No. _____

In the
Supreme Court of the United States

MICHAEL FAUST, in his official capacity as Director of the Arizona Department of Child Safety,

Petitioner,

v.

B.K., by her next friend Margaret Tinsley,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), this Court held that a class action may not be certified unless a question central to each class member's claim is capable of being resolved "in one stroke" for the entire class. *Id.* at 350. The Court also held that Rule 23(b)(2) injunctive classes are appropriate only if and to the extent "a single injunction or declaratory judgment [c]ould provide relief to each member of the class." *Id.* at 360. In this case, plaintiffs sought to amalgamate various alleged "failures" of the Arizona child-welfare system that they claim constitute substantive due process violations and litigate them all as a class action on behalf of every child in the system. The class includes children with intensive health needs, and others who are healthy; children in group homes, and others in foster or kinship homes; children alleged to have received inadequate care, and others well served. Indeed, it includes members who have no injury at all. The Ninth Circuit nonetheless held that Rule 23 was satisfied.

The questions presented are:

1. Whether a putative class may satisfy the commonality requirement of Rule 23(a)(2) by alleging that a state-run system suffers from "systemwide failures" to which every class member is "exposed" simply by virtue of being in the system.

2. Whether a putative class may invoke Rule 23(b)(2) to challenge alleged "systemwide failures" to which every class member is "exposed" when the class members have not suffered a common injury that could be uniformly remedied by a single injunction.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit:

- *Tinsley, et al. v. Flanagan, et al.*, No. 2:15-cv-185-ROS (D. Ariz.) (opinion granting class certification issued September 30, 2017).

- *Tinsley, et al. v. Faust, et al.*, No. 19-80146 (9th Cir.) (joint petition for permission to appeal pursuant to Rule 23(f) filed Oct. 25, 2019).

- *B.K. et al. v. Jami Snyder*, Nos. 17-17501 & 17-17502 (9th Cir.) (opinion affirming class certification order in part issued April 26, 2019; petitions for panel rehearing and rehearing en banc denied July 15, 2019; mandate issued July 23, 2019).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

PARTIES TO THE PROCEEDING

Petitioner Michael Faust is Director of the Arizona Department of Child Safety. He succeeded Gregory McKay in this role after the Ninth Circuit issued its decision.

Respondent is B.K., an individual, by her next friend Margaret Tinsley.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns any stock in the Arizona Department of Child Safety. Petitioner Michael Faust is an individual.

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This sprawling class action should never have been certified. The Ninth Circuit, however, employs an approach to class actions seeking systemwide reform that makes certification all but automatic: Allege various disparate injuries to inmates or foster children, seek an injunction to make the system "do better" by those in its custody or care, and certification of a (b)(2) class follows as a matter of course. That approach cannot be squared with this Court's precedents, the governing law in the rest of the country, or basic principles of federalism.

Plaintiffs are Arizona foster children who claim that various alleged operational "failures" of the State's child-welfare system have exposed them and all other children in the system to substantial risk of serious harm, in violation of their substantive due process rights. Those alleged harms stem not from specific policies or practices directly and uniformly applicable to every child in the system (such as a policy classifying every child by race or categorically denying particular treatment options). Instead, the supposed "policies and practices" plaintiffs challenge are such generalized alleged inadequacies as the failure to provide timely access to healthcare, ineffective coordination of services, or overuse of congregate care. Everything about those claims—from whether any alleged "failure" caused injury to whether any indifference to a child's needs was deliberate and so conscious-shocking as to violate substantive due process—is inherently individualized. After all, whether healthcare was timely provided, or whether a placement was appropriate, necessarily

turns on the facts and circumstances of each child. Yet the Ninth Circuit concluded that plaintiffs may amalgamate these various claims on behalf of a class consisting of every child in the Arizona child-welfare system.

That is a deeply flawed view of Rule 23. This Court has made clear that class actions are not designed to amalgamate disparate claims or provide relief to parties who have not suffered any injury. Rather, putative class plaintiffs must seek to litigate a truly "common" issue—a single cause with a classwide unconstitutional effect—and seek injunctive relief that uniformly benefits a cohesive class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). The decision below is not remotely consistent with those requirements. The general class here includes some children with intensive physical and mental health needs, and others who are healthy; some children in group homes, and others in foster or kinship homes; and even children who concededly are actively receiving adequate care and would lack standing to bring any individual claim. That should have made class certification a nonstarter. Yet the Ninth Circuit nonetheless found Rule 23 satisfied "solely by virtue of" the fact that every class member is in the state child-welfare system. App.16.

That may be enough to define a (very broad) class, but it is not remotely sufficient to satisfy the requirements of Rule 23. Rule 23(a)(2)'s commonality requirement demands more than "merely" alleging that each class member "suffered a violation of the same provision of law"; it demands an "affirmative[] demonstrat[ion]" that each member's claim "depend[s]

upon a common contention" that can be resolved "classwide … in one stroke." *Wal-Mart*, 564 U.S. at 350. Here, each member's claim necessarily depends on proving that defendants were deliberately indifferent to that member's specific needs. As then-Judge Alito correctly recognized, that "obviously varies depending on the medical needs of the particular" plaintiff. *Rouse v. Plantier* 182 F.3d 192, 199 (3d Cir. 1999). It is little wonder, then, that multiple circuits have rejected the Ninth Circuit's unduly permissive understanding of commonality in systemwide cases, or that the Fifth Circuit rejected the very argument the Ninth Circuit accepted here in a case brought by the same lawyers against Texas' child-welfare system. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012).

The decision equally defies Rule 23(b)(2) and implicates a different circuit split. Rule 23(b) does not impose the predominance and superiority requirements of (b)(3) on (b)(2) classes or allow opt-out rights because Rule 23(b)(2) is limited to cases where the injury and corresponding injunctive remedy are shared uniformly by everyone in a cohesive class. In other words, when an individual could seek injunctive relief invalidating a policy applicable to an entire cohesive class (say, the race-based admission policy of a school), the individual may seek the relief for the class without allowing opt-out or a separate showing of predominance and superiority. But unless the challenged conduct can be declared unlawful and remedied "only as to all of the class members or as to none of them," a (b)(2) class may not be certified. *Wal-Mart*, 564 U.S. at 360.

