No. 19-765

IN THE

Supreme Court of the United States

MICHAEL FAUST,
Petitioner,

v.

B.K., by her next friend Margaret Tinsley, et al.
Respondents.

On Petition for a Writ of Certiorari
To the Ninth Circuit Court of Appeals

BRIEF OF MISSOURI, ALASKA, ARKANSAS, INDIANA, KANSAS, KENTUCKY, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(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.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Just in the last few years, the Ninth Circuit has certified class litigation on behalf of all 33,000 inmates in Arizona's prison system, *Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014), and now on behalf of all foster children who "are or will be" in the custody of Arizona's Department of Child Safety, Pet. App. 2. Missouri and other *amici* routinely face similar class litigation and have a significant interest in limiting the damage and confusion caused by the Ninth Circuit's rulings granting near-automatic certification in institutional-reform cases like this one.

The Ninth Circuit's decisions conflict with two core class-certification principles and deepen two corresponding circuit splits. First, class actions do not allow claimants to evade basic justiciability principles. But the circuits disagree on whether a class may be certified when, on its face, a putative class contains members with no colorable claim. Here, the Ninth Circuit certified a class where many members have no constitutional injury at all. That outcome simply cannot be reconciled with Article III's case-and-controversy requirement. Second, all members of a Rule 23(b)(2) class must have sufficiently *similar* claims such that a State's conduct is either unlawful as to all class members or as to none of them. The Ninth Circuit held that it is enough for all class members to be subject to or exposed to the same policies or practices. But many other circuits have rejected certification of similar classes. Such classes contain a wide range of dissimilar claims that

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[1] In compliance with Supreme Court Rule 37.2(a), Missouri provided counsel of record with timely notice of its intent to file this amicus brief.

cannot be decided together, from healthy, exposure-only plaintiffs with no cognizable injury, to those with negligence claims, to those who may face a risk of injury that falls short of the demanding due-process standard. Claims of constitutionally inadequate medical care are *particularly* individualized—both as to the imminence and substantiality of the injury, and the deliberateness or conscious-shocking nature of the alleged practice.

These errors matter because class certification nearly always forces class-wide settlement in institutional-reform cases. Sprawling class actions place enormous pressure on state agencies with limited budgets and resources. Class-wide discovery and protracted litigation often consume the very resources the State needs to help the populations the litigation is meant to serve. Conversely, agencies have strong incentives to offer favorable settlements, which rewrite state budgets and reallocate scarce resources by judicially blessed decree. This reality reinforces the need for a certification test with teeth, and underscores the need for this Court's review in this case, where the parties have not settled yet.

The Ninth Circuit's rulings also raise grave structural concerns. Apart from resolving actual cases and controversies, the judiciary lacks both the power and the tools to make sound budgetary and executory decisions. But institutional-reform litigation is often meant *precisely* to sidestep elected officials in the political branches in favor of a redo by unelected judges. Sensitive federalism concerns are at their height here as well. Overbroad class actions improperly assume responsibility for the daily operation of core state functions, dictate state policy priorities (often creating strong disincentives for States to help at-risk populations), and blindly shift

state resources away from other citizens and governmental programs not represented in court. This Court should grant review.

REASONS FOR GRANTING THE PETITION

I. The circuits disagree about how Rule 23 applies to claims of constitutionally inadequate medical care.

A. All members of a properly defined class must have potentially viable claims, but the Ninth Circuit held otherwise.

1. Class actions do not allow claimants to evade basic justiciability principles. "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (citation omitted). Whether "in individual or class actions," the "role of courts" is constitutionally limited to providing relief to claimants "who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). As in individual cases, Article III standing requires an injury-in-fact that is "imminent" and "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-11 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

As this Court has "emphasized repeatedly," that injury must be "concrete *in both a qualitative and temporal sense*." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added). While *Anchem Products* decertified the class on other grounds, it strongly suggested that it would have also lacked jurisdiction over "exposure-only" members of the putative class, even in suits raising traditional tort or statutory

claims. *Amchem Prods., Inc.*, 521 U.S. at 613 n.15 (citing *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997) (ruling that an "exposure-only" railworker could not recover in light of common-law principles)). Article III is "stretched beyond the breaking point when . . . the plaintiff alleges only an injury at some indefinite future time." *Lujan,* 504 U.S. at 564 n.2; *Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III.").

