Nos. 17-17501 & 17-17502

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

B.K. by her next friend Margaret Tinsley, et al., Plaintiffs/Appellees, v. Gregory McKay, in his official capacity as Director of the Arizona Department of Child Safety, and Thomas J. Betlach, in his official capacity as Director of the Arizona Health Care Cost Containment System, Defendants/Appellants.	District Court No. 2:15-CV-00185-PHX-ROS

APPELLANTS' JOINT REPLY BRIEF

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INTRODUCTION

The classes in this case are irreparably defective. Plaintiffs have not explained how a generalized "risk" can create a justiciable claim when the Supreme Court has squarely held it cannot. Nor have they explained why the Constitution permits them to sue on behalf of thousands who lack standing. Plaintiffs have also not explained how a court can conduct a "rigorous" class certification analysis based only on allegations; how merely being a foster child makes that child "typical" of every foster child in the state; or how a single, "indivisible" injunction can address multiple competing issues.

Perhaps most fundamentally, Plaintiffs have not shown how their claims can *actually be tried on a classwide basis*. Plaintiffs enumerate problems without identifying common causes and *assume* Defendants are liable without offering any means of proving it. Without common causes and common means of proof, this purported "*class* action" will disintegrate into an endless search for a non-existent common question. The district court's Order certifying the classes should be reversed.

FACTUAL BACKGROUND

This appeal arises in an unusual posture. The district court granted class certification while discovery was ongoing. This Court granted interlocutory appeal regarding class certification, but, in the meantime, the parties continued collecting new information, including depositions and expert reports. Consequently, a significant

body of evidence now exists that was not before the district court when it granted class certification.

The changing factual landscape is germane to the case's underlying merits because federal courts must "return control to state and local officials as soon as a violation of federal law has been remedied," so injunctive relief of the type Plaintiffs seek is appropriate only if there remains "an ongoing violation of federal law[.]" *Horne v. Flores*, 557 U.S. 433, 451, 454 (2009). Liability is therefore a moving target in any case seeking injunctive relief. Unlike a damages action—where liability is largely fixed in time—Defendants' liability can change or even evaporate depending on the evolution of facts.

Nevertheless, this new evidence should have no impact on the outcome of this appeal. As explained below, this appeal does not require the Court to resolve evidentiary conflicts regarding the merits; instead, it merely requires the Court to determine whether evidentiary conflicts *can* be resolved in *classwide* proceedings. Still, because bad facts risk making bad law, *see Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting), the record should be clarified at the outset.

Plaintiffs devote much of their Answering Brief to presenting their evidence in the light most favorable to them. For instance, they elaborate on their expert reports without even mentioning Defendants' contrary expert reports. *See* AB 13-31. Defendants' initial expert reports are available, *see* ER00332-ER00418, if the Court seeks a balanced discussion.

Plaintiffs also treat *old* data as if they reflected *continuing* problems, even where newer data are available. Some examples:

- Plaintiffs claim "DCS is the 'de facto parent' of approximately 18,000 children [in out of home care]. . . . " AB 3. As of March 31, 2018, the number of children in out-of-home care decreased to 14,929. *See* Child Welfare Reporting Requirements Semi-Annual Report (CWRRSAR) for October 1, 2017 through March 31, 2018, p. 5, *available at* https://dcs.az.gov/reports-data/dcs-reports.[1]

- Plaintiffs contend "from October 1, 2015 through March 31, 2016, 974 children remained in a shelter for more than 21 consecutive days." AB 24. Plaintiffs fail to note that from October through March of 2018, the number had fallen to 462. *See* CWRRSAR for October 1, 2017 through March 31, 2018, pp. 5-6, *available at* https://dcs.az.gov/reports-data/dcs-reports.

- Plaintiffs claim "DCS failed to timely initiate an attempt to see [children] in 28% of the reports of maltreatment it received over the three-year period from January 1, 2013 through January 31, 2016." AB 29. Plaintiffs ignore that for fiscal year 2018, DCS timely responded to reports of maltreatment in 93.4% of all instances. *See* DCS Monthly Operational Report (July 2018), Operational Data, Report Response Time FY 2018 YTD Total, *available at* https://dcs.az.gov/reports-data/dcs-reports.[2]

Intentional or otherwise, citing outdated information as if it were current skews perception of the case.

Even where Plaintiffs *do* recognize more recent data, they have done so one-sidedly. Defendants' Opening Brief cited a handful of extra-record materials; specifically: a post-class-certification report from one of Plaintiffs' own experts; an op-ed written by Plaintiffs' counsel; and some official government websites. *See* OB 3

[1] Last accessed on August 18, 2018, as were all other websites cited herein.

[2] These data are available on official government websites and are subject to judicial notice. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 999 (9th Cir. 2010).

n.1, 30 n.1, 38 n.16, 39, 55-56. All these sources are subject to judicial notice, *see Daniels-Hall*, 629 F.3d at 999, or do not depend on the truth of the underlying source. Plaintiffs, in contrast, repeatedly cite expert reports written after class certification—all commissioned by Plaintiffs themselves—*to prove the truth of disputed merits issues*. *See* AB 10 n.7, 12 n.8, 16 n.9, 17 n.10, 25 n.17, 28 n.18, 31 n.19, 32 n.20.

This appeal is not about the merits, and so Plaintiffs' assertions are irrelevant to the class certification issues. Nevertheless, if the Court has questions about the merits, it should consider supplementing the record with Defendants' updated expert reports, available as attachments to Doc. Nos. 393 and 402. These reports rebut Plaintiffs' one-sided assertions and document the immense effort Defendants have undertaken to improve child welfare in Arizona.

ARGUMENT

I. PLAINTIFFS' SPRAWLING SUPER-CLASSES LACK COMMONALITY.

Plaintiffs contend DCS is deliberately indifferent to the welfare of *every* child in its care, and that DCS and AHCCCS have caused children to receive insufficient Medicaid services. Defendants dispute these allegations, but the question on appeal is not whether Plaintiffs or Defendants are right, or even whether Plaintiffs have presented *evidence* that they are right. The question is whether a trial court can determine who is right without individualized inquiries. It cannot. The "glues" Plaintiffs propose to hold their classes together do not stick.

A. The Supreme Court has rejected the notion that anyone subject to an inadequate governmental system faces a "substantial risk of harm."

Plaintiffs assert that every child in DCS custody has a common due process claim because "each class member is exposed to" a common "risk." AB 42. They also assert that "Defendants' argument on all these issues is that the class action remedy is *never* appropriate unless each class member has experienced actual harm." *Id.* at 36 (emphasis original). Both assertions are false.

Defendants have repeatedly acknowledged that a substantial risk of serious harm supports a due process violation and that actual harm is not required. *See, e.g.*, OB 6, 14-16, 18-20, 31. The real dispute is over what constitutes *substantial* risk. The "substantial risk" requirement arises from the "irreducible constitutional minimum" of standing, which requires "injury in fact." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992). Although "injury in fact" does not require Plaintiffs to show they were actually harmed, it does require them to show "an invasion of a legally protected interest" that is "actual *or imminent*, not conjectural or hypothetical." *Id.* (emphasis added; citations, quotation marks, and footnote omitted). "An allegation of future injury may" therefore qualify "as injury in fact," but only "if the threatened injury is certainly

impending, or there is a *substantial* risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quotation marks omitted).[3]

This limitation recognizes that risk exists on a continuum. A seriously ill prisoner, for instance, could be said to face some degree of "risk" from an inadequate prison infirmary. But so could everyone in the prison, because they someday might get sick. And so too everyone in Arizona, because they someday might be convicted of a crime and sent to that prison. A line must be drawn *somewhere*; otherwise, nearly anyone could sue the government for imperfect performance.

But the limitation also serves a broader purpose: it "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("*Casey*"); *accord id.* at 357. "[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). The "role of courts" is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm," *Casey*, 518 U.S. at 349; it is not "to become virtually continuing monitors of the wisdom and soundness of" the other branches. *Lujan*, 504 U.S. at 577. Whether a plaintiff faces a *substantial*

[3] As these cases illustrate, the Supreme Court uses "substantial" and "imminent" interchangeably when describing the degree of risk required. *See also Helling v. McKinney*, 509 U.S. 25, 34 (1993) (requiring "sufficiently imminent dangers"); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Helling* to hold that deliberate indifference requires "a substantial risk of serious harm"); *Baze v. Rees*, 553 U.S. 35, 49-50 (2008) (plurality op.) (using "substantial" and "imminent" to describe the same standard).

risk because of a *particular* invasion of his or her rights is a discrete question a court can answer. Whether an executive decisionmaker's performance is "good enough" to stay on the job is a *political* question outside the court's purview.

Casey therefore drew a bright line: "merely the status of being subject to a governmental institution that was not organized or managed properly" *is not enough to create a justiciable claim*. 518 U.S. at 350. If, for example, "a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared[.]" *Id.* (internal citation omitted); *see also Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 55 (1st Cir. 2014) (rejecting argument that "deficiencies" in a child-welfare system "mean that the children are exposed to an incrementally greater risk of future harm, and harm of constitutional dimensions[;]" "[t]hat there may be deficiencies yet to be fully addressed does not establish that there has been a constitutionally cognizable increased risk of class-wide harm").

Casey is flatly inconsistent with *Parsons v. Ryan*, which held that every Arizona prison inmate—healthy and unhealthy alike—faced a "substantial risk of serious harm" due to the existence of inadequate prison medical facilities. 754 F.3d 657, 678-79 (9th Cir. 2014) ("*Parsons I*"). The *Parsons I* approach supports Plaintiffs' case, but it controverts *Casey*. That is why Defendants acknowledge the conflict and argue *Parsons I* should be overruled.