Consistent with that understanding, most circuits reject proposed (b)(2) classes that seek to amalgamate the kinds of inherently individualized claims at issue here, and to obtain relief designed to make the system "better" in varying and not necessarily compatible ways. Those courts demand a cohesive class seeking uniform relief because such sensible limits are necessary to avoid making Rule 23(b)(2) certification all but automatic in cases seeking systemwide relief and to limit (b)(2) classes to cases where opt-out rights and predominance and superiority inquiries are superfluous. The Ninth Circuit stands alone in declaring cohesion irrelevant in (b)(2) cases and in making certification in systemwide cases essentially automatic.

Making matters worse, the decision below transforms the class-action device into a roving license for federal courts and unaccountable plaintiffs' lawyers to second-guess the decisions of state agencies. If merely identifying a few instances of underachievement and alleging that administrators could improve suffices to justify class treatment, then plaintiffs and federal courts will routinely run state institutions. Indeed, the mere threat of class actions like the one certified here has already produced that result in more than twenty States. That cannot be reconciled with either the plain text of Rule 23 or the clear import of this Court's cases. It defies norms of federalism and "transform[s]" federal courts "into boards of inquiry charged with determining 'best practices'" at the state and local level. *Baze v. Rees*, 553 U.S. 35, 51 (2008). This Court should grant certiorari and reject the Ninth Circuit's outlier view

that systemwide litigation gets a free pass from the requirements of Rule 23.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 922 F.3d 957 and reproduced at App.1-48. The district court's order is unreported but is reproduced at App.51-82.

JURISDICTION

The Ninth Circuit issued its opinion on April 26, 2019, and denied rehearing en banc on July 15, 2019. App.1-50. Justice Kagan extended the time to file a petition for certiorari to December 12, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Factual and Procedural Background

1. The Great Recession hit Arizona particularly hard. In its wake, the State's out-of-home foster population doubled in a six-year period, and a strained system did not perform at its best, as caseworker workloads quickly swelled to unprecedented levels. *See* J.B. Wogan, *How Arizona Fixed Its Broken Child Welfare System in 2 Years*, Governing (Apr. 27, 2017), https://bit.ly/2mPnHjB.

In her 2014 State of the State address, then-Governor Brewer implored the State Legislature "to face [these] challenges head-on" and "establish a separate agency that focuses exclusively on the safety and well-being of children, and helping families in distress without jeopardizing child safety." Gov. Jan Brewer, *2014 State of the State Speech* (Jan. 13, 2014), https://bit.ly/370l5SD. The Legislature heeded her call, overhauling the State's child-welfare system and

replacing it with a new Department of Child Safety ("DCS"). *See* 2014 Ariz. Sess. Laws 2d Spec. Sess., ch. 1, §§6, 20, 54.

Unlike the division DCS replaced, which was within the Department of Economic Security, DCS is an independent, cabinet-level department whose director is appointed by and directly accountable to the Governor. *Id.* The new agency received unprecedented financial support. The Legislature has dramatically increased child-welfare spending, funding hundreds of new full-time positions. *See* Dep't of Child Safety, *Fiscal Year 2015 Appropriations Report* 60, 72, https://bit.ly/3491jlk (last visited Dec. 11, 2019).

Since its inception, DCS has striven to improve Arizona's foster services and protect the children in its care. Those efforts have borne considerable fruit. DCS has succeeded in shrinking workloads and backlogs and has radically diminished response times to reports of abuse and neglect. *See* Wogan, *supra* ("The backlog of cases used to be about 16,200. Now it's under 700 and shrinking. The average [investigative] caseload used to be 145. Now it's 22 …. And the time it typically takes to connect with the child abuse hotline, which used to be more than 12 minutes, is now 28 seconds.").

DCS' improvements have drawn high praise. In January 2017, the U.S. Department of Health and Human Services' Children's Bureau approved a program improvement plan for Arizona "focused on increasing investigation response times to hotline reports; eliminating the 33,000+ investigations backlog; and improving child safety assessments,

family engagement and establishing permanent, loving homes for children." Dep't of Child Safety, *DCS is first in the nation to complete federal review* (Aug. 20, 2019), https://bit.ly/374E3HG. DCS "completed the plan and met its goals eight months before its March 31, 2020 deadline, making it the first in the nation to complete the process." *Arizona Department of Child Safety meets goals months before deadline*, KTAR.com (Aug. 21, 2019), https://bit.ly/2Kkuc6S. The HHS Children's Bureau recently lauded those accomplishments, commending what DCS has "done to improve the child welfare service delivery system and outcomes for children and families in Arizona." Letter from Jerry Milner, Associate Comm'r of the U.S. Dep't of Health & Human Servs. Children's Bureau, to DCS (Jan. 2, 2019), https://bit.ly/2PC2iVM.

2. Unfortunately, Children's Rights, Inc. ("CRI") was unwilling to give the Legislature's reforms time to take effect. CRI is a New York-based nonprofit that touts its use of "relentless strategic advocacy and legal action" to "hold governments accountable."[1] Less than nine months after DCS was established, CRI filed this lawsuit on behalf of a small number of children in Arizona's child-welfare system. CRI has filed more than a dozen suits against state foster systems in recent years, each designed, in its own words, to "transform the way kids are treated in foster care" by using federal courts and the federal class-action device

[1] *Our Mission: What We Do*, CRI, https://bit.ly/2m8dTku (last visited Dec. 11, 2019).

to craft "sustainable reform," "monitor progress," and "step in as needed, for as long as it takes."[2]

The sweeping claims here are emblematic of CRI's approach. Substantive due process claims are reserved for extraordinary situations that "shock the conscience," and thus by design are difficult to plausibly plead and successfully prove. *See, e.g.*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). Undeterred, this lawsuit alleges that various DCS "failures" deprived the plaintiffs "of their right to 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," all in violation of substantive due process. App.68-69.

