No. 19-765

In the
Supreme Court of the United States

MICHAEL FAUST, DIRECTOR,
ARIZONA DEPARTMENT OF CHILD SAFETY,
Petitioner,

v.

B. K., BY HER NEXT FRIEND
MARGARET TINSLEY, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CHILDHELP, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Childhelp, Inc. ("Childhelp") is one of the oldest and largest nonprofit organizations focused on helping children who are victims of child abuse and neglect or are otherwise at risk. Over the last six decades Childhelp has served millions of children. Childhelp's programs include foster care and adoption services, behavioral health services, residential treatment, an abuse prevention curriculum for grades pre-K through 12, and a nationwide hotline with text and live-chat capability. Childhelp provides services nationwide but has its headquarters in Arizona.

In Arizona, Childhelp works closely with the Department of Child Safety ("DCS") at the Childhelp Children's Advocacy Center. The Center is a one-stop location that offers multiple co-located services, including medical care, counseling, and victim advocacy services. Through close collaboration with DCS, Childhelp has been able to serve thousands of children in Arizona. Childhelp also has experience in States where federal courts have assumed control of children's services. In Tennessee, for example, Childhelp serves children through foster care and adoption services and operates a child advocacy center. Tennessee's child-welfare system has just emerged from 18 years of

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[1] No party or counsel for a party has authored any portion of this brief, and no one other than Amicus has funded the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for petitioners and respondents have provided written consent to the filing of this brief. Greg McKay, the former director of the Arizona Department of Child Safety, joined Childhelp in September 2019. He took no part in the preparation of this brief.

federal judicial management. *See generally* Dave Boucher and Anita Wadhwani, *No More Federal Oversight for Tennessee Children Services*, The Tennessean (July 18, 2017). For Childhelp and other providers of children's services, the federal judiciary's management of this traditional state function impacts the delivery of care. It stifles innovation and calibrates the machinery of change to the lumbering pace of litigation.

As a provider of services to children in Tennessee, which has endured federal court supervision for many years, and in Arizona, which now risks the same fate, Childhelp writes to ask the Court to consider its perspective on federal court supervision and what it means for children.

SUMMARY OF THE ARGUMENT

Child-welfare systems have become targets for institutional-reform litigation. For plaintiffs seeking to control the delivery of services, class litigation has become a tool for diminishing state sovereignty, bypassing the democratic appropriations process, and squashing innovation around the country. Injunctions and consent decrees place federal courts in command of state agencies with little input from—and no accountability to—the individuals whom their decisions affect. The method for accomplishing this transfer of power is class certification under Federal Rule of Civil Procedure 23(b)(2). This case is worthy of this Court's review because it represents a new low in certification standards.

The seemingly sterile topic of class certification becomes an issue of national importance in light of its impact on state agencies and the vulnerable children they serve. States assume an enormous challenge when they intervene on behalf of children who are not safe. Successful intervention saves lives, but failure strands children in the desolation from which States have long worked to extricate them. Transferring this traditional state role to a federal court handicaps innovation and accountability. The States themselves as well as the service providers with whom they work are better able to craft solutions to the problems they face, as Arizona's own experience demonstrates.

The Court should review the decision below and close the procedural avenue that plaintiffs have used to displace local, democratic decision-making.

ARGUMENT

The courts below lumped together a menagerie of claims under nine so-called "practices" in order to create a way for Petitioners to have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). The result is easy certification for any class seeking to install a federal court as overseer of state services. It is also a perversion of the Federal Rules. Institutional-reform litigation is strong medicine that should require a genuine policy—typically codified in statute or rule—before a class can be certified. The Ninth Circuit's alternative approach, which allows a district court to zoom out from each plaintiff's claims until it sees broad categories that it can label a "policy" or "practice" lowers the bar for judicial intervention and harms States and the people they serve. This Court should take the instant case to address an affront to federalism that has now become entrenched in the Ninth Circuit.

I. This Case Shows the Error in the Ninth Circuit's Now-Entrenched *Parsons* Rule for Class Certification.

At a sufficient level of abstraction, divergent claims fit under a single descriptive umbrella and could be branded as a general "practice." But abstractions and generalizations are no way to serve children. They also offend the premise of Rule 23(b)(2), which provides an easier path to class certification when a defendant has injured many plaintiffs with a single unlawful stroke. Here, Respondents' claims cover a multiplicity of alleged shortcomings. The Ninth Circuit could only

certify them under Rule 23(b)(2) by creating broad umbrella terms to impersonate the kind of actual policies for which the Rule is designed.