Plaintiffs' two-paragraph discussion of *Casey*, on the other hand, simply embraces what helps Plaintiffs in *Parsons I* and ignores what hurts them in *Casey*:

> [*Casey*] reversed an injunction requiring reform to the law-library and legal-assistance system in Arizona prisons. The Court might have sustained the injunction if "the right at issue—the right to which the actual or threatened harm must pertain—were the right to a law library or to legal assistance." But the Court held that no such right existed; rather, the only pertinent right was the "right of access to the courts," an end to which law libraries and legal assistance are merely means. Because prisoners were only twice denied their right of access to the courts, the prisoner class lacked standing for a systemwide injunction.
>
> Here, by contrast, the right to which the actual or threatened harm must pertain is the right to be free from a substantial risk of harm. As discussed in the next section, each class member is exposed to that risk because of practices they all face.

AB 42 (citations and some quotation marks omitted).

These statements embrace two equally erroneous arguments. First, Plaintiffs suggest *Casey* is distinguishable because it involved a non-risk-based claim (access to the courts), while this case involves a risk-based claim (freedom from deliberate indifference). If that distinction were valid, it would defeat Count Two because Medicaid claims are not risk-based. *Compare Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (describing elements of a deliberate-indifference claim with reference to risk), *with Katie A., ex rel. Ludin v. Los Angeles Cnty.*, 481 F.3d 1150, 1158 (9th Cir. 2007) (describing elements of a Medicaid claim without reference to risk). Regardless, the distinction is false because *Casey* also expressly discussed risk-based claims involving deliberate indifference to prison medical care. 518 U.S. at 350. Those claims are

doctrinally "identical" to the deliberate-indifference claims raised here. *Tamas v. Dep't. of Soc. & Health Servs.*, 630 F.3d 833, 845 (9th Cir. 2010). If *Casey* applies to them, it applies here, too.[4]

Second, Plaintiffs argue that the *Casey* plaintiffs failed only to provide *enough* examples of mismanagement. The *Casey* plaintiffs "were only twice denied their right of access to the courts," and Plaintiffs suggest the outcome would have differed if the *Casey* plaintiffs had simply shown more denials of access. AB 42. The Juvenile Law Center and the Law Professors make similar arguments. *See* JLC Brief at 14; Professors' Brief at 12 n.3.

Casey indeed held that "two instances" of actual harm "were a patently inadequate basis for a conclusion of systemwide violation," 518 U.S. at 359, a holding which only highlights the inadequacy of Plaintiffs' factual allegations to support their wide array of claims. But *Casey also* squarely stated that "merely the status of being subject to a governmental institution that was not organized or managed properly" is insufficient to support a constitutional claim. *Id.* at 350. *Casey*'s narrower holdings do not negate its broader holding. "*[A]ll* alternative rationales for a given result have precedential value." *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925 n.21 (5th

[4] It is no answer that *Casey* did not actually *apply* its rule to a deliberate-indifference claim. This Court is "bound by the theory or reasoning underlying a Supreme Court case, not just by its holding[.]" *Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 (9th Cir. 2008) (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Cir. 1977) (en banc) (quotation marks omitted); *accord Operating Eng'rs Pension Tr. v. Charles Minor Equip. Rental*, 766 F.2d 1301, 1304 (9th Cir. 1985).

Contrary to Plaintiffs' assertions, a faithful application of *Casey* does not mean civil-rights class actions will "never" be appropriate to prevent future harms. AB 36. It just means that a plaintiff must go "one step further," *Casey*, 518 U.S. at 351, and "articulate how a *particular* deficit creates a *substantial* risk of serious harm in light of the serious … needs of that [person] or group of [persons]," *Parsons v. Ryan*, 784 F.3d 571, 577 (9th Cir. 2015) ("*Parsons II*") (Ikuta, J., dissenting from denial of rehearing en banc) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)) (emphasis added). Defendants' Opening Brief lists numerous examples, including delousing procedures, sentencing-credit policies, bathroom access policies, Hepatitis C treatment policies, contaminated water systems, climate-control systems, asbestos exposure, and fire prevention systems. OB 29. Those examples all involved a substantially elevated risk from a clearly identifiable cause. This case does not.

B. A "practice" of failing to provide services cannot bind the classes together because it cannot provide a common answer to the question of why services were not provided.

Plaintiffs next argue that "systemic practices" bind the classes together. *E.g.*, AB 35. According to Plaintiffs, these "practices" include:

- "fail[ing] to maintain an adequate array of therapeutic services";
- "burden[ing] its foster care workers with unreasonably high workloads";

- "fail[ing] "to remedy its significant shortage of licensed family foster homes" and therefore "plac[ing] large numbers of children in" less-preferable settings;

- "unnecessarily separat[ing]" siblings and "plac[ing] them unreasonably far from their home communities";

- "frequently fail[ing] to provide" physical and dental health services to "many children"; and

- "fail[ing] to timely complete" abuse and neglect investigations.

Id. at 43-44. Plaintiffs argue these "practices" establish commonality "because 'either each of the policies and practices is unlawful as to every class member or it is not.'" *Id.* at 44 (quoting *Parsons I*, 754 F.3d at 678) (brackets omitted).

The Opening Brief discusses the infirmity in describing a pattern of problems as a "practice"—the fact that a system sometimes fails does not mean it has a "practice of failing."[5] Regardless, the underlying issue is not whether Plaintiffs have produced evidence of problems within Arizona's child-welfare system. It is whether a court can determine *why those problems exist* without conducting individualized inquiries. That is what is required by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Plaintiffs propose no plausible way of doing it.

[5] Plaintiffs frame all three of their substantive due process claims as a "practice of failing." AB 13, 25, 28.

1. The existence of aggregate problems does not establish causation or statewide deliberate indifference.

Deliberate indifference has both objective and subjective elements. Plaintiffs alleging deliberate indifference must show:

1. Objectively serious harm or "an objectively substantial risk of serious harm." *Tamas*, 630 F.3d at 845.

2. That the defendant's subjective *mens rea* rose to the level of conscience-shocking deliberate indifference. *Henry A. v. Willden*, 678 F.3d 991, 1000-01 (9th Cir. 2012); *Tamas*, 630 F.3d at 844.

3. That "the defendants' actions were both an actual and proximate cause of their injuries." *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013). Accordingly, Plaintiffs must do more than demonstrate problems exist. They must also show *why* those problems exist—the subjective and causative elements of their claim.

Similarly, the Medicaid Act requires states to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals[.]" 42 U.S.C. § 1396a(a)(8). It is therefore not enough for Plaintiffs merely to show that some members of the class did not receive Medicaid services. There are many reasons beyond AHCCCS's control why a child might miss an appointment or fail to follow medical advice. So Plaintiffs must show

why class members did not receive services—for instance, that the state denied them an "opportunity" to apply for services or to obtain reasonably prompt services.

Class certification therefore depends on whether the question—"*Why* am I not receiving Medicaid benefits or minimally sufficient services from DCS and AHCCCS?"—can be answered classwide without individualized inquiries. If it can, it would have the capacity "'to generate common *answers* apt to drive the resolution of the litigation'" because it would establish a prima facie case for every element of Plaintiffs' claim. *Wal-Mart*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). But if it cannot, class certification is inappropriate because the court would have to make individualized inquiries to determine *why* the problems occurred, and those "'[d]issimilarities within the proposed class" would "impede the generation of common answers.'" *Id.* (quoting Nagareda, *supra*, at 132).[6]

Calling problems classwide "practices of failure" does not answer the critical question. Showing an inadequate "array of therapeutic services"—assuming this states a claim under *Casey* in the first place—does not explain *why* those services were inadequate. Showing DCS does not employ enough caseworkers does not explain *why*

[6] Plaintiffs therefore miss the mark when they complain that Defendants failed to "seriously dispute the evidence" of their purported "practices." AB 44. Defendants *do* dispute that evidence, but for now the dispute is irrelevant. The question before the Court is not whether these "practices" exist, but rather whether their *causes* can be determined without individualized inquiries.

it does not, and showing there is a "shortage of licensed family foster homes" does not show DCS *caused* the shortage. And so on, for each of Plaintiffs' allegations. Lumping problems together as "patterns" or "practices" misses the point. Saying a system fails—even in predictable ways—does not explain *why* those failures occurred.

That analytical flaw has serious consequences. Consider the allegation that DCS has a "practice" of having too few caseworkers. Assuming *arguendo* that this is true, a lack of caseworkers might be explained by countless factors other than deliberate indifference. It takes years to train a caseworker,[7] and Arizona experienced a historic spike in child-welfare cases after the Great Recession. It might have been *impossible* to expand the pool of available social workers quickly enough to meet that sudden need.[8] The pool of qualified social workers may have been too small for reasons outside of DCS's control, whether it was too few social-work majors at the state universities, or the rarity of people who can endure the emotional strain of caring for abused or

[7] *See* Ariz. Dept. of Child Safety, *Career Opportunities: DCS Specialist* https://dcs.az.gov/about/career-opportunities/dcs-specialistdcs-trainee.

[8] Even one of Plaintiffs' experts acknowledged that Arizona's foster-care population "more than doubl[ed]" between 2010 and 2016, and "[t]he result is that today Arizona is responsible for the safety and wellbeing [sic] of more children than it can adequately care for." ER01258. Assuming that is true, it indicates that problems arose from factors outside Defendants' control, not because of some sudden outbreak of managerial deliberate indifference.

neglected children.[9] DCS also may have appropriately prioritized the limited pool of social workers by "triaging" them to areas of urgent and immediate need—such as investigations—instead of long-term case management. After all, child-welfare professionals may "exercise professional judgment in ordering improvements over time, or in deciding which deficiencies to address first." *Connor B.*, 774 F.3d at 56-57; *see also* ER00544 (indicating that DCS engaged in precisely this sort of triage).

