No. 19-765

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, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SECRETARIES' INNOVATION GROUP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Secretaries' Innovation Group is a membership organization of state human service and workforce secretaries. The Group exchanges state program innovations for national solutions that favor healthy families, work, economic self-reliance, budget responsibility, and limited government.

The Group's members are comprised of current and former Secretaries of human service and workforce agencies (sometimes titled Directors or Commissioners). Members gather to learn of successful innovations that have been executed "on the ground," to hear of new opportunities to design or replicate initiatives that advance the goals of family health and self-reliance, to form options for waivers and other administrative vehicles for state freedom of action, and to consider and approve actions that advance the policies of limited government and state autonomy.

The Secretaries' Innovation Group has a strong interest in this case because it involves a public-interest law firm that files serial lawsuits against state child-welfare systems, seeking to impose federal-court consent decrees or injunctive orders that inevitably result in long-term court monitoring and a loss of state sovereignty. The Group respectfully requests that this Court grant the petition and reverse the district court's order certifying this case as a class action.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no such counsel or party made a monetary contribution to fund the preparation or submission of the brief. In accord with Rule 37.2, all parties were timely notified and have filed blanket letters of consent to the filing of *amici* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class actions can be a useful and effective tool for institutional reform. But unless courts are careful in how they allow litigants to wield this tool, class actions can also be weapons of great destruction that reduce state sovereignty and place the levers of government in the hands of courts, third-party monitors, and lawyers.

Outside of prison litigation, few areas of state government have been more adversely impacted by improper class proceedings than child-welfare systems. In a 2000 study, the national Center for Youth Law identified some 57 child-welfare institutional-reform lawsuits involving 36 states, with consent decrees governing at least 35 of the lawsuits. These class-action lawsuits have now reached legendary status. A class-action consent decree involving the Connecticut Department of Children and Families has been in place for 29 years. A similar class-action in the District of Columbia resulted in a court order that has governed the District's child-welfare system for nearly as long. The consent decree involving Maryland's foster program has been in place for more than 30 years. And in New Jersey, where the Division of Children and Families has received numerous national awards, the State has been operating under a class-action consent decree for 16 years, with no end in sight.

These types of actions come with a significant cost. They hamstring child-welfare systems, binding them to court-enforced rules that may not benefit an individual child or sibling group. For example, depending on individual circumstances, a residential-care setting may be the most appropriate placement for a

particular child with individualized needs. Yet a class-action consent or injunctive decree—especially a decree following the one-size-fits-all model of Respondents' class counsel—is likely to limit or prohibit the use of such facilities, despite the child's best interests.

Or a child removed from parental care and placed in state custody may have a serious need for psychotropic medications—those that can affect a child's mind, emotions, and behavior. (Such medications are common to treat everything from Attention Deficit Disorder to a Bipolar Disorder.) But under class counsel's cookie-cutter approach to reforming child-welfare systems, it is likely that further dispensation of such medications will require consent from the same parent whose abuse or neglect resulted in the removal.

These and other examples show that class actions are wholly inappropriate vehicles for dealing with children who are not uniform in their needs and who are impacted in different ways by a child-welfare system's alleged "failures." When such actions are filed against state agencies, as here, courts must take particular care to ensure that Fed. R. Civ. P. Rule 23's commonality and uniformity requirements are satisfied. This is the "one stroke" requirement that this Court has articulated as being indispensable to class practice. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011). Yet the Ninth Circuit's lax standard for class certification allows serial plaintiffs' lawyers to undermine state officials and impose their own policies, with the result that the lawyers—with the assistance of courts and monitors—run the system. The Court should grant the petition and reverse.

STATEMENT

Arizona's child-welfare system

The petition explains how the Great Recession resulted in an explosion of Arizona's out-of-home foster population, and the many steps the State has taken to improve its provision of foster-care services and to protect children in care. Pet. 5–6. Those improvements have resulted in numerous accolades and praise. *Id.* 6–7. But, notwithstanding stories of individual cases on which Respondents' counsel rely to claim systemwide failure, even the petition understates how well the overall system has performed relative to the rest of the country.