This is more true, not less, when litigants assert constitutionally inadequate medical care—claims that set a high bar for qualitative and temporal concreteness. Qualitatively, the medical harm must be "deliberate" and "conscience shocking." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (citation omitted); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) ("unnecessary and wanton infliction of pain"). An allegation of mere "medical malpractice" does not state a viable claim. *Estelle*, 429 U.S. at 106; *Cty. of Sacramento*, 523 U.S. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"). Temporally, the Constitution requires "actual" and "serious" medical harm. *Helling v. McKinney*, 509 U.S. 25, 32-33 (1993); *Estelle*, 429 U.S. at 104. A risk of future harm satisfies this standard only in limited circumstances: when the future risk is "sure or very likely," and the future harm is "imminent." *Helling*, 509 U.S. at 33; *see Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015).

2. The circuit courts disagree about what this justiciability analysis should look like in the class action context, leading to divergent outcomes.

Several circuits require that a class be defined such that every member of the class has a potentially viable claim. "In order for a class to be certified, each

member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (holding that the class "must therefore be defined in such a way that anyone within it would have standing") (citation omitted). This test was first formulated by the Second Circuit: "[N]o class may be certified that contains members lacking Article III standing. . . . The class must therefore be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). This conclusion follows from basic justiciability principles. "[I]ncluding claimants in the class definition that lack colorable claims . . . ignores the standing requirement of Article III and creates a substantive right where none existed before." *In re Deepwater Horizon*, 732 F.3d 326, 341 (5th Cir. 2013) ("*Deepwater I*"). This approach is called the *Denney* test.

Other circuits, including the Ninth Circuit at times, refuse to look beyond the standing of the named plaintiffs. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 56 (1st Cir. 2018) (noting "the divergence evident in the manner in which our sister circuits have addressed the treatment of uninjured putative class members"); *In re Deepwater Horizon*, 739 F.3d 790, 800 (5th Cir. 2014) ("*Deepwater II*") (outlining "two analytical approaches" taken by the lower courts to "evaluate standing for the purposes of class certification"). These courts focus "exclusively on the Article III standing of the 'named plaintiffs'" and "ignore the absent class members entirely." *Deepwater II*, 739 F.3d at 800 (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676-78 (7th Cir. 2009); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013,

1020-21 (9th Cir. 2001)); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998). This is known as the *Kohen* test.

The Fifth, Seventh, and Ninth Circuits have internal conflicts on this point. Each has followed *Denney* in some cases, and *Kohen* in other cases. *See Deepwater II*, 739 F.3d at 801-02 & n.28-30 (citing *Deepwater I*, 732 F.3d at 341; *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012) as examples of cases following something more like the *Denney* test).

This Court should grant review to resolve this conflict of authority about the interplay of Article III and class certification.

3. Here, the Ninth Circuit's decisions fail to grapple with the implications of this Court's Article III cases. A class should not be certified based merely on the allegation that class members are *exposed to* the possibility of constitutionally inadequate medical services. Exposure-only claimants fall short of Article III's case-or-controversy standard even as to ordinary tort claims. *See Amchem Prods., Inc.*, 521 U.S. at 613 n.15; *Metro-North Commuter R. Co.*, 521 U.S. 424. They certainly fall short of Article III's requirements under the higher bar reserved for constitutional claims of inadequate medical services. *Helling*, 509 U.S. at 33. An allegation that a class is "subject to" constitutionally "inadequate" medical practices fails to state a claim. *Lewis*, 518 U.S. at 350. Such a class would improperly include "healthy" class members who have "suffered no deprivation of needed medical treatment." *Id.*

Yet that is exactly what the Ninth Circuit did, both in *Parsons* and again here. *Parsons* dismissed

concerns about the lack of a common injury because all class members "have in common . . . their alleged *exposure*" to defendant's policies or practices. 754 F.3d at 678 (emphasis added). The panel in this case held that, in a class action, only the named plaintiffs—and not other putative class members—needed to have standing. Pet. App. 11-13. Both cases ignore Article III's strictures and this Court's opinion in *Lewis*.