If Director McKay were truly deliberately indifferent to a need for more caseworkers, then enjoining DCS to "employ more caseworkers" could provide a remedy. AB 63. "In public law litigation, however, defendants fail for many reasons besides intransigence." Ross Sandler & David Schoenbrod, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 149 (2003). And, if a shortage existed for other reasons, an injunction would *actively harm* Plaintiffs. If a training lag created a shortage that was later cured by time and decreasing numbers of foster children, an injunction would funnel money *away* from foster children to court-appointed "monitors" who would oversee improvements that would have happened anyway. If a shortage persisted because of factors outside of DCS's control, then DCS could be held in contempt for failure to achieve the impossible. And, if a shortage

[9] "The available data currently reflect an estimated national average turnover rate of approximately 30 percent (with individual agency rates as high as 65 percent and as low as 6 percent)." Casey Family Programs, *How does turnover affect outcomes and what can be done to address retention?*, https://www.casey.org/turnover-costs-and-retention-strategies/.

existed because DCS legitimately prioritized scarce resources to other areas, then an injunction would scramble those priorities—like ordering a doctor to check her patient's cholesterol before treating a spurting artery.[10]

These explanations admittedly entail speculation. But so do Plaintiffs', and that is precisely the problem. *All* explanations for the purported lack of caseworkers are speculative because Plaintiffs have not met their burden to provide a classwide means of explaining the *causes* of the alleged shortage. That means there is no "common question" to bind the classes together.

The parallels in *Wal-Mart* are striking. The *Wal-Mart* plaintiffs argued that evidence of company-wide gender disparities established a common question regarding "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies … that may have worked to unlawfully discriminate against them in violation of Title VII." 564 U.S. at 347, 356-57. The Supreme Court rejected this artificial commonality. In a Title VII action, "the crux of the inquiry is the reason for a particular employment decision[.]" *Id.* at 352 (quotation marks omitted). Mere evidence of systemwide disparities could not resolve that inquiry because it could not explain *why* those disparities existed, "let alone raise the inference

[10] *See also* Sandler & Schoenbrod, *supra*, at 149 ("Governor Michael O. Leavitt of Utah in 1994 signed a foster care and child protective services consent decree … but regretted it two years later. He said that 'the litigation has become a hinderance to our ability to fix the system, a diversion. It's the single part of my job that I find most difficult. We are dealing with social trends we don't control.'").

that" there was "a company-wide policy of discrimination[.]" *Id.* at 356-57. As a result, the class failed. "Without some glue holding the alleged reasons for [the employment] decisions together, it w[ould] be impossible to say that examination of all the class members' claims for relief w[ould] produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352.

The same is true here. Plaintiffs wish to sue about thousands of child-welfare and Medicaid decisions at once. *Wal-Mart* requires them to provide significant proof of a common answer to the crucial question of *why* those decisions occurred. As exemplified elsewhere in this brief, providing examples of bad outcomes cannot explain why bad outcomes occurred and therefore cannot establish commonality.

Plaintiffs never confront this problem. They assert *Wal-Mart* is distinguishable because the aggregate statistics in that case involved "millions of employment decisions … committed to local managers' broad discretion at 3,400 separate stores," while here, "decision-making is centralized in just two agencies." AB 52. That assertion is plainly wrong. Every organization centralizes some decisions and delegates others. One could just as easily say that decision-making in *Wal-Mart* was "centralized in just one company," while child welfare decisions are committed to individual caseworkers' broad discretion. But even indulging the false notion that every decision made at DCS and AHCCCS is "centralized," it would not establish what Plaintiffs must prove: (1) that the problem *was caused* by a Defendant's decision; and (2) in the case of DCS, that the decision was *motivated* by deliberate indifference.

Nor is it enough to observe that the alleged problems are "longstanding." AB 15. Persistence might circumstantially suggest deliberate indifference, *see Farmer*, 511 U.S. at 842-43, but only if other plausible competing inferences can be excluded. *See Parker v. Freightliner Corp.*, 940 F.2d 1019, 1027 (7th Cir. 1991) ("circumstantial evidence will negate other reasonable causes … only if the evidence justifies an inference of probability as distinguished from mere possibility") (quotation marks omitted). *Farmer* offers the example of a prison warden's failure to prevent known, repeated attacks against an individual prisoner. 511 U.S. at 842-43. That would suggest deliberate indifference because there is a readily discernible cause of the problem that is within the warden's immediate control. Otherwise, the inference fails. A "longstanding" problem might just as easily be intractable for reasons beyond the agency's control.

The history of child-welfare class-action litigation in this country demonstrates the error in inferring causation, and deliberate indifference, merely from longstanding problems. Federal courts themselves routinely supervise child-welfare systems for years without reaching their goals.[11] Defendant McKay has only been Director of DCS since February 10, 2015. *Governor Doug Ducey Announces Management Changes at*

[11] *See, e.g.*, *LaShawn A. v. Bowser*, No. 1:89-CV-01754 (D.D.C.) (under judicial supervision since August 1991); *Juan F. v. Rell*, No. 2:89-CV-00859 (D. Conn.) (under judicial supervision since January 1991); *D.B. v. Granholm*, No. 2:06-CV-13548 (E.D. Mich.) (under judicial supervision since 2008); *Johnson v. Barbour*, No. 3:04-CV-00251 (S.D. Miss.) (same).

Department of Child Safety (Feb. 10, 2015), *available at* https://azgovernor.gov/governor/news/governor-doug-ducey-announces-management-changes-department-child-safety. A court cannot infer he is deliberately indifferent based on allegations that he failed to do in three years what *federal courts* could not do in decades.

Plaintiffs provide no analysis to counter Defendants' explanation that they have misused aggregate statistics. Rather, Plaintiffs observe that Defendants use statewide aggregate data to measure their own performance. AB 52. "Presumably," Plaintiffs add, "Defendants do so because they recognize the probative value of the data." *Id.* Of course Defendants presume correctly; aggregate data is probative for appropriate analyses. But it is also blind to complex causes; erases local variations; and cannot explain the reasons for aggregate results. Plaintiffs offer no analysis to rebut the point of Defendants' argument: aggregate data cannot explain *why* problems occur. No competent agency would manage itself using *only* statewide data without considering individual causes. Yet that is how Plaintiffs rationalize their eligibility for class certification.

By contrast, class actions challenging truly common problems with common causes amenable to unitary solutions—sentencing-credit policies, contaminated water systems, asbestos exposure, and the like—are properly certified because they serve the purposes of efficiency and fairness under Rule 23(b)(2). Those classes do not require individual examinations because they have a common mechanism that explains *why*

the purported harm (or risk of harm) occurred. The court simply determines whether a facially illegal sentencing-credit policy exists, or whether an interconnected water system is tainted, or whether there is asbestos in the walls. Nothing like that ties the classes here together.[12]

2. Even if the existence of problems alone could raise an inference of causation or deliberate indifference, Defendants would be entitled to rebut that inference with individualized defenses.

Mere allegations of classwide harm cannot establish commonality for a second reason: Even assuming Plaintiffs can establish a classwide prima facie case, Defendants would be entitled to rebut that case with individualized inquiries.

Wal-Mart again shows why. As discussed, *Wal-Mart* held the mere existence of a gender disparity did not suggest the disparity was caused by "a company-wide policy of discrimination[.]" 564 U.S. at 356-57. Yet, even if it did, "that would still not demonstrate" commonality because Wal-Mart would be entitled to *rebut* that inference with individual evidence. *Id.* at 357. "Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have

[12] Defendants use the term "policies" as a shorthand for these common issues, but function is what matters, not form. A prison may not have a formal "policy" to contaminate its water, but a contaminated system could provide a common issue because liability could be efficiently litigated classwide based on the same body of evidence—evidence that proves or disproves liability in *every* class member's case. Conversely, everything a government does is affected by "policy" in some sense, but that does not mean everything a government does presents a common issue.

been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store." *Id.* These individualized defenses eliminated the efficiencies of a class action because, as in this case, there was no common question. *Id.*

Wal-Mart reiterated this principle when explaining why the class failed under Rule 23(b)(2). "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 564 U.S. at 367 (citations omitted). Numerous decisions have reached the same conclusion under both the Rules Enabling Act and the Due Process Clause. *See Tyson Foods, Inc., v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (class certification is improper if it "deprive[s]" the defendant "of its ability to litigate individual defenses"); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013), *not followed on other grounds by Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232-33 (2d Cir. 2008) (defendants have a due process right "to challenge the allegations of individual plaintiffs"); *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (9th Cir. 2010) (en banc) (courts may not calculate class damages in ways that "circumvent

individualized proof requirements and alter the substantive rights at issue"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member").

Properly constituted classes do not have this problem. Whether a water system is contaminated, for instance, does not depend on the circumstances of individual plaintiffs. The only defenses go to the water system itself, and individualized defenses are irrelevant. Because those defenses are "common to the claims made by all class members," they cannot cause "individual questions to overwhelm questions common to the class." *Tyson*, 136 S. Ct. at 1047 (quotation marks and ellipsis omitted). Here, by contrast, individualized defenses can disprove the allegations of causation and deliberate indifference. Plaintiffs assert that a court may infer deliberate indifference based on the existence of problems within DCS and that DCS and AHCCCS have caused every single deprivation of Medicaid services. Even if these erroneous inferences were sound, DCS and AHCCCS would have the right to rebut them by presenting individual evidence about *actual* reasons for the alleged problems, and those individualized defenses would "overwhelm questions common to the class." *Id.*

Plaintiffs therefore miss the point by responding that whether the aggregate data "ultimately does establish deliberate indifference" is a question "for trial, and 'is immaterial at the class certification stage.'" AB 52 (quoting *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1166 n.5 (9th Cir. 2014)) (brackets omitted). A court does not have to

determine whether Plaintiffs would ultimately succeed at trial. But it *does* have to determine whether that trial can produce a sound classwide judgment *without individualized inquiries*.