The U.S. Department of Health and Human Services (DHS) manages a program, known as the Child and Family Services Reviews (CFSR), which is structured to assist states, the District of Columbia, and territories to identify strengths and areas of needed improvement within their child-welfare agencies. The most recent review, Round 3, analyzed the baseline performance of all 50 states, the District of Columbia, and Puerto Rico during the 2013 fiscal year. The review covered seven different categories related to child safety, permanency of placements, and time in state custody. DHS then calculated a risk-adjusted performance for each jurisdiction based on the population of children being served, and the Department compared that adjusted score to the "national standard," which the Department set based on the performance of all jurisdictions. For a jurisdiction with a risk-adjusted performance that fell below the national standard, the Department created a program improvement plan called a "PIP" goal.

In 2013, Arizona was still in the very first stages of its multi-year effort to redesign its child-welfare system. In fact, the Arizona Department of Child Safety was not even created until 2014. Nevertheless, Arizona's 2013 performance compares favorably with other jurisdictions and does not support the allegation that Arizona exposed children in foster care to an unreasonable risk of harm.[2]

With respect to maltreatment in care, Arizona performed exceptionally well. Its raw score (2.36) placed the state as 7th best in the nation for child safety among children in foster care. After accounting for the system's population, Arizona's risk-adjusted performance (3.37) made it the 5th safest foster system in the nation. This standard of safety is even more impressive given that the states with the best performance in all categories are typically those with the smallest population of children in care. For example, the six jurisdictions whose raw maltreatment-in-care score ranked ahead of Arizona averaged 4,877 children served over the baseline year; Arizona served 22,408 children in that period. There are no other jurisdictions of comparable size with a child-safety performance that is even close to Arizona's. Unsurprisingly, DHS did not create a PIP goal for Arizona regarding maltreatment in foster care.

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[2] The following comparisons are made with data obtained from the CFSR Round 3 Review, made available to all the states. See generally https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews/round3.

Arizona also scored quite well in DHS's second measure of child safety, the recurrence of maltreatment. Arizona's raw score (5.3%) was the 13th best performance in the nation, well under the national standard. Arizona's risk-adjusted performance (6.9%) was also 13th best among all jurisdictions. In fact, when compared to the national standard (9.1%), Arizona's risk-adjusted performance was approximately 25% better. In other words, when measured against a theoretical "model" jurisdiction, Arizona's children were 25% more safe. Again, it was unnecessary for DHS to create a PIP goal for Arizona with respect to recurrence of maltreatment.

Placement stability measures the average number of placements for all children who entered foster care within a 12-month period. Arizona's raw score (3.46) was tied for 12th best in the nation. Its risk-adjusted performance (3.53) was 14th best. When compared to the national standard (4.12), Arizona's risk-adjusted performance means that children in Arizona's system, on average, experienced 14% fewer placements than a theoretical "model" jurisdiction. Again, it was unnecessary for DHS to create a PIP goal for Arizona with respect to placement stability.

The re-entry metric measures the percentage of children who, after being returned to their home or placed in a new, permanent home, re-enter state care. In this category, Arizona's performance was at the national average. Its performance (8%) ranked 28th best, and its risk-adjusted performance (7.9%) ranked 26th. Because the risk-adjusted performance was better than the national standard of 8.3%, it was again unnecessary for DHS to create a PIP goal.

The permanency metric measures how quickly a child in state care is returned to his or her home or another permanent placement (e.g., adoptive parents). DHS measures a jurisdiction's performance by examining the percentage of children who experience permanency within 12 months in three separate cohorts: (1) children in care for 12 months, (2) those in care for 12-23 months, and (3) those in care for 24+ months.

Arizona's performance in permanency for children in care for 12 months is the one CFSR Round 3 category where the state failed to meet the national standard. 30.5% of children in this cohort had permanent placements within 12 months, and Arizona's adjusted performance was 28.5% compared to the national standard of 40.5%. DHS set a PIP goal of 32.1%, which means that Arizona had to improve its permanency metric for this cohort by approximately 12.65% to satisfy the federal government.

