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,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Plaintiffs' opposition is remarkable both for what it says and for what it omits. Plaintiffs do not deny that they seek to accomplish a hostile takeover of Arizona's child-welfare system through a class action that amalgamates the disparate needs and circumstances of every Arizona foster child. Instead, they offer the State a seat at the table in fashioning "the remedial plan" once it cedes control of a core state function to the federal judiciary. BIO.31. Plaintiffs insist "there is no circuit split." BIO.3, 22. But they flat-out ignore on-point decisions from the Sixth, Seventh, and Eighth Circuits and the Ninth Circuit's alone-in-the-nation rejection of the need for "cohesion" in a (b)(2) class. Plaintiffs describe the decision below as "fact-bound." BIO.i, 3, 14, 16. But multiple amici, including 13 States, beg to differ. And understandably so, as this lawsuit is not meaningfully different either from a certification effort that the Fifth Circuit rejected or from an earlier Ninth Circuit decision that green-lights takeovers of state institutions via Rule 23. Plaintiffs label the certification decision "discretionary." BIO.2, 35. But *Wal-Mart* holds that federal courts *have no discretion* to certify "do-better" classes based on nebulous alleged "failings" that can be assessed only by examining each class member's individualized circumstances. Finally, plaintiffs complain that the decision below is "interlocutory." BIO.34. But class certification is problematic precisely because it transforms and distorts litigation at the outset. And, as the States' amicus brief makes clear, those ills are all the more grave, and all the more inconsistent with federalism principles, when the

defendant is an arm of a State. Certiorari is plainly warranted.

ARGUMENT

I. The Decision Below Defies Rule 23(a)(2) And Entrenches A Circuit Split.

1. Taking their cues from the Ninth Circuit, plaintiffs contend that the decision below "simply applied settled legal principles to the facts of this case." BIO.2. But while the Ninth Circuit certainly claimed that it was "adher[ing] to *Wal-Mart*," BIO.3, neither saying nor repeating that makes it so. In reality, the decision below is irreconcilable with *Wal-Mart*'s admonition that Rule 23(a)(2) requires a common question that can be decided for each class member "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

While plaintiffs attempt to portray their complaint as a paradigmatic challenge to systemwide "practices," they in fact seek to challenge an amalgam of alleged "failings" and inadequacies, such as "failure to provide timely access to health care" and "overuse of congregate care for children with unmet mental-health needs." BIO.5. Establishing that such "failures" violate the substantive due process rights of any one individual class member should be a tall order. After all, proving a substantive due process violation requires proving that "the State has been deliberately indifferent to [that child's] needs." BIO.1. To state that standard alongside the "practices" plaintiffs allege is to define the problem: Determining whether *any* (let alone all) of those "practices" constitutes deliberate indifference to a class member's

needs first entails determining what each class member's needs are.

To take an example, congregate care may be wholly irrelevant to one class member because of an absence of needs, perfectly appropriate for another given his circumstances, negligent for another given hers, and deliberately indifferent to yet another given his. The introduction of a concept like "overuse" only makes matters worse. This is not a situation where a specific practice used throughout the system is simply incompatible with due process. Congregate care *vel non* is not unconstitutional. Rather, plaintiffs claim that too much of it crosses a constitutional line. Meaningfully evaluating that claim vis-à-vis thousands of children with different circumstances based on the circumstances of one or a handful of class representatives is impossible.

So too with "access to health care." *Cf. Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 557-58 (7th Cir. 2016). To decide whether the State was deliberately indifferent to B.K.'s own healthcare needs would be eminently manageable; a trial would focus on her specific needs, and what the State did, or chose not to do, to meet them. By contrast, to decide whether the State has a systemwide "practice" of failing to provide timely access to healthcare to *all* foster children would require a factfinder to examine innumerable individualized sets of facts. And at the end of that process, there would at most be multiple individualized instances of violating an amorphous and context-dependent substantive due process standard. Such a proceeding manifestly would not "generate common *answers* apt to drive the resolution

of the litigation." *Wal-Mart*, 564 U.S. at 350. If the State had a uniform practice of making every foster care child wait two weeks to see a doctor, that could be tackled in a classwide fashion. But whether the system fails to provide timely care to one child says nothing about the experience of another class member.