B. All members of a Rule 23(b)(2) class must have sufficiently similar claims, but the Ninth Circuit certified the class anyway.

1. In a Rule 23(b)(2) case, all class members must also have sufficiently *similar* claims. As this Court reaffirmed in *Wal-Mart v. Dukes*: "'The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the 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*.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis added; citation omitted); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (noting that if "some members of the certified class may not be entitled to [relief] as a constitutional matter . . . then it may no longer be true that the complained-of conduct is such that it can be enjoined or declared unlawful as to all class members or as to none of them") (citation omitted).

Many appellate decisions, all citing *Dukes*, have acknowledged this all-or-none principle. *See, e.g., Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018); *Yates v. Collier*, 868 F.3d 354, 362-63 (5th Cir. 2017). Even the Ninth Circuit's cases pay it lip service. *See* Pet. App. 20; *Parsons*, 754 F.3d at 678 (arguing that "each of the policies and practices is

unlawful as to every inmate or it is not").

2. But the circuit courts disagree about how this all-or-none standard applies in practice, leading to different outcomes. The Ninth Circuit, for example, affirmed certification of a class that included all 33,000 inmates in Arizona's prison system. *Parsons*, 754 F.3d 657. These inmates were all "subject to" fifteen different alleged policies or practices ranging from delayed medical care, to inadequate medication for mental health patients, to substandard dental care. *Id.* at 665. *Parsons* held that commonality "does not require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination." *Id.* at 678. "[E]very inmate" was "subject to" the "same . . . policies." *Id.* No other showing was required. "[E]ither each of the policies and practices is unlawful as to every inmate or it is not." *Id.*

This analysis guts *Dukes*' all-or-none standard, as noted by the six-judge dissent from denial of rehearing en banc in *Parsons*. *Parsons v. Ryan*, 784 F.3d 571, 573 (9th Cir. 2015) (Ikuta, J. dissenting) (*"Parsons II"*). Rule 23 requires finding "a *similar* substantial risk of serious harm." *Id.* (emphasis added). Far from showing a similar risk, the record showed "a diverse group of prisoners with different health conditions and needs who require different levels of medical care." *Id.* The panel erred by certifying "this diverse class," because "not all members of the Class have an Eighth Amendment claim, let alone a common claim." *Id.* Allegations of "[e]xposure" to inadequate policies, *id.*, of "attenuated" risks of harm, *id.* at 577, and of medical malpractice, *id.* at 578, do not state Eighth Amendment claims. Thus, even among "those prisoners who are not healthy," many will have no

Eighth Amendment claim, and Rule 23 requires proof of "*sufficiently similar* serious medical needs." *Id*. at 579.

The Fifth Circuit's cases agree with Judge Ikuta's dissent. To satisfy Rule 23 in the Fifth Circuit, the "'class members must have been harmed in essentially the same way.'" *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 845 (5th Cir. 2012) (citation omitted). To show essentially the same injury, the class must prove "'that even the youngest, healthiest, and most acclimatized inmates face a substantial threat of serious harm *despite*'" existing practices. *Yates*, 868 F.3d at 358 (citation omitted). In *Yates*, that standard was satisfied. The putative class alleged extreme heat levels in prison buildings, and proved the similarity of risk by presented expert testimony that existing policies "were ineffective to reduce the risk of serious harm to a constitutionally permissible level for *any* inmate, including the healthy inmates." *Id*. In *Stukenberg*, the standard was not met. A class containing all foster children in Texas "'stretch[ed]" class certification beyond recognition "by attempting to aggregate several amorphous claims of systemic or widespread conduct into one 'super-claim.'" 675 F.3d at 844 (citation omitted). Such amorphous claims did not even establish commonality—let alone satisfy Rule 23(b)(2)'s more rigorous standard—because they could not be resolved "in one stroke." *Id*.

