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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Joel W. Nomkin
Counsel of Record
Joseph E. Mais
Shane R. Swindle
Andrea Driggs
PERKINS COIE LLP
2901 N. Central Avenue
Suite 2000
Phoenix, AZ 85012
(602) 351–8000
jnomkin@perkinscoie.com

Harry Frischer
Aaron Finch
CHILDREN'S RIGHTS, INC.
Wall Street Plaza
88 Pine Street, Suite 800
New York, NY 10005
(212) 683–2210

Counsel for Respondents

[additional counsel listed on inside cover]

Anne C. Ronan
Daniel J. Adelman
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
514 W. Roosevelt Street
Phoenix, AZ 85003
(602) 258–8850

Lauren Pardee Ruben
PERKINS COIE LLP
1900 16th Street Mall
Suite 1400
Denver, CO 80202
(303) 291–2300

QUESTION PRESENTED

Classes of children in Arizona's foster care system brought this action alleging that the State engages in specific practices that expose all children in its custody to a serious risk of physical and emotional harm, in violation of their due process rights. After examining the complaint and the voluminous evidentiary record confirming the existence of the challenged common practices, the district court certified the proposed classes. In so doing, the court found that issues such as whether the State exposes class members to an unconstitutional risk of harm by seriously overburdening caseworkers, or by providing an insufficient array of housing and mental-health services, can be answered in "one stroke," as required to establish commonality under Rule 23(a). The court likewise found that if the children prove the existence of the challenged practices at trial, an injunction modifying those practices will be "appropriate respecting the class as a whole," as required for certification under Rule 23(b)(2). On interlocutory appeal, the Ninth Circuit affirmed in relevant part, finding no abuse of discretion.

The question presented is whether the court of appeals erred in affirming the district court's interlocutory, discretionary, and fact-bound decision to grant class certification.

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INTRODUCTION

The State of Arizona is the "*de facto* parent" of abused and neglected children who have been placed in Arizona's foster care system. *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 843 (9th Cir. 2010). As such, the State is responsible for delivering medical and other services to the children in its custody. The classes of foster care children here, however, allege that the State has been deliberately indifferent to their needs in violation of their due process rights. To establish a due process violation, the children must show, among other things, conditions posing "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 251–53 (5th Cir. 2018).

In granting class certification, the district court identified multiple statewide practices, such as chronic understaffing and failure to provide an adequate array of housing and medical services, that allegedly expose all class members to a substantial risk of harm. Its decision was based on a voluminous record that included the State's own data, multiple expert reports, deposition testimony, and independent investigative reports. Applying the legal standards set forth by this Court, the Ninth Circuit affirmed the certification order in relevant part. The State petitioned for rehearing *en banc*, but not a single judge requested a vote.

This Court likewise should not upset the district court's interlocutory, fact-dependent, and discretionary certification decision. Certiorari should be denied for multiple reasons.

First, the courts below simply applied settled legal principles to the facts of this case. Looking to Rule 23, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and cases following *Wal-Mart*, the lower courts correctly found that class certification was appropriate given the elements of the children's due process claims and the extensive record evidence. In particular, because the key question is whether the State's practices create a substantial *risk* of harm to all children in its care—not whether any individual child has already suffered actual injury—the lower courts concluded that the children's due process claims could be litigated on a classwide basis. In objecting to that conclusion, the State' real quarrel is with the well-established substantive due process standard—not with the lower courts' application of Rule 23(a)(2)'s commonality requirement.

The Ninth Circuit did not "endorse[] a rule of virtual automatic certification in every case seeking systemwide reform," as the State asserts (at 14). Rather, the court affirmed based on evidence showing that the State maintains systemic practices that endanger all class members. Indeed, the Ninth Circuit's partial reversal in this case refutes any notion of an automatic rule or "free pass": the court *vacated* a subclass of children alleging violations of the Medicaid Act based on the different facts and legal standards applicable to that claim.

Second, contrary to the State's assertion, there is no circuit split. The decision below is consistent with a vast body of case law—including the very authority cited by the State—finding both commonality under Rule 23(a)(2) and the availability of injunctive relief under Rule 23(b)(2) in foster care and other cases like this one.

Third, this case is a poor vehicle for this Court's review. Given the Ninth Circuit's express adherence to *Wal-Mart* and its progeny, this case turns on a straightforward factual issue: do the challenged practices continue to exist and expose class members to the harm alleged? That fact-bound question is particularly inappropriate for review here, both because the children have not yet had a chance to prove their case at trial, and because the State seeks review from a stale record (one that that ended when the class was originally certified) and ignores the mountain of evidence developed since that confirms the existence of the challenged practices. Moreover, numerous events could effectively moot all or part of the current controversy. For example, the State may move for summary judgment, the class could be modified or decertified, and the outcome at trial is, as always, uncertain.

The Petition should be denied.

STATEMENT

A. The children allege denial of their due process rights.

"Virtually every" circuit agrees that once the state takes children in its custody, the children

have a constitutional right to "personal security and reasonably safe living conditions." *M.D.*, 907 F.3d at 250 & n.17 (collecting cases) (quoting *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004)). "The rationale for this principle is simple enough:" when a State takes a person into custody "and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the ... Due Process Clause." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

In 2015, ten foster children in Arizona brought this action alleging that the State—through the director of its Department of Child Safety ("DCS")—has violated and continues to violate these fundamental due process rights.[1]

The Second Amended Complaint asserts three due process claims. Two of the claims—for deprivation of medical care and failure to timely investigate reports of abuse and neglect—are brought on behalf of a "General Class" of children who are or will be in DCS's custody. ER2720–27, 2732–35. The third due process claim—for failure to place

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[1] The children are represented by Children's Rights, Inc., among other counsel. Not all share DCS's dim view of the children's counsel. *See, e.g.*, *Perdue v. Kenny A.*, 559 U.S. 542, 548–49 (2010) (noting district court's finding that attorneys for Children's Rights, Inc. "had exhibited 'a higher degree of skill, commitment, dedication, and professionalism ... than the Court ha[d] seen displayed by the attorneys in any other case during its 27 years on the bench'") (first alteration in original) (citation omitted).

children in appropriate living environments—is asserted on behalf of a "Non-Kinship Subclass" of children not placed in the care of an adult relative or person with a significant relationship to the child. ER2735–41. The Second Amended Complaint also includes a claim for violations of the Medicaid Act on behalf of a "Medicaid Subclass." ER2727–31.