Significantly, however, Arizona's performance was outstanding for the next two cohorts. For those children in care 12-23 month, 53.1% had a permanent placement within 12 months, good for 7th best in the nation. Arizona's risk-adjusted performance (50.9%) was also tied for 7th best in the nation. Arizona was well above the national standard of 43.6% and accordingly did not have a PIP goal.

Similarly, for those children in care 24+ months, 40.6% had a permanent placement within 12 months, which was 6th best in the nation. Arizona's risk-adjusted performance (37.7%) was tied for 4th best in the nation. Arizona was well above the national standard of 30.3% and did not have a PIP goal.

The permanency takeaway is that while Arizona does not permanently place as many children as it would like for children in care 12 months or less, it makes up that lost ground in its exceptional performance for children in care for 12-23 months and for more than 24 months. These statistics do not show a population of children at risk of unreasonable harm; they show a system that is thorough and methodical in placements. And given the structural and policy improvements and the massive number of dollars that have flowed into Arizona's child-welfare system since 2013, the state's performance today is already improved. As noted, during the CFSR Round 3, children in Arizona's system had a 30.5% permanent-placement rate within 12 months. In fiscal years 2017, 2018, and 2019, that figure jumped to 60.8%, 61.2%, and 59.6% respectively. FY20 Monthly Operational Outcomes Report, available at https://bit.ly/36TxTKj.

It is significant that Arizona satisfied six of the seven CFSR Round 3 national standards even at a time that Respondents allege Arizona was in "systemwide failure." Only four states with very small foster systems satisfied all seven standards. No jurisdiction with a foster system of a size comparable to Arizona's satisfied every national standard. Yet, despite Arizona's comparatively high performance, using objective, federal-agency data, Respondents filed this class action. If Arizona can perform so well and still be sued, then every state child-welfare agency, no matter how high performing, is vulnerable to an expensive, high-stakes lawsuit at the whim of plaintiffs or attorneys who want to further their own agendas and control public policy.

How class-action litigation controls state child-welfare systems

Because of low class-certification standards and minimal resistance by defendant government officials, there are numerous instances where federal courts have entered consent decrees that have governed child-welfare systems for decades. To be sure, consent decrees sometimes have their intended effect by focusing government officials on a problem that needs to be solved. But it is telling that despite the use of numerous class-action consent decrees to govern child-welfare systems over the past several decades, only three states have ever managed to exit:

Connecticut: *Juan F.* v. *Malloy* (28 years). Litigation was filed in December 1989 and settlement reached in January 1991. The current exit plan (approved in July 2006) contains 22 outcome measures that all must be met and sustained for six months before exit.

District of Columbia: *LaShawn A.* v. *Gray* (27 years). Plaintiffs filed a complaint in 1989 which resulted in a court-ordered decree in 1993. The current implementation plan has been in place since December 2010 and includes approximately 92 separately measured exit standards divided into outcomes to be achieved and outcomes to be maintained.

Georgia: *Kenny A.* v. *Deal* (15 years). Litigation was filed in 2002 and a consent decree entered in 2005. The modified agreement currently in place contains 29 outcome measures that must be achieved simultaneously for three consecutive periods before exit.

Illinois: Multiple (41 years). Illinois currently operates under more than 10 consent decrees/settlement agreements related to the child-welfare system. There are several coordinators and monitors embedded within the Department of Children and Family Services to oversee and monitor compliance.

Maryland: *L.J.* v. *Massinga* (32 years). Litigation was filed in 1984 on behalf of Baltimore children placed in Maryland's foster-care program. The parties entered an initial consent decree in 1988, with the intent that it would be complete in two years. Twenty-one years later, in 2009, the parties entered a modified consent decree. Exit from court supervision is not available until Maryland has complied with all commitments for 18 consecutive months.

Michigan: *Dwayne B.* v. *Snyder* (14 years). Plaintiffs filed their lawsuit in 2006, and the parties entered a consent decree in 2008 that was modified in 2011 and again at the end of 2015. The current agreement includes 11 outcome measures to be maintained and 56 measures to be achieved, with various measures rolling to exit when achieved for specified timeframes.