Plaintiffs elide that fundamental flaw in their certification effort by emphasizing that if there *is* a systemwide "failing," then it puts every child in the system at risk. But even setting aside the critical problem that not every child would be exposed to the same kind or degree of risks, that misses the point. The problem here is that plaintiffs are not targeting the kind of systemwide policy (whether official or "unofficial yet well-defined," BIO.32) as to which legality can be determined for all class members "in one stroke." *Wal-Mart*, 564 U.S. at 350. They instead press a theory that a system that fails a number of children or inmates in very different ways can be made better by federal judicial control. That is not a basis for a valid class action; it is a roadmap for institutional takeover, which explains the outpouring of amicus support. Just as the *Wal-Mart* plaintiffs could not create commonality by labeling thousands of disparate employment actions a companywide "practice" of discrimination, plaintiffs here cannot create it by labeling countless disparate placement and care decisions a systemwide "practice" of deliberate indifference.

That does not mean, as plaintiffs suggest, that no substantive due process claim could ever be litigated on a classwide basis. It simply means that a substantive due process claim, just like any claim,

may be litigated by a class only if it involves genuinely common issues. Substantive due process claims are not inherently individualized. True systemwide practices, whether official or unofficial, such as not turning on the heat or air-conditioning, allowing triple-bunking, disallowing psychiatric care, requiring waiting periods, or having "demonstrably unsafe drinking water," BIO.20, could all be tested in a class action. But simply saying that the "system" failed to provide adequate healthcare to multiple individuals, so there must be a systemwide problem, does not satisfy Rule 23(a)'s commonality requirement.

2. It is little surprise, then, that the panel affirmed certification only by applying circuit precedent that renders the substance of claims irrelevant in the institutional reform context. Under *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), commonality exists so long as (1) each class member is "exposed" to the same alleged "practices," regardless of what those practices are, Pet.App.16-18 (quoting *Parsons*, 754 F.3d at 678), and (2) the claims "turn on a risk-based assessment of [the challenged] conditions," BIO.25-26. That is nothing more than a description of the basic theory underlying virtually every effort to certify an institutional reform class. If all that matters is that the class alleges "systemwide practices" and "risk-based assessments," then certification will necessarily follow. Indeed, it followed here even though the class undoubtedly includes members who neither have suffered nor are at any meaningful risk of suffering any injury at all.

That approach flatly contradicts *Wal-Mart* and squarely conflicts with decisions from other circuits

that have rejected the same sleight of hand. Indeed, the Fifth Circuit rejected certification for (among other things) failure to prove commonality in a virtually identical case brought by the same lawyers against Texas' child-welfare system. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012). Plaintiffs' only answer is to point to a later decision that affirmed after the district court recertified on remand. BIO.23 (citing *M.D. v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018)). But they conveniently neglect to mention that the defendants (1) failed to file their 23(f) petition within the jurisdictional time limit, *M.D. v. Perry*, 547 F. App'x 543 (5th Cir. 2013), and then (2) inexplicably "waived" all their Rule 23 arguments in their post-judgment appeal, 907 F.3d at 270. The court thus affirmed certification the second time around in all of one sentence and a footnote. *Id.* at 270-71 & n.42.

Plaintiffs' effort to "harmonize" their position with the Seventh Circuit's cases fares no better. BIO.24. While they emphasize language from *Phillips* noting that "a class action probably could be brought where plaintiffs presented some evidence that a prison had a policy that *regularly and systemically* impeded timely examinations," 828 F.3d at 557 (emphasis added), that just proves the point: In the Seventh Circuit, whether to certify an institutional reform class turns on whether the claims are *actually* common. A class action challenging mandatory waiting-periods or refusals to give dental exams could thus go forward, but an amorphous allegation of systemwide failure would go nowhere. That is clear from *Phillips*, which rejected certification of a class "claiming that the level of dental care [prisoners] received" was

unconstitutional because that claim could be resolved only "by looking at the unique facts of each detainee's case." *Id.* at 543, 556. And the conflict with *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), is even clearer. *See* Pet.23-24.

