IN THE SUPREME COURT OF THE UNITED STATES

No. ___

MICHAEL FAUST, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE ARIZONA DEPARTMENT OF CHILD SAFETY,

Applicant,

v.

B.K., BY HER NEXT FRIEND MARGARET TINSLEY,
B.T., BY HIS NEXT FRIEND JENNIFER KUPISZEWSKI,
AND A.C.-B., M.C.-B., D.C.-B., AND J.M., BY THEIR NEXT FRIEND SUSAN BRANDT,

Respondents.

**APPLICATION TO THE HON. ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Michael Faust, in his official capacity as Director of the Arizona Department of Child Safety,[1] hereby moves for an extension of time of 30 days, to and including November 13, 2019, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be October 14, 2019.

In support of this request, Applicant states as follows:

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[1] Mr. Faust succeeded Gregory McKay as Director of the Arizona Department of Child Safety after the Ninth Circuit issued its opinion in this case.

1. The U.S. Court of Appeals for the Ninth Circuit rendered its decision on on April 26, 2019 (Exhibit 1), and denied rehearing en banc on July 15, 2019 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. The Great Recession hit Arizona particularly hard. In its wake, the State's foster population doubled in a six-year period. The Arizona Legislature responded to that development by establishing the Arizona Department of Child Safety ("DCS") in 2014. *See* Ariz. Rev. Stat. §8-451. Since its inception, DCS has worked tirelessly to improve Arizona's foster services and protect the children in its care. Those efforts have borne considerable fruit. Despite being in existence for only a few years, DCS has succeeded in shrinking caseloads and backlogs and in greatly diminishing response times for responding to reports of child abuse and neglect. *See* J.B. Wogan, *How Arizona Fixed Its Broken Child Welfare System in 2 Years*, Governing (Apr. 27, 2017), https://bit.ly/2mPnHjB.

3. Rather than give this nascent agency time to address the increased demands on the State's foster care system, Children's Rights Incorporated ("CRI"), a New York City nonprofit with a self-described mission of using "relentless strategic advocacy and legal action" to "hold governments accountable" and "transform the way kids are treated in foster care,"[2] filed suit against DCS and the State's Medicaid agency in February of 2015 on behalf of ten children in DCS care. The plaintiffs allege that various DCS "practices" of "failure" have deprived them "of their right to

[2] CRI, *Our Mission: What We Do*, https://bit.ly/2m8dTku (last visited Sept. 24, 2019); CRI, *Our Campaigns: Class Actions*, https://bit.ly/2m6T358 (last visited Sept. 24, 2019).

adequate and timely physical, dental, and mental health care," "their right to placement in a living environment that protects their physical, mental, and emotional safety, and well-being," and their right "to timely investigations into allegations of abuse and neglect while in the state's custody." Order 13, No. 2:15-cv-00185-ROS (D. Ariz. Sept. 30, 2017), Dkt.363. To rectify these alleged injuries, the plaintiffs seek an order "Declar[ing]" defendants' "violation of plaintiffs' substantive rights" "unconstitutional and unlawful"; "Permanently enjoin[ing]" defendants "from subjecting plaintiffs to practices that violate their rights"; "appoint[ing]" "a neutral expert" to "monitor[]" the Arizona child welfare system; granting the district court "continuing jurisdiction to oversee compliance"; and providing such further "remedial relief" as deemed "appropriate" "to ensure" defendants' "future compliance." Second Amended Complaint 50-52, No. 2:15-cv-00185-ROS (D. Ariz. June 8, 2015), Dkt.37.

4. Had CRI sued on behalf of the ten original named plaintiffs alone, such a sweeping request for relief would have been a nonstarter. Yet relief tailored to those ten plaintiffs' alleged injuries would not satisfy CRI's ambition to "transform" Arizona's "child welfare agencies" into whatever CRI envisions. The plaintiffs accordingly premised their attempt to remake DCS on the federal class action device—in particular, on Rule 23(b)(2), which permits class actions where "the [defendant] has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The plaintiffs sought to certify three sprawling classes under Rule 23(b)(2): (1) A class consisting of "all

children who are will be in the legal custody of DCS due to a suspicion of abuse or neglect" (the "General Class"); (2) a subclass consisting of "all children in the General Class who are not placed in the care of an adult relative or person who has a significant relationship with the child" (the "Non-Kinship Subclass"); and (3) another subclass consisting of "all members of the General Class who are entitled to early and periodic screening, diagnostic, and treatment … services under the federal Medicaid statute" (the "Medicaid Subclass"). Pls.' Mot. for Class Certification 6, No. 2:15-cv-00185-ROS (D. Ariz. Nov. 29, 2016), Dkt.234.