In other contexts, this Court has "repeatedly told courts—*and the Ninth Circuit in particular*—. . . not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (emphasis added); *see also City of Escondito v. Emmons*, 139 S. Ct. 500, 503 (2019) (summarily reversing the Ninth Circuit for excessive generality); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (same). The current case represents a similar exercise in abstraction. Once again, the Ninth Circuit has looked at disparate cases and unearthed a "policy or practice" defined in general terms that encompasses divergent circumstances. In the field of child welfare, however, decisions like the ones challenged in this case are individualized. Only by judicial aggregation do they appear to reflect some (unwritten) policy of providing inadequate care. This Court should curtail the Ninth Circuit's pattern of generalizing claims of government misconduct in order to impose crushing liability on state and local governments.

Amicus begins its work every day from the starting point that each child presents unique facts and circumstances. Before *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), this insight was built into Rule 23(b)(2)'s insistence that the defendant in an institutional-reform class action took steps "that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Judge Reinhardt's opinion in *Parsons* and the panel's holding

here upset decades of precedent as well as the basic intuition that every child is unique.

In *Parsons*, the Ninth Circuit permitted a diverse group of inmates to pursue a class action on the theory that they were all subject to "policies and practices" in areas ranging from dental care to the conditions of solitary confinement. 754 F.3d at 662. *Parsons* concluded that the policies-and-practices theory was sufficient to satisfy the requirements of Rule 23. In particular, the court held that plaintiffs alleging each type of injury raised "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *Parsons*, 754 F.3d at 678 (framing the common question as "whether the specified statewide policies and practices to which they are all subjected by [defendant] expose them to a substantial risk of harm"). The other requirements for class certification followed as a matter of course. If the policies-and-practices theory was correct, then the class representatives were necessarily typical of other class members because policies and practices necessarily extend across an organization. Fed. R. Civ. P. 23(a)(3); *Parsons*, 754 F.3d at 686. Likewise, Rule 23(b)(2) presented no obstacle to the *Parsons* court, which concluded that a single injunction ordering the State to follow the law at all times was sufficient: "develop and implement . . . a plan to eliminate the substantial risk of serious harm that prisoner Plaintiffs . . . suffer due to Defendants' inadequate medical, mental health, and dental care, and due to Defendants' isolation policies." *Id.* at 687.

When the Ninth Circuit decided *Parsons*, it set itself apart from four other circuits that had considered

similar claims. *DL v. Dist. of Columbia*, 713 F.3d 120 (D.C. Cir. 2013); *Kress v. CCA of Tenn., LLC*, 694 F.3d 890 (7th Cir. 2012); *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012); *Shook v. Board of County Commissioners*, 543 F.3d 597 (10th Cir. 2008). It also disregarded this Court's precedent addressing class certification based on an alleged "policy" in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011). That departure has now become entrenched and cries out for review by this Court.

Parsons was wrongly decided, and the current case illustrates why. Both the district court and panel decisions rely on *Parsons* at every turn. App. 18 ("In *Parsons*, we concluded that the district court did not abuse its discretion in similar circumstances"); App. 19 ("the same reasoning [from *Parsons*] applies here"); App. 21 ("Once more, the same reasoning [from *Parsons*] applies here"). But the variety of alleged wrongdoing in the present case is even greater than in *Parsons*. Where the earlier plaintiffs alleged four categories of misconduct by the defendants, the district court here listed nine distinct types of alleged wrongs. App. 17. That litany—ranging from children's dental care to employment conditions for case workers—appeared to the panel to fall within the broad boundaries (if any) created by *Parsons*. Tellingly, the panel noted that it had no choice but to follow the earlier opinion. *Id.* As a result, *Parsons* has become an umbrella under which courts can amass seemingly any variety of claims.

This Court should now weigh in to correct the Ninth Circuit's costly departure from precedent. The current case is the ideal vehicle for doing so because child

welfare is inherently child-specific. This Court has already held in *Wal-Mart* that it is insufficient to allege a violation of the same law (there, "that they have suffered a Title VII injury") or even a violation of the same type ("or even a disparate-impact Title VII injury"). 564 U.S. at 350. Here, the alleged injuries are not the result of a policy at all.

