**2019-1094**

# United States Court of Appeals for the Federal Circuit

CONLEY F. MONK, JR., JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, WILLIAM JEROME WOOD, II,

*Petitioners-Appellants,*

– v. –

ROBERT L. WILKIE, Secretary of Veterans Affairs,

*Respondent-Appellee.*

*On Appeal from the United States Court of Appeals for Veterans Claims in No. 15-1280, Chief Judge Robert N. Davis, Judge Amanda L. Meredith, Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge Margaret C. Bartley, Judge Mary J. Schoelen, Judge Michael P. Allen and Judge William S. Greenberg*

## BRIEF OF *AMICI CURIAE* ADMINISTRATIVE LAW, CIVIL PROCEDURE, AND FEDERAL COURTS PROFESSORS IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Conley F. Monk, Jr v. Robert L. Wilkie

Case No. 2019-1094

## CERTIFICATE OF INTEREST

Counsel for the:
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certifies the following (use "None" if applicable; use extra sheets if necessary):

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is: | 3. Parent corporations and publicly held companies that own 10% or more of stock in the party |
|---|---|---|
| See Attachment A | None | None |
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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

*Monk v. Wilkie*, No. 15-1280, United States Court of Appeals for Veterans Claims

1/24/2019
Date

/s/ Jason L. Lictman
Signature of counsel

Jason L. Lichtman
Printed name of counsel

Please Note: All questions must be answered

cc: Counsel of Record

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**CIRCUIT RULE 29-2(a) STATEMENT**

This brief has been filed with the consent of all parties to this action.

Dated: January 24, 2019 Respectfully submitted,

*/s/ Jason L. Lichtman*

Jason L. Lichtman

## STATEMENT OF INTEREST[1]

Amici are professors of civil procedure, administrative law, and federal jurisdiction who offer a unique perspective about how the Federal Rules of Civil Procedure were designed to help courts review unlawful government policies. Amici have written extensively about due process in the administrative state, the judicial review of government action, and the use of class actions. Together, amici share an interest in ensuring that the Federal Rules of Civil Procedure continue to be construed so as to ensure the "just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Amici are listed above and file this in their individual capacities as scholars. They provide institutional affiliation solely for purposes of identification.

[1] No counsel for a party authored any part of this brief, and no person other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Since the adoption of the modern class action rule, plaintiffs have litigated class actions to obtain injunctive relief from government agencies, institutions, and programs. Consistent with that history, this Court held that the Court of Appeals for Veterans Claims could hear class action suits against the Veterans Administration "to compel correction of systemic error and to ensure that like veterans are treated alike." *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017).

On remand, an eight-member panel of the CAVC agreed to use Rule 23 of the Federal Rules of Civil Procedure "as a guide" to hear class actions. *Monk v. Wilkie*, 30 Vet. App. 167, 184 (2018). But four members of the panel declined to certify the class. They found that individual differences among the veterans meant that they could not challenge systemic delays at the Veterans Administration together. *Id* at 179. They also required plaintiffs to identify specific practices that caused delays in the VA system without the benefit of discovery.

In this brief, Amici address a number of questions that have been raised about the rules governing class actions in cases where plaintiffs seek to enjoin systemwide government practices. They detail how courts have consistently and appropriately relied on class actions in a wide range of actions for injunctive or declaratory relief, including due process challenges to government practices that undermine individual rights. Such cases may not always involve an explicit class-

wide policy, but instead a pervasive *practice* of government delay, mismanagement, or dysfunction. Amici make three points in support of the propriety of class certification in such cases.

First, courts routinely hold that common questions exist in injunctive relief class action challenges to government policies and practices. These include both facial challenges to policies, as well as challenges to unwritten institutional practices that would often escape resolution without precertification discovery, class-wide fact-finding and declaratory relief. When those government policies are held to be unlawful, that determination "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 50 (2011).

Second, due process challenges lend themselves to class certification because they often raise common questions about how system-wide hearing procedures impact a group of people who depend on them for relief. As the Supreme Court has long recognized: "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). The same is true for unreasonable delays in government administration that violate due process or other applicable laws. Because such challenges often turn on

systemic government practices, courts can resolve common questions among class members "in one stroke," as the law requires. *Wal-Mart*, 564 U.S. at 50.