B. The children presented extensive evidence of classwide practices supporting class certification.

After almost two years of litigation, the children moved for class certification.[2] Their motion identified multiple systemic practices that violated their due process rights by exposing them to a substantial risk of serious harm.

As to the General Class, the children identified nine specific practices: (1) failure to provide timely access to health care; (2) failure to coordinate the delivery of physical and dental care services; (3) ineffective coordination and monitoring of DCS health services; (4) overuse of congregate care for children with unmet mental-health needs; (5) failure to initiate investigations in a timely manner after reports of abuse; (6) failure to document a timely "safety assessment" after initiating an investigation; (7) failure to meet deadlines for closing investigations; (8) delays in important investigative steps; and (9) excessive DCS caseworker

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[2] At the time of certification in 2017, the class was represented by two named plaintiffs. App.5. One has since "aged out"; the other, B.K., remains in foster care. *Id.* Both remain named plaintiffs.

caseloads. App.70. As to the Non-Kinship Subclass, the children identified three specific practices: (1) excessive use of emergency shelters and group homes; (2) unnecessary separation of siblings; and (3) placement of children far from home. *Id.*

As the district court observed, the children supported their certification motion with "nearly ninety exhibits, including expert reports by multiple specialists in child welfare systems and health care services, excerpts of deposition transcripts, internal DCS documents and progress assessments, thousands of pages of documents obtained through discovery, and Named Plaintiffs' sealed medical files." App.55–56. In stark contrast to the extra-record internet links on which DCS relies (at 5–8, 10), that evidence paints a disturbing picture of DCS's child welfare practices. Three examples are illustrative.

First, caseworkers are seriously overburdened. As of June 2016, the state-wide average caseload was 30 children per employee—150% of the State's own standard of 20. ER1279–80. Some regions had caseloads *double* the State's standard. ER1280. The children's experts explained that overburdened caseworkers cannot and do not adequately perform their basic duties. For example, they are often unavailable for critical meetings with healthcare providers, rarely have time to monitor children's mental and physical health treatment, and regularly miss critical deadlines for investigating reports of abuse and neglect. *See* ER782–86, 1260–69, 1279–81, 1524–26. DCS itself has acknowledged both its failure to meet caseload

standards and the effect of that failure on the well-being of children in its custody:

> Child Safety Specialist caseload continues to be a primary challenge facing the Department, which affects performance in relation to all safety, permanency, and well-being outcomes. Child Safety Specialists have been carrying caseloads well above the standards for many years.

ER1062.

Second, the State has failed to maintain an adequate number of family foster homes, leading to warehousing of children in shelters and other forms of congregate care. ER1508, 1511–14. The State has long been aware of the issue, acknowledging that it has "an insufficient number of foster homes to meet demand." ER1163. The State also recognizes the harms wrought by congregate care, admitting that a "family-like setting" "is imperative for a child's healthy brain and social development throughout life," and that "congregate care placements can have significant negative impacts on children's overall development." ER2148, 2317. Yet in 2016, data showed a shortfall of about 2,900 foster care beds, a gap that left many children (including toddlers under the age of three) stranded in shelters for prolonged periods of time.[3]

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[3] Of the 18,906 children in out-of-home care in March 2016, 8,506 were placed with family. ER675. There were thus 10,400 children potentially in need of foster families. Yet DCS had only 7,452 available beds (10,337 total beds minus 2,885 unavailable beds, ER680), leaving a gap of 2,948 beds. *See also* ER1512–14.

Third, the State has a practice of failing to provide necessary health services, including "comprehensive evaluations, timely annual visits, semi-annual preventative dental health care, adequate health assessments, and complete immunizations." App.70. *All* foster children require these basic services, yet the State routinely fails to provide them. The children's expert, for example, found that DCS "has a clear pattern of failing to ensure that about half of children in foster care receive ... essential [immunization] services," even though "[l]ack of immunizations places them at risk for infectious diseases." ER779–80. Likewise, data from June 2016 show that DCS provided proper physical and dental services in only 51% of cases reviewed. ER772. Less than one-third of foster children received the mental and behavioral services identified in their case plans in the first half of 2014, ER1268, and most children did not receive a timely mental-health assessment in 2016, ER1261–65.

Expert testimony explained that these class-wide problems are exacerbated by the State's failure to maintain a system of oversight and coordination to ensure that foster children receive the services they need. ER1277–81. DCS assigns coordination responsibility to Child and Family Teams ("CFTs"), in which behavioral health providers and DCS caseworkers are supposed to work collaboratively to ensure that children receive proper care. ER1277–78. Despite the CFTs' critical coordination role, expert analysis found there is "no systematic monitoring of CFT practice." ER1279. There is no system for tracking whether CFTs occur or

whether children receive the services identified by their CFTs. *Id.*

In sum, far from what DCS euphemistically calls (at 4) "a few instances of underachievement," the evidence presented to the district court revealed a pattern of serious and systemic violations of the State's duties to foster children in its custody. As detailed below, that evidence has compounded since the district court's decision.

