S. Dist. LEXIS 23920, at *46-47 (D.D.C. May 13, 1998) (certifying class of children alleging that the "[District of Columbia Public Schools] failed to timely comply with the determinations of hearing officers in 90% of the cases in which favorable determinations are received" in violation of affirmative statutory duties under the IDEA).

deficiencies in Texas's administration of the [Permanent Managing Conservatorship]," the Fifth Circuit rejected the argument that a "specific policy" was required by Rule 23(b)(2); instead, class certification 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." 675 F.3d 832, 847 (2012). Taking no position on whether the class should be certified, the Fifth Circuit ordered a re-examination of the class certification order for a "rigorous analysis" in light of *Wal-Mart*, which was handed down while the appeal was pending. *Id.* at 837, 848. On remand, the district court again certified the class.[9] *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013). *See also, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 687 (9th Cir. 2014) (affirming certification of class of state inmates suing the Arizona Department of Corrections for injunctive relief to "alleviate the alleged systemic Eighth Amendment violations" of inadequate healthcare and isolation conditions policies); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011) (denying motion to decertify Rule 23(b)(2) class of children in foster care alleging that "specific and overarching systemic deficiencies within DCF [Department of Children of

[9] The Fifth Circuit dismissed the appeal of the second class certification order for late filing. *M.D. ex rel. Stukenberg v. Perry*, 547 Fed. App'x 543 (2013).

Families] . . . place children at risk of harm," because "[t]hese systemic shortcomings provide the 'glue' that unites [p]laintiffs' claims.").

In *Amchem v. Windsor*, a case involving class certification under Rule 23, Justice Ginsburg cautioned that "[t]he text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered." 521 U.S. 591, 620 (1997). *Wal-Mart* is an important decision, to be sure, and it has focused judicial attention more closely on the commonality requirement of Rule 23 than had previously been the norm. But *Wal-Mart* did not shift the commonality inquiry from the existence of common questions to the existence of a deliberate law-violating policy, as the District suggests.

2. This Court rejected the District's extreme "affirmative policy" position in *D.L.*

This Court in *D.L.* recognized that a *practice* of failing to carry out a duty, as well as a policy, would be enough for class certification, stopping well short of the position adopted by the Seventh Circuit panel majority in *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (2012). That case, like *D.L.*, involved a school system's failure to carry out its obligations under the IDEA. The Seventh Circuit majority dismissed the proposition that a government's systemic failure to carry out a statutory duty under the IDEA could warrant class certification: "Child-find

inquiries, like other aspects of the IDEA, are necessarily child specific. There is no such thing as a 'systemic' failure to find and refer individual disabled children for [individualized educational program] evaluation—except perhaps if there was 'significant proof' that [Milwaukee Public Schools] operated under child-find *policies* that violated the IDEA." 668 F.3d at 498. But this Court in *D.L.* agreed with Judge Rovner's opinion, concurring in part and dissenting in part, that "[s]ystemic violations of the IDEA are cognizable" as class actions even when they arise from "widespread practices" rather than deliberate policies. *D.L.*, 713 F.3d at 128 (quoting *Jamie S.*, 668 F.3d at 505 (Rovner, J.)); *see also D.L.*, 713 F.3d at 126 (after *Wal-Mart* commonality is not satisfied "[i]n the absence of a policy or practice that affects all members of the class"), 128 (concluding that, under Rule 23(a)(2), a common statutory violation is not enough "in the absence of a uniform policy or practice," and requiring a "common harm suffered as a result of a policy or practice that affects each class member").

The fallacy of the District's effort to equate the existence of common questions of law or fact (*i.e.*, "a common contention . . . capable of class-wide resolution," *Wal-Mart*, 131 S. Ct. at 2251) with the existence of an "affirmative policy" to violate federal law (D.C. Br. 21) is exposed by Judge Edwards's analysis of a colloquy in the *D.L.* oral argument. *D.L.*, 713 F.3d at 129-130 (Edwards, J., concurring). Not only did the District assert that commonality would

be lacking if the District had "no policy, nothing in effect at all"; but it also went further to argue that even if everyone eligible for a federal program could not "get in the door," that would be insufficient for commonality under the District's interpretation of *Wal-Mart*. *Id.*

Although the District does not reprise that extreme position in its brief in this case, it goes nearly as far in suggesting that there would be no common question if the reason that District residents were denied rights under federal law was administrative chaos and incompetence rather than a deliberate articulated policy to flout federal authority. (D.C. Br. 21-22). Commonality comes from the existence of a particular legal duty owed to a class of persons and the District's widespread failure to fulfill that legal duty, even if it is failing with the best of intentions and because of inadequate resources or poor administration—especially when the District's duty is phrased as "shall *administer* services, programs, and activities" so as to achieve the end of integrating persons with disabilities into community-based rather than institutional care.[10] 28 C.F.R. § 35.130(d) (emphasis added).