Mississippi: *Olivia Y.* v. *Barbour* (12 years). Litigation was filed in 2004 and a consent decree entered in 2008. Modified settlement agreements were finalized in 2012 and in 2016 in response to the plaintiffs' motions for contempt and the appointment of a receiver for the entire system.

New Jersey: *Charlie and Nadine H.* v. *Christie* (16 years). Litigation was brought in 1999, a first consent decree was entered in 2004, a modified settlement agreement was entered in 2006, and a sustainability and exit plan was entered in late 2015. The 2015 plan contains 48 outcome measures to be maintained or to be achieved before exit. Despite meeting a high percentage of these outcomes and receiving numerous national awards for the quality of services provided to New Jersey children, New Jersey's Department of Children and Families continues to be hamstrung by the consent decree.

New York: *Marisol A.* v. *Giuliani*; *Elisa W.* v. *New York City* (22 years). The *Marisol A.* class-action lawsuit was filed against the City and State of New York in 1995, and the parties approved a consent decree in 1998. Although the parties terminated monitoring, the court retained authority to issue injunctions and award damages. While the city has increased its foster-care system's budget by $100 million over the past two years, the *Elisa W.* class-action lawsuit was filed in early 2015 against the City and State of New York, and the state recently settled and agreed to the entry of another consent decree requiring the appointment of another monitor.

Ohio: *Roe* v. *Staples* (30 years). Plaintiffs filed their lawsuit in 1983, a consent decree was entered in 1986, and a modified decree was entered in 2006. Substantive provisions include requirements involving needs assessments, case plans, placement, visitation, and service. Ohio finally resolved the monitoring component of the decree in 2015, 30 years after execution of the initial decree.

Oklahoma: *D.G.* v. *Yarbrough* (8 years). The lawsuit was filed in 2008, and the court approved the parties' consent decree in 2012. The consent-decree monitors are, twice per year, to assess the state's "good faith efforts" to comply with the goals of the decree.

South Carolina: *Michelle H.* v. *Haley* (4 years). Litigation was initiated in January 2015 and a settlement reached in early 2016. The consent decree requires the state to satisfy dozens of provisions relating to caseloads, investigations, placements, visitation, and health care.

Wisconsin: *Jeanine B.* v. *Walker* (18 years). A lawsuit was filed against the Governor of Wisconsin on behalf of all Milwaukee children in child-welfare custody, with a final settlement reached in 2002. The city remains under court supervision because the program has yet to satisfy the final unfilled settlement requirement regarding number of placements.

In many of these cases, as in Arizona, substantial system improvements have been made. But those improvements were just as likely to come from government officials as plaintiffs' attorneys. And more money could have been allocated to program improvement but for litigation costs. (For example, as of 2016, Michigan had paid more than $10 million to plaintiffs' attorneys and monitors and continues to pay the monitors more than $1.5 million annually. John Bursch & Maura Corrigan, *Rethinking Consent Decrees*, Am. Enter. Inst. (June 2016), https://bit.ly/35849bv.) By allowing state officials to direct the change instead of the courts, the improvements would likely have come more quickly and efficiently—and more carefully tailored to meet the needs of each individual child in the system.

ARGUMENT

Despite best intentions, class-action practice involving child-welfare systems has been a mess. And the primary reason for this outcome—and the many decades of court supervision that have resulted—is because federal district courts fail to take class-action standards seriously. When a court ignores Rule 23(a)(2)'s commonality requirement by allowing a class to be certified based on alleged "systemwide failures," the remedy is a consent decree or injunction that demands systemwide solutions rather than carefully reticulated relief for a specific child in need. The same is true when a court ignores Rule 23(b)(2)'s requirement of a common injury that can be remedied by a single injunction.

The types of harm alleged in these cases looks nothing like a product-liability action or a class-based employment action that stems from a single, unlawful policy, such as how to calculate retirement benefits. The harms are necessarily individualized and depend on the unique circumstances of each child. The Court should grant the petition and reverse the precipitous class-certification decision here.