C. The district court granted the children's certification motion.

After examining the elements of the children's claims and the voluminous record evidence, the district court granted the children's motion for class certification, finding that the proposed classes satisfied Rule 23(a)(2)'s commonality requirement and that injunctive relief (assuming the children's success at trial) would be appropriate under Rule 23(b)(2).[4]

On commonality, the district court applied *Wal-Mart*'s command that "'[w]hat matters … is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" App.67 (quoting *Wal-Mart*, 564 U.S. at 350)). That test was satisfied, the court found, because the children had "set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the

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[4] The Petition contests only the application of Rules 23(a)(2) and 23(b)(2). This Opposition thus confines itself to those issues.

specified statewide policies and practices to which they are all subjected by the DCS expose them to a substantial risk of harm." App.72.

The district court likewise found Rule 23(b)(2) satisfied because DCS has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." App.78 (quoting Rule 23(b)(2)). The district court rejected DCS's argument that any injunctive relief would need to be tailored to the unique circumstances of each class member because the harm the children "seek to remedy is the 'risk of exposure' created by subjecting children in foster care to DCS's … policies and practices." App.79.

The district court also certified a subclass of children alleging violations of the Medicaid Act. App.73–81.

D. The Ninth Circuit affirmed the certification order in relevant part and unanimously rejected DCS's petition for rehearing *en banc*.

In an opinion by Judge Wallace, the Ninth Circuit affirmed in relevant part, holding that the district court did not abuse its discretion in certifying the General Class and the Non-Kinship Subclass. In so holding, the court of appeals expressly followed the Rule 23 framework this Court defined in *Wal-Mart* and other cases that applied *Wal-Mart*, including *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014).

The court of appeals began by setting forth the legal standard for commonalty under Rule

23(a)(2). It quoted *Wal-Mart* and *Parsons*, which in turn quoted *Wal-Mart*:

> Merely alleging a "violation of the same provision of law" does not satisfy commonality. [*Wal-Mart*, 564 U.S.] at 350. Instead, the plaintiffs' claims must "'depend upon a common contention' such that 'determination of their truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.'" *Parsons*, 754 F.3d at 675 (alteration omitted) (quoting *Wal-Mart*, 564 U.S. at 350). "What matters to class certification is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (internal quotation marks, alterations, and emphasis omitted) (quoting *Wal-Mart*, 564 U.S. at 350).

App.13.

Applying this standard, the court of appeals held that the district court "did not abuse its discretion by concluding that commonality existed." App.17–18. Rather, the court of appeals observed, the district court "properly grounded its commonality determination in the constitutionality of statewide policies and practices," which "are the 'glue' that holds the class together." App.16–17 (quoting *Parsons*, 754 F.3d at 678). Regardless of whether the children ultimately prevail on the merits, the court of appeals explained, the consti-

tutionality of these practices "can properly be litigated in a class setting." App.17.

The Ninth Circuit further held that the district court did not abuse its discretion in concluding that injunctive relief would be appropriate with respect to the class as a whole. "'The key to the (b)(2) class,'" the court of appeals observed, "'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."'" App.20 (quoting *Wal-Mart*, 564 U.S. at 360). "'In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class,'" not "'when each individual class member would be entitled to a different injunction.'" *Id.* (quoting *Wal-Mart*, 564 U.S. at 360).

Rule 23(b)(2) applies to the children's due process claims, the court of appeals explained, because they "have not brought a concatenation of individual claims that must be redressed through individual injunctions." App.21. Rather, "they have brought unified claims that 'a specified set of centralized [DCS] policies and practices of uniform and statewide application' have placed them at a substantial risk of harm." App.21 (alteration in original) (quoting *Parsons*, 754 F.3d at 687). "A single, indivisible injunction ordering state officials to abate those policies and practices 'would provide relief to each member of the class,' thus satisfying Rule 23(b)(2)." *Id.* (quoting *Wal-Mart*, 564 U.S. at 360).

The Ninth Circuit vacated the district court's certification of Medicaid Subclass, however, because it concluded that "proving a substantial risk of harm" does not establish a Medicaid violation. App.31. Instead, it held that the children's Medicaid claim "must be based on acts or omissions by the state that actually violate the requirements imposed by the Medicaid Act." *Id.* Because the district court's certification of the Medicaid Subclass was based on "an apparent misconception of the legal framework for such a claim," the court of appeals remanded for further analysis and additional factual findings. App.31, 34–36.[5]

DCS petitioned for rehearing *en banc*, but not a single judge requested a vote on the petition. App.50.

E. Additional post-certification evidence further supports class certification.

Citing non-record material, DCS argues (*e.g.*, at 6–7) that it has righted the ship and that the complaint never should have been filed. But evidence compiled after the certification order shows that DCS's deficient practices continue. Among other things, 74% of caseworkers had unmanageable caseloads in Q4 FY2019;[6] about one in three children failed to receive required medical screenings

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[5] On remand, the district court recertified the Medicaid Subclass. The State's petition for interlocutory review of that decision is now pending before the Ninth Circuit. The Petition here does not challenge the Medicaid Subclass.

[6] *Tinsley v. Faust*, 411 F. Supp. 3d 462, 479 (D. Ariz. 2019); Dist. Ct. Dkt. 482(2) Ex. A(4) at 7–9.

in 2018 and 2019;[7] the State still lacks sufficient therapeutic foster homes and other behavioral health services;[8] congregate-care use has *increased* more than 2% since 2014;[9] and the number of family foster homes available to foster children has decreased each month for the last two years.[10] The district court cited such continuing problems in recertifying the Medicaid Subclass on remand. *See Tinsley v. Faust*, 411 F. Supp. 3d 462, 476–82 (D. Ariz. 2019).

REASONS FOR DENYING THE WRIT

According to DCS (at 4, 14, 20), the Ninth Circuit—in "abrogation" of *Wal-Mart*—adopted a rule of "virtual automatic certification" whenever a lawsuit challenges systemwide practices, and did so based on evidence of "a few instances of underachievement." DCS must be thinking of a different case. The Ninth Circuit adopted no such automatic rule; it simply affirmed class certification based on allegations—backed by deposition testimony, expert witness reports, and documents from the State's own records—that DCS engages in specific practices that put all children in its custody at substantial risk of serious mental, emotional, and physical harm. DCS does not even acknowledge the vast record evidence of these constitutionally defective practices. This evidentiary record highlights the fact-bound nature of the decisions below.