PPAL v. City of Springfield, 934 F.3d 13 (1st Cir. 2019), is much the same. *PPAL* held commonality lacking notwithstanding allegations of "systemwide failings" because the class claims "depend[ed] on [each] student's unique disability and needs." *Id.* at 30-31. And while plaintiffs emphasize that the Third Circuit's decision in *Rouse v. Plantier*, 182 F.3d 192 (1999), did not involve class certification as such, *Rouse* recognized that the precise kind of claims pressed here are inherently individualized. That is why the en banc dissenters in *Parsons* pointed to *Rouse* as fundamentally inconsistent with *Parsons*. Some claims are too inherently individualized for class treatment. That is not true of all substantive due process claims, as a systemwide policy could violate the rights of all inmates or foster children. But as *Rouse* makes clear, it is true for the kind of deliberate-inference-to-medical-needs claim pressed here. The problem with *Parsons* and the decision below is that their lax approach to Rule 23 in general, and commonality in particular, makes even the most inherently individualized claim certifiable. That is why this Court's review is urgently needed.

II. The Decision Below Defies Rule 23(b)(2) And Entrenches Another Circuit Split.

1. Compounding the problem, the decision below does away with the (b)(2) cohesion requirement. In *Wal-Mart*, this Court held that a (b)(2) class may be

certified only when the complained-of conduct "can be enjoined or declared unlawful only as to all of the class members or as to none of them." 564 U.S. at 360. That cohesion among plaintiffs is why a (b)(2) class may be certified without establishing predominance or typicality: For a proper (b)(2) class, those requirements will necessarily be satisfied. If a policy denying every inmate a dental exam is invalidated, it benefits every inmate. As illustrated above, however, there is no way to "declare[] unlawful" the conduct plaintiffs here complain of as to all class members at once because the class lacks that fundamental cohesion.

Although this defect was front-and-center in the petition, plaintiffs pay it little mind. Instead, they argue that "an order requiring DCS to remedy unsafe conditions … would benefit all class members by reducing the risk of harm for every child in foster care." BIO.33 (emphasis omitted). But while that might be true if all plaintiffs sought were "a generic order that DCS obey the Constitution" (which would be impermissible on other grounds), they in fact seek "a much more sweeping judicial takeover of the Department." CH.Br.10; *see* Pet.27-31. Yet even the Ninth Circuit acknowledged that "different foster children" have "competing interests," Pet.App.22—interests that a hostile judicial takeover cannot harmonize. And a class seeking relief that benefits only some members—or, worse still, benefits some members at the expense of others—cannot be certified under Rule 23(b)(2). *See Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018).

2. Plaintiffs brazenly claim "no conflict exists" on whether Rule 23(b)(2) requires cohesiveness. BIO.27. But they flatly ignore the Sixth, Seventh, and Eighth Circuits. *Compare* Pet.31 (citing cases from each circuit), *with* BIO.27-31 (citing none). While *plaintiffs* may believe that "Rule 23(b)(2) 'focuses on the *defendant*,'" BIO.28, the three circuits they ignore all hold that Rule 23(b)(2) requires cohesiveness *among class members*. *See Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 433 (6th Cir. 2009) (reversing certification of (b)(2) class for failure to adhere to "the well-recognized rule that Rule 23(b)(2) classes must be *cohesive*"); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 & n.8 (7th Cir. 2011) (same); *Ebert v. General Mills*, 823 F.3d 472, 480 (8th Cir. 2016) (same). In contrast, the Ninth Circuit recently made explicit what the decision below (and others) had already held implicitly: The Ninth Circuit "reject[s]" the view that "'cohesiveness' is required under Rule 23(b)(2)." *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 937-38 (9th Cir. 2019).