In fact, *Wal-Mart* rejected the same kind of manufactured "policy" embraced by the Ninth Circuit below. There, as here, the plaintiffs alleged that the defendant's "culture" amounted to a "policy" that harmed members of the class. *Wal-Mart*, 564 U.S. at 353–54. Indeed, the only true policy at issue in *Wal-Mart* was one that allowed managers discretion in their personnel decisions. *Id.* at 355. The same features appear in the present case. Plaintiffs do not identify any actual policy that violates the Constitution. Instead, they rely on "statewide practices," App. 17, which are nothing more than linguistic headings to aggregate individual claims. A judge following the decision below could certainly have aggregated the *Wal-Mart* plaintiffs' claims under "practices" akin to the categories presented here. That outcome creates a different law for class certification in the Ninth Circuit than in the circuits that faithfully apply *Wal-Mart*.

In the context of child welfare, the policies-and-practices bypass for class certification is especially misguided. For example, Plaintiffs complain that DCS separates too many siblings. Plaintiff/Appellee's Opposition to Appeal of Class Certification, *B.K. v. McKay*, No. 17-1750, 2018 WL 3218584, at *9, *24 (9th Cir. June 29, 2018). Considering this allegation apart

from the facts of individual cases obscures details like the need to accommodate a child with special needs, whose brother or sister can thrive in a more conventional setting. Likewise, half-siblings might be separated from each other when moving in with relatives that they do not share in common. Or perhaps a child facing severe behavioral health challenges may need individualized, specialized care for a period of time before becoming stable enough to join siblings in a traditional placement. Like the promotion decisions in *Wal-Mart*, such nuances are lost when considering only aggregate data and inferring a nefarious practice. For that very reason, the Rules require a common fact to be decided in one stroke, which is impossible in child welfare cases, absent an actual policy that offends the Constitution.

For the same reason, the proposed class cannot satisfy the requirement of Rule 23(b)(2) that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). To the contrary, not only is there no silver bullet injunction that a court could issue, but many of the areas where respondents seek judicial intervention invite misallocation of resources. Hiring personnel with specialized skills, for example, is not as easy as declaring that DCS should employ more highly trained therapists. The process of recruiting specialists is time consuming and often yields no qualified candidates. In the absence of a glut of professionals looking to work with at-risk children, the better path is to allow DCS to innovate and learn from creative solutions in other jurisdictions. Of course, the relief that respondents seek is more than just one hiring

binge. They ask for either a generic order that DCS obey the Constitution or a much more sweeping judicial takeover of the Department. Neither of those measures will solve the class members' problems in one stroke, meaning that they preclude certification under Rule 23(b)(2).

This case marks a particularly misguided abuse of institutional-reform litigation. State and local governments face an array of challenges in addressing the diverse needs of the endangered and hurting children in our nation's child-safety systems. The class certification theory embraced by the Ninth Circuit amalgamates the unique circumstances of children in Arizona's child-welfare system under generalized "practices." That generalization is foreclosed by precedent from this Court and has been rejected by other circuits since before the Ninth Circuit took a different path in *Parsons*. The Court should grant the current Petition to confirm that Rule 23(b)(2) requires a challenge to a genuine policy or other common action impacting every member of the class in the same way.

II. The Reform of Arizona's Child Welfare System Illustrates the Importance of this Issue.

The importance of limiting federal judicial oversight to its appropriate and very rare circumstances is hard to overstate. Institutional-reform litigation enlists a federal court to administer programs ordinarily managed by local authorities. Whether by injunction or consent decree, this governance by the federal judiciary is offensive to federalism, immune to accountability, and ultimately harmful to the

innovation that Arizona and other States have made a hallmark of their child-welfare reforms.

A. The Decision Below Threatens Child Welfare.

The Arizona Department of Child Safety is a success story for child-welfare reform. After a tragic revelation that over 6,000 cases of suspected abuse had gone uninvestigated, Arizona's elected officials took action. Soumya Karlamangla, *Arizona to Investigate Why 6,000 Child Abuse Reports Were Ignored*, Los Angeles Times (Nov. 6, 2013). In early 2014, then-Governor Jan Brewer launched a new, cabinet-level child-welfare agency. Governor Brewer's plan received bipartisan support in the legislature and similarly broad support in the community. Since the creation of DCS, transparency, innovation, and accountability have improved significantly.

Improvement, of course, does not mean that the Department is completely without problems, or that problems are easily remedied. But it means that the State's leaders are acknowledging and addressing challenges in a deliberate, publicly accountable manner. And outcomes are improving. DCS has developed a national reputation for consistent progress that Amicus wishes were replicated in other States. Among the Department's accomplishments:

- A backlog of cases that had climbed as high as 16,000 has been slashed—decreasing to just 1,000.
- The total number of children in state care, which had swelled to a high of over 19,000, has declined to 13,000.