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[7] Dist. Ct. Dkt. 484(2) Ex. C Ex.10.

[8] Dist. Ct. Dkt. 483(1) Ex. B at 10–15.

[9] Dist. Ct. Dkt. 482(2) Ex. A(4) at 2.

[10] *Id.* at 5–7.

Rather than creating a circuit split, as DCS contends, the Ninth Circuit decision is in harmony with the very cases that DCS claims create a conflict. Indeed, in the leading case DCS cites for the supposed split, the Fifth Circuit ultimately *affirmed* critical aspects of a judgment in favor of certified classes of foster children who established they risked undue harm from practices like those in issue here. *See M.D.*, 907 F.3d at 271 & n.42.

While DCS wants this Court to skip over the need for a trial, it still wants the Court to condemn the injunction DCS imagines would enter following a trial. Its request to review such a hypothetical injunction is just that—hypothetical. Beyond that, DCS's contention that Rule 23(b)(2) is limited to cases where each member in the class has suffered the same injury from the challenged policy or practice is flat wrong. As the 1966 Advisory Committee Notes to the rule confirm, a class is certifiable under Rule 23(b)(2) even if the policy in question "has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Courts thus uphold certifications of Rule 23(b)(2) classes "despite the fact that not all class members may have suffered the injury posed by the class representatives," "so long as the challenged policy or practice was generally applicable to the class as a whole." 2 William B. Rubenstein, Newberg on Class Actions § 4:28 (5th ed. 2019) (collecting cases). That is the case here.

DCS's erroneous view of Rule 23(b)(2) highlights a central flaw in its entire argument. Its core contention is that each class member must have

actually suffered harm. But that is wrong not just as a matter of class-action law, but as a matter of substantive due process. As the very case on which DCS so heavily relies makes clear, for foster children to establish a substantive due process claim, "plaintiffs need not show that every member of the class has actually *been* harmed while in State custody; they need only demonstrate that they face a *risk* of serious harm as a result of the State's policies and that the State was deliberately indifferent to that risk." *M.D.*, 907 F.3d at 256.

In any event, DCS does not even attempt to explain why this case should be reviewed now, on an incomplete record, before a trial where the children will have an opportunity to further prove the existence of the challenged practices that are the glue that hold the classes together.

The Petition should be denied.

I. The Ninth Circuit correctly affirmed the discretionary and fact-bound class certification decision.

The Ninth Circuit correctly found no basis to upset the district court's straightforward application of governing class-action law to the extensive factual record. In arguing otherwise, DCS ignores the nature of the substantive due process claims at issue.

A. The certification order correctly applied *Wal-Mart* to the record evidence.

As demonstrated above (at 9–13), both the district court's certification order and the Ninth Circuit's decision affirming it faithfully hewed to *Wal-Mart*'s analytical framework. Both decisions expressly applied that framework to the children's evidentiary showing. The fact that class certification was rejected in *Wal-Mart* and permitted here reflects the fundamental differences in the claims and facts between the two lawsuits.

In *Wal-Mart*, the plaintiff sought to bring a Title VII gender discrimination case on behalf of a putative class of 1.5 million female employees. 564 U.S. at 343. But the only allegedly discriminatory "policy" the evidence established was "Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters." *Id.* at 355. As the Court emphasized, that "policy" was "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it [was] a policy *against having* uniform employment practices." *Id.* The millions of employment decisions at issue were "committed to local managers' broad discretion" at 3,400 separate stores. *Id.* at 343, 356–59.

Here, by contrast, the children have provided evidence that one centralized agency that is charged with "protect[ing] children," Ariz. Rev. Stat. § 8–451, maintains statewide practices that subject all foster children to a substantial risk of harm. Critically as well, *Wal-Mart* emphasized that "even a single common question" is sufficient

to satisfy Rule 23(a)(2)'s commonality requirement. 564 U.S. at 359 (quotation marks, alterations, and citation omitted). Here, the children have identified multiple common questions, such as whether DCS exposes children to a serious risk of harm by overburdening caseworkers, failing to have sufficient family foster homes, and failing to have an adequate array of mental and behavioral health services. All of these and other questions raised by the challenged practices can be answered in "one stroke" as to *all* class members. *Id.* at 350.

The Fifth Circuit's recent decision in *M.D.* explains why. The trial record there established that the State of Texas had a "policy or practice of maintaining overburdened caseworkers," one of the practices alleged here. 907 F.3d at 264. That problem, the court held, warranted class treatment because it exposed "all" foster children in permanent conservatorship "to a serious risk of physical and psychological harm." *Id.* at 264, 271. Finding the practice unconstitutional on the merits, the court reasoned that "the principle seems obvious: when workloads exceed caseworker bandwidth, caseworkers are not able to effectively safeguard children's health and well-being." *Id.* at 265. Likewise, the court found that oversight failures in Texas's foster care system (another practice challenged here) justified class certification and created an unconstitutional risk of serious harm to the affected class of children. *Id.* at 265–68; 271.