Third, certifying class actions in such cases is consistent with historical practice. The authors of the modern class action rule specifically designed the rule to address cases where a government defendant systematically interferes with private plaintiffs' rights. For that reason, they wrote Rule 23(b)(2) to apply when the defendant "has acted or refused to act on grounds that apply generally to the class." The drafters made clear that this language allows courts to certify classes for injunctive or declaratory relief even when the defendant's actions threaten only "one or a few members of the class, provided it [defendant's conduct] is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2) Advisory Committee Notes to 1966 amendments.

## ARGUMENT

### I. Courts find common questions routinely in class actions challenging government practices.

Rule 23(b)(2) provides that a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). In cases where plaintiffs seek injunctive or declaratory relief against the government, that language means that the defendant must (1) act in a "consistent manner toward members of the class" such that its "actions may be viewed as part of a pattern of activity," or (2) establish a

"regulatory scheme common to all class members." 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1775 (3d ed. 2008) (collecting cases) ("Wright & Miller"). The Advisory Committee notes to Rule 23 explain that courts should liberally certify classes in such cases.

Courts have long certified classes when plaintiffs offered proof of an unwritten, unlawful practice, particularly where class discovery and trial might be the only way for parties to challenge government action that otherwise would escape detection. *See, e.g.*, *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (class challenging heating conditions in prison); *Marisol A. ex rel. Forbes v. Guiliani*, 126 F.3d 372, 377 (2d Cir. 1997) (class challenging foster care conditions); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 256 (S.D.N.Y. 2006)(class challenging welfare program that denied disabled applicants access to city services). Injunctive relief class actions are particularly important in civil rights cases because those cases "often involve classes which are difficult to enumerate but which involve allegations that a defendant's conduct affected all class members in the same way." 1 William B. Rubenstein, Newberg on Class Actions § 4.40 (5th ed. 2018) (collecting cases).

The Supreme Court's decision in *Wal-Mart* is consistent with this long-standing approach. In that case, a putative class of 1.5 million female employees sued their retail employer, alleging gender discrimination in violation of Title VII.

564 U.S. at 343. The Court rejected certification because, among other things, while the plaintiffs may have suffered a Title VII injury, their collection of individualized claims did not rely on a "common contention" "as to all" the plaintiffs. *Id.* at 350, 360 ("Title VII, for example, can be violated in many ways.").

*Wal-Mart* expressly distinguished such sprawling nationwide damage class actions from challenges to systemic government abuse. Recounting the history of the class action rule, the Court in *Wal-Mart* recognized that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." 564 U.S. at 361. The Court reaffirmed that plaintiffs may continue to challenge even unwritten and unlawful common practices that "manifest" in a "subjective decisionmaking process." *Wal-Mart*, 564 U.S. at 531.

The idea in *Wal-Mart* that the class relief must apply "as to all" plaintiffs was a reference to the widely-respected work of Richard Nagareda. *Wal–Mart*, 564 U.S. at 360 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Nagareda, who served as a reporter for the American Law Institute's *Principles of the Law of Aggregate Litigation,* worried that the Court could not provide a common remedy to the millions of women who sought money damages based on individual managerial decisions made around the country. In that same passage, however, Nagareda also

referred readers to a portion of the ALI's *Principles*, which explained why injunctive relief against the government often would apply to all:

> [I]n litigation against governmental entities . . . the generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named plaintiff.

Nagareda, *supra*, at 132 n.123 (citing *Principles of the Law of Aggregate Litig*. § 2.04 cmt. a at 112).