Relying on a combination of allegations specific to the named plaintiffs and the same pre-2014 reports that led the Legislature to overhaul the child-welfare system months before the lawsuit, the lawsuit contends that the following alleged systemwide inadequacies constitute unconstitutional "policies or practices":

> (1) failure to provide timely access to health care, including comprehensive evaluations, timely annual visits, semi-annual preventative dental health care, adequate health assessments, and immunizations; (2) failure to coordinate physical and dental

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[2] *Our Campaigns: Class Actions*, CRI, https://bit.ly/2m6T358 (last visited Dec. 11, 2019).

> care service delivery; (3) ineffective coordination and monitoring of DCS physical and dental services; (4) overuse of congregate care for children with unmet mental needs; (5) excessive caseworker caseloads; (6) failure to investigate reports of abuse timely; (7) failure to document "safety assessments"; (8) failure to close investigations timely; and (9) investigation delays.

App.17. It further alleges that "failures" of the State's Medicaid agency have deprived plaintiffs of "services required under the federal Medicaid statute." App.69; *see* 42 U.S.C. §1396a(a)(10)(A)(i)(I) (children in foster care eligible for Medicaid services).

To remedy these alleged operational "failures," the lawsuit seeks an order: "[d]eclar[ing]" the alleged "violation of plaintiffs' substantive rights" "unconstitutional and unlawful"; "[p]ermanently enjoin[ing]" defendants "from subjecting plaintiffs to practices that violate their rights"; "appoint[ing]" "a neutral expert" to "monitor" defendants' compliance with these generic obey-the-law commands; granting the district court "continuing jurisdiction to oversee compliance"; and providing further "relief" as "appropriate" "to ensure" defendants' "future compliance." Dist.Ct.Dkt.37 at 50-52.

The suit was filed on behalf of ten children, only one of whom, B.K., remains in foster care. Had the suit been limited to those ten plaintiffs, the claims would have focused on individual circumstances, and such sweeping relief would have been a nonstarter. But relief tailored to ten individuals' alleged injuries would hardly "transform" Arizona's "child welfare

agencies."[3] Plaintiffs accordingly sought to certify three sprawling classes under Rule 23(b)(2):

> (1) A class consisting of "all children who are or 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").

Dist.Ct.Dkt.234 at 6.

B. The District Court's Certification Order

DCS opposed certification, arguing that the claims could not be litigated or remedied on a classwide basis given the disparate circumstances and needs of the children in the proposed classes. DCS further argued that named plaintiffs who allegedly were deprived of needed medical assistance were atypical of a class that includes individuals who have received adequate care. The district court did not reject those premises, but it deemed them irrelevant under the Ninth Circuit's decision in *Parsons v. Ryan*,

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[3] *Our Campaigns: Foster Care Reform*, CRI, https://bit.ly/2Y0nvMs (last visited Dec. 11, 2019).

754 F.3d 657 (2014), and so granted certification in full. App.51-82.

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 "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's prisons had vastly different health needs requiring vastly different levels of care; some had terminal illnesses, others were perfectly healthy. *Id.* at 678-79. Nonetheless, the court, in an opinion by Judge Reinhardt, held that "every inmate suffer[ed] exactly the same constitutional injury" and affirmed certification of an injunction class under Rule 23(b)(2). *Id.* at 678, 687-90.

The Arizona Department of Corrections ("ADC"), the defendant in *Parsons*, unsuccessfully sought rehearing en banc. Judge Ikuta, joined by Judges O'Scannlain, Kozinski, Callahan, Bea, and Smith, dissented. *See Parsons v. Ryan*, 784 F.3d 571 (9th Cir. 2015) (Ikuta, J., dissenting from the denial of rehearing en banc). As Judge Ikuta explained, Judge Reinhardt's decision not only "create[d] a circuit split" with the Third Circuit's decision in *Rouse*, *id.* at 573, but defied two on-point decisions of this Court. First, *Parsons* flouted *Wal-Mart*, which held that commonality demands proof that all class members' claims "depend upon a common contention … that is central to the validity of each [class member's] claims" and that can be decided for each class member "in one stroke." 564 U.S. at 350. Second, *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 577-81 (Ikuta, J.).

The district court here found *Parsons* controlling and, as Judge Ikuta predicted, produced an outcome incompatible with *Wal-Mart*, *Lewis*, and decisions of other circuits. The court ruled that Rule 23(a) was satisfied solely because "every child" in the class "is necessarily subject to the same … practices." App.72; *see* App.71-75 (subclasses). Likewise, because the "Named Plaintiffs seek to remedy … the 'risk of exposure' created by subjecting children in foster care to [alleged] policies and practices," *Parsons* instructed that Rule 23(b)(2) was "'unquestionably satisfied'" as well. App.78-79 (quoting *Parsons*, 754 F.3d at 688).

C. The Ninth Circuit's Decision

"The only issue on appeal [was] whether the three classes were properly certified." App.8. As with the district court, the Ninth Circuit's analysis began, and largely ended, with *Parsons*.

The Ninth Circuit did not dispute that "some class members are adequately receiving care, and thus do not have a concrete due process injury." App.11. Yet, under *Parsons*, that was irrelevant. All that mattered was that one named plaintiff, B.K., "has standing to bring" each claim "asserted on behalf of" the classes. App.12-13; *see* App.24, 28-29 (subclasses). Nor did the inclusion of members who suffered no injury create a typicality problem in the Ninth Circuit's view. Under

Parsons, the fact that B.K. was allegedly deprived of "glasses" and "orthopedic shoes," App.27, did not render her an atypical representative of members suffering very different injuries or no injuries at all. Because the plaintiffs alleged systemwide failures, and every class member is in (or will someday be in) the system, B.K.'s claims were sufficiently typical. App.19-20.