The children's identification of practices affecting all class members here thus belies DCS's argument (at 14, 24–25) that the court of appeals adopted a "virtual[ly] automatic" certification rule:

"allege a 'systemwide failure' and call it a day." It was the evidence of the challenged practices, not some automatic rule, that drove the decisions below. As the Ninth Circuit correctly concluded, the district court's application of *Wal-Mart* to that evidence was well within its discretion. *See, e.g.*, *M.D.*, 907 F.3d at 248 (applying abuse of discretion standard because of "the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation") (quotation marks and alterations omitted).[11]

B. DCS's complaint that not all class members have suffered injury misconceives due process law.

Ignoring the evidence on which the district court relied in certifying the due process class, DCS proclaims—without any factual support—that some children are "adequately receiving care." Pet.19 (quoting the Ninth Circuit's summary of *DCS's argument* below (App.11)). As an initial matter, even if that were so, DCS's claim amounts to a merits-based argument that the alleged practices do not exist. And whether they exist or not is a question that can be tried on a classwide basis—it is not a reason to deny certification. *See Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to

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[11] DCS's suggestion of an "automatic certification" rule further ignores that the Ninth Circuit *vacated* the district court's certification of the Medicaid Subclass after "carefully examining the nature of the plaintiffs' claim under the Medicaid Act." App.29, 34–36.

the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

More fundamentally, DCS's argument that certification is inappropriate because some class members have so far escaped harm is really an attack on the principle that a substantial *risk* of harm may establish a constitutional injury. But this Court has repeatedly reaffirmed that principle, explaining that a "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). A prison inmate, for example, may "successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery," and prison officials may not be "deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." *Id.* It "would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*[12]

Cases to this effect are legion. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) ("[O]ne does

[12] The *amicus* brief of Missouri et al. invites this Court (at 3–7) to resolve a purported circuit conflict over whether every member of the class must have Article III standing. But that question is not presented by the Petition and so should not be considered. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013). In any event, as discussed above, in a substantive due process case like this, class members *do* suffer Article III injury when they face an undue *risk* of harm. They need not show that they have *already* suffered harm.

not have to await the consummation of threatened injury to obtain preventive relief.") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Thompson v. Virginia*, 878 F.3d 89, 107 (4th Cir. 2017) (explaining that "[a]n inmate need not show that she in fact suffered serious harm" to prove a substantial risk of harm); *Board v. Farnham*, 394 F.3d 469, 482 (7th Cir. 2005) (recognizing "constitutional right of pretrial detainees to receive necessary and proper personal hygiene items as *preventative* of future medical and physical harm") (emphasis added).

Consistent with this precedent, multiple courts following *Wal-Mart* have approved class certification in foster care and other cases like this one challenging state practices alleged to expose class members to a common *risk* of harm. *See, e.g.*, *M.D.*, 907 F.3d at 271 (affirming certification where "the State's policies with respect to caseload management, monitoring, and oversight violate[d] [foster children's] right to be free from a substantial risk of serious harm on a class-wide basis"); *Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1038–39 (8th Cir. 2018) (affirming certification of class challenging practice of withholding medication from prisoners with chronic Hepatitis C even though "the physical symptoms eventually suffered by each class member may vary"); *Parsons*, 754 F.3d at 681–82 (citing five post-*Wal-Mart* cases concluding that the commonality requirement "can be satisfied by proof of the existence of systemic policies and practices that allegedly expose inmates to a substantial risk of harm").

Cases decided before *Wal-Mart* reached the same result, and nothing in *Wal-Mart* casts doubt on them. *See, e.g.*, *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195–96 (10th Cir. 2010) (concluding that deficient monitoring practices exposed all foster children to a risk of harm "regardless of their individual differences"); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (affirming certification of a class of foster children asserting due process claims because the children alleged that their injuries "derive[d] from a unitary course of conduct by a single system"); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (holding that district court abused its discretion by *declining* to certify a class of foster children alleging due process violations; observing that "all class members are *subject* to the same harm" even if "they have not all suffered actual injury").

In sum, the decisions below are consistent with both this Court's precedent and other federal case law. They leave no unsettled legal question that warrants this Court's review.

II. There is no circuit split.

Ignoring the broad consensus on the propriety of class certification in suits like this one, DCS suggests two circuit splits: one regarding Rule 23(a)(2)'s commonality requirement, and one involving injunctive relief under Rule 23(b)(2). Neither purported conflict withstands scrutiny.

A. There is no split over Rule 23(a)(2)'s commonality requirement.

DCS's charge of an inter-circuit conflict on the commonality issue showcases a Fifth Circuit case already discussed above, *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012). DCS gives this case such prominence because, in DCS's words (at 21), it "involved a lawsuit virtually identical to this one—indeed, brought by the same organization—alleging substantive due process claims on behalf of a class consisting of all children in Texas' foster-care system." But DCS mentions only the Fifth Circuit's initial, 2012 opinion, where the court held that the district court, ruling before *Wal-Mart* was decided, had not applied *Wal-Mart's* "'rigorous analysis.'" 675 F.3d at 838. In remanding, the court observed that the district court could again conclude that a class should be certified. *Id.* at 844, 847–49.

And that is exactly what happened—and what DCS ignores. In 2018, after the plaintiffs had the chance to prove their class claims at trial, the Fifth Circuit *affirmed* the district court's certification of a general class and one subclass. *M.D.*, 907 F.3d at 271 & n.42. In language similar to *Parsons* and Judge Wallace's opinion here, the Fifth Circuit held: "Because we conclude that the State's policies with respect to caseload management, monitoring, and oversight violate plaintiffs' right to be free from a substantial risk of serious harm on a class-wide basis, we hold that the General Class and the [licensed foster care] subclass were properly certi-

fied." *Id.* at 271. Far from demonstrating a conflict, *M.D. validates* the Ninth Circuit's approach.[13]

Similarly perplexing is DCS's suggestion that the Ninth Circuit's approach conflicts with the Seventh Circuit's. In the most recent of the two Seventh Circuit cases DCS cites, *Phillips v. Sheriff of Cook County*, 828 F.3d 541 (7th Cir. 2016), the Seventh Circuit expressly harmonized its approach with the Ninth Circuit's legal analysis in *Parsons*. *Phillips* merely held that the evidence did not establish the sort of practices and policies that affected the entire class in *Parsons*. For example, *Phillips* recognized that the inmate-plaintiffs there might have met the commonality test had they proved, as did the *Parsons* plaintiffs, systematic deficiencies in the provision of medical services. *Id.* at 556–58 & n.39; *see also id.* at 557 (agreeing that "a class action probably could be brought where plaintiffs presented some evidence that a prison had a policy that regularly and systematically impeded timely examinations").