I. A public-law complaint alleging a government agency's "systemwide failures" is insufficient to satisfy Rule 23(a)(2)'s commonality requirement.

In the earliest days of our country, citizen lawsuits against the government were primarily limited to instances where the government had wrongly taken something from the plaintiff, such as property, a contract right, or some other property-based right.

Ross Sandler & David Schoenbrod, Democracy By Decree 98 (2003). In fact, until quite recently, this Court had always barred plaintiffs from using the Due Process Clause to claim a fundamental right to force the government to give them something in the form of status or benefits: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests." *Deshaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). "Although the liberty protected by the Due Process Clause affords *protection against unwarranted government interference*," it does not confer an *entitlement* to such [governmental aid] as may be necessary to realize all the advantages of that freedom. *Id.* (emphasis added). Accord, *e.g.*, *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (rejecting claim for a positive right to a homeless shelter); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35 (1973) (rejecting claim for a positive right to a public education. But see *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015) (requiring state governments to give recognition, status, and benefits to same-sex couples).

As government grew and dispensed ever-increasing benefits to provide things like welfare, education, housing, and health care, citizens began to sue over how the government distributed and administered these benefits. The new "entitlement" sentiment crystallized in an article that the Yale Law Journal published in 1964. Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964). The article asserted that these new government benefits, "the new property," were as important to citizens and the legal system as when the government unlawfully took private property. So, the

article concluded, courts should give equal weight to a citizen who claims a government benefit as to someone the government forced to relinquish a house or land.

But there is a substantial difference between the two types of litigation. Violation of a private property right is easy to identify and remedy. Democracy By Decree, pp. 104–05. If the government takes private property, the courts order the government to give it back or pay compensation. If the action is a breach of contract, damages are awarded to place the non-breaching party in the position she would have been in but for the breach.

In contrast, soft rights, such as a right to "clean" water, an "adequate" education, or a "safe" child-welfare system involve positive rights; they tell the government what to do, rather than what not to do. Democracy By Decree, pp. 104–05. Problematically, these positive rights are aspirational and frequently impossible to fully vindicate in a world of limited resources. And public officials have trouble knowing how to obey a court order that enforces such rights. *Id.*

For example, New York City's public officials have spent decades trying to comply with a court-enforced consent decree that required the city to provide a free appropriate education for all children with disabilities. Democracy By Decree, p. 105. Despite growing the city's special-education budget from $434 million to $2.685 billion over a 20-year period, the city remained under court supervision, notwithstanding the fact that the city's per-capita expenditures on special-education students were nearly four times higher than on general-education students ($50,698 per special-education student versus $13,802 per general-

education student in fiscal year 2015. NYC Dept. of Educ. System Wide Report #2 for Fiscal Year 2015: Function By Student Type—Public Schools Only, available at https://on.nyc.gov/2RfQqK1.)

In 1976, as plaintiffs' attorneys and judges continued to push for ever-more-sweeping court supervision of state and local governments, the Harvard Law Review published what remains one of the most comprehensive defenses of the practice: Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harvard L. Rev. 1281 (1976). In it, Professor Abram Chayes contrasted the old way of doing things, so-called "private law litigation," with the new trend, which he named "public law litigation." Democracy By Decree, p. 114. In Chayes' view, courts were often better than elected officials at resolving policy problems and would frequently produce better outcomes. *Id.* at 115. And at the time, Chayes' conclusion mirrored public perception. After all, the public was widely supportive of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and its progeny that successfully desegregated the public schools.

But "Chayes's impressionistic article [wa]s almost bereft of either usable doctrinal analysis or reliable empirical proof." Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. Mich. J. L. Reform 647, 691 (1988). Though frequently cited, the article's "success seems to have depended on gut reactions" rather than hard data. *Id.* Most problematic, Chayes misunderstood the role of the judge in public-law litigation.