Similarly, the Seventh Circuit has held that allegations of delays in medical treatment typically are not common to a class. *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541 (7th Cir. 2016). "[T]he constitutionality of a wait for medical treatment" depends on "individual circumstances" and so can "only be answered by looking at the unique facts of

each detainee's case." *Id*. at 555-56. Plaintiffs had not shown "a policy or practice which rises to the level of a systemic indifference" classwide. *Id*. at 557 (noting such a class might be possible with proof of more "consistent" and "egregious" delays). Because "[s]ome of the alleged delays . . . 'may constitute deliberate indifference'" but not all of them, determining which class members had claims "'depend[ed] on the facts of the individual case.'" *Id*. at 558 (citation omitted).

The Third Circuit has also held that a class of prisoners with diverse medical needs do not present the same claim. *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999) (Alito, J.). In *Rouse*, a class of all prisoners who were insulin-dependent diabetics alleged deliberate indifference. The Court started with *Lewis* and *Estelle*: deliberate indifference "obviously varies depending on the medical needs of the particularly prisoner" yet "the plaintiff class is a medically diverse group." *Id.* The evidence showed that "not all insulin-dependent diabetic plaintiffs require the same level of medical care." Those with "unstable" blood sugar levels required more "intensive medical treatment" than those with "stable" blood sugar levels. *Id.* at 198. Thus, "it is possible that conduct that violates the Eighth Amendment rights of the unstable plaintiffs may not violate the constitutional rights of the stable plaintiffs." *Id.* "In light of the diverse medical needs of, and the different levels of care" required by, class members, the district court erred in holding that "all members of the plaintiff class" alleged the same injury. *Id.*

These cases present clear conflicts on the requirements for Rule 23(b)(2) classes. "Where the Third Circuit held that it was error to conclude 'on a wholesale basis' that different types of diabetic prisoners had 'alleged a violation of their Eighth

Amendment rights,'" the Ninth Circuit "holds that the district court correctly aggregated the Eighth Amendment claims of all prisoners in [Arizona], in all their medical diversity, on the basis of a general claim of deliberate indifference." *Parsons II*, 784 F.3d at 580. And where the Ninth Circuit has twice held that claims of delayed medical treatment could be litigated under Rule 23(b)(2), *see* Pet. App. 17, the Seventh Circuit in *Phillips* said they could not. The Court should grant review to resolve these divergent outcomes.

3. *Dukes*' all-or-none principle should make certification more difficult in class actions alleging constitutionally inadequate medical care. As many circuits recognize, such claims "'by their nature require individual determinations.'" *Kress v. CCA of Tennessee, LLC*, 694 F.3d 890, 893 (7th Cir. 2012) (citation omitted). The constitutional right at issue "is one that obviously varies depending on the medical needs of the particular" individual. *Rouse*, 182 F.3d at 199; *Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir. 2007). The Ninth Circuit's cases do not faithfully apply Rule 23(b)(2).

Needless to say, a class that contains some members with potentially viable claims, and some members without potentially viable claims, fails to satisfy Rule 23(b)(2). Those simply "subject to" a policy or practice do not have a claim at all, *Lewis*, 518 U.S. at 350, and thus they do not have the "same injury," *Dukes*, 564 at 350, as those alleging concrete medical harm. Thus, it is emphatically *not* true that injunctive relief can only be granted as to all or as to none of such a class.

But it is not just healthy class members who lack a colorable constitutional claim. *Parsons II*, 784 F.3d at 573, 579 (Ikuta, J. dissenting). Allegations of

"[e]xposure" to inadequate policies, *id.*, of "attenuated" risks of harm, *id.* at 577, and of medical malpractice, *id.* at 578, do not state constitutional claims either. Even among a class made up only of those "who are not healthy," many will have no potentially viable constitutional claim. *Id.* at 579. "The Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Cty. of Sacramento*, 523 U.S. at 848 (citation omitted).