- The average wait time for callers to the DCS child-safety hotline has plummeted from over twelve minutes to just 31 seconds.
- The hotline call abandonment rate has improved from 32 percent to 2.4 percent.
- The average time for placement in foster care has fallen from 40 hours to 7 hours.
- Average caseload has dropped by approximately 85 percent.

See generally Press Release, Office of the Governor, Arizona Department of Child Safety Clears Inactive Case Backlog (Mar. 16, 2019) https://azgovernor.gov/governor/news/2017/03/arizona-department-child-safety-clears-inactive-case-backlog.

These improvements have attracted national attention. For example, *Governing Magazine* described the "eye-popping improvements in performance" that occurred between 2015 and 2017. J.B. Wogan, *How Arizona Fixed Its Broken Child Welfare System in 2 Years*, GOVERNING (Apr. 27, 2017), https://www.governing.com/topics/health-human-services/gov-arizona-child-welfare-greg-mckay.html. The magazine attributed this progress to the selection of Greg McKay—himself a former foster parent—to run the organization. *Id.* The Seattle-based Casey Family Programs concurred, awarding McKay its Excellence for Children Award in 2018.

Similarly, in 2018, the Department's adoption of mobile technology under Chief Information Officer Linda Jewell earned it a spot on the CIO 100 List alongside companies like Adobe, Verizon, and Siemens. Amy Bennett, *2018 CIO Winners: Recognizing IT*

Excellence, CIO (May 1, 2018), https://www.itworld.com/article/3269275/cio-com-honors-the-2018-cio-100-winners-and-hall-of-fame-inductees.html. In fact, Arizona DCS was one of just two state agencies on the list. *Id.* (the other was the Pennsylvania Treasury Department).

Notably, McKay's tenure and the "eye-popping" reform of child services began just one month after the filing of this lawsuit in 2015. Indeed, this lawsuit began just over a year after DCS came into existence as its own agency. The night-and-day contrast between what the Department has accomplished and the drudgery of this litigation—still laboring to decide class certification—illustrates the core flaw in seeking judicial remedies for every government failure.

Further highlighting the superiority of political solutions and the variety of claims aggregated below, some of DCS's reforms respond directly to the "policies and practices" identified in the lower courts. One of the trial court's nine "statewide practices," for example, was "excessive caseworker caseloads." App. 17. That fact is a relic of the time when the complaint was filed. In 2014, the average caseload was 145, more than seven times the recommended national standard of 20. Wogan, *supra*. In June 2018, the last report for which data is available, that figure had plunged to 19.85. Ariz. Dept. of Child Safety, "Semi-Annual Child Welfare Report" (Sept. 2018, Rev. Oct. 29, 2018) (data from website; calculation original). One problem with relying on litigation is that it cannot adapt to changing circumstances nearly as quickly as the political branches. And modifying injunctions and consent

decrees is virtually impossible. A previous effort to alter a consent decree in Arizona required 17 years of litigation before eventual resolution by this Court. *Horne v. Flores*, 557 U.S. 433, 441 (2009).

B. The Decision Below Threatens Federalism.

As a provider of services to children throughout the nation, Amicus collaborates with state and local child-welfare agencies on a daily basis. These agencies face serious and evolving challenges. Child-welfare outcomes depend, among other things, on factors like economic prosperity, education, and the pervasiveness of substance abuse within a community. In Childhelp's experience, local leaders are better able to address these shifting challenges than are federal judges. That insight is consistent with the federalism at the heart of American government. By supplanting local leadership with judicial management, the Ninth Circuit has dealt a blow to both federalism and children in need. What has become possible through the efforts of DCS reformers in Arizona could now be smothered by judicial control.

A growing consensus both within the judiciary and outside of it recognizes the downsides of courts administering non-judicial departments. The primary flaw is that the interests of children are essentially unrepresented in the process. Judge Richard Posner has recognized that judicial decrees give "federal district court judges managerial responsibilities remote from the judicial function in an adversary system." Richard A. Posner, The Federal Courts: Challenge and Reform 341 (1996). Judge Posner traces the many unintended consequences that have followed

institutional-reform litigation. Across different contexts, those consequences include "sapping the authority of wardens and guards," "'white flight' to suburbs and to parochial and other private schools," and the closure of state-run mental institutions with a resulting increase in homelessness. *Id.*