Policy choices require reams of information and the balancing of competing interests—quintessential legislative functions. Since courts lack the time and capacity to fulfill the legislative role (not to mention the lack of constitutional authority), they tend to shift the policy-making function to the parties by encouraging them to consent to a court-supervised decree. These result in what the authors of Democracy by Decree have called "the controlling group"—consisting of plaintiff lawyers (like counsel to Respondents here), their experts, and court-appointed masters or monitors, among others. Democracy By Decree, p. 118. This controlling group undermines Chayes' assumption that judges are calling the shots:

> [Chayes] wrote in 1976 that judges, moderated by the inherent conservatism of the judicial community, would base public policy on reasoned and principled decision making. This ideal is rarely achieved. The bulk of the court orders in institutional reform cases result from bargains that, like the legislation they most resemble, are not necessarily logical or principled. When a proposed order is submitted for judicial signature on consent of the parties, judges are freed from having to choose among policies and can remain true to a still powerful judicial culture based on the separation of powers, which expects judges to let elected officials manage government. . . . The judge anoints the controlling group and keeps it going by pressuring the parties and holding the defendants and their successors in office to the bargain. [*Id.* at 119.]

And once the controlling group has achieved entry of an initial consent decree, what the law requires no longer matters. The statutory or constitutional "legal hook" that was the impetus for the decree falls away, and the law becomes "what[ever] the controlling group says it is." Democracy By Decree, p. 123. Agreed-upon plans that fail to work are toxic. The public officials charged with compliance can be held in criminal contempt if they attempt to deviate from the plan. And woe to the public official who seeks to modify the decree. Judges and plaintiffs' attorneys analogize consent decrees to contracts, and "[j]udges resist allowing modifications unless plaintiffs' attorneys consent, even if the term sought to be modified is unnecessary to correct a violation of law." *Id.* at 127.

All of this is exactly the type of environment that Respondents are asking the federal courts to create for Arizona's child-welfare system. Based on allegations of "systemwide failures" to which every class member is "exposed" simply by virtue of being in the system, they demand a court order—likely in a form identical to the one Respondents' counsel has used for other state child-welfare systems—that will address alleged problems that individual class members may not have in common.

For example, Respondents alleged that Arizona's Department of Child Safety overuses congregate care. Though not preferred as a blanket policy, a child-welfare agency's use of congregate care violates no federal law and does not represent a total disregard of professional judgment. When a child-welfare system experiences a sudden influx of children in care, a congregate-care setting may be the only realistic

alternative to leaving children with their abusive parent or other caregiver. It is simply not possible to say that every child in congregate care shares an injury in common with every other child in congregate care, much less with every child in a child-welfare system. Yet that is precisely the type of allegation the lower courts accepted in granting class certification.

Or consider Respondents' claim that Arizona's Department of Child Safety fails to ensure that all children in its care are receiving adequate behavioral-health services. The federal government concluded that the Department assessed and provided such services 83% of the time in 2013, 89% of the time in 2014, and 87% of the time in 2015, and that the provision of services "to meet children's mental health needs was a strength in 87% of cases." Annual Progress and Services Rpt. (APSR) for FFY 2017, p. 80 (Pls.' Mot. for Class Certification, Ex. 36). If an individual child has consistently been denied services, she or he might have a claim. But to allege that an unidentified 15% of the class did not receive the same timely treatment as the other 85% of the class is to define lack of commonality. It also ignores the reasons why some class members did not receive such services, what their individualized needs are, and whether they have even been harmed by the Department's policies and practices.

In sum, Respondents assert amorphous claims that the Department's allegedly unconstitutional policies or practices constitute a violation of the putative class's substantive-due-process rights. But it is impossible to say that any two members of the class have anything in common. By definition, a child-welfare population is made up of children with individual circumstances.

Their needs are different. Their placements are different. And their treatment plans must be different. By ignoring these differences, the Ninth Circuit deepened a circuit split and nullified Rule 23(a)(2)'s commonality requirement. That ruling will have long-term negative consequences not only for Arizona, but for institutional-reform litigation around the country.

II. Allegations of a child-welfare agency's "systemwide failures" are insufficient to satisfy Rule 23(b)(2)'s common-injury requirement.

For many of the same reasons, Respondents' allegations of a child-welfare "systemwide failure" do not show a common injury that a single consent decree or injunction can effectively remedy. Indeed, child-welfare consent decrees are designed to ignore individualized remedies.