In some cases, it can. In *Jimenez*, for example, the plaintiffs argued "that Allstate ha[d] a practice or unofficial policy of requiring its claims adjusters to work unpaid off-the-clock overtime[.]" 765 F.3d at 1162-63. Allstate responded that this alleged "informal policy" did not exist. *Id.* at 1166 n.5. *Jimenez* rightly found commonality because Allstate's defense could be litigated classwide by presenting the testimony of the managers who were alleged to have been implementing the purported policy—testimony that does not vary based on the circumstances of the individual class members. *Id.* at 1166. Here, by contrast, Plaintiffs simply infer DCS is deliberately indifferent to substantial risks because sometimes children are harmed. *That* contention is amenable to individualized defenses that "overwhelm questions common to the class." *Tyson*, 136 S. Ct. at 1047.

C. Plaintiffs cannot bind the classes together by treating non-constitutional standards as constitutional requirements and non-Medicaid standards as statutory requirements.

There is no classwide way to prove whether Defendants are liable. Plaintiffs attempt to avoid that problem by turning to things they *can* prove—such as best practices, "federal standards," state statutes, and whether Defendants meet their own deadlines—and pretending that *those* are the governing standards. *See, e.g.*, AB 17-18, 24, 29, 52.

That is a false attribution. Competent agencies, including DCS and AHCCCS, will set their standards well above constitutional minima. "[T]he federal [child welfare] standards," for instance, "were intentionally set above the performance of most states … specifically to push states to improve against that benchmark." *Connor B.*, 774 F.3d at 55 n.11. Due process does not convert these "aspirational statutory, regulatory, [or] private standards" into constitutional requirements. *Id.* at 55 (footnote omitted). So it is with the Medicaid Act—it requires only what it requires. It does not transform state law or agency standards into federal requirements. And punishing states for failing to meet their own targets would create perverse incentives. Substandard agencies could simply lower their standards to avoid being sued, and high performing agencies would be vulnerable to suit merely because they hold themselves to a higher standard. *See* Sandler & Schoenbrod, *supra*, at 148-49.

Regardless, relying on non-constitutional and non-statutory standards suffers from the same flaw as Plaintiffs' other arguments: It cannot explain *why* the standards were not met. *See Wal-Mart*, 564 U.S. at 356 (data showing Wal-Mart "'promotes a lower percentage of women than its competitors'" were "insufficient to establish that [the plaintiffs'] theory can be proved on a classwide basis" because they do not explain *the reason* for the companywide gender disparity). It therefore cannot provide commonality.

D. Plaintiffs cannot avoid individualized inquiries by relying on expert reports.

The district court reasoned that a trial would "not require the Court … to undertake an individualized determination" because "every child in the DSC [sic] custody is necessarily subject to the same … policies and practices[.]" ER00016. The district court further assumed that "expert reports" would provide the evidence to show that these "state-wide practices" existed. ER00018-19 n.5. *Parsons I* similarly assumed that expert reports could do much of the work of establishing a common question, *see, e.g.*, 754 F.3d at 662, 680, 683, 687, and crafting a common remedy, *id.* at 689 n.35.

But Plaintiffs' experts still do not address the critical issue. The experts do not claim to have evaluated a representative sample of actual cases to determine whether Defendants were actually at fault.[13] Nor do the experts claim their expertise allows them to divine causation and deliberate indifference where mere laypersons cannot. Instead, they: (1) describe problems, without showing their causes;[14] and (2) rely on

[13] Even if they had, it would not provide commonality. Before *Wal-Mart*, a handful of cases suggested courts could avoid individualized adjudications by evaluating a sample set of individual cases and then extrapolating those results to the class as a whole. *Wal-Mart* disposed of those suggestions. *See* 564 U.S. at 367 (disapproving of the "novel project" of "Trial by Formula"); 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 11:21 (5th ed. June 2018 Update) (courts have "consistently interpreted the Supreme Court's reference to 'Trial by Formula' as damning extrapolation from sample trials" and have "largely abandoned trial by extrapolation, as it is strongly disfavored and arguably unconstitutional").

non-constitutional and non-statutory standards to establish constitutional and statutory violations.[15]

In short, Plaintiffs' expert reports suffer from the same deficiencies as the rest of Plaintiffs' evidence. They cannot fill the gap in Plaintiffs' prima facie case with proof of classwide causation or deliberate indifference.[16] And, even if they could,

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[14] *See, e.g.*, ER00786 (Blatt Report) ("DCS operates a system that fails to meet its stated goals for children, and which continues to place these children at unnecessary risk of harm."); ER01518 (Happach Report) (asserting that children "are at substantial and unreasonable risk of harm due to an inadequate placement array"); ER01254 (White Report) ("the state agencies responsible for this care are failing to meet the behavioral health needs of children in its custody, which creates a significant risk of harm").

[15] *See, e.g.*, ER00769-70 (Blatt Report) (describing the "Minimum Requirements of Health Care Delivery" entirely by reference to private standards); ER01511 (Happach Report) ("I undertook an assessment of Arizona DCS with regard to its conformity to accepted standards of performance and practice in the child welfare field[.]"); ER01261-67 (White Report) (extensively discussing whether Defendants meet their own deadlines).

[16] The only statement that even arguably addressed deliberate indifference was this conclusion from Dr. Blatt:

> Based on my review of CMDP reporting to AHCCCS and its quality assurance documents, I see no evidence of shortages in the number or type of providers to meet foster children's physical and dental needs. Rather, it is my opinion, that the failure to effectively manage and coordinate children's care at DCS is causing these low levels of health care delivery.

ER00782 (footnote omitted); *see also* AB 27 (citing Dr. Blatt). Dr. Blatt appears to have reached this conclusion for two reasons. First, he claimed he saw "no evidence of shortages" in providers. ER00782. It is unclear where Dr. Blatt looked for such evidence, but regardless, even if one potential cause for the problems can be excluded

Defendants would still be entitled to do what the experts did not—determine the *actual* causes of the purported problems with evidence of *individual cases* in rebuttal. Those defenses would "overwhelm questions common to the class" and defeat commonality. *Tyson*, 136 S. Ct. at 1047.

E. Wal-Mart ended the certification of classes based on superficial common questions.

Plaintiffs next argue that their approach finds support in circuit-court and district-court decisions. AB 45. That may have been true once, but it is not anymore.

In the years before *Wal-Mart*, many courts tolerated "wildly indefinite class definition[s.]" *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 496 (7th Cir. 2012). Plaintiffs rely on three such pre-*Wal-Mart* cases: *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997); and *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994). But *Wal-Mart* has

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based on Dr. Blatt's say-so, it does not exclude *other* potential causes that still have nothing to do with deliberate indifference. Second, Dr. Blatt relied on reports listing "children in foster care for whom there is no billing record for a comprehensive physical health or dental health service within the first four months of care." ER00781. He then reasoned that DCS's use of these reports must be "ineffective" at ensuring care because "children appear to remain on these reports for months[.]" ER00783-84. But the reports in question are generated by looking at billing requests received by DCS's health-insurance plan. There are many reasons why DCS might not receive a billing request "for months"—the most obvious being that the child is already receiving care through a different insurance plan. And even falsely assuming that every missing billing request indicates a lack of service delivery, that *still* would not explain *why the service was not delivered*. As with so many other allegations, Dr. Blatt assumes Defendants are responsible merely because a problem exists; he does not demonstrate causation or deliberate indifference.

since "changed the landscape[.]" *DL v. District of Columbia*, 713 F.3d 120, 126 (D.C. Cir. 2013). It is now clear that classes based on "superficial common questions"—such as whether the plaintiffs were subject to the same governmental system or "'suffered a violation of the same provision of law'"—are not enough. *Jamie S.*, 668 F.3d at 497. "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." *Wal-Mart*, 564 U.S. at 350 (quotation marks and ellipsis omitted).

Even a cursory reading of *DG*, *Marisol A.*, and *Baby Neal* demonstrates that their analysis cannot survive *Wal-Mart*. Compare, for instance:

- *DG*, 594 F.3d at 1194 ("In deciding whether the proposed class meets [Rule 23's] requirements, the district court must accept the substantive allegations of the complaint as true[.]") (quotation marks omitted), with *Wal-Mart*, 564 U.S. at 350 ("Rule 23 does not set forth a mere pleading standard.");

- *Marisol A.*, 126 F.3d at 377 (affirming class certification regarding "'whether each child has a legal entitlement to the services of which that child is being deprived,'" and "'whether defendants systematically have failed to provide these legally mandated services'"), with *Wal-Mart*, 564 U.S. at 349-50 ("Commonality … does not mean merely that [the plaintiffs] have all suffered a violation of the same provision of law.");

- *Baby Neal*, 43 F.3d at 56 (commonality "is easily met"), with *Wal-Mart*, 564 U.S. at 350-51 (plaintiffs "must affirmatively demonstrate" commonality, and courts must conduct a "rigorous analysis" to determine whether plaintiffs have met their burden).

Plaintiffs next observe that *Parsons I* "cites a half dozen 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.'" AB 47 (quoting *Parsons I*, 754 F.3d at 681-82). But again, there is no dispute that plaintiffs may use class actions to challenge truly systemic *policies* that pose truly *substantial* risks of harm. Some of the cases cited in *Parsons* meet those requirements.[17] So do other cases cited in Plaintiffs' brief. *See Floyd v. City of N.Y.,* 283 F.R.D. 153, 173 (S.D.N.Y. 2012) (cited at AB 58) (certifying a challenge to New York City's "stop-and-frisk" program). This case does not.