5. The district court granted the plaintiffs' motion for class certification in full. As the court explained, its analysis was controlled by the Ninth Circuit's decision in *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (Reinhardt, J.).

6. In *Parsons*, a small group of plaintiffs brought suit on behalf of all 33,000 State prisoners in Arizona, alleging that statewide "practices" governing prisoner medical care "expose[d]" every prisoner in the State "to a substantial risk of serious harm to which the defendants [we]re deliberately indifferent." *Id.* at 662. The thousands of men and women in Arizona prisons had discrete problems and different health needs requiring different levels of medical care, yet the Ninth Circuit held that those intra-class distinctions made no difference. *Id.* at 678-79. Even though the proposed class included some prisoners with terminal illnesses and others who were perfectly healthy, the Ninth Circuit held that "every inmate suffer[ed] exactly the same constitutional injury" for purposes of Rule 23 in light of the State's alleged

"practice" of failing to deliver necessary care. *Id.* at 675. The court accordingly certified an injunction class under Rule 23(b)(2). *Id.* at 687-89.

7. The Arizona Department of Corrections ("ADC"), the defendant in *Parsons*, sought rehearing en banc. Before the court acted on the petition, however, the parties entered into a settlement agreement, and ADC asked the panel to vacate its opinion. The panel refused, and the full court subsequently denied rehearing. Judge Ikuta, joined by Judges O'Scannlain, Kozinski, Callahan, Bea, and Smith, published a dissent. *Parsons v. Ryan*, 784 F.3d 571 (9th Cir. 2015) (Ikuta, J., dissenting from the denial of rehearing en banc). As Judge Ikuta explained, the "failure to take [*Parsons*] en banc in order to vacate it" left intact a precedential decision that "create[d] a circuit split," *id.* at 573 (citing *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999)), and that defied not one Supreme Court decision but two. *Parsons* flouted *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), which held that class certification is appropriate only where the plaintiffs' claims "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." And *Parsons* defied *Lewis v. Casey*, 518 U.S. 343, 350 (1996), which held that "a healthy inmate who had suffered no deprivation of needed medical treatment" could not "claim violation of his constitutional right to medical care, simply on the ground that the prison medical facilities were inadequate." *See Parsons*, 784 F.3d at 579-83 (Ikuta, J., dissenting from the denial of rehearing en banc).

8. As the district court here recognized, this case follows directly from *Parsons*; as a result, it raises the same fundamental conflicts with decisions of this Court and other circuits. By authorizing relief under Rule 23(b)(2) that is far broader than any injunctive relief that could be obtained in any individual suit, the decision below not only distorts the class action device, but highlights that the Ninth Circuit's jurisprudence under Rule 23(b)(2) is incompatible with this Court's decisions, the decisions of other circuits, and the Rules Enabling Act, 28 U.S.C. §2072(b). *See also Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 937-38 (9th Cir. 2019) (expressly rejecting the cohesiveness requirement for Rule 23(b)(2) class actions adopted by the majority of circuits).

9. Applicant's counsel, Paul D. Clement, was not involved in the extensive proceedings below and was only recently retained. Applicant's counsel requires additional time to review the substantial record and prior proceedings in this case in order to prepare a petition that best presents the arguments for this Court's review.

10. Applicant's counsel also has substantial briefing and argument obligations between now and October 14, including oral argument in *Pulse Network, L.L.C. v. Visa, Inc.*, No. 18-20669 (5th Cir.) and a memorandum of points and authorities in support of summary judgment in *Northport Health Services of Arkansas, LLC v. U.S. Department of Health and Human Services*, No. 5:19-cv-05168-TLB (W.D. Ark.).

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that an extension of time to and including November 13, 2019, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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