[10] In its Rule 23(f) petition after remand in *D.L.*, the District similarly argued that a failure to adopt policies to prevent violations of the IDEA was insufficient for class certification. Pet. for Permission to Appeal under Fed. R. Civ. P. 23(f) at 15, *D.L. v. District of Columbia*, No. 05-1437 (D.D.C. filed Nov. 22, 2013), ECF No. 393-1. This Court denied review of that contention. *In re D.L.*, No. 13-8009, 2014 U.S. App. LEXIS 1919 (D.C. Cir. Jan. 30, 2014).

3. A common practice of deficient administration need not be "uniform" in the sense that the District *always* fails.

The District attempts to conflate practice with policy by stressing the *D.L.* court's use at one point of the word "uniform" to modify "policy or practice." (D.C. Br. 21 (*quoting D.L.*, 713 F.3d at 128)). But the Rule 23(a)(2) standard is a "good deal of commonality," not absolute uniformity. *See In re Johnson*, 760 F.3d at 73.[11]

On the basis of a supposed "uniformity" requirement, the District contends that even a broadly deficient system of providing transition assistance (or meeting some other governmental duty) would not permit class certification unless "the District *always* fails." (D.C. Br. 21). But there can be placement successes despite gaps in the District's efforts that make it more difficult for nursing home patients to receive services in community settings across the board. The fact that the District sometimes succeeds in placing a few nursing home residents back into the community (often with the help of family members or private agencies) is not inconsistent with the absence of an effective system of transition assistance that

[11] In fact, in the only case cited by the District in which 23(f) review was granted for a class alleging systemic deficiencies in a State's provision of public services (D.C. Br. 16; Class Br. 13), the Fifth Circuit rejected the "[State]'s argument that the proposed class can only be certified under Rule 23(b)(2) if its claims are premised on a 'specific policy of the State *uniformly* affecting – and injuring – each [plaintiff]." *M.D.*, 675 F.3d at 847. Instead, the court determined that "a pattern or practice of agency action or inaction – including a failure to correct a structural deficiency within the agency" – is sufficient. *Id.*

leaves hundreds of nursing home residents stranded in institutional settings who neither want nor need to be there. The outcome in *D.L.* turned on the inclusion of four distinct phases of the child find process at issue, not whether the deficiencies identified in each stage were "uniform" or reflected a District policy.[12] A "practice," as used in *D.L.*, can be a systemic failure to meet a legal obligation even without any design or intent to do so.

Nothing in *Wal-Mart* suggests that the Court was closing the door to such institutional reform litigation when warranted by a systemic violation of federal law. Indeed, just a few weeks before it decided *Wal-Mart*, the Court upheld sweeping injunctive relief—including a mandatory population limit—based on deficient mental health treatment in the California prison system in *Brown v. Plata*, 131 S. Ct. 1910 (2011). The State's systemic failure to provide constitutionally-mandated adequate treatment was due to a multitude of causes rather than a single deliberate policy to deny inmates their right to treatment. Although the Court divided 5-4, only Justice Scalia's dissent for himself and Justice Thomas called

[12] This Court denied the District's Rule 23(f) petition challenging, *inter alia*, a conceptually similar transition assistance subclass after remand in *D.L.* *In re D.L.*, 2014 U.S. App. LEXIS 1919; *see also* Pet. for Permission to Appeal under Fed. R. Civ. P. 23(f) at 3-5, 16; *D.L. v. District of Columbia*, No. 05-1437, 2013 U.S. Dist. LEXIS 160018 (D.D.C. Nov. 8, 2013) (certifying subclass for transition assistance to preschool). The standard for the District's duty to provide effective transition assistance presents a common question even if the particular transition plans developed vary from individual to individual.

into question the predicate for class-based injunctive relief ("the plaintiffs' claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional"), on the basis that only a minority of the class had suffered deprivations of treatment severe enough to violate the Eighth Amendment (*i.e.*, that the prisons did not *always* fail to provide constitutionally adequate treatment). 131 S. Ct. at 1952-53. The *Brown v. Plata* majority implicitly rejected that view in sustaining the sweeping remedial order. Similarly, it does not preclude class certification here that the deficiencies in the District's transition assistance do not prevent *all* transitions to community-based services.

The District argues that a policy is required for all classes, but if that means a court cannot certify a class subjected to violations of federal law through maladministration rather than design, even when the District has an affirmative duty as it does under the ADA and *Olmstead*, that argument is contrary to the plain language and longstanding interpretation of Rule 23.

4. Concerns about the efficacy of remedies for systemic deficiencies are matters of trial court discretion, not threshold class certification requirements.