Even among those with potentially viable claims, Rule 23(b)(2) demands a shared *degree* of risk and *imminence* of future harm. *Parsons II*, 784 F.3d at 573, 579. The degree and imminence of the harm will often vary by individual. *Rouse*, 182 F.3d at 199. For example, "the question of whether a particular policy or practice causes a constitutional violation necessarily depends on context—*i.e.*, how that policy or practice is interacting with other . . . conditions." *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 254 (5th Cir. 2018). The same policy that "could amount to a constitutional violation" in one environment may not be a constitutional violation in another. *Id.* This bars certification of a Rule 23(b)(2) class: defendant's conduct cannot be enjoined only as to all or none of the class.

The Ninth Circuit's decisions ignore all of this. Again, *Parsons* upheld certification of the statewide class of Arizona inmates because the Court concluded that there was a substantial question whether "they are *all* subjected" to "a substantial risk of harm," such that "each of the policies and practices is unlawful as to every inmate or it is not." *Parsons*, 754 F.3d 678. *Parsons* erred, however, because it applied far too permissive a standard in scrutinizing whether every single inmate in Arizona facilities had a potentially

valid constitutional claim. At the time of the certification decision in *Parsons,* literally thousands of strong, healthy Arizona inmates faced no "imminent" risk of harm that was "sure or very likely" to occur. *Id.*

The Ninth Circuit took the same mistaken approach in this case. Plaintiffs do not even allege that every class member has suffered an injury—indeed, the class likely contains many members with no unmet physical or mental health needs at all—but the court dismissed these concerns. Pet. App. 22. At the very least, the diverse array of allegedly deficient policies guarantees that putative class members lack similar injuries: those allegedly harmed by policies governing sibling placement, for example, have different injuries than those allegedly harmed by policies governing mental health care. Pet. App. 17. An injunction reforming sibling-placement policies does little to resolve the claims of those alleging deficient mental care. *Id.* The nature of the claims also requires individualized analysis. For example, the constitutionality of wait times for medical care, *id.*, is an inherently individualized inquiry that can "only be answered by looking at the unique facts of each [individual's] case," *Phillips*, 828 F.3d at 555-56.

The result is the certification of a class that includes large numbers of plaintiffs who not only lack similar claims, but also lack standing to sue altogether—a situation which raises grave constitutional concerns under Article III and ignores this Court's Rule 23(b)(2) precedents.

II. These questions are important and recurring, yet often force settlement before the certification question reaches this Court.

In practice, a virtually automatic class certification standard like that applied by the Ninth Circuit almost always leads to settlement—particularly in institutional-reform cases. This reality reinforces the need for a certification test with teeth, and underscores the need for this Court's review in this case, where the parties have not settled yet.

A. Class certification rulings often play a disproportionate role in determining the outcome of class litigation. *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings."). Nowhere is this truer than in institutional reform cases. These cases can place enormous pressure on state agencies with limited budgets and resources. The burdens of prolonged litigation and classwide discovery can overwhelm these agencies, and these burdens can detract from their ability to pursue their missions of providing public benefits and enforcing state law in the interest of the public good. Thus, for state agencies as for private parties, "an order granting class certification 'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (quoting Advisory Committee Notes to 1998 Amendments adopting Rule 23(f)). Because of this pressure, settlement after an adverse class-certification decision is extremely common.

Institutional-reform litigation is also particularly susceptible to settlement because often both parties have powerful incentives to enter into a consent decree. *See Horne v. Flores*, 557 U.S. 433, 448-49 (2009). Such cases allow state agency defendants to bypass the legislature and expand their budgets through the judiciary. *Ragsdale v. Turnock,* 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part) ("[I]t is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches"). This means that, in practice, defendants in institutional reform cases "'are sometimes happy to be sued and happier still to lose.'" *Horne*, 557 U.S. at 448-49 (quoting Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294–1295). State agencies can expand their services and budgets through judicially blessed settlements. *Id.* ("Government officials, who always operate under fiscal and political constraints, 'frequently win by losing' " in institutional reform litigation") (quoting Sandler & Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 170 (2003)).