Other observers have pointed to the decline in accountability and innovation that follows judicial oversight, a trend that Amicus has observed first-hand. In testimony before Congress, Dr. David Sanders, the Executive Vice President for Systems Improvement at Casey Family Programs explained that "the reality" of consent decrees is that they last longer than anyone anticipates (an average of 16.8 years) and, despite efforts toward tailoring, inevitably tend toward "cookie cutter" solutions that cannot accommodate new information. *Examining "Sue and Settle" Agreements: Part II: J. Hearing Before the Subcomm. on Intergovernmental Affairs and the Subcomm. on the Interior, Energy, and Environment of the Comm. of Oversight and Government Reform*, H.R., 115 Cong. 1 (July 25, 2017) (Statement of Dr. David Sanders, Exec. Vice President for Systems Improvement at Casey Family Programs) ("Sanders Testimony") at 16.

Of particular concern in the area of child welfare are developments in areas like "brain science, the impact of trauma, and the growing number of evidence-based and promising practices that achieve positive and lasting outcomes." *Id.* There is no reason to think that these developments will stop anytime soon, yet an injunction or consent decree entered today will lock in current thinking for decades to come.

Illustrating this point, the American Enterprise Institute recently studied Michigan's experience operating under a consent decree intended to improve that State's child-welfare system. John Bursch & Maura Corrigan, *Rethinking Consent Decrees*, Am. Enter. Inst. (June 2016). That report notes the nearly ubiquitous feature of judicial decrees setting caseload limits for each caseworker, which "preclude[s] experimenting with different arrangements that might provide better services to children." *Id.* at 8 (citing team-based approaches as an example). It also identifies millions of dollars diverted from children's services to "plaintiffs' attorneys and court-appointed monitors." *Id.* at 10. Michigan's experience is consistent with what Amicus has observed in other jurisdictions. It also matches Dr. Sanders's conclusion that, under a judicial decree, "the objective becomes checking off the frequency of activities or services rather than having a focus on the quality or effectiveness of programs." Sanders Testimony at 17. Unsurprisingly, only six of the 31 States to have faced litigation over their child-welfare programs have emerged from judicial oversight. Casey Family Programs, *Information Packet: Supportive Communities* (July 2019), available at https://caseyfamilypro-wpengine.netdnassl.com/media/SComm_Consent-decree-summary_fnl.pdf.

A better path is to leave authority over child welfare with the political branches of government and the voters who have the opportunity to change course with every election. Arizona's experience is a good example. Beginning in 2015, the governor responded to deficiencies at DCS with the appointment of a new

director and additional resources. Innovations over the past four years track best practices in the field, including regular data collection to identify weakness and respond before it becomes a crisis. The best child-welfare programs "use data to create robust continuous quality improvement (CQI) programs to self-correct in real time and into the future." Sanders Testimony at 18. These self-policing methods, like Arizona's monthly and semi-annual data reports, "render aspects of the justification for consent decrees obsolete." *Id.*

And the process of structural improvement in Arizona continues. Just this year, the Arizona Legislature passed a bill DCS had requested that will give the Department authority over behavioral health, an area that currently falls within the purview of the Arizona Health Care Cost Containment System. S.B. 1246, 54th Leg., 1st Sess. (Ariz. 2019) (enacted with only one vote against). Adding responsibility for behavioral health will improve DCS's ability to care for children, but it will also cause a temporary spike in workload that would look like backsliding to someone unfamiliar with the Department's plans. Large-scale innovation is essential for continued progress, but injunctions necessarily deal in benchmarks and quantifiable criteria. The story of DCS's improvement could never have occurred under such a regime. Nor can it continue in that setting.

Courts serve an essential function, but in Amicus's experience, federal judicial decrees quell the nimbleness and accountability that has made DCS a turnaround success story. Child-welfare services succeed when they can accommodate each child's

circumstances and develop new approaches in response to new evidence. The law incorporates this insight in the class-certification process. At this stage—not later—courts must recognize the limits of their ability to administer a system as complicated and dynamic as the Department of Child Safety.

Rule 23(b)(2)'s insistence on a clean, single issue impacting all plaintiffs is a tool in service of the separation of powers. It recognizes that federal courts can accomplish much but they are ill-suited to the administration of a large and diverse social program. That work belongs to the executive and legislative branches. Because this case presents a new frontier in aggregating diverse claims within a 23(b)(2) class, Amicus urges the Court to review the Ninth Circuit's decision and the *Parsons* precedent on which it relies with an eye toward preserving ingenuity and accountability in child-welfare reform.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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