Finally, Plaintiffs observe that *M.D. v. Perry*, 294 F.R.D. 7, 44 (S.D. Tex. 2013), and *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011) "certified classes of foster children challenging practices similar to those at issue here." AB 47. But the propriety of class certification in *M.D.* is deeply questionable and is currently on appeal before the Fifth Circuit. And, although the state did not appeal the class-certification order in *Connor B.*, the First Circuit's subsequent decision regarding the merits had much to say about the wisdom of certifying classes like this one:

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[17] *See Chief Goes Out v. Missoula Cty.*, No. CV 12-155-M-DWM, 2013 WL 139938, at *1 (D. Mont. Jan. 10, 2013) (policy denying fresh air and exercise); *Butler v. Suffolk Cty.*, 289 F.R.D. 80, 97-98 (E.D.N.Y. 2013) (class of inmates living in same unhygienic correctional facilities); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, 2012 WL 6738517, at *1 (S.D. Ind. Dec. 31, 2012) (class "claiming that the continual confinement of seriously mentally ill prisoners in segregation violates their right to be free from cruel and unusual punishment"). The remaining cases challenged amorphous "practices" and bear the same flaws as *Parsons I* itself. *See Hughes v. Judd*, No. 8:12-cv-568-T-23MAP, 2013 WL 1821077, at *23-24 (M.D. Fla. Mar. 27, 2013), *report and recommendation adopted as modified*, 2013 WL 1810806 (M.D. Fla. Apr. 30, 2013); *Rosas v. Baca*, No. CV 12-00428 DDP SHX, 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012).

> This is not a case in which the plaintiffs have shown that the [child welfare agency] has engaged in particular practices which have already caused direct harm to the entire class or even a majority of the class…. The assertion also fails that the present deficiencies mean that the children are exposed to an incrementally greater risk of future harm, and harm of constitutional dimensions. That there may be deficiencies yet to be fully addressed does not establish that there has been a constitutionally cognizable increased risk of class-wide harm[.]

Connor B., 774 F.3d at 55. Plaintiffs fail to mention this discussion, which aptly summarizes why class certification was inappropriate here.

Finally, Plaintiffs' *amici* suggest that *Brown v. Plata*, 563 U.S. 493 (2011), approved of the type of classes certified here. ACLU Brief at 30-31; JLC Brief at 14; Professors' Brief at 11. It did not. *Plata* arose from two cases regarding the California prison system. The first, *Coleman v. Brown*, involved a "class of seriously mentally ill persons[.]" *Plata*, 563 U.S. at 506. After a trial in 1995, the district court found "systematic failure[s]" in various areas and appointed a special master to oversee a remedy. *Id.* Twelve years later, the master found "that, after years of slow improvement, the state of mental health care in California's prisons was deteriorating" due to "increased overcrowding." *Id.* at 507. The second case, *Plata v. Brown*, involved a class of prisoners "with serious medical conditions." *Id.* In 2001, California conceded that it had violated the Eighth Amendment. *Id.* In 2005, a receiver was appointed, and in 2008, the receiver concluded the ongoing problems were caused, at least in part, by prison overcrowding. *Id.* at 507-09. The cases were later consolidated, and a three-judge district court ordered California to reduce its prison population to

137.5% of design capacity within two years, either by building new prisons or by releasing prisoners. *Id.* at 509-10. California appealed—arguing that the order was improper under the Prison Litigation Reform Act—and the Supreme Court affirmed. *Id.* at 500-02.

Plata's approach is admittedly in tension with *Casey*. As Justice Scalia observed in his dissent, the classes in *Plata* appeared to be certified under one of two theories. "The first is that although some or most plaintiffs in the class do not *individually* have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation." *Id.* at 552 (Scalia, J., dissenting). "That theory," however, "is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Id.* (Scalia, J., dissenting) (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.)). The second theory is "that every member of the plaintiff class *has* suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims." *Id.* at 552 (Scalia, J., dissenting). That, however, would be contrary to *Casey*. *Id.* at 552-53 (Scalia, J., dissenting) (citing *Casey*, 518 U.S. at 350). The *Plata* majority offered no response to this criticism. It cited *Casey* once for the proposition that courts cannot "unnecessarily reach out to improve prison conditions other than those that violate the Constitution," *id.* at 531 (citing *Casey*, 518

U.S. at 357), but it never explained how every member of the classes in *Plata* suffered a constitutional violation.

Nevertheless, there are at least two ways to reconcile *Plata* and *Casey*. The first is that "*Plata* involved the certification of two discrete classes: those prisoners with 'serious mental disorders,' and those with 'serious medical conditions.'" *Parsons II*, 784 F.3d at 578 (Ikuta, J., dissenting from denial of rehearing en banc). "These discrete classes may have [had] sufficiently similar serious medical needs" to establish substantial risk in a way the classes discussed in *Casey* did not. *Id.*

The second is that *Plata* was constrained by its procedural posture. Classwide liability was established by trial in 1995 (in *Coleman v. Brown*) and by concession in 2001 (in *Plata v. Brown*). California could have challenged the *Coleman* verdict by appeal or chosen not to settle in *Plata*. It apparently did not. When the case arrived at the Supreme Court, the question of whether a classwide constitutional violation occurred was therefore res judicata. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Commc'ns Telesystems Int'l v. Cal. Pub. Util. Com'n*, 196 F.3d 1011, 1017 (9th Cir. 1999). California was precluded from raising an untimely challenge to its own classwide liability. The Supreme Court similarly had no reason to address the issue, even if the finding of liability was questionable under *Casey*. The existence of a classwide constitutional violation was a given, and the only thing left was to determine the proper remedy.

That also explains how *Plata* fits together with *Wal-Mart*, which was issued only a few weeks later. *Wal-Mart* makes clear that class certification is about the search for

"common *answers*" that allow for efficient classwide litigation. 564 U.S. at 350 (quotation marks omitted). By the time *Plata* arrived at the Supreme Court, there had already been a "common answer" regarding liability. It is therefore unsurprising that *Plata* did not address the question of whether liability could be litigated classwide in one stroke. It was water under the bridge. Here, by contrast, the question is directly presented. Plaintiffs need a classwide means of answering that question, and they have presented none.

F. Rule 23 cannot permit what the Constitution forbids.

The Opening Brief described the three-way split in this Court's class-action standing cases. *Compare Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012) (all class members must have standing), *with e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016) (it need only be "possible" that all members have standing), *and Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (only "one named plaintiff" must have standing). The Opening Brief further argued that the best way to resolve this split would be to hold that *all* plaintiffs in a class must have standing, *see* OB 12-14, because standing is an "irreducible constitutional minimum," *Lujan*, 504 U.S. at 560, and Rule 23 cannot alter that minimum by allowing thousands of people without standing to sue.

Conversely, the notion that "only one" named plaintiff is sufficient for standing is flawed. Defendants agree only one named plaintiff is *necessary* for standing on each of the issues being litigated, at least in the sense that multiple named plaintiffs are not

required. If some named plaintiffs lack standing, the case can continue with the remaining plaintiffs who have it. *See, e.g.*, *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018); *Bates*, 511 F.3d at 985-88. But this does not mean the class itself need not have standing; indeed, the assumption behind cases like *Bates* and *Zappos* is that the class itself will *also* have standing. That is why class actions can continue even if the named plaintiff's claims become moot—the absent class members will fulfil the case-or-controversy requirement even if the named plaintiff cannot. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 752-57 (1976). Thus, while some cases admittedly suggest "standing is satisfied if at least one named plaintiff meets the requirements," *Bates*, 511 F.3d at 985, they mistake a *necessary* condition for a *sufficient* one. The better way to resolve the split is therefore to hold that everyone in the class must have standing.

Plaintiffs, meanwhile, do not explain why their view of the split is correct. They just ignore the split and assert Defendants have "[m]isstate[d]" the law. AB 53. Plaintiffs do not even *attempt* to explain how requiring only one member of the class to have standing can "be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure shall not abridge,

enlarge or modify any substantive right[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quotation marks omitted). The silence is telling.[18]

Instead, Plaintiffs make an alternative argument: "As the district court found, 'every single child in the foster care system faces a substantial risk of serious harm' if Defendants' practices fail to adhere to constitutional and Medicaid Act requirements." AB 53 (quoting ER00017) (citation omitted). From that, Plaintiffs reason "[e]ven if other class members were required to establish standing, that risk of harm suffices." *Id.* at 53-54. The error in Plaintiffs' approach should be familiar by now. Although a truly substantial risk of harm can provide standing, "merely the status of being subject to a governmental institution that was not organized or managed properly" cannot. *Casey*, 518 U.S. at 350.

Plaintiffs also assert Defendants have "concede[d] that 'class members need not show injury' for 'Article III standing.'" AB 53. Defendants did no such thing, nor could they have, given that "'injury in fact'" is an "irreducible constitutional minimum[.]" *Lujan*, 504 U.S. at 560. What Defendants *actually* argued is that "'the indivisible nature'" of Rule 23(b)(2) classes "is what *preserves* Article III standing … even though class members need not show injury: the remedy *must necessarily* apply to all class members." OB 42 & n.19 (quoting *Wal-Mart*, 564 U.S. at 360) (first emphasis

[18] That is particularly true regarding Plaintiffs' Medicaid claim—Plaintiffs have not cited a single decision that has certified a class based upon a right to be free from the mere possibility that the Medicaid Act *might* be violated.

added; second emphasis original). Because the indivisible relief arises from an "act[] or refus[al] to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), the relief is the same no matter how the class is drawn. That makes defining the "injury in fact" a largely academic exercise because any order will "*necessarily* benefit[] all members of the disfavored group, regardless of whether they suffered an actual injury." OB 42 n.19.

This unique feature of Rule 23(b)(2) classes only highlights problems with the classes here. Imagine a class of prisoners who allege their prison has "demonstrably unsafe drinking water[.]" *Helling*, 509 U.S. at 33. Even if the class definition were wildly over-inclusive—say "every citizen of the United States"—the remedy would still be limited to fixing the water system in the prison. The same will be true if the class were improperly limited only to a particular floor of the prison. In other words, true Rule 23(b)(2) classes are self-limiting. Collateral benefits will accrue to some persons without injury-in-fact (as is true in most litigation). *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). But standing principles are preserved by the unity of the class and "the indivisible nature of the injunctive or declaratory remedy warranted[.]" *Wal-Mart*, 564 U.S. at 360 (quotation marks omitted). No matter how the class is drawn, the indivisible remedy remains the same.