As time has passed, appellate courts have continued to endorse class actions that challenge government practices in cases seeking injunctive relief. *See, e.g, Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017) (class of prisoners challenging excessive heating in prison); *DL v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017) (class of former pre-school age children challenging delays in implementation of learning plans under IDEA); *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016) (class of plaintiffs challenging practice of sweeping streets of pedestrians in the morning hours); *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015) (class of citizens challenging failure of municipality to provide community-based care under Medicaid); *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) (class of inmates challenging a policy of housing, in the same cells, inmates known to be hostile to one another); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014)

(class of prisoners challenging policies and delays related to their medical and dental care).[2]

Federal courts do require plaintiffs to adduce more robust evidence where there is reason to ask whether a common thread indeed connects all of their experiences. But all that means is that plaintiffs can no longer rely on unsupported allegations that their various harms all flow from the defendant's informal but systemic practices. *Compare M.D. v. Perry*, 675 F.3d 832, 842 (5th Cir. 2012) *with M.D. v. Perry*, 294 F.R.D. 7, 38-45 (S.D. Tex. 2013) (certifying class after remand based on evidence that class members faced the same "unacceptable risk of harm" in state child protective services). In such cases, courts will provide an opportunity for limited precertification class discovery. *See* Newberg on Class Actions, *supra* at § 7:15 &16 ("Discovery concerning the certification requirements is therefore permitted, indeed often required.") (collecting cases); Manual for Complex

[2] These decisions differ from comparatively rare appellate decisions that have left injunctive relief class actions against the government uncertified after remand. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012); *Phillips v. Sheriff of Cook County*, 828 F.3d 541 (7th Cir. 2016). In *Philips*, the court found that the plaintiffs' claims were isolated instances, not systemic, while in *Jamie S*., the court found that individualized hearings were required to determine class membership. These cases differ from lawsuits that allege that systemic government neglect or maladministration exposes plaintiffs to serious harm. *Compare Parsons*, 754 F.3d at 680 ("Even if some ... are exposed to *a greater or idiosyncratic risk* of harm by the policy and practice of not hiring enough staff to provide adequate medical care to all inmates, that single policy and practice allegedly exposes every single inmate to a serious risk of the same basic kind of harm.") (emphasis in original).

Litigation, Fourth, § 21.14 (2004) (discovery specifically required "when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues."); *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1311 (11th Cir. 2008) (abuse of discretion to deny plaintiffs precertification discovery).

Class certification, however, does not require an adjudication of the merits. It only requires—in the absence of an express policy or practice—that plaintiffs proffer some "glue" holding together the activity they challenge. *Wal-Mart*, 564 U.S. at 352. *See also Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013) ("A putative class "need not, at that threshold, prove that the predominating question will be answered in their favor."). A higher bar would perversely limit classwide challenges to illegal unwritten government practices, where class discovery and trial may be the only way for parties to demonstrate the merits of their challenge to unlawful action.

## II. Courts have long relied on class actions to resolve challenges to government conduct.

### A. Due process challenges to government policies and practices are well-suited for class actions..

Consistent with the history of Rule 23(b)(2), courts have long relied on class actions to resolve constitutional challenges to agency decisions, particularly when plaintiffs challenge a common procedure or allege such a consistent pattern of egregious delay that a trier of fact might find a systemic unlawful practice. *See,*

*e.g.*, *Lippert v. Baldwin*, No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) (collecting cases); Wright & Miller, *supra*, § 1775 (3d ed. 2008) (collecting cases where "Rule 23(b)(2) . . . has been used extensively to challenge" complex benefit schemes). Due process challenges, in particular, lend themselves to class certification because they often raise common questions about how the same system-wide hearing procedures impact a group of people who depend on them for relief.

From the beginning of its modern decisions on procedural due process, the Supreme Court recognized that the inquiry turns on common questions. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), for example, the Supreme Court weighed the government's refusal to permit hearings against the private interests of an entire population of social security beneficiaries. Describing general features of the social security hearing process, and an average claimant's ability to use that process, the Supreme Court believed the risk of erroneously denying a beneficiary's case based on written submissions was low. *Id.* at 345. The Court stressed the importance of evaluating procedures as they applied to the entire claimant population. Providing more process for some beneficiaries, according to the Court, might come at the expense of other claimants' recoveries as well as the public coffers. *Id.* at 348. The Court acknowledged that decisions about "veracity" occasionally may impact an individual's entitlement to relief in a single case, but

in the end, the Court broadly endorsed the government's hearing procedures for all claimants. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases," emphasized the *Mathews* Court, "not the rare exceptions." *Id.* at 344.