Turning to commonality, *Parsons* controlled again. Just as in *Parsons*, plaintiffs argued that the assorted "practices" or "failure[s]" they allege "affect[]" everyone in Arizona's child-welfare system. App.17. Because the same deliberate-indifference "standard" that governed the claims in *Parsons* governs the claims here, the Ninth Circuit concluded that "[t]he same reasoning" obtained: "[T]he constitutionality of" the alleged systemwide failures is "a common question of law or fact that can be litigated in one stroke." App.16-17.

Parsons supplied the rule of decision yet again for Rule 23(b)(2). In *Parsons*, the court held that a "single, indivisible injunction" could remedy "a specified set" of statewide "practices," notwithstanding myriad divisions among class members, on the theory that any injunction that improves the system generally will redound to the benefit of everyone in it. App.21; *see Parsons*, 754 F.3d at 687-88. Here, as there, it made no difference that some class members have severe health problems while others are healthy, or that injunctive relief for one member (say, ordering DCS to shift resources from one objective to another) might affirmatively harm other members. *See* App.22.

The court then turned to the subclasses. With respect to the Non-Kinship Subclass, the court found "little else to add." App.25. With respect to the Medicaid Subclass, the court vacated and remanded, holding that the district court misapplied "the legal framework for [a Medicaid Act] claim." App.31. The court "emphasize[d]," however, that "nothing in our opinion should prevent the district court from making new factual findings and exercising its discretion to recertify the Medicaid Subclass on remand." App.35-36. Judge Adelman dissented from the Medicaid Subclass holding but concurred in the rest. In his view, *Parsons* supported certification of both subclasses. App.37-48.[4]

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of this Court and other circuits on the basic requirements of Rule 23(a)(2) and Rule 23(b)(2), and endorses a rule of virtual automatic certification in every case seeking systemwide reform. When it comes to Rule 23(a)(2)'s commonality requirement, the decision below is flatly inconsistent with this Court's decision in *Wal-Mart* and several circuit court decisions faithfully applying it. *Wal-Mart* made clear that Rule 23(a)(2) requires more than identifying common questions; it requires identifying issues that generate common answers that drive the litigation. Those kinds of truly common issues are missing in cases seeking systemwide improvements for a widely disparate class, some with serious needs and others for whom existing services

[4] On remand, the district court recertified the Medicaid subclass. As with the original certification, the court held no hearing.

are adequate or even exemplary. Such claims cannot be productively litigated in a single proceeding designed to produce a single common answer. Consistent with that understanding, numerous other circuits have rejected comparable efforts to seek systemwide relief on commonality grounds, both in the specific context of systemwide foster-care reform and even in the context of single institutions, like individual schools.

The decision below also conflicts with *Wal-Mart* and the views of nearly every other circuit when it comes to Rule 23(b)(2). Rule 23(b)(2) provides an attractive target for plaintiffs, as it dispenses with the requirements of predominance, superiority, and opt-out necessary for a (b)(3) class. To avoid misuse of the (b)(2) class action, this Court made clear in *Wal-Mart* that (b)(2) is appropriate only in cases where opt-out rights and predominance and superiority inquiries would be superfluous—namely, cases where each class member was injured in the same way and the plaintiff seeks indivisible injunctive or declaratory relief that would benefit the whole class. For similar reasons, nearly every circuit demands cohesiveness in a (b)(2) class. The decision below conflicts not only with all those decisions, but with the Rules Enabling Act. Individual suits alleging substantive due process violations would face daunting obstacles and could never procure the kind of sweeping injunctive relief sought here. By constructing a composite plaintiff and authorizing composite relief, the decision below uses Rule 23 to vastly enlarge substantive rights in plain contravention of the Rules Enabling Act.

The decision below is critically important, as it creates a regime of near-automatic certification when it comes to institutional-reform litigation in the Ninth Circuit. If all it takes to certify a (b)(2) class for systemwide relief is to allege that an individual plaintiff's injuries emanate from systemwide failures and identify potential injunctive relief that could improve the system generally, then it will be the rare institutional-reform case in which certification will be denied.

This is a case in point. A fledgling state agency pointed to the individualized nature of the claims and the breadth of a class that includes individuals suffering no injury at all, while pleading for the opportunity to fulfill its mandate to redress acknowledged problems with the system it was established to replace. None of that mattered in the face of circuit precedent that makes the certification of systemwide classes routine, with serious adverse effects on federalism and political accountability. In short, the decision below is wrong, conflicts with Supreme Court precedent and other circuit decisions, and is consequential. The need for this Court's review is clear.

I. The Decision Below Nullifies Rule 23(a)(2) And Deepens A Circuit Split.

1. A party seeking class certification must prove, *inter alia*, that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Taken literally, that requirement appears trivial, as "[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 564 U.S. at 349. But Rule 23(a)(2) demands more than showing "merely"

that each class member "suffered a violation of the same provision of law." *Id.* at 349-50. It demands a common question that is "central to the validity of each [member's] claims" and that can be answered for each member "in one stroke." *Id.* at 350.

Wal-Mart is illustrative. There, a group of current and former female employees sought to certify "a class encompassing all women employed by Wal-Mart at any time after December 26, 1998," every one of whom, they claimed, "ha[d] been subjected to … allegedly discriminatory pay and promotion policies" in violation of Title VII. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577-78 (9th Cir. 2010) (en banc). The Ninth Circuit found Rule 23(a)(2) satisfied, reasoning that the class "raise[d] the common question" of whether all members "were subjected to a single set of corporate policies" that "worked to unlawfully discriminate against them." *Id.* at 612 (emphases omitted).