Nearly every child-welfare consent decree involving Respondents' counsel dictates certain caseload ratios, such as 12 children or families for every caseworker (or something similar). Such a provision locks in a single-caseworker-for-a-single-child practice and precludes other practices that might provide better services to children. For example, certain children in the Respondent class may be better served with a small team of workers who can collaborate to assure that the child's needs are being met. But Respondents' counsel's one-size-fits-all approach does not contemplate that such children may require that remedy.

The ratio also ignores different job responsibilities, support systems, and other features that distinguish one child-welfare system from another, not to mention innovations and efficiencies that constantly affect the number of cases that a case manager is able to capably handle. It is like comparing the productivity of someone who has a typewriter to someone who has a computer with Microsoft Word and a laser printer, then imposing the same productivity standard on both of them. Yet Respondents' counsel pretends that there is a national caseload "standard" (largely imposed in other states by Respondents' own consent decrees) that Arizona does not meet.

Some decrees in other states also contain requirements addressing psychotropic medications. For example, Michigan's child-welfare agency must ensure that informed consent is obtained and documented in writing in connection with each psychotropic medication prescribed to a child in the agency's custody. But if a child is in custody, it is almost always because the child has been abused or neglected by his or her parent, and the only person who can provide the consent is that parent. While there are workarounds, they result in harmful delays in dispensing these important medications. Respondents' claims ignore that one child's injury could be the unnecessary dispensation of psychotropic medications—militating in favor of a consent requirement—while another child's injury may be a delay in receiving such medications—counseling against a consent requirement. There is no common injury, so there can be no common remedy.

Similarly, nearly every child-welfare consent decree contains requirements regarding the CFSR standards noted above, two related to safety and five to permanency. Only four, very small states were in compliance with all seven factors at the time the federal government conducted its review. (In the view of Respondents' counsel, essentially every state child-welfare program in the country should be governed by plaintiffs' lawyers and court-appointed monitors rather than government officials.) More important, these standards sometimes work against each other. For example, when a state places children in permanent homes quickly, those children may rebound to state custody at a higher rate than a state that places children in permanent homes in a more deliberative fashion. But a consent decree or injunction will likely force the state to make quicker placements. This may remedy a child who has been injured by a longer period in state care. But it may harm a child who suffered no injury until the court order forced a change in placement status.

In these and countless other examples, class-action court orders in the child-welfare context invariably lead to a uniform remedy that helps some children while hurting others. That is because, having litigated the class claims based on alleged systemwide failures, the litigation has failed to account for the fact that every child is unique and does not suffer a common injury from agency policy. It is quite possible a given child will have suffered no injury at all—until a cookie-cutter court order has inflicted it.

These problems are exacerbated by the fact that federal district courts routinely overlook this Court's holding in *Horne* v. *Flores*, 557 U.S. 433 (2009), that if a state agency is complying with federal law and has corrected the violations that resulted in a consent order or injunctive order, then the order should be vacated, even if the agency has not dotted every 'i' and crossed every 't' in the order. *Id.* at 452 (quotation omitted) ("[W]hen the objects of the decree have been attained, responsibility for discharging the State's obligations [must be] returned *promptly* to the State and its officials."). This means that lack of precision at the class-certification stage results in the type of sledge-hammer-rather-than-scalpel consent decrees discussed above—decrees that are not tailored to the individual child and that last for many decades.

In sum, institutional-reform litigation aimed at child-welfare systems is not just a matter of taking control away from state and local officials. It has real-life consequences that often present officials with a Catch 22: do what is best for a child and place the government in a position where it is defying a court order, or follow the court's directive at the expense of a child's best interests. No caseworker should be put in that position. And reigning in overbroad class certification in this context will go a long way toward preventing that problem in the first instance. If courts adhere to Rule 23's exacting requirements, it is far more likely that remedies will be tailored to specific children's needs rather than to purported "systemwide improvement" that ignores individualization. This case is an ideal vehicle to clarify the importance of commonality and common injury in class-action public-interest litigation and to put children's interests first.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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