Accordingly, after *Mathews*, federal courts routinely found no obstacle to certifying injunctive relief classes in procedural due process cases. In 1980, the Eighth Circuit reversed a decision by the district court denying class certification when patients held in a state mental hospital challenged the facility's commitment and release procedures as inconsistent with due process. *Coley v. Clinton*, 635 F.2d 1364, 1366 (8th Cir. 1980). The fact that orders of release for individual patients would depend on "facts peculiar to their individual cases" could not thwart the classwide challenge, especially given Rule 23(b)(2)'s purpose—"to enable plaintiffs to bring lawsuits vindicating civil rights." *Id.* at 1378.

In the next decade, a class of children alleging "systemic deficiencies" in the administration of a city's foster care system won certification. *Baby Neal v. Casey*, 43 F.3d 48, 53 (3d Cir. 1994). Each child's experience in the system differed and each individual class member had his or her own "individual service needs." *Id.* at 55. Nonetheless, as the Third Circuit observed, "(b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that the defendant's conduct [was] central to the claims of all class

members irrespective of their individual circumstances and the disparate effects of the conduct." *Id.* at 57.

Indeed, many landmark due process challenges to social security, immigration, and other state proceedings in the Supreme Court proceeded as class actions—ensuring that the Court had a complete record to address the full scope of the legal issues alleged. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion."); *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 488 (1991) (noting a district court's finding of jurisdiction and grant of class certification in a case challenging the administration of an immigration program that failed to provide applicants with notice, translation services, or an opportunity to challenge adverse witnesses).[3] Even *Goldberg v. Kelly,* which emphasized that the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard," was brought as a consolidated action and uniformly affirmed plaintiffs' right to a timely hearing. 397 U.S. 254, 268–69 (1970).

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[3] *See also, e.g., Greene v. Lindsey*, 456 U.S. 444 (1982) (finding that a "service by posting" law violated due process in an injunctive relief class); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (class action of school children seeking injunctive relief from corporal punishment); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (class action against Columbus school system).

Long after *Wal-Mart,* courts have continued to certify Rule 23(b)(2) class actions alleging that the government violated procedural due process. *See, e.g.*, *Murphy v. Piper*, No. CV 16-2623, 2017 WL 4355970, at *10 (D. Minn. Sept. 29, 2017) ("Plaintiffs' due process claims are capable of [c]lasswide resolution because the Court can determine with respect to the class as a whole whether Defendant is fulfilling her statutory obligation to ensure that adequate notice and opportunity for a hearing is being afforded"); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1203 (N.D. Cal. 2017) ("The procedural due process claim for which A.H. seeks class-wide preliminary injunctive relief is amenable to common answers."); *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601 (S.D.N.Y. 2018) (certifying procedural due process class for systemic delays in immigration release process).

Procedural due process class actions permit courts to answer many petitioners' claims "in one stroke" precisely because they raise questions about common procedures the government makes available for people who depend upon them for relief. *See, e.g., Reid v. Donelan*, 2018 WL 5269992 at *5 (D. Mass. Oct. 23, 2018) (class raised common due process claims); *Braggs v. Dunn,* 317 F.R.D. 634, 663 (M.D. Ala. 2016) (prisoners' procedural due process challenge can be "answered in one stroke—namely, by determining whether . . . involuntary-medication practices adequately protect due-process rights."). Classwide findings help courts assess the full impact of government procedures on an entire

population, a determination that the Due Process Clause often requires. *Parham v. J. R.*, 442 U.S. 584, 615 (1979) ("[I]t bears repeating" that "procedural due process rules are shaped by the risk of error . . . as applied to the generality of cases.") (internal quotation marks and citation omitted).[4]

### B. Challenges to systemic government delays are well-suited for class actions.

Cases alleging that government delays violate due process or federal statutes also raise common questions for classwide adjudication. Class actions may challenge systemwide delays in a government process because they often "do not