In reversing, this Court did not contest that this question was "common" in the literal sense that it applied to every class member. 564 U.S. at 349. But as the Court made clear, that "is not sufficient." *Id.* "What matters to class certification … is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350. And on that front, the plaintiffs were "worlds away" from what Rule 23(a)(2) requires. *Id.* at 355. The "crucial question" on which each plaintiff's claim depended was "*why was I disfavored*." *Id.* at 352. Yet they did not identify the kind of uniform policy or practice, applicable "in *all* of

Wal-Mart's 3,400 stores," that could allow that question to be answered for every class member "in one stroke." *Id.* at 350, 357. Absent some common "glue" that could hold together "the alleged *reasons*" for "literally millions of employment decisions," the class failed to prove that classwide litigation would generate "common *answers*," and hence failed to satisfy Rule 23(a)(2). *Id.* at 350-53.

2. The Ninth Circuit's decision below, and the *Parsons* decision on which it relied, cannot be reconciled with *Wal-Mart*. According to the Ninth Circuit, simply because plaintiffs alleged systemwide "failures" to which every child in Arizona's child-welfare system is "exposed," "the constitutionality of" those alleged failures is "'a common question of law or fact that can be litigated in one stroke.'" App.16-17; *see Parsons*, 754 F.3d at 678. That is demonstrably false, and would effectively render the commonality requirement a dead letter in institutional-reform litigation.

Plaintiffs seek to challenge a wide array of alleged "policies and practices" ranging from "failure to provide timely access to health care" to "overuse of congregate care for children with unmet mental [health] needs" to "failure to investigate reports of abuse timely." App.17. They seek to challenge all of these alleged "policies and practices," moreover, on substantive due process grounds, which means they must prove that "state officials … act[ed] with such deliberate indifference to [a] liberty interest that their actions 'shock the conscience.'" *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010). And they seek to litigate these claims on behalf of a

class that includes some children with intensive health needs, but others who are healthy; some children in group homes, but others in foster homes; and some children who allegedly received inadequate services, but others well served. As is patently clear, there is no way to answer in a single stroke whether these alleged deficiencies amount to deliberate indifference with respect to "all children who are or will be" in Arizona's child-welfare system. The only certainty is that some class members have neither suffered nor stand to suffer *any injury*, let alone a conscience-shocking substantive due process violation.

Take, for instance, the allegation that DCS has a "practice[]" of "failure to provide timely access to health care." App.17. It is difficult enough to determine in one stroke whether such a "practice" exists, as plaintiffs do not claim that defendants have any concrete policies slowing access to healthcare, such as requiring children to wait six months for a physical or permitting them to visit the dentist only once every two years. But even assuming plaintiffs could surmount that obstacle, there is no way to generate a common answer to the question whether this alleged "failure" demonstrates such "deliberate indifference" to each child's needs as to "shock the conscience," as there is a vast gulf between a two-week delay in getting a healthy child to a pediatrician for an annual check-up and a two-week delay in getting a child with a festering wound and a high fever to a hospital. The class even includes children who "are adequately receiving care" and face no prospect of a "concrete due process injury" at all. App.11.

These problems are not unique to plaintiffs' healthcare-needs allegations. Their claims uniformly suffer from the deficiency that they do not rest on any "common contention … of such a nature that it is capable of classwide resolution." *Wal-Mart*, 564 U.S. at 350. For instance, plaintiffs allege that DCS has a "practice[]" of "overuse of congregate care for children with unmet mental [health] needs." App.17. Once again, plaintiffs do not target any concrete, objective policy, such as a rule that all children must be placed in congregate care for their first month in the system regardless of their mental health needs. Nor do they limit this claim to children with unmet mental health needs, or even to children with mental health issues. Instead, they seek relief for the entire class based on allegations that consist largely of identifying specific circumstances in which one plaintiff allegedly should not have been placed in congregate care. *See* Dist.Ct.Dkt.37 ¶¶56-62. That focus on a single child's placement underscores the individualized nature of such claims and the impossibility of a classwide determination that the treatment of the entire class "shocks the conscience."

These glaring commonality problems made no difference to the Ninth Circuit; under *Parsons*, so long as every child is "exposed" to the alleged deficiencies in the system, "'either each of the policies and practices is unlawful as to every [child] or it is not.'" App.16-17 (quoting *Parsons*, 754 F.3d at 678). That is not an application of *Wal-Mart* but an abrogation of it. Under *Wal-Mart*, commonality depends on "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." 564 U.S. at 350. When, as here, whether

an alleged policy deprives class members of their constitutional rights plainly depends on the particular circumstances of each member, that capacity is absent. If there are 13,000 plaintiffs, there will be 13,000 inquiries into causes and effects, in the same manner that *Wal-Mart* would have involved inquiries into "literally millions of employment decisions." *Id.* at 352. By embracing a rule under which the constitutionality of an alleged policy or practice is automatically deemed a "common" question so long as it applies "systemwide," the Ninth Circuit has effectively exempted institutional litigation from *Wal-Mart*'s conception of commonality.

3. The Ninth Circuit's rule conflicts not only with *Wal-Mart*, but with the many decisions of other circuits faithfully applying it—including in circumstances materially indistinguishable from this case and *Parsons*.

For instance, the Fifth Circuit's decision in *M.D. ex rel. Stukenberg v. Perry* involved a lawsuit virtually identical to this one—indeed, brought by the same organization—alleging substantive due process claims on behalf of a class consisting of all children in Texas' foster-care system. Just as in this case, the "gravamen of the Named Plaintiffs' complaint" was that "various system-wide problems … subject[ed] all children in [the system] to a variety of harms." 675 F.3d at 835. The district court, deciding certification pre-*Wal-Mart*, "found that the class claims raised … common questions" based on alleged systemwide "failures" including "whether Defendants failed to maintain a caseworker staff of sufficient size and capacity to perform properly," or "to provide sufficient numbers

and types of foster care placements necessary to the Plaintiffs' needs." *Id.* at 839 (quoting *M.D. v. Perry*, No. C-11-84, 2011 WL 2173673, at *5 (S.D. Tex. June 2, 2011)).