In other words, institutional-reform litigation consumes already scarce resources, while settling such litigation often generates new resources. It is no wonder, then, that class certification often leads to settlement, regardless of the merits.

B. These concerns underscore the need for the Court to grant review in this case. Once the district court certifies a Rule 23(b)(2) class, high litigation costs and invasive discovery create enormous pressure for Missouri, Arizona, and other government

entities to settle before the appellate process plays out, and certainly before the case reaches this Court.

Parsons followed this pattern. The Ninth Circuit affirmed the certification of a class including every one of the 33,000 prisoners in Arizona prisons. *Parsons II*, 784 F.3d at 573. The case settled within days, even before the Ninth Circuit issued its mandate. *Id.* at 572 n.1. The proposed settlement demanded Arizona comply with a sprawling list of 103 different performance measures. Doc. 1185, *Parsons v. Ryan*, No. cv-12-0601 (D. Ariz. 2015). The district court continues to assert federal oversight of Arizona's prison system to this day. Doc. 2898, *Parsons v. Ryan*, No. cv-12-0601 (D. Ariz. 2018).

Missouri's recent experience is similar. A district court in Missouri certified a broad class of prisoners, relying heavily on the Ninth Circuit's decision in *Parsons*. *See Postawko v. Mo. Dep't of Corrs.*, No. 2:16-cv-04219-NKL, 2017 WL 3185155, *6-8 (W.D. Mo. July 26, 2017) (citing *Parsons* for the proposition that mere exposure to a common policy or practice is sufficient to certify a Rule 23(b)(2) class). A year later, the same court certified a broad class containing most of the children in Missouri's foster care system, and again relied heavily on *Parsons*. *See M.B. v. Eggemeyer v. Corsi*, 327 F.R.D. 271, 280 (W.D. Mo. 2018). That case settled before the appellate panel issued its opinion reviewing the certification decision under Rule 23(f).

Even before *Parsons*, plaintiffs sought certification of a class containing over 10,000 foster children in Oklahoma. Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 786 (2016) (discussing *D.G. ex rel. Stricklin v. Henry*, No. 4:08-cv-00074-GKF-FHM (N.D. Okla. Feb. 13, 2008)). The district court certified the class, and Oklahoma was forced into a

$100 million settlement. *Id.* at 789 & n.89. A study in 2000 showed dozens of similar consent decrees just in child-welfare institutional-reform cases, and an updated list shows many more since then. *See* Bursch & Corrigan, *Rethinking Consent Decrees*, Am. Enter. Inst. at 6, 20-21 (June 2016).

As these examples show, overbroad certification decisions often lead to class settlement in institutional-reform cases, and settlement means the class certification decision never reaches this Court.

III. The Ninth Circuit's toothless certification test implicates serious structural and federalism concerns.

The Court should also grant review because the Ninth Circuit's toothless certification test implicates sensitive structural and federalism concerns.

A. Overbroad class certification exceeds the judiciary's powers and impedes upon legislative and executive prerogatives.

The judiciary's powers are limited to actual cases and controversies for a reason. "'[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *Raines v. Byrd,* 521 U.S. 811, 820 (1997) (citation omitted). Article III requires a temporally concrete injury precisely because the requirement "confines the Judicial Branch to its proper, limited role in the constitutional framework of government." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and in the judgment). This balance of powers does not change based on perceived exigency or need for reform. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 476 n. 13 (1982) ("'[T]he Art. III power of the federal courts does not wax and wane in

harmony with a litigant's desire for a 'hospitable forum.'") (citation omitted). "The Constitution charges federal judges with deciding cases and controversies, not with running state [agencies]." *Lewis*, 518 U.S. at 364 (Thomas, J., concurring).