[4] This trend has continued in challenges to systemic government practices. In a recent decision, *Jennings v. Rodriguez*, the Supreme Court asked, in *dicta*, "whether a Rule 23(b)(2) class action continues to be the appropriate vehicle" for due process claims "in light of" *Wal-Mart*. No. 15-1204, slip. op. 30 (Feb. 27, 2018). That question was not before the Court and had not been briefed. But since then, federal courts have reaffirmed that injunctive relief class actions against government practices raise straightforward and common questions capable of classwide resolution. *See, e.g., L.V.M.*, 318 F. Supp. 3d at 615 ("to the extent that the due process claim challenges the ORR's director review policy and its *systemic* delay in the release process," the "precaution in *Jennings v. Rodriguez* … is not applicable here.") (emphasis in original); *Reid,* supra at *5 (rejecting government's argument that each case requires a "fact specific, individualized analysis," when common question is whether petitioners should receive "chance to plead their case after six months at an individualized … hearing."); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) (class certification appropriate because defendants unwritten practice of denying parole "requires only a common, programmatic analysis, [] because the specific facts of each denial matter not…"); *Hamama v. Adducci*, 2018 WL 4566612 at *6-7 (E.D. Mich. Sept. 24, 2018) (systemwide denial of "meaningful access … to immigration courts, not the results, will drive the resolution of this litigation"). This is consistent with *Wal-Mart,* which explicitly endorsed decades of judicial practice certifying class actions challenging system-wide governmental policies. *Wal-Mart,* 564 U.S. at 361.

involve any analysis of independent facts attributable only to individual plaintiffs." *L.V.M.*, 318 F. Supp. 3d at 615. Such cases "can be answered on a classwide basis" because that common legal question—whether the government processes take longer than the law permits—does not turn on the individual circumstances of individual class members. *Garnett v. Zeilinger*, 301 F.Supp.3d 199, 207-8 (D.D.C. 2018) (unlawful delays in SNAP benefits "can be answered on a classwide basis"). *See also, e.g.*, *D.L. v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017) (same as to unlawful delays in IDEA benefits); *Parsons*, 754 F.3d at 679 (same as to unlawful delays in medical care).

Accordingly, "[e]xtensive and unreasonable delays" in a government institution are a common "policy and practice" capable of class adjudication that satisfy the Rule 23 commonality requirement. *Parsons*, 754 F.3d at 679; *Barnett v. Bowen*, 794 F.2d 17, 23 (2d Cir. 1986) ("[I]t would still be appropriate to define a class to include all applicants who may experience unreasonable delays"). The right to a "timely hearing" is a core due process right. *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citations omitted). A class action alleging systemic delays in adjudication raises common contentions as much as other due process challenges to practices that deny parole or immigration hearings. This is true even if the Court eventually finds, on the merits, no unlawful

systemwide conduct. *Reid, supra* at *5 ("Even if the answer to that question [of systematic delay] is no, the class still meets the commonality requirement.")

Class actions in government delay cases also serve several important functions—preserving judicial review, facilitating sound administration, and promoting access to justice. Class certification prevents the government defendant from mooting individual cases and avoiding a decision on the merits of the class-wide claim. *See, e.g.*, *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) (certifying a 23(b)(2) class involving the administration of food stamps due to "the defendants' ability to moot the claims of the named plaintiffs, 'thereby evading judicial review of their conduct'"). In delay cases, government defendants may moot individual cases by moving them to the "top of the pile," thereby preventing the Court from ever resolving the common questions at the heart of petitioners' class claims. *See Monk*, 855 F.3d at 1316-18 (observing case law involving veteran challenges is "replete with such examples"); *White v. Mathews*, 434 F. Supp. 1252, 1253 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977) (approving the certification of class of plaintiffs alleging extensive delays in the scheduling and completion of hearings before an administrative law judge).

Class adjudication of delay cases also promotes consistent administration and relief. Given the nature of the relief sought in most delay cases—expeditious adjudication of the petitioners' claims for benefits—individual relief may

sometimes harm other members of the class by moving individual cases ahead of others. *See Ebanks v. Shulkin*, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017) (recognizing that "[g]ranting a mandamus [in an individual delay case] may result in no more than line-jumping without resolving the underlying problem of the overall delay"). Resolving the individual claims may contribute to longer delays for class members who do not bring their own claims. *Id.* ("a judicial order putting [petitioner] at the head of the queue simply moves all others back one space and produces no net gain" (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991))). By contrast, a class action ensures that all class claims are resolved in a uniformly timely manner, without favoring some individual petitioners over others who are similarly situated. *Ebanks*, 877 F.3d at 1039-40 (endorsing class-wide relief over individual relief when veterans allege delays in the adjudication of their cases); *Barnett v. Bowen*, 665 F. Supp. 1096, 1099 (D. Vt. 1987) (concluding that a class action is "essential" to ensuring that all claims for Social Security disability benefits are decided in a uniformly timely manner).