Here, by contrast, it matters *deeply* how many people are included in the class. Plaintiffs ask for DCS to be enjoined "to employ more caseworkers" and "to expand the number of non-congregate care facilities[.]" AB 63. But how many more

caseworkers should be hired, and by how much should which types of facilities be "expand[ed]"? The answer will vary depending on how many people suffered an injury (or substantial risk of injury) directly attributable to deliberate indifference. In other words, the remedy is proportional to the scope of the class. Certifying a class containing thousands of children who suffered no injury in fact will necessarily distort that remedy, either by making the remedy over-inclusive or by misdirecting it to uninjured parties.[19] As the Professors observe, that is surely a commonality problem. Professors' Brief at 11-12. But given that the Rules Enabling Act cannot amend the Constitution, it is also a problem under Article III.

G. Adherence to Supreme Court precedent will not endanger properly constituted civil rights actions.

Plaintiffs and their *amici* argue that Defendants' approach will undermine legitimate civil rights actions. But their argument rests on misconceptions.

Defendants do not argue that Plaintiffs must show identical harms.

The ACLU asserts that Plaintiffs "need not show that every single one of them has suffered the exact same injury arising in identical circumstance[.]" ACLU Brief at 3; *see also* JLC Brief at 8. Defendants have never argued otherwise. A truly common

[19] One might respond that a court could differentiate between injured and uninjured class members when crafting its remedy. But if that were possible, then why not do it now and define the classes in such a way that *everyone* has standing? The answer, of course, is that that there is no principled way of narrowing the classes in this case. Plaintiffs have nothing in common except their foster-care status and this lawsuit. *Cf. Wal-Mart*, 564 U.S. at 360.

policy—a failure to keep a prison at a livable temperature, for instance—might cause different harms depending on the vulnerabilities of individual plaintiffs. *See Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017). Commonality does not require those harms to be the same. It simply requires *the mechanism* of harm to be the same because the *common mechanism* is what allows the case to be litigated fairly as a class without individualized inquiries. As discussed, there is no such mechanism here.

Defendants do not argue that a policy must be "explicit" to justify class certification.

The Professors and the ACLU next suggest that Defendants believe only "explicit, stated policies" will qualify for class certification. Professors' Brief at 13. The Professors worry this would allow "pervasive customs or practices that cause class-wide harm" to go unaddressed. *Id.* The ACLU uses less restrained language, accusing Defendants of "harken[ing] back to the days of state and local government resistance to racial desegregation[.]" ACLU Brief at 29. These concerns are misplaced. Furthermore—although it should be clear already—adopting the approach advocated by Defendants, and six members of this Court in *Parsons II*, would not portend Jim Crow's return.

Although a challenge to an explicit policy is *sufficient* to establish commonality, that does not mean that *only* an explicit policy may establish commonality. As the Professors point out, Rule 23(b)(2) was created with racial desegregation in mind after some segregationist school districts simply replaced overt policies with equally

insidious, ostensibly individual determinations which they enforced in discriminatory ways. Professors' Brief at 16.

That point is well taken, but it also demonstrates why class certification was inappropriate here. As the Professors point out, "[t]he drafters of 23(b)(2) specifically sought to avoid an analysis focusing only on *individual outcomes* rather than *systemic causes*." Professors' Brief at 18. In the school segregation cases, the systemic cause was clear: *deliberate racism*. Although the districts purported to have racially neutral policies, those policies were mere pretexts for *de facto* policies of discrimination.

A secret, *de facto*, or unwritten policy is still a policy. A court can evaluate proof of whether a secret policy exists without individualized inquiries, either through direct evidence about its existence, *see Jimenez*, 765 F.3d at 1165-66 & n.5 (affirming class certification regarding the existence of an unwritten policy), or through circumstantial evidence that a formal policy is pretextual, *see, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). If the policy exists, a court can strike it down in a unified remedy. That a pretextual policy ostensibly relies on "individualized" determinations is of no moment. Superficial *individual* questions cannot *defeat* class certification any more than superficial *common* questions can *justify* class certification.

Here, there is no allegation or evidence that Defendants have a secret or tacit policy to place children at significant risk of serious harm. Instead, Plaintiffs and their experts simply assume that Defendants *must* be the cause of *every* harm, whenever it occurs. That ignores the critical inquiry: proof of the *actual systemic cause* of the

problem. Or, to analogize to school desegregation, it is like certifying a class based solely on evidence that a district's schools have a racial imbalance. A mere racial imbalance is not enough, *see Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977); there must be some classwide means of proving that the imbalance was *caused* by discrimination. Similarly, there must be some classwide means of proving that the problems here were *caused* by Defendants (and, in the case of DCS, that the problems resulted from deliberate indifference). Plaintiffs have not offered one.

Defendants do not argue that every class member must submit individualized proof of standing.

Plaintiffs' *amici* next characterize Defendants' argument to be that every class member is "required to submit specific evidence to establish their own standing" at the class-certification stage. Professors' Brief at 11; *see also* JLC Brief at 12-13. Not so. Article III merely requires that standing "'be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Casey*, 518 U.S. at 358 (quoting *Lujan*, 504 U.S. at 561). This requirement is satisfied with evidence showing a classwide cause of plaintiffs' "injury in fact." *Cf. Wal-Mart*, 564 U.S. at 349-50. There is no such showing here.

A proper understanding of class actions preserves claim aggregation in cases where it is both efficient and fair.

Finally, Plaintiffs and their *amici* contend Defendants' approach will leave civil-rights violations uncorrected. Many of these worries spring from concerns that have

already been addressed. Classes involving a truly classwide substantial risk of harm will continue to be certified. So too will classes challenging institutional defendants that "act[] or refuse[] to act on *grounds that apply generally to the class*." Fed. R. Civ. P. 23(b)(2) (emphasis added). The only classes that will *not* be certified are question-begging classes like the ones in this case—classes which *assume* the defendants have illegally caused the problem without providing a classwide way to *prove* it.

Meanwhile, individual plaintiffs at substantial risk of harm—but harm not traceable to a classwide cause—may still file individual suits under 42 U.S.C. § 1983. These suits also provide monetary damages, which are unavailable in Rule 23(b)(2) class actions. *See Wal-Mart*, 564 U.S. at 360 (claims for monetary relief cannot be certified under Rule 23(b)(2) unless they are merely "incidental to the injunctive or declaratory relief"). Individual plaintiffs are also entitled to attorneys' fees under 42 U.S.C. § 1988(b). Indeed, this fee-shifting provision exists specifically "to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotation marks omitted).

Individual injunctive remedies will appropriately be narrower than class injunctive remedies if the plaintiff can only show individual harm and not classwide harm. But even then, individual remedies will still provide broader benefits. The threat of damages and attorneys' fees will incentivize reform. And "[d]ecisions favorable to particular plaintiffs will have their effect in the normal way: through the force of precedent." *Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008).

Furthermore, class actions are not necessarily better than individual suits at achieving lasting institutional change. "Scholars and commentators from across the political spectrum have documented the limited success" of "institutional reform" litigation, and even some "strong proponents of court-led reform" have concluded "that they cannot show that" such cases "actually do more good than harm[.]" Sandler & Schoenbrod, *supra*, at 6 & nn.11 & 12 (collecting authorities). That is predictable where—as here—courts attempt to implement "institutional reform" without a realistic means of determining whether the institution was at fault in the first place.

Absent demonstrable fault (individual or classwide), the remedy is the ballot box, not the courtroom. There is no reason to think the political branches will fail to protect foster children because of animus or prejudice. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Indeed, Arizona's political process has *already* acted to protect them. Governor Ducey appointed Director McKay with the express mission of "permanently reform[ing] [Arizona's] child safety system." *Governor Doug Ducey Announces Management Changes at Department of Child Safety* (Feb. 10, 2015), *available at* https://azgovernor.gov/governor/news/governor-doug-ducey-announces-management-changes-department-child-safety.

The ACLU speculates that individual lawsuits would not allow "systemic deficiencies" to "come to light" or grant "access" to "facilities and documents[.]" ACLU Brief at 26. But it is hard to see why that would be so. Whether a defendant had the requisite knowledge of a "substantial risk"—and thus was deliberately

indifferent—"is a question of fact subject to demonstration in the usual ways[.]" *Farmer*, 511 U.S. at 842. Individual defendants harmed by a genuinely "systemic" cause can direct the full panoply of discovery at proving that point.

The ACLU also argues class remedies are necessary because individual prisoner suits are often dismissed under the Prison Litigation Reform Act for failure to exhaust administrative remedies. ACLU Brief at 26. Rule 23 is not an alternative to the exhaustion requirement; indeed, the exhaustion requirement exists because courts were "flood[ed]" with individual prison-condition suits. *Jones v. Bock*, 549 U.S. 199, 203 (2007). Pursuing the misguided point further, the ACLU complains that individual suits are ineffective because they "are often dismissed based on … a failure to show deliberate indifference[.]" ACLU Brief at 26. If a plaintiff cannot "show deliberate indifference," then her suit is meritless and *should* be dismissed. The ACLU's point perfectly encapsulates how Plaintiffs' approach sweeps in class members who have no constitutional claim. That is a flaw, not a feature.

Finally, the ACLU argues for broad class certification because it led to favorable outcomes in *Parsons*. The accuracy of the ACLU's descriptions, which appear to treat disputed issues in *Parsons* as fact,[20] are beyond the scope of this brief.

[20] *Compare* ACLU Brief at 5 (citing the plaintiffs' complaint for the proposition that *Parsons* involved "'unnecessary pain and suffering, preventable injury, amputation, disfigurement, and death' that routinely occur[ed] in the Arizona prison system"), *with* ACLU APP079 (settlement agreement stating that "[d]efendants deny all the allegations in the Complaint" and do not admit "any wrongdoing").