Plaintiffs alternatively contend that "whether Rule 23(b)(2) imposes [a] 'cohesiveness' requirement makes no difference here." BIO.30. That is plainly wrong. Plaintiffs cannot deny that the general class "includes some children with intensive health needs, but others who are healthy; some children in group homes, but others in foster homes; and some children who allegedly received inadequate services, but others well served." Pet.18-19. In the Sixth, Seventh, or Eighth Circuit, those "disparate factual circumstances" would "prevent the class from being cohesive" and render certification a nonstarter. *Ebert*, 823 F.3d at 480-81; *accord Kartman*, 634 F.3d at 893

& n.8; *Romberio*, 385 F. App'x at 433. In the Ninth Circuit, class certification was a *fait accompli*.

As for the few circuits they discuss (at 22), plaintiffs misdescribe the caselaw. In reality, the Third and Tenth Circuits agree with the Sixth, Seventh, and Eighth that "'disparate factual circumstances of class members' may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011); *see also Shook v. Bd. of Cty. Comm'rs of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008). The supposedly contrary Tenth Circuit case plaintiffs cite not only agreed with *Shook* that Rule 23(b)(2) "demands 'cohesiveness among class members with respect to their injuries,'" but expressly relied on then-Judge Gorsuch's opinion for that proposition. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (quoting *Shook*).

Plaintiffs are thus left invoking a pre-*Wal-Mart* case that certified a class of "'all children in Philadelphia who have been abused or neglected.'" *Baby Neal v. Casey*, 43 F.3d 48, 54 (3d Cir. 1994). Even though individual class members had diverse "circumstances and needs," the court found Rule 23(b)(2) satisfied based on its view of "the proper role of (b)(2) class actions" in "institutional reform" cases. *Id.* at 54, 64. *Baby Neal* is out of step with other Third Circuit caselaw, as it too rests on the mistaken view that certification should be virtually automatic in institutional reform cases. But the very fact that such pre-*Wal-Mart* cases remain on the books elsewhere and are the law in the Ninth Circuit is all the more

reason why this Court should grant review and make clear that Rule 23's requirements are not reduced or relaxed in institutional reform cases.

III. This Is An Excellent Case To Review The Ninth Circuit's Federalism-Defying Rule.

This case powerfully illustrates the untenable consequences of the Ninth Circuit's rule of virtually automatic certification for institutional reform cases. Simply by alleging that various purported "failings" exist "systemwide," plaintiffs have forced Arizona to divert millions of tax dollars from its child-welfare system to defending against an amorphous class action. The only alternative would be to lose control over a core state function altogether, and along with it the ability to delicately balance the competing needs of thousands of children with countless other costly state objectives and obligations.

Plaintiffs' only response is to emphasize that this petition is "interlocutory." BIO.34. But in the class-action context, that is all the more reason to grant review. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014); *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 (2013); *Wal-Mart*, 564 U.S. at 348. Rule 23(f) is designed to allow defendants to challenge class certification *before* a full-blown trial, lest the intense settlement pressure that inevitably follows from certification routinely preclude review. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013). The specter of costly class litigation therefore counsels in favor of certiorari, not against it—especially since the defendant here is a state agency. Pet.33-36; States.Br.14-19. The State should not be forced to submit to an intrusive

injunction and "remedial plan," BIO.31, before it can seek this Court's review of a certification decision that squarely conflicts with decisions from this Court and others.

Plaintiffs counter that a trial would give them "an opportunity to further prove the existence of" "the glue" that they claim "hold[s] the classes together." BIO.16. That argument itself erases any potential doubt about the pressing need for this Court's intervention. As this Court has held time and again, plaintiffs must prove that Rule 23 is satisfied *before* they may proceed to the merits. That plaintiffs even now argue otherwise confirms beyond doubt the fundamental incompatibility between this Court's jurisprudence and the Ninth Circuit's regime.

CONCLUSION

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

Respectfully submitted,

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