Lurking beneath the surface of the District's arguments is the extensive and not altogether happy history of judicial efforts to reform public programs and institutions, including in the District of Columbia. Many of the district court's questions during the hearing on class certification were directed to the scope of relief and the judicial involvement that would ensue if a class was certified and the court decreed class-wide relief. (J.A. 1274-97). However, questions about the prudent exercise of judicial power in those circumstances are best addressed in the remedy stage, not by adopting class certification standards that effectively place the maladministration of programs beyond judicial reach. The district court's decision to grant class certification, despite a healthy regard (as shown by the hearing transcript) for the task that may lie ahead, deserves deference from this Court on appellate review—especially review limited to "manifest error." Moreover, the district court's close, if premature, attention to those issues at the class certification stage assures their prudent consideration if and when the time comes to fashion a class-wide remedial order.

* * *

Adopting the District's view of Rule 23 would significantly limit the ability of courts to "say what the law is" and mean it. Federal rights can be threatened by neglect as well as defiance, and when that neglect affects a class, as in this case, certification under Rule 23(b)(2) is proper.

CONCLUSION

The District's Rule 23(f) petition seeking review of the class certification order should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the foregoing Brief as *Amici Curiae* in Support of Respondents of the Legal Aid Society of the District of Columbia, *et al*., complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(C) because it contains 5,939 words (excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii)), and complies with the typeface and type style requirements in Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 point, Times New Roman font.

/s/ David A. Reiser
David A. Reiser
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I caused the foregoing Brief as *Amici Curiae* in Support of Respondents of the Legal Aid Society of the District of Columbia, *et al*., to be filed with the Court through the Court's CM/ECF system. Counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

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APPENDIX: INDIVIDUAL STATEMENTS OF INTEREST OF AMICI

The Legal Aid Society of 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 Bylaws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services provider in the District of Columbia and has long represented individuals seeking and receiving Medicaid. The resolution of this appeal will impact its clients who face the same barriers that the certified class challenges in this case.

Bread for the City (BFC) is a nonprofit organization that provides low-income residents of the District of Columbia with supplemental food, clothing, primary medical care, social services, and civil legal services. Among other things, BFC has helped District residents obtain and maintain Medicaid. BFC's medical clinic has observed firsthand the challenges of patients who receive Medicaid in institutional settings and in the community. BFC and the community members it serves have an interest in this appeal to ensure that the statutory rights of Medicaid beneficiaries to receive treatment in the least restrictive setting are protected in the District of Columbia.

The Center for Public Representation (the Center) is a national public interest law firm with offices in Northampton and Newton, Massachusetts, that

advocates for the rights of children and adults with mental illness, intellectual and developmental disabilities and brain injuries. For more than forty years, the Center has represented its clients in dozens of states in cases related to entitlement to appropriate integrated community based services, fair housing rights, inappropriate nursing home placements, involuntary commitment, and conditions in prisons and juvenile justice facilities. Of particular relevance to this action, the Center has successfully obtained class certification in several ADA cases on behalf of nursing facility residents with disabilities, *Rolland v. Cellucci*, No. 98-30208, 1999 U.S. Dist. LEXIS 23814 (D. Mass. Feb. 2, 1999), *discretionary review denied*, No. 99-8089 (1st Cir. Mar. 2, 1999), *class decertification denied sub nom. Rolland v. Patrick*, 2008 U.S. Dist. LEXIS 66477 (D. Mass. Aug. 19, 2008), *aff'd sub nom. Voss v. Rolland*, 592 F.3d 242 (1st Cir. 2010); and *Hutchinson v. Patrick*, No. 07-30084 (D. Mass. Oct. 2, 2008), as well as the two ADA cases relied upon by the district court in this matter, *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013); and *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012).

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all fifty states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A

System. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The National Health Law Program, (NHeLP) is a forty year-old public interest law firm working to advance access to quality healthcare and protect the legal rights of low-income people with disabilities. As such, NHeLP works extensively with Medicaid recipients. NHeLP works to advance access to healthcare through education, policy analysis, class action and individual litigation, as well as administrative advocacy.

The National Senior Citizens Law Center (NSCLC) is a nonprofit organization that advocates nationwide to promote the independence and well-being of low income older persons and people with disabilities. For more than forty years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs.

NSCLC works to ensure access to the federal courts to enforce safety net and civil rights statutes, particularly the Medicaid Act, a critical source of health insurance for the District's older persons and people with disabilities who seek treatment in the least restrictive setting. NSCLC has participated as counsel in numerous lawsuits regarding Medicaid and is profoundly concerned about the unnecessary segregation of the District's Medicaid patients in institutions for Medicaid services that could be provided in the community.