True or otherwise, those descriptions are inapposite. Replacing one decisionmaker for another might bring *some* benefits to *some* individuals. But replacing executive decision-making with judicial decision-making is legally inappropriate, and its greater benefit to society is dubious at best.

Because all policymaking involves tradeoffs, "institutional reform" injunctions necessarily divert resources from "other individuals, social welfare programs, and institutions"—"'generally from one poor group to another[.]'" John P. Dwyer, *Pendent Jurisdiction and the Eleventh Amendment.*, 75 CAL. L. REV. 129, 163 & n.196 (1987) (quoting Jack B. Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 LAW & HUMAN BEHAV. 145, 146 (1982)). Worse, courts are structurally blind to these tradeoffs. Persons professing institutional injury will "come to court and narrate their grievances," *Rahman*, 530 F.3d at 627, as the ACLU has done in its amicus brief. But persons harmed *by the injunction itself* remain "invisible[.]" *Id.*; *see also* Dwyer, *supra*, at 163; Sandler and Schoenbrod, *supra*, at 155. A court will never hear from people who *could have benefitted* from resources directed to other areas. Nor will it know of innovative reforms precluded by the terms of an injunction. *See* Sandler & Schoenbrod, *supra*, at 147-48. Judicial intervention in furtherance of "systemic" reform causes real harms, often to the poor and vulnerable. Those harms can be addressed by political actors, but they will never be "brought to light" by litigation.

None of this means courts should "shrink from their obligation to enforce" constitutional rights. *Plata*, 563 U.S. at 511 (quotation marks omitted). It simply means

courts cannot treat the *causes* of purported constitutional harms as an afterthought. Demonstrating the way this problem plays out, the ACLU states the district court in *Parsons* recently decided it would "require Defendants to hire outside experts who can perform the *analysis necessary to understand why the deficiencies persist* and to opine as to the policies and procedures necessary to compel compliance[.]" ACLU Brief at 9 (emphasis added). That is the very "rigorous analysis" *Wal-Mart* required courts to undertake *before* they certify a class. If *Parsons* were properly certified, then the reason "why the deficiencies persist" would be known already—a common question would have established, in one stroke, that the deficiencies resulted from the defendants' alleged deliberate indifference. That in turn would reveal an obvious *remedy*—the court would simply order the defendant to implement the solution to which it was previously "deliberately indifferent." Instead, the *Parsons* court is still searching for the common question *that should have been identified at the class-certification stage*. The ACLU's observation illustrates how *Parsons I* put the cart before the horse.[21]

II. THE NAMED PLAINTIFFS ARE NOT TYPICAL OF THE CLASS.

The Opening Brief identified two errors in the district court's typicality finding. First, the Order found typicality based solely on disputed allegations instead of

[21] That the *Parsons* defendants settled despite this lack of a common question only highlights the power of improper class certifications to coerce settlements. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722 (9th Cir. 2010).

evidence. OB 37. And second, the Named Plaintiffs could not possibly be typical of the diverse interests of such a sprawling and heterogeneous class. *Id.* at 39.

Plaintiffs attempt to overcome the first flaw—the district court's reliance on mere allegations—by referring to *their own* summary of the evidence. Plaintiffs then accuse Defendants of "ignor[ing]" this evidence and contend it was sufficient to support a typicality finding. AB 55-56. But merely imagining the findings the district court *could have made* is not enough. Typicality requires a rigorous analysis to determine whether the named plaintiffs "are *in fact*" typical of the class. *Wal-Mart*, 564 U.S. at 350. By its own clear terms, the Order in this case found typicality based solely on allegations. *See* ER00019-20. That was a plain violation of *Wal-Mart*.

Plaintiffs respond to the second flaw—the potential conflicts inherent in their heterogeneous class—by relying on *Parsons I*. According to Plaintiffs, the Named Plaintiffs' claims are typical of those of the classes because "each is exposed to the same challenged practices, and to the same substantial risk of serious harm, as all other class members." AB 55. Even *Parsons I* did not go this far. As pointed out in the Opening Brief, *Parsons I* was "limited to forms of health care[.]" OB 39. Plaintiffs do not meaningfully respond to that point.

Nor can they. Even granting the mistaken notion that every child in DCS custody faces a constitutionally cognizable "substantial risk of serious harm," they manifestly do not all face "*the same* substantial risk of serious harm." Typicality ensures "the interests of the class members will be fairly and adequately protected in their

absence." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). This Court recently reiterated that Rule 23(a)(4)'s adequacy requirement—which serves the same purpose—"must be broken down *for specific application*" because "conflicts within classes come in many guises." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 607 (9th Cir. 2018) (emphasis added). For instance, a named plaintiff with stronger claims "may have interests in protecting those claims from class members with much weaker ones," while a named plaintiff with weaker claims might be tempted to settle quickly without pressing the stronger claims of others. *Id.*

The interests here do not "overlap," AB 55, in a way that fulfills the purposes of the typicality requirement. Health care, dental care, mental health care, sibling placement, congregate placement, and caseworker caseloads are all different interests, any of which could be deprioritized or bargained away by a named plaintiff who did not experience that particular alleged harm and whose interests may actually conflict with the interests of other plaintiffs. As explained in the Opening Brief, treating such disparate claims as "typical" of each other "defin[es] typicality at such a high level of generality as to render it meaningless[.]" OB 39.

III. THE ORDER VIOLATES RULES 65(B) AND 23(B)(2).

Plaintiffs contend that Rule 23(b)(2) requires only that injunctive relief be *possible* without individualized inquiries. That view is mistaken. Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply

generally to the class," such that "relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Moreover, these classes are "mandatory." *Wal-Mart*, 564 U.S. at 362. They provide "no opportunity for … class members to opt out, and do[] not even oblige the District Court to afford them notice of the action." *Id.* The reason these classes are "mandatory" is inherent in Rule 23(b)(2) itself. "'The key to the (b)(2) class is 'the *indivisible* nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful *only* as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360 (quoting Nagareda, *supra*, at 132) (emphasis added).

In other words, Rule 23(b)(2) classes are mandatory because they *must* be—"the relief sought *must perforce* affect the entire class at once[.]" *Id.* at 361-62 (emphasis added). As already discussed, that is why Rule 23(b)(2) does not require every class member to have suffered injury. Because the relief *must perforce* apply to everyone, even people who have not been injured will necessarily benefit. *See* Part I(F), *supra*. It is also why Rule 23(b)(2) classes can be certified even if some class members do not wish to challenge the defendant's actions. *See* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 651 (2015). Because the relief *must perforce* apply to everyone, denying relief to *some* class members would mean denying it to *all* class members. *See Wal-Mart*, 564 U.S. at 361-62. A court cannot strike down a discriminatory policy while leaving it in place as to some, or change a

centralized water or heating system without directly affecting everybody connected to the system.

This, in turn, preserves due process in Rule 23(b)(2) classes. "The procedural protections attending the (b)(3) class … are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*." *Wal-Mart*, 564 U.S. at 362-63. In a properly constituted Rule 23(b)(2) class, there is no need to seek input from absent class members. Relief is indivisible, so their input cannot make a difference. By contrast, "[w]here a lead plaintiff seeks an equitable remedy that is *divisible*," due process affords class members an opportunity to opine on what that divisible remedy will be. Williams, *supra*, at 651-52 (emphasis added).

In Plaintiffs' eyes, Rule 23(b)(2) essentially requires that injunctive relief be *possible* without individualized inquiries. According to Plaintiffs, "an injunction limiting the number of foster children assigned to Defendants' caseworkers" would satisfy this requirement because it would not "require[e] differentiation between class members." AB 57. So would "requiring Defendants' caseworkers to investigate reports of abuse within a certain time" because such an order "can be implemented only as to all foster children or as to none of them." *Id.* In support, Plaintiffs quote *Parsons I*, 754 F.3d at 680, which similarly reasoned that Rule 23(b)(2) certification was appropriate because "'[e]ither ADC employs enough nurses and doctors to provide adequate care to all of

its inmates or it does not do so; there is no need for an inmate-by-inmate inquiry.'"[22] AB 58.

Plaintiffs' view embodies two defects. First, Plaintiffs are wrong that a court can craft relief without individualized inquiries. "The federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Spallone v. United States*, 493 U.S. 265, 276 (1990). This means "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation." *Horne*, 557 U.S. at 450 (brackets and quotation marks omitted). "If [a remedial order] is not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers." *Id.* (brackets and quotation marks omitted). A remedy therefore "may require only" what is necessary to "bring the conditions above constitutional minima." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986). "'The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.'" *Casey*, 518 U.S. at 360 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

[22] The quoted portion of *Parsons I* actually addressed commonality under Rule 23(a)(2), but *Parsons I* later applied identical logic in its Rule 23(b)(2) analysis. *See Parsons I*, 754 F.3d at 689.

Plaintiffs seek to do precisely what *Casey* forbids—to determine the remedy "by the geographical extent of the plaintiff class" instead of "the extent of the violation established[.]" *Id.* According to Plaintiffs, a remedy can be issued without individualized inquiries by simply setting statewide targets. AB 57-58; *see also Parsons I,* 754 F.3d at 689 (reasoning that individualized inquiries were unnecessary because a court could issue a classwide "injunction that requires ADC to hire more doctors, with the exact number of necessary additional hires to be determined"). But how will a court set those targets? If "[t]he scope of injunctive relief is dictated by the extent of the violation established," *Casey*, 518 U.S. at 360, then a court cannot craft an injunction without first determining the extent of the violation.