The Fifth Circuit, applying this Court's intervening *Wal-Mart* decision, disagreed. As the court explained, just as the "mere claim by employees of the same company" in *Wal-Mart* "that they have suffered a Title VII injury" did not suffice to show "that all their claims can productively be litigated at once," neither did the mere fact that "[a]ll class members are within the same system and subject to the same alleged deficiencies in that system." *Id.* at 838-39, 840. That was particularly true given the prospect that "the proposed class's substantive due process claims require[] the State to act with 'deliberate indifference' that 'shocks the conscience,'" for the myriad "'dissimilarities within the proposed class'" meant that "resolution of" each member's claim would "require individual analysis" "regarding the harm or risk of harm experienced." *Id.* at 843 & n.4 (quoting *Wal-Mart*, 564 U.S. at 350, and *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir. 2000)). In short, "by attempting to aggregate several amorphous claims of systemic or widespread conduct into one 'super-claim,'" the plaintiffs sought to "'stretch[] the notions of commonality'" beyond recognition. *Id.* at 844.

The Fifth Circuit is not alone in refusing to find commonality satisfied simply because a class alleges "systemwide" failures. In *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13 (1st Cir. 2019), the plaintiffs sought to certify "a class of all students with a mental health disability who are

or have been enrolled at" a special-needs school in Springfield, Massachusetts. *Id.* at 17-18. Much like in *M.D.*, the plaintiffs alleged "that Springfield engages in common practices" that violate federal law, and framed the common question as whether "those practices create harms common to the children of the proposed class." *Id.* at 29. Like the Fifth Circuit, the First Circuit held that that was not enough even as to a suit focused on a single institution. Because the answer to that question "depend[ed] on [each] student's unique disability and needs," the claims of each class member could not be resolved (or even meaningfully advanced) in a single stroke. *Id.* at 30-31. As the court explained, "[a] finding that one student with a certain type and degree of mental health disability should have" received better services "would not mean that another student with a different type, or even just a different degree, of mental health disability should have received the same." *Id.* at 27-28.

The Seventh Circuit's decision in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (2012), is much the same. *Jamie S.* involved an effort to challenge a school district's compliance with the Individuals with Disabilities Education Act on behalf of a class of virtually all children eligible for special-education services. 668 F.3d at 495. The district court found commonality based on such "superficial common questions" as, "Did MPS fulfill its IDEA obligations to each child?" *Id.* at 498. The Seventh Circuit vacated and remanded, explaining that because that question would have to "be answered separately for each child based on individualized questions of fact and law," the plaintiffs' claims did not satisfy the commonality

requirement. *Id.* at 497-98; *see also Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 544-56 (7th Cir. 2016) (affirming decertification of class of "[a]ll persons presently confined at [a] jail who are experiencing dental pain" on ground that claims could "only be answered by looking at the unique facts of each detainee's case").[5]

These decisions are of a piece not only with *Wal-Mart*, but with pre-*Wal-Mart* decisions that correctly understood Rule 23's commonality requirement, including the Third Circuit's decision in *Rouse*. The plaintiffs in *Rouse* sought to bring §1983 claims on behalf of all "past, present, and future insulin-dependent diabetic inmates" at "a correctional facility in New Jersey." 182 F.3d at 193. The district court granted certification, but the Third Circuit vacated, in an opinion authored by then-Judge Alito. As the court explained, "not all insulin-dependent diabetics require the same level of medical care"; some require intensive management to maintain safe blood-sugar levels, but others do not. *Id.* at 198. Prison policies that might violate one prisoner's Eighth Amendment rights thus might not violate another's. As a result, the critical question for each class member's claim—are the practices "constitutionally adequate"?—could not be answered in one stroke. *Id.* at 198-99.

As these and other cases make clear, plaintiffs seeking to utilize the class-action device cannot simply

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[5] Notably, one district court recently acknowledged the clear "split" between *Phillips* and *Parsons*. *See Dearduff v. Washington*, 330 F.R.D. 452, 466 (E.D. Mich. 2019).

allege a "systemwide failure" and call it a day. They must demonstrate "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. To be sure, an allegation that a systemwide policy is unconstitutional *could* fit that bill. But it no more *automatically* does so than an allegation that an employer has an organization-wide policy that fosters discrimination against female employees. Here, all plaintiffs have "identified" is a hodgepodge of alleged "failures" to live up to "aspirational … private standards as to a variety of topics within the overall complex of foster child care." *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 55 (1st Cir. 2014). Whether those alleged failures rise to the level of such deliberate indifference as to shock the conscience is manifestly not a question that can be answered "in one stroke" for every child in DCS' care. *Wal-Mart*, 564 U.S. at 350. The Ninth Circuit's contrary conclusion cannot be reconciled with *Wal-Mart* or with the many decisions from circuits that faithfully follow it.

II. The Decision Below Expands Rule 23(b)(2) And Deepens Yet Another Circuit Split.

The decision below also deepens a circuit split on whether Rule 23(b)(2) imposes any meaningful constraints on the propriety of class certification in the institutional-reform context. While both *Wal-Mart* and the many decisions faithfully following it teach that it does, the Ninth Circuit has once again parted ways with those teachings.

1. In addition to satisfying the requirements of Rule 23(a), a party seeking class treatment must establish that the class "satisf[ies] at least one of the

three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345. Plaintiffs here sought certification under Rule 23(b)(2), App.51, which authorizes class treatment when 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 key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted.'" *Wal-Mart*, 564 U.S. at 360. Certification is appropriate under Rule 23(b)(2) only when the complained-of conduct "is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.*

That explains why the proponent of a (b)(2) class need not establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members" or "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Those requirements "are missing from (b)(2) not because the Rule considers them unnecessary," but because a class that fits (b)(2)'s terms necessarily satisfies them. *Wal-Mart*, 564 U.S. at 362. After all, the only way a single indivisible injunction could remedy each class member's injury is if each class member's claim depends upon the same common contention. *Id.* at 362-63; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) ((b)(2) class may not be certified where "some members … may not be entitled to" requested relief).