Finally, class actions in delay cases promote access to justice. Precedential decisions in individual cases cannot provide the same relief as a class action, particularly in administrative systems short on legal representation. Adjudication based on stare decisis requires lawyers to "find relevant precedents, interpret their significance to the case at hand, and advocate how they should be applied."

Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2024 (2012). To benefit from a decision about unlawful delays at the VA, for example, other veterans would have to know about the Court's decision, understand its relevance to their own case, convince an individual adjudicator that they should benefit from a precedential decision, and if the VA disagrees, return to court and seek their own injunction. Moreover, most veterans would have to do this without the benefit of legal representation.[5] By contrast, when the Court issues a judgment granting relief in a class action, petitioners benefit from the judgment in the class proceeding and may rely on class counsel to protect their rights. *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987) ("Class actions enable unidentified class members to enforce court orders … rather than relying on the res judicata in a subsequent lawsuit.").

## III. Rule 23's history supports certification of class actions challenging government practices.

The above decisions are consistent with the history of the modern class action rule, which "builds on experience mainly, but not exclusively, in the civil rights field." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citations omitted); *see also* David Marcus, *Flawed but Noble: Desegregation Litigation and*

[5] In 2016, only 14.3% of applicants for disability benefits were represented by attorneys at the BVA. Bd. of Veterans' Appeals, Annual Report: Fiscal Year 2016, U.S. Dep't Veterans Aff. 26 (2016), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf.

*Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 678–91 (2011); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. Rev. 1017, 1031-42 (2017). Rule 23's authors believed class actions would "open up new avenues for redress," empowering judges to identify class members' "solidarity of interests" and "to resolve disputes to vindicate those rights." Resnik, *Reorienting the Process Due*, *supra* at 1042. To that end, Rule 23 was crafted to address cases where a government defendant's practices systematically interfere with plaintiffs' rights.

The Court's focus on civil rights suits as a driving force behind Rule 23(b)(2) is well supported by the historical record. The effort to revise Rule 23 coincided with efforts after *Brown v. Board of Education*, 347 U.S. 483 (1954), to desegregate public schools. By the early 1960s, a number of intransigent governments had jettisoned crude, explicit policies that simply required segregated schools. Instead, school boards gave children a default school assignment, but allowed them to petition to have that assignment changed. Marcus, *supra*, at 684-85. Whether a board would grant any particular child's petition ostensibly depended on a host of individual, facially nondiscriminatory factors specific to each one. *E.g.*, *Joyner v. McDowell Cnty. Bd. of Educ.*, 92 S.E.2d 795, 798 (N.C. 1956). When challenged in class actions, governments invoked these

individualized remedial processes to argue that no two children's claims to attend desegregated schools depended on common questions of law or fact. Such arguments succeeded in derailing desegregation class actions, even as schools remained categorically segregated. *E.g., Brunson v. Bd. of Trustees of Sch. Dist. No. 1 of Clarendon Cty.*, 30 F.R.D. 369, 370-71 (E.D.S.C. 1962).

The Committee members most responsible for the revised Rule 23 were "keenly interested" in these efforts to use individual remedial processes to defeat desegregation class actions. Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 16, 1963), *microformed on* CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.).[6] An episode during the drafting process illustrates just how determined they were that courts certify classes in such cases. An early version of Rule 23(b)(2) would have made injunctive relief class actions only "presumptively maintainable." Memorandum, Modification of Rule 23 on Class Actions EE-10 to EE-11 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.).[7]

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[6] *See also* Rule 23 @ 50: The Fiftieth Anniversary of Rule 23, An Oral History of Rule 23: An Interview of Professor Arthur R. Miller by Samuel Issacharoff, N.Y. Univ. Sch. of Law Ctr. on Civil Justice 5 (Dec. 3, 2016)("[I]n the work on Rules 17 through 25, the centerpiece became Rule 23 . . . [a]nd within that centerpiece, the centerpiece was civil rights."); Marcus, *supra*, at 703 n.267 (quoting Wright's letter).