In view of *Phillips*, the Seventh Circuit's pre-*Parsons* decision in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), does not suggest, let alone let it be "said with confidence[,] that another circuit would decide the case differently."

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[13] The Fifth Circuit also held that evidence failed to establish that certain other practices violated plaintiffs' substantive due process rights. *M.D.*, 907 F.3d at 268–70. But that fact-bound conclusion on the merits does not undermine the larger point pertinent to class certification: the Fifth Circuit agrees that whether state practices present a substantial risk of harm is a question that can be litigated on a class-wide basis.

S. Shapiro et al., Supreme Court Practice 6–119 (11th ed. 2019). In any event, *Jamie S.*—decided on a complete trial record—is inapposite. The court there held that alleged violations of the Individuals with Disabilities Act could not be established on a classwide basis precisely because, unlike here, there was no systemic policy or practice that affected the entire class. 668 F.3d at 498.

Like the Seventh Circuit in *Phillips*, the First Circuit approvingly cited *Parsons* in *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13 (1st Cir. 2019) (*PPAL*). The *PPAL* plaintiffs alleged that the city and its public schools had violated the Americans with Disabilities Act (ADA) by unnecessarily segregating students with mental-health disabilities in a separate school. *Id.* at 17. Quoting *Parsons*, the First Circuit explained that a proposed class satisfies commonality if the suit challenges "'a particular and sufficiently well-defined set of allegedly illegal policies [or] practices' that work similar harm on the class plaintiffs." *Id.* at 28 (alteration in original). The *Parsons* claims met that description, the First Circuit observed, because the inmates there had identified "polic[ies] [and] practice[s] imposed by a single entity or a small group of actors." *Id.* at 28 n.14. The *PPAL* plaintiffs, by contrast, failed to establish "a common policy or practice" governing segregation decisions that purportedly violated the ADA, and they did not claim that decisionmakers decided to segregate students in a common manner. *Id.* at 28 n.14, 30. Moreover, unlike the substantive due process claims at issue here and in *Parsons*, the ADA claim in *PPAL* did not turn on a

risk-based assessment of conditions faced by the class as a whole.

DCS also claims that *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999), is conflicting, but that case did not concern class certification at all. The plaintiffs there were "a class of past, present, and future insulin-dependent diabetic inmates ... who filed suit claiming that various corrections officials and employees were deliberately indifferent to [their] serious medical needs." *Id.* at 193. The plaintiffs sought damages, and "[t]he *only issue* in [the] appeal [was] whether the defendants [were] entitled to summary judgment based on qualified immunity." *Id.* at 196 (emphasis added). "The question of class certification for purposes of damages [was] not before [the court]," and the Third Circuit "express[ed] no opinion on [that] issue." *Id.* at 199 n.3.[14]

In sum, the Ninth Circuit's commonality analysis is not the "outlier" DCS portrays (at 4–5). It fits comfortably within the precedent on which DCS relies.

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[14] *Amicus* Childhelp, Inc. charges (at 6–7) that the Ninth Circuit approach also conflicts with *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013). But Childhelp (a contract provider to DCS led by DCS's former director) ignores the later decision in *DL*, where the court, following a remand, affirmed the certification of three subclasses. 860 F.3d 713 (D.C. Cir. 2017). Notably, the D.C. Circuit found commonality satisfied where defendant had a practice of missing deadlines about 20% of the time. *Id.* at 719, 724–25.

B. There is no split over the requirements for injunctive relief under Rule 23(b)(2).

DCS next claims (at 25–33) a conflict involving Rule 23(b)(2). Again, no conflict exists.

Rule 23(b)(2) provides that a class action may be maintained if Rule 23(a) is satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Consistent with this Court's precedent and the decisions of other circuits, the lower courts correctly found those requirements satisfied here.

The certified classes typify the intended use of Rule 23(b)(2) because they seek uniform injunctive and declaratory relief from practices that affect the classes as wholes. Indeed, civil rights cases like this one are prime examples of what Rule 23(b)(2) was designed to address. *See* 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1776 (3d ed. 2005) (explaining that "subdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions").

Adhering to *Wal-Mart*, the court of appeals here recognized that "'[t]he 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."'" App.20 (quoting *Wal-Mart*, 564 U.S. at 360). Actions seeking to enjoin or declare

unlawful "a generally applicable policy or practice" call for "indivisible remedies" that meet the *Wal-Mart* test. Principles of the Law of Aggregate Litigation § 2.04 (2010). An injunction limiting the number of foster children assigned to each caseworker, for example, would "appl[y] to the proposed class as a whole without requiring differentiation between class members." *DG*, 594 F.3d at 1201. Likewise, requiring caseworkers to investigate reports of abuse within a certain period can be implemented only as to all foster children or as to none of them. *See M.D.*, 907 F.3d at 276.[15]

Contrary to DCS's assertion (*e.g.*, at 32), "Rule 23(b)(2) does not ... require that all plaintiffs be identically situated as long as they were subject to the same policy or practice." 1 McLaughlin on Class Actions § 5:15 (16th ed.). Rather than focus on the circumstances of each class member, Rule 23(b)(2) "focuses on the *defendant* and questions whether the *defendant* has a policy that affects everyone in the proposed class in a similar fashion." Rubenstein, *supra*, § 4:28 (emphasis added). Courts have thus found it proper to certify Rule 23(b)(2) classes "despite the fact that not all class members may have suffered the injury posed by the class representatives." *Id.* (collecting cases). As the Advisory Committee Notes to Rule 23(b)(2) confirm, and as DCS conceded in briefing below, "[a] class is certifiable under Rule 23(b)(2) even if the policy in question 'has taken effect or is