That also explains why Rule 23(b)(2) does not require "mandatory notice" to absent class members

or "the right to opt out." *Wal-Mart*, 564 U.S. at 362. When a defendant "has acted or refused to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), the same injunction or declaration will remedy each member's injury. Indeed, even an injunction obtained by a single plaintiff in individual litigation would benefit a properly defined class. For example, an injunction eliminating an improper criterion in a college's admission process would benefit a class of would-be applicants whether the injunction was procured by one litigant or a properly defined class. "[A]llowing individual members of the class to pursue relief on their own" thus would be "pointless"; if the action succeeds, then all members' injuries will be remedied in full regardless of whether some potential class members would prefer to opt out. McLaughlin on Class Actions §5:21 (16th ed. 2019). But by the same token, if the class seeks relief that may *not* benefit some members—or, worse still, may benefit some members at the expense of others by diverting resources to problems that do not trouble some class members—then the answer is not to let those members opt out. It is to refuse to certify the class under Rule 23(b)(2) at all for the failure to pursue indivisible relief on behalf of a cohesive class.

2. Those principles should have made denial of (b)(2) certification straightforward here. Plaintiffs do not even allege that every class member suffered an injury, let alone any one injury that could be remedied by a single injunction or declaration. They instead seek to amalgamate and challenge, on behalf of a highly disparate class, a diverse array of alleged "policies and practices" ranging from "failure to provide timely access to health care" to "overuse of

congregate care for children with unmet mental [health] needs" to "failure to investigate reports of abuse timely." App.17. And even setting aside the problem that some plaintiffs have not suffered any injuries at all, they seek remedies that unquestionably would not benefit some class members. An order remedying the allegedly unconstitutional separation of siblings would provide relief only to children with siblings. An order compelling DCS to remedy the alleged "overuse of congregate care for children with unmet mental [health] needs," App.17, would provide zero relief to class members without unmet mental health needs, and would divert resources from programs that would benefit class members without unmet needs. An order compelling DCS to remedy the alleged "failure to provide timely access to health care," App.17, would provide relief only for members who have been so deprived and again divert resources from other programs. And so on.

Plaintiffs try to get around the indivisible-relief problem by requesting generic obey-the-law injunctions, accompanied by the appointment of "a neutral expert" to indefinitely "monitor[]" DCS' compliance under the "continuing jurisdiction" of the district court. Dist.Ct.Dkt.37 at 51-52. But that generic "do better" relief just highlights the basic (b)(2) problem. Plaintiffs are forced to resort to requesting a generic order compelling DCS to "establish and implement practices to ensure that all members of the General Class receive the physical, mental and behavioral health services to which they are entitled under the federal substantive Due Process Clause" and leaving a court-appointed expert to fill in the details, *id.* at 51, because there is no one, concrete

reform that would accomplish that objective for all class members. After all, "different foster children face different potential harms" and "thus hav[e] … competing interests." App.22. As *Rouse* recognized, the health services to which someone in state custody is entitled under the Due Process Clause differ from person to person. Diverting DCS resources to address the area of need impacting some class members will take resources from programs benefitting others. Remedying some class members' claims would not benefit *and might even harm* others.

The Ninth Circuit affirmed certification of the class nonetheless, relying heavily on *Parsons*, which effectively read the indivisible-relief requirement right out of Rule 23(b)(2). As *Parsons* starkly put it, Rule 23(b)(2) "does not require a finding that all members of the class have suffered identical injuries." 754 F.3d at 688. Instead, in the Ninth Circuit's view, Rule 23(b)(2) is "unquestionably satisfied" so long as "members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Id.* In other words, as this case confirms, all that matters to the Ninth Circuit is that all class members "are allegedly exposed" to the challenged "practices" or "failures," even if they harm different members to different degrees or do not harm some at all. *Id.*; *accord* App.21.

3. The Ninth Circuit's approach squarely conflicts not only with this Court's precedent, but with decisions from other circuits rejecting such a boundless conception of Rule 23(b)(2). The Fifth Circuit's decision in *M.D.* is again illustrative. As that

court explained, "Rule 23(b)(2) applies only when a single injunction … would provide relief to each member of the class." 675 F.3d at 846 (quoting *Wal-Mart*, 564 U.S. at 360). Yet the plaintiffs "requested some forms of relief that would not apply to all class members." *Id.*; *see, e.g.*, *id.* at 846 (requesting "the creation of expert panels to review the cases of all class members who have had more than four placements"). Indeed, such divisive and divisible relief was inherent in the class definition, which included all children in the system regardless of whether they were affected, or were even likely to be affected, by any single alleged "failure." Because the proposed class would require "the district court to order the defendant to craft individualized 'injunctive-type' relief for certain class members," the court held that "the proposed class lacks cohesiveness to proceed as a 23(b)(2) class." *Id.* at 847.

The Tenth Circuit embraced the same analysis in *Shook v. Board of County Commissioners of El Paso*, 543 F.3d 597 (2008). There, the plaintiffs sought to certify a class of all prisoners suffering from mental illness and to challenge seven alleged practices having to do with mental illness. As then-Judge Gorsuch explained for the court in affirming the denial of certification, "Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries," which "must be sufficiently similar that they can be addressed in a single injunction that need not differentiate between class members." *Id.* at 604. Yet the plaintiffs sought relief that "would require the district court to craft an injunction that distinguishes—based on individual characteristics and circumstances—*between* how prison officials may

treat class members, rather than prescribing a standard of conduct applicable to *all* class members." *Id.* at 605. The plaintiffs also sought other relief that would be "overly broad relative to the class as defined." *Id.* at 606. The court accordingly agreed that the class lacked the cohesiveness Rule 23(b)(2) requires, even though the class there (all prisoners suffering from mental illness) was far more cohesive than here or in *Parsons*.