The Constitution rightly vests budgetary and executory responsibilities only in the political branches. "Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state [agencies] and run them by judicial decree." *Id.* "[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Id.* at 349 (majority op.). In fact, class actions like this one are often used precisely to "'sidestep political constraints'" and "'block ordinary avenues of political change.'" *Horne*, 557 U.S. at 448-49 (quoting McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL FORUM 295, 317). Even where such change is consistent with the goals of those currently holding political offices, overbroad judicially driven reform may "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins,* 540 U.S. 431, 441 (2004). Ordinary legislative avenues of political change protect against this. *See* Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL FORUM 19, 40 (1987) ("Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination").

Unsurprisingly, courts are also poorly equipped to exercise legislative and executive functions. *See Angela R. v. Clinton*, 999 F.2d 320, 326 (8th Cir. 1993)

("Federal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies."). "Federal courts do not possess the capabilities of state and local governments in addressing difficult . . . problems. . . . Federal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies." *Missouri v. Jenkins*, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring). And even if the judiciary had such resources, "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

To be sure, courts should decide the cases and controversies before them. But an artificial expansion of Rule 23 to encompasses classes like the one at issue in this case go beyond the courts' Article III powers and beyond the Rules Enabling Act. "If this seems a modest vision of the judiciary's role, we answer that modesty is the best posture for the branch that . . . lacks the full kit of tools possessed by the legislative and executive branches." *Rahman v. Chertoff*, 530 F.3d 622, 627–28 (7th Cir. 2008) (Easterbrook, J.).

B. Overbroad class certification violates principles of federalism by encroaching on core state functions.

Overbroad class actions against state agencies also raise grave federalism concerns. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo v. Goode*, 423

U.S. 362, 378 (1976) (citation omitted). "[T]his concern [for federalism] is heightened in the class action context because of the likelihood that an order granting class certification 'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Elizabeth M.*, 458 F.3d at 784 (citation omitted). These concerns are heightened in three ways.

First, overbroad class actions interfere with the daily operation of core state functions. "By certifying a single class action to litigate this broad array of claims and prayers for relief, the district court has essentially conferred on itself jurisdiction to assert control over the operation of . . . a major component of Nebraska [or Arizona] state government. A federal court may not lightly assume this power." *Elizabeth M.*, 458 F.3d at 784. Careful class-certification decisions are necessary to minimize "interference by the federal judiciary with the internal operations of [state] institutions." *Youngberg*, 457 U.S. at 322.

Second, overbroad class actions threaten to dictate state policy priorities. States voluntarily undertake difficult tasks—like running a foster care system—that do not guarantee perfect outcomes. In carrying out those tasks, a State "'necessarily has considerable discretion in determining the nature and scope of its responsibilities,' including discretion in choosing among aspects of a problem to approach at a given time." *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (quoting *Youngberg*, 457 U.S. at 317). A State is not required to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). So "it is not appropriate for the courts to specify which of several professionally acceptable

choices should have been made." *Connor B.*, 774 F.3d at 54 (citation omitted).

Third, sensitive federalism concerns are also "heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities." *Horne*, 557 U.S. at 448; *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1196 (8th Cir. 2013) (noting federalism concerns regarding a request "to increase appropriations to the State's foster care program"). "A structural reform decree 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 represent in court." *Jenkins*, 515 U.S. at 131 (Thomas, J., concurring).

Applying a "rigorous analysis" to claims of constitutional injury within a putative class will properly safeguard these federalism concerns. Where *every* class member faces a similar constitutionally intolerable risk of injury that is "imminent" and "sure or very likely to occur," class certification under Rule 23(b)(2) may be proper, assuming other requisites of Rule 23 are met. But where, as here, many class member lack any imminent, certainly impending injury of constitutional dimensions—but instead face injuries that are merely possible or conjectural—a federal court should not arrogate to itself the authority to dictate state policymaking under the aegis of class certification. This authority to dictate state policy priorities "should not be lightly assumed." *Elizabeth M.*, 458 F.3d at 784.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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