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[15] The fact that the children here are challenging specific practices that expose them to serious risk of harm refutes DCS's suggestion (at 28) that they are merely seeking "obey-the-law injunctions."

threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.'" CA9 Dkt. 24(1) at 41–42 (quoting Advisory Committee Notes 1966).[16]

The case DCS cites (at 29) as "illustrative" of a conflict on this issue illustrates no such thing. In *M.D.*, the Fifth Circuit expressly rejected the argument that "certification was improper because the class members have not been 'harmed in essentially the same way.'" 907 F.3d at 271 (citation omitted). Indeed, as the Fifth Circuit recognized, the suggestion that class members must have suffered a uniform injury has an even more fundamental flaw: it ignores that, as a matter of substantive due process, *exposure* to a serious risk of harm *is* the legal injury. *Id.* at 251–53, 256. The Tenth Circuit—which DCS cites (at 30) as another circuit in conflict—agrees. *See DG*, 594 F.3d at 1201 (holding that Rule 23(b)(2) was satisfied where the named plaintiffs alleged that excessive caseloads subjected all class members to an undue risk of harm). After all, that some class members

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[16] *See also, e.g.*, Wright et al., *supra*, § 1775 ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); *DG*, 594 F.3d at 1201 ("Rule 23(b)(2) does not require Named Plaintiffs to prove OKDHS's controverted policies or practices actually harm or impose a risk of harm upon every class member at the class certification stage."); *Baby Neal*, 43 F.3d at 64 ("Because the children in the system are comparably subject to the injuries caused by [various] systemic failure[s], even if the extent of their individual injuries may be affected by their own individual circumstances, the challenge to the system constitutes a legal claim applicable to the class as a whole.").

have so far been fortunate to escape harm cannot excuse a practice that threatens harm in the future.

The fact that every child here is exposed to serious harm through practices like failure to provide timely immunizations and serious understaffing makes this an even stronger case for certification than *Parsons*. The class in *Parsons* included healthy adult inmates who did not immediately require medical treatment, whereas every child in foster care needs services including attentive caseworkers and preventative medical care.

DCS is equally wrong in asserting (at 31) that the Ninth Circuit's decision here creates a conflict on the issue of "cohesiveness." The decisions below did not even discuss cohesiveness. To manufacture a conflict, DCS resorts (at 31) to citing a *different* Ninth Circuit decision as supposedly rejecting a cohesiveness requirement. But that decision is not at issue here.

In any event, any difference of opinion on whether Rule 23(b)(2) imposes an extra-textual "cohesiveness" requirement makes no difference here. The point of the cohesiveness principle is to "filter out money damage cases or the occasional injunctive case that fails to meet the underlying terms of Rule 23(b)(2)." Rubenstein, *supra*, § 4:34. And "if the class proponents can satisfy the textual requirements of Rule 23(b)(2)—that the defendant has acted in a manner that affects the class members generally such that injunctive relief would be appropriate for all—they ought to be able to meet the cohesiveness test as to that same injunctive relief." *Id.* The Tenth Circuit accordingly found

cohesion in a class of foster children challenging eight practices—including a failure to adequately monitor foster care children—similar to those challenged here. *See DG*, 594 F.3d at 1193, 1201.

III. DCS's "federalism" and other objections to the hypothetical injunction are baseless.

Finally, DCS attacks the *hypothetical* injunction that *might* issue should the children prevail at trial. These arguments are flawed for multiple reasons.

DCS, echoed by its *amici*, warns (at 33) that the decision below "paves the way for the transfer of control over state systems and institutions … to the federal judiciary and plaintiffs' lawyers." Hardly. This case has yet to be tried, and no injunction has been issued—let alone one that warrants such rhetoric. If and when the children prevail, Ninth Circuit precedent will require appropriate deference to DCS by giving it "an opportunity jointly to develop the remedial plan needed to implement the injunction." *Katie A. ex rel. Ludin v. L.A. Cty.*, 481 F.3d 1150, 1157 (9th Cir. 2007). At this interlocutory stage, however, DCS's federalism concerns are at best premature.

DCS's argument about the Rules Enabling Act is similarly misplaced. The children seek only to vindicate their due process rights under well-established legal standards, not to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). DCS's gripe is essentially a challenge to the scope of the potential remedy, a concern best

addressed *after* the contours of any injunction are known.

Moreover, similar cases from other circuits that *have* reached a final judgment recognize that district courts can tailor injunctive relief that safeguards plaintiffs' rights without damage to federalism principles. *See, e.g.*, *DL v. District of Columbia*, 860 F.3d 713, 727, 730 (D.C. Cir. 2017) (affirming injunction allowing the city "flexibility in how to achieve compliance and time to do so" and excusing it from compliance where it was "unable to meet its deadlines through no fault of its own").[17]

Other circuits likewise reject DCS's assertion (at 34) that Rule 23(b)(2) injunctions are strictly limited to lawsuits challenging a "concrete policy, like categorically denying children certain medicine." *See, e.g.*, *PPAL*, 934 F.3d at 29 (recognizing the propriety of certification where plaintiffs identify an "unofficial yet well-defined practice"); *M.D.*, 675 F.3d at 847 ("[W]e do not necessarily agree with Texas's argument that the proposed class can only be certified under Rule 23(b)(2) if its claims are premised on a 'specific policy [of the State] uniformly affecting—and injuring—each child.'"); *Bell*

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[17] Missouri's brief relies heavily on *Horne v. Flores*, 557 U.S. 433 (2009), but that case involved a motion seeking relief from a consent decree that was "no longer equitable" in light of changed circumstances, *id.* at 439 (quoting Rule 60(b)(5)). *Horne* explained that responsibility for discharging a state's obligations must be returned to the state when compliance has been attained, but it emphasized that courts must "vigilantly enforce federal law and must not hesitate in awarding necessary relief." *Id.* at 450.

v. PNC Bank, N.A., 800 F.3d 360, 375–76 (7th Cir. 2015) (second alteration in original) (concluding that whether defendant had an "unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours" was a common question "capable of class-wide resolution"); *DG*, 594 F.3d at 1198 ("agency-wide failure to monitor class members adequately" constitutes an "unconstitutional risk of abuse or neglect").