These decisions hardly stand alone. Most circuits enforce *Wal-Mart*'s demand that injunctive relief be indivisible by holding that (b)(2) classes must be cohesive. *See, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480-81 (8th Cir. 2016) ("It is the disparate factual circumstances of class members that prevent the class from being cohesive and thus unable to be certified under Rule 23(b)(2)."); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011) (same); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 n.8 (7th Cir. 2011) (same); *Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009) ("'homogeneity'" is the "defining characteristic" of (b)(2) classes).

4. The Ninth Circuit, by contrast, recently made explicit what *Parsons* and the decision below had already implicitly held: The circuit "reject[s] in no uncertain terms" the notion that "'cohesiveness' is required under Rule 23(b)(2)." *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 937-38 (9th Cir. 2019). The Ninth Circuit seems to think that result is compelled by the fact that Rule 23(b)(2) does not contain a "predominance" requirement. *See id.* But as *Wal-Mart* made clear, predominance and other "procedural protections attending the (b)(3)

class … are missing from (b)(2) not because the Rule considers them unnecessary," but because they are "self-evident" in a *properly* certified (b)(2) class. 564 U.S. at 362-63. Thus, a valid (b)(2) class that could not satisfy a predominance requirement should be the null set. Properly understood, Rule 23(b)(2) is more demanding, not less. It is not enough for common issues to predominate; the ultimate relief must provide uniform benefits to a cohesive class by enjoining a policy or practice that inflicts the same indivisible injury on each class member. That is what it means to identify circumstances in which the defendant allegedly "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).

That conclusion is reinforced by the Rules Enabling Act, which forbids courts from applying the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). To comply with the Rules Enabling Act, Rule 23 must do no more than "merely enable[] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). The point is to avoid the repetition of litigating the *same* claim over and over again, not to amalgamate a collection of *different* claims into a single proceeding that cannot help but warp the substantive law and enlarge the substantive rights of at least some class members. Here, it is hard to imagine how any one plaintiff could prove all or even most of the claims plaintiffs press, let alone seek and obtain an

injunction ordering DCS to provide "semiannual preventative dental health care," restrict use of "congregate care," "close investigations timely," reduce "caseworker caseloads" systemwide, and so on, all under the continuing supervision of a court-appointed expert. And the fact that the Ninth Circuit's (b)(2) class action would provide relief to uninjured parties is a sure sign of reversible error.

In short, "[t]he common thread running through the proposed class's current deficiencies under both Rule 23(a)(2) and 23(b)(2) is that it has attempted to aggregate a plethora of discrete claims challenging aspects of [the State's child-welfare system] into one 'super-claim.'" *M.D.*, 675 F.3d at 848. "[T]hat novel project" flouts the plain language of Rule 23, this Court's cases, and its admonition that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right[.]'" *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. §2072(b)).

III. The Ninth Circuit's Decision Undermines Core Constitutional Values Of Federalism And Accountability.

The decision below is not just wrong, but dangerously wrong, as it paves the way for the transfer of control over state systems and institutions from democratically accountable state officials to the federal judiciary and plaintiffs' lawyers. There is no better illustration of that than the relief the class seeks, which essentially wrests control over a newly-formed state agency by subjecting it to generic obey-the-law obligations and the supervision of "a neutral [which is to say politically unaccountable] expert" to indefinitely "monitor[]" compliance with those

commands, under the "continuing jurisdiction" of a federal court. Dkt.37 at 51-52.

That kind of unabashed effort to shift to courts "areas of core state responsibility" raises "sensitive federalism concerns." *Horne v. Flores*, 557 U.S. 433, 448 (2009). "[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). States, not federal courts, are charged with running child-welfare systems, and federal courts should be loath to embrace any mode of litigation that is specifically designed to make it easier to wrest control from a State's hands. Not only is there "no reason to think judges or juries are better qualified than appropriate professionals in administering an institution," *Connor B.*, 774 F.3d at 55, but the kind of "structural reform decree" sought here "eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds … at the expense of other citizens, other government programs, and other institutions not represented in court," *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

To be sure, the judiciary, and (b)(2) classes in particular, have a useful role in ensuring that state policies and practices comply with federal law. But there is a vast difference between a lawsuit seeking to challenge and change a concrete policy, like categorically denying children certain medicine or segregating them based on an impermissible criterion, and a lawsuit claiming that the failure to timely meet

the needs of some children amounts to a "systemwide practice" that justifies indefinite judicial management of a state executive agency. If all it takes to subject a State to extensive and expensive class-action litigation over every aspect of how it discharges a traditional state function like child-welfare or prison administration is allegations that everyone in the system is "exposed" to systemwide "failures" that could be remedied by a "do better" injunction administered by a federal court and "a neutral expert," then the class-action device will quickly devolve into a license for federal courts and plaintiffs' lawyers to second-guess the decisions of duly constituted state agencies. Indeed, we are arguably already there.[6]

As this case vividly illustrates, such efforts are profoundly misplaced. Arizona overhauled its entire child-welfare system on the eve of plaintiffs' lawsuit through the politically accountable choices of elected officials. Those reforms were undertaken with the specific objective of addressing many of the concerns plaintiffs identified in their complaint—indeed, in part because of findings in the very studies on which plaintiffs rely. Since then, the State has made remarkable strides to improve its foster-care program. Indeed, Arizona has garnered national acclaim for its efforts to bring meaningful reform to a system that was stymied by the conflux of increased demands and diminishing resources. Yet plaintiffs seek to divert DCS and millions of taxpayer dollars away from these

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[6] *See* John Bursch & Maura Corrigan, *Rethinking Consent Decrees*, Am. Enter. Inst. at 6 (June 2016), https://bit.ly/35849bv (citing 2000 study identifying at least 35 consent decrees resulting from child-welfare institutional-reform lawsuits).

efforts, in hopes of persuading a federal court to supplant them with its own (or, better yet, plaintiffs') judgments about how best to run a child-welfare system while also satisfying all the many other demands to which a state government is subject. The Ninth Circuit's conclusion that Rule 23 not only countenances this result, but does so virtually automatically, cannot be reconciled with the decisions of this Court or of the circuits that have faithfully followed them.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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