Again, that would require individual inquiries. A court cannot presume that every deficiency in DCS was caused by a constitutional violation, nor can it ground its order in aspirational standards that do not reflect "constitutional minima." *Toussaint*, 801 F.2d at 1086-87. And, as also discussed above, the failure to tailor the remedy to reality could have grave consequences. For instance, sometimes siblings *should* be separated to allow for specialized care, because one sibling is abusing another, or to allow separate kinship placements for half-siblings. Sibling separations are complex determinations often involving competing interests to be balanced by trained social workers. If a court uses national "standards" and sets the wrong target for sibling separations, then children will remain with siblings even when it is not in their best interests. The only way to set those targets accurately is by examining the facts on the

ground. Similarly, issuing a classwide injunction "to hire more doctors, with the exact number of necessary additional hires to be determined" later, *Parsons I,* 754 F.3d at 689, is like issuing a classwide order to "pay money, with the exact amount to be determined later." That merely defers the individualized inquiries, as evidenced in *Parsons* itself. *See* Part I(G), *supra.*

Second and more significantly, Plaintiffs' approach contradicts *Wal-Mart.* Plaintiffs assert that Rule 23(b)(2) certification is "appropriate so long as the deficiencies identified by Plaintiffs, if proven at trial, 'might *conceivably* be remedied by an injunction.'" AB 62 (quoting *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 522 (N.D. Cal. 2011)) (emphasis added). That was certainly how some courts previously described the standard. *See, e.g.*, *DG*, 594 F.3d at 1200; *see also Gray*, 279 F.R.D. at 520 (post-*Wal-Mart* case relying on *DG*). *Wal-Mart*, however, clarified that it is not enough that the relief sought could *potentially* affect the entire class at once. "[T]he relief sought *must perforce* affect the entire class at once" because "[t]he key to the (b)(2) class" is that the proposed relief can apply "*only* as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360-62 (emphasis added; quotation marks omitted).

And for good reason. It will often be possible to "conceive" of relief that affects the entire class at once because courts have broad flexibility when fashioning injunctive relief. *See Hills v. Gautreaux*, 425 U.S. 284, 297 (1976). But if a classwide injunction is simply one choice among many, then absent class members could

disagree about the appropriate remedy, relief is no longer "indivisible," and the rationale for mandatory class treatment collapses. *See Wal-Mart*, 564 U.S. at 362-63.

Plaintiffs respond that there are no possible disagreements in this case. According to Plaintiffs, Defendants "need not (and cannot) shift required resources from one constitutional or statutory need to another, but must instead expand the pool of existing resources to address *all* the identified violations." AB 60 (quotation marks omitted). Plaintiffs doubly misunderstand Defendants' argument. First, not all resources are monetarily quantifiable. Defendants acknowledge that "constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963). But there is no warehouse where Defendants can pull dedicated social workers from the shelves. Money cannot stop a child from abusing a sibling, or purchase a loving adoptive parent, or create kinship placements where none exist. Defendants have limited control over such factors no matter how much money they spend.

Second, even with unlimited resources, there would still be divisions in the class. Plaintiffs seek relief in categories including health care, dental care, mental health care, sibling placement, congregate placement, and caseworker caseloads. Relief is obviously "divisible" *between* these categories. Sibling placement and healthcare, for instance, cannot be addressed in "a single injunction or declaratory judgment," *Wal-Mart*, 564 U.S. at 360, unless one thinks that "a single injunction" merely means "can be written on the same piece of paper." Plaintiffs' requested relief is also divisible

within these categories. Reasonable members of the classes could differ about *how* health care should be improved, how many social workers are necessary, and how competing interests in sibling placements, kinship placements, and congregate placements should be weighed.

Those "divisible" questions are unsuited for a mandatory Rule 23(b)(2) class. If "all of the members of the plaintiff class have been hurt by the same violation of law, and the purpose of the lawsuit is to end that violation," then there are likely to be few conflicts within the class. Sandler & Schoenbrod, *supra*, at 124. However, if the case "is not just about ending violations of rights but also about making policy," then "there are often sharp conflicts of interest among the plaintiffs and between them and their lawyer." *Id.* Plaintiffs' approach presumes they know the best prescription to fix a child welfare system; that nobody in the classes could reasonably disagree with them; and that Defendants can implement that prescription instantaneously without resource constraints or policy tradeoffs. That only works if Plaintiffs are omniscient and Defendants are omnipotent.

"It is not enough to say that the named plaintiffs want relief for the [class] as a whole, if the class is defined so broadly that some members will actually be harmed by that relief." *Spano v. The Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011). That is why it is not enough merely to say that all class members could *conceivably* agree on a single remedy. Rule 23 requires an "indivisible" remedy that "must perforce affect the entire class at once." *Wal-Mart*, 564 U.S. at 360-62. Otherwise, due process requires that

absent class members have a say in the matter. *See id.* at 362-63. This case offers them none.

IV. THE MEDICAID SUBCLASS SHOULD NOT HAVE BEEN CERTIFIED.

Finally, Plaintiffs failed to rebut many of Defendants' specific arguments regarding the Medicaid Subclass. Initially, Plaintiffs mistakenly believe that Director Betlach is still a defendant in Count One. AB 7 n.6. Director Betlach was dismissed from Count One in 2016. Doc. No. 220. He is only a defendant on Count Two, the Medicaid claim.

On that claim, Plaintiffs still point to no evidence of: a "concrete and particularized" or "actual or imminent" injury-in-fact to either Named Plaintiff caused by Director Betlach; a "causal connection between [any] injury and the conduct complained of"; or any injury "fairly traceable" to the actions of Director Betlach. *Lujan,* 504 U.S. at 560-61 (brackets omitted). They rely instead on the argument that B.T. and B.K. are *statistically at risk* of not receiving Medicaid services with reasonable promptness. Citing *Marisol A.*—and only that case—they contend that "a risk of harm suffices to state a claim" under the Medicaid Act. AB 41. *Marisol A.* does not support that proposition at all.

In that case, the plaintiffs alleged violations of "a diverse array of federal and state laws," including the Medicaid Act, the Child Abuse Prevention and Treatment Act ("CAPTA"), *and* the Fourteenth Amendment (due process). *Marisol A.*, 126 F.3d at 375. The district court, however, certified a *single* class consisting of all current and

future children in the state's custody *and* all "children who, while not in the custody of [the state], are or will be at risk of neglect or abuse and whose status is or should be known to [the state]." *Id.* Although the Second Circuit held that the district court did not abuse its discretion in certifying a class, it remanded and directed the district court to create subclasses because, as certified, the sprawling class consisted of "separate and discrete legal claims pursuant to federal and state constitutional, statutory, and regulatory obligations of the defendants." *Id.* at 378. It further ordered the district court to "engage in a rigorous analysis of the plaintiffs' legal claims and factual circumstances in order to ensure that appropriate subclasses are identified[.]" *Id.* Thus, the "at-risk" aspect of the class was not tethered to the Medicaid claim. On remand, the plaintiffs did not propose a subclass based on a Medicaid violation, and they specified that the "at risk" proposed class was based on violations of the CAPTA and the Fourteenth Amendment. *See Marisol A. v. Giuliani*, 95 CIV. 10533 (RJW), 1998 WL 199927, at **2-4 (S.D.N.Y. Apr. 23, 1998).

Plaintiffs also do not point to any evidence that they were deprived of Medicaid services. Although B.K. and B.T. have been in and out of foster care since 2005, *see* ER02702, ER02707, the *only* evidence regarding their care was the 28 pages found in their Supplemental Excerpts of Record ("SER"). These pages showed a foster mother once stated, without more, "at this times [sic], [B.K.] is flat footed and this causes her many problems dealing with her balance and behaviors." SER 27. *Nothing* supports Plaintiffs' statements that she "was forced to wait years before receiving necessary

orthotics" and had "a debilitating limp." *See* AB 12 (citing to SER 27, to Plaintiffs' own complaint, and to the district court's Order which relied entirely on Plaintiffs' complaint). Plaintiffs' exhibits also showed that, when B.K. "disrupted" her HCTC (therapeutic foster home) placement in 2013, placement with another HCTC family was not "available." The exhibits gave no context as to how long a home was unavailable or whether this was a failure of the State, a reaction of potential families to B.K.'s extreme behavior, or the result of some other cause. SER 16-21. Plaintiffs imply her placements harmed her, but they provided no evidence of this.

With respect to B.T., their exhibits showed he was assaulted in 2011 by another child, but Plaintiffs did not argue this represents a Medicaid violation. Another excerpt shows he was approved for an HCTC placement in late 2014 and that "no families have become available." SER 15. As with B.K., there is no evidentiary context. Plaintiffs argue that B.T. moved over the years to "at least 10 different foster care facilities" and these facilities were "unable to provide the level of care he required," AB 13, but they provided no evidence to support such a claim. The complaint alleged B.T. did not receive other services, but Plaintiffs did not support these allegations either.[23]

[23] Plaintiffs cite their experts' incorrect claims of waiting lists, misleading statistics, and use of non-Medicaid standards (e.g. agency performance goals and standards under Titles IV-B and IV-E), *see* AB 15-16, but none of this adds anything to either child's standing, commonality, or typicality. The experts did not even mention B.T. or B.K.

Two instances of lack of access to the courts were a "patently inadequate basis for a conclusion of systemwide violation" in *Casey*, 518 U.S. at 359. Here, the Named Plaintiffs failed to establish *even one* violation of Medicaid's reasonable promptness requirement. The district court abused its discretion by using a pleading standard to certify a Medicaid Subclass without evidence that either Named Plaintiff suffered an injury-in-fact from any violation of Medicaid requirements or that either was typical of, or shared a common issue with, the putative class. ER00009-11. Certification of the Medicaid Subclass should be reversed.

CONCLUSION

The district court's Order should be vacated and remanded with instructions to de-certify the General Class and Subclasses.

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 15,076 words, as counted by the 2010 Microsoft Word word-processing program used to generate this brief, and is filed jointly by separately represented parties. This number exceeds the type-volume limitation of the Ninth Circuit Local Rules 32-1(b) and 32-2(b). A joint motion for leave to file an oversized brief was filed on August 13, 2018, and is currently pending before the Court.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 2010 Microsoft Word word-processing program with a 14-point Garamond font.

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CERTIFICATE OF SERVICE

I certify that on August 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 20, 2018

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