As these cases reflect, non-formalized practices can cause just as much harm to foster children as formalized policies. For example, defaulting to congregate care because of capacity constraints (not because of the needs of the children involved) puts all class members at risk of harm. To require federal courts to turn a blind eye to these practices would undermine their duty to protect civil rights. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of [state] administration.").[18]

DCS suggests (at 27) that its hypothetical injunction "may *not* benefit some [class] members." But again, an order requiring DCS to remedy unsafe conditions—by, for example, hiring more caseworkers, reducing investigation delays, and providing timely vaccinations—*would* benefit all class members by reducing the risk of harm for every child in foster care. DCS's argument thus depends

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[18] DCS similarly suggests (at 20) that commonality under Rule 23(a) requires the class to "target [a] concrete, objective policy." That argument fails under the same precedent as its Rule 23(b)(2) argument.

on a purported lack of resources—the notion that DCS might have to "divert resources" from one program to another because it supposedly cannot fix all constitutional violations that might be established at trial. *See* Pet.28. That concern is entirely speculative: no trial has yet determined which DCS practices are unconstitutional, and the scope and expense of the hypothetical remedial order are unknown. Potential resource constraints can be addressed after trial, on a full evidentiary record, as DCS collaborates in fashioning appropriate remedies.

IV. This case is a poor vehicle for review.

Given the Ninth Circuit's express fidelity to *Wal-Mart* and other governing precedent, the Petition, at bottom, challenges the application of that precedent to these facts. Yet under this Court's Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error [is] ... the misapplication of a properly stated rule of law." Error correction is particularly unwarranted here, where the reviewing court's "inquiry is limited to asking whether the district court's decision 'exceeded the bounds of permissible choice,' a standard that ... acknowledges the possibility that polar opposite decisions may both fall within the 'range of possible outcomes the facts and law at issue can fairly support.'" *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 610 (10th Cir. 2008) (Gorsuch, J.) (citation omitted).

The interlocutory status of this case also counsels against granting certiorari. This Court "generally await[s] final judgment in the lower courts

before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari). This case illustrates why.

First, the Court would be reviewing a discretionary decision made on the evidentiary record as it existed in 2017. Since then, new evidence has emerged that is relevant to both class certification and the merits. DCS and *amici* implicitly recognize the importance of post-certification developments: they repeatedly assert (albeit with citations to extra-record, non-evidentiary material) that things have improved since this case was filed. The children strongly dispute that claim, and they have developed evidence—including over 360,000 documents produced by the State since the certification order—showing that, in important respects, the challenged practices have continued or even worsened. *E.g.*, Dist. Ct. Dkt. 482(2) Ex. A(4) at 1–9 (showing that DCS's use of congregate care has increased while available foster family homes have decreased and that caseworkers remain dangerously overloaded); Dist. Ct. Dkt. 483(1) Ex. B at 2–19 (showing that the state has not taken the necessary steps to address its inadequate behavioral health services); Dist. Ct. Dkt. 480(1) Ex. C at 2–10 (showing that foster children continue to fail to receive required medical screenings).[19]

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[19] Childhelp suggests (at 12–13) that DCS has solved the problem of excessive caseloads. But the children's expert has analyzed updated data and concluded that caseloads carried by relevant DCS personnel often exceed, by a wide margin, the standards promulgated by DCS itself. Dist. Ct. Dkt. 482(2) Ex. A(4) at 7–9. Similarly, *amicus* the Secretaries'

Whether DCS or the children are correct about the significance of these post-certification developments is a matter for trial. Not surprisingly, the primary precedent DCS cites reviewed the appropriateness of class certification following a trial, based on a full evidentiary record. *See M.D.*, 907 F.3d 237.

What is more, any number of developments could moot all or part of the Petition. For example, DCS has indicated that it intends to move for summary judgment. If that motion is filed and granted, it would end or narrow the case. Assuming some or all claims survive summary judgment, trial would follow shortly thereafter. At that point, the district court could subdivide or decertify the classes if they prove as unwieldy as DCS says. *See* Fed. R. Civ. P. 23(c)(1)(C)) & (c)(5). Even if the classes maintain their present form, the children would face the always-uncertain outcome of trial.[20]

Innovation Group (at 4–8) cites various extra-record Child and Family Services Reviews. But the Secretaries' reliance on those reviews is misplaced. For example, the Reviews measure the rate at which children exit foster care, but do not measure whether children have adequate access to health services in foster care.

[20] Missouri argues (at 14) that review now is important because the Ninth Circuit's approach "almost always" coerces a settlement. But injunction suits like this one do not expose the defendant to the "potentially ruinous liability" that might force a settlement regardless of the merits. *See* Fed. R. Civ. P. 23, Advisory Committee Notes 1998, Note on Subdivision (f). DCS cannot and does not suggest that it was under any coercion to settle—it has litigated this case vigorously for five years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Joel W. Nomkin
Counsel of Record
Joseph E. Mais
Shane R. Swindle
Andrea Driggs
PERKINS COIE LLP
2901 N. Central Avenue,
Suite 2000
Phoenix, AZ 85012
(602) 351–8000
jnomkin@perkinscoie.com

Lauren Pardee Ruben
PERKINS COIE LLP
1900 16th Street Mall,
Suite 1400
Denver, CO 80202
(303) 291–2300

Harry Frischer
Aaron Finch
CHILDREN'S RIGHTS, INC.
Wall Street Plaza
88 Pine Street, Suite 800
New York, NY 10005
(212) 683–2210

Anne C. Ronan
Daniel J. Adelman
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
514 W. Roosevelt Street
Phoenix, Arizona 85003
(602) 258–8850

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