[7] The Advisory Committee documents quoted here are also referenced in Marcus, *supra*, at 704-08.

Charles Alan Wright, one of the committee members, objected. "It is absolutely essential to the progress of integration," Wright wrote the committee reporter Benjamin Kaplan, "that such suits be treated as class actions . . . ." Letter from Charles A. Wright. Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 6, 1963), *microformed on* CIS-6312-65 (Jud. Conf. Records, Cong. Info. Serv.).

Wright then sent Kaplan a letter that quoted extensively from *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963). *See* Wright Letter (Feb. 16, 1963), *supra*. There, a school board attempted to defeat a class action on grounds that any particular student's assignment to any particular school required an individualized process. The Fifth Circuit refused to allow this mirage of individualized treatment to thwart the plaintiffs' challenge. "Properly construed," the Fifth Circuit reasoned, "the purpose of the suit was not to achieve specific assignment of specific children to any specific . . . school." Rather, the suit "was directed at the system-wide policy of racial segregation." *Potts*, 313 F.2d at 288. After receiving Wright's letter quoting from *Potts*, Kaplan redrafted Rule 23(b)(2) to suggest that such class suits should simply be "maintained," and he included *Potts* in the Advisory Committee's note on the revised rule as an exemplar of the Rule 23(b)(2) class action. Memorandum, *Modification of Rule 23 on Class Actions* EE-2 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.).

Deliberations over other categories of class actions confirmed Rule 23(b)(2)'s intended reach. At one point, committee member John Frank—concerned about the abusive use of class actions in cases for monetary relief—advocated for Rule 23(b)(2)'s abandonment. He invoked Rule 23(b)(1)(A), which allows for certification when "inconsistent or varying adjudications with respect to individual class members . . . establish incompatible standards of conduct for the party opposing the class . . . ." Fed. R. Civ. P. 23(b)(1)(A). Frank believed a court could certify a desegregation class under this section, obviating the need for Rule 23(b)(2). Marcus, *supra*, at 705-06. By individualizing the remedial process for desegregation, however, intransigent governments could be forced to allow one black child to attend an all-white school, while refusing the same for other black children. As Kaplan and Wright appreciated, Rule 23(b)(1)(A) applies only when the defendant cannot possibly tailor its policy or course of conduct to particular individuals. Marcus, *supra*, at 706-07; Maureen Carroll, *Class Action Myopia*, 65 Duke L.J. 843, 854 (2016). It does not address instances when the defendant can treat class members individually but instead subjects them to a single policy or set of systemic practices. As Kaplan argued in response to Frank, "[Rule 23(b)](2) must remain in to make it absolutely clear" that such cases are covered. Transcript

of Session on Class Actions 11 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).[8]

In sum, Rule 23's drafters were committed to enabling group-based litigation and understood the vital role class actions could play in promoting institutional reform. Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and Mdls in the Federal Courts*, 165 U. Pa. L. Rev. 1765, 1791 (2017). By vesting judges with discretion to structure cases consistent with the "character of the right" asserted, the Committee believed class actions could finally "vindicate the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Resnik, *Reorienting the Process Due, supra* at 1032 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497, 497 (1969). As the examples of class actions described in Part I and II demonstrate, federal courts to this day have honored the Advisory Committee's hope that class actions would prove a powerful weapon for the vindication of civil rights against unlawful government practices.

## CONCLUSION

Certification of injunctive and declaratory relief class actions challenging government practices and delays under the Due Process Clause is consistent with

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[8] *See also* Marcus, *supra*, at 707.

Rule 23(b)(2)'s text, design, and history, as well as federal case law. Such cases permit courts to answer many petitioners' claims "in one stroke," just as *Wal-Mart* requires, precisely because they often raise system-wide policy concerns for claimants, while facilitating judicial review, consistent administration, and access to justice.

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Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify that, on January 24, 2019 the foregoing Brief for Amici Curiae Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellants was filed through the CM/ECF system and served electronically on parties in the case.

/s/ Robyn Cocho
Robyn Cocho

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