IN THE UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 17-17501

B.K. by her next friend Margaret Tinsley, et al.,
Plaintiffs/Appellees,

v.

JAMI SNYDER,
in her official capacity as Director of the Arizona Health Care Cost Containment System,
Defendants/Appellant.

Appeal from the United States District Court
District of Arizona
No. 2:15-cv-00185, Roslyn O. Silver, Judge

BRIEF OF *AMICI CURIAE* STATES OF MISSOURI, ALABAMA, ARKANSAS, INDIANA, LOUISIANA, NEBRASKA, SOUTH CAROLINA, AND TEXAS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST OF *AMICI*

Missouri and other States frequently face Rule 23(b)(2) class actions alleging that state agencies are continuing to violate federal constitutional rights. These cases can place enormous pressure on state agencies with limited budgets and resources. The burdens of prolonged litigation and classwide discovery can overwhelm these agencies, and these burdens can detract from their ability to pursue their missions of providing public benefits and enforcing state law in the interest of the public good. Thus, for state agencies as for private parties, "an order granting class certification 'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (quoting Advisory Committee Notes to 1998 Amendments adopting Rule 23(f)). Because of this pressure, settlement after an adverse class certification decision is extremely common, both for state agencies and private parties. Where state agencies are defendants, such undue pressure to settle raises grave concerns of federalism, because it entails that a federal court will effectively take over control of part of a state program or facility—a power that a federal court "may not lightly assume." *Id.*

The panel opinion in this case relied heavily on this Court's opinion in

Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014). *Parsons* is also frequently cited in favor of certifying class actions against States and state agencies outside the Ninth Circuit. This widespread reliance on *Parsons* is unfortunate, because *Parsons* was wrongly decided, and its error infected the class certification decision in this case and other cases outside this Circuit. *Parsons* conceded—as it must—that every member of a Rule 23(b)(2) class must have a potentially viable claim, or the class may not be certified. But *Parsons* eviscerated this rigorous requirement by ignoring the fact that a valid constitutional claim requires the plaintiff to show that the constitutionally intolerable injury alleged is "imminent," "sure or very likely to occur," and "certainly impending." By overlooking these requirements, *Parsons* erroneously concluded that every single inmate in Arizona prisons had a potentially viable claim for inadequate medical care. But if perfectly healthy individual inmates had filed individual lawsuits, these lawsuits would have been promptly dismissed for lack of standing and ripeness, and for failure to state a claim. The States have a strong interest in urging this Court to clarify or, if necessary, overrule *Parsons*, and hold that every member of a Rule 23(b)(2) class must face an imminent, certainly impending injury before the class may be certified.

ARGUMENT

I. This Court Should Grant En Banc Consideration to Clarify that Every Class Member Must Have a Potentially Viable Claim Based on an Alleged Injury that Is Both "Imminent" and "Sure or Very Likely" to Occur Before a Class Can Be Certified Under Rule 23(b)(2).

A. A class containing members who have no potentially viable claims cannot be certified under Rule 23(b)(2).

The Supreme Court reaffirmed in *Wal-Mart v. Dukes* that, in order for a class to be certified under Rule 23(b)(2), all class members must have potentially valid claims: "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 the class members or as to none of them.*'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis added) (quotation omitted). Needless to say, a class that contains some members with potentially viable claims, and some members without potentially viable claims, fails to satisfy this standard. Such a class does not challenge conduct that is "such that it can be enjoined . . . only as to all class members or as to none of them." *Id.*

Several appellate decisions, all citing *Dukes*, have acknowledged this principle. *See, e.g.*, *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018) (upholding certification a Rule 23(b)(2) class challenging a policy of

denying anti-viral drugs to HCV-positive inmates on the ground that "the relevant policy was alleged to pose an unconstitutional risk of serious harm to *all* class members," and because "every inmate" was allegedly subject to a constitutionally intolerable risk of harm); *Yates v. Collier*, 868 F.3d 354, 362-63 (5th Cir. 2017) (upholding certification of a Rule 23(b)(2) class challenging an overheated prison due to findings that "absent mitigation measures, *every inmate* in the [challenged facility] is at a substantial risk of serious harm due to the heat," including "the youngest, healthiest, and most acclimatized inmates") (emphasis in original).

Most notably, this Court explicitly reaffirmed this principle in *Parsons v. Ryan*, the case on which the panel opinion most heavily relied. *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014). *Parsons* upheld certification of the statewide class of Arizona inmates because the Court concluded that there was a substantial question whether "they are *all* subjected" to "a substantial risk of harm," such that "each of the policies and practices is unlawful *as to every inmate or it is not.*" *Id.* (emphases added). Similarly, the dissent from denial of en banc consideration in *Parsons* recognized that, for certification to be proper under Rule 23(b)(2), "each member in a class must have a potentially viable claim." *Parsons v. Ryan*, 784 F.3d 571, 575 (9th Cir. 2015) (Ikuta, J., dissenting from denial of rehearing en banc).

The dissent concluded that "[b]ecause the proposed class includes healthy prisoners who have no claim, there is no commonality." *Id.* at 577. Thus, in *Parsons*, all participating Judges of this Court agreed that every class member must have a potentially viable claim for a class to be certified under Rule 23(b)(2).

B. Parsons erred by applying far too lenient a standard to determine whether all class members had a potentially viable claim.

Because every class member must have a potentially viable claim to satisfy commonality and cohesiveness, the certification decision under Rule 23(b)(2) frequently requires preliminary consideration of the merits. "Frequently that 'rigorous analysis' [required by Rule 23(b)] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 564 U.S. at 351. Such preliminary consideration is required to ascertain whether the class is such that some members have no potentially viable claims at all. If so, the class cannot be certified under Rule 23(b)(2).

Parsons erred, however, because it applied far too permissive a standard in scrutinizing whether every single inmate in Arizona facilities had a potentially valid constitutional claim. In concluding that every single inmate in Arizona custody was currently facing a constitutionally intolerable risk of harm, *Parsons* overlooked the

Supreme Court's repeated instruction that a constitutionally intolerable risk of harm under the Eighth Amendment must be both "imminent" and "sure or very likely" to occur—not speculative or remote. *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion). "To establish that [official conduct] violates the Eighth Amendment, however, the conditions presenting the risk must be '*sure or very likely* to cause serious illness or needless suffering,' and give risk to 'sufficiently *imminent* dangers.'" *Id.* at 49-50 (emphasis in original) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). At the time of the certification decision in *Parsons,* literally thousands of strong, healthy Arizona inmates faced no "imminent" risk of harm that was "sure or very likely" to occur. *Id.* Accordingly, *Parsons* erred when it concluded that each challenged policy was unlawful "as to every inmate or it is not." *Parsons*, 754 F.3d at 678.

This Court should grant en banc consideration of this case to either clarify this critical point or, if necessary, overrule *Parsons*. The "substantial risk of serious harm" that supports an Eighth Amendment claim must be both "imminent" and "sure or very likely" to occur to support a constitutional claim. When a class is defined to include members who do not face "imminent" constitutional injury that is "sure or very likely to occur," the class cannot be certified under Rule 23(b)(2).

C. Considerations of Article III standing support en banc rehearing.

The substantive requirements of *Baze*—that constitutional injury must be both "imminent" and "sure or very likely" to occur—mirror the requirements of Article III standing. As the Supreme Court has repeatedly emphasized, Article III standing likewise requires an injury-in-fact that is "imminent" and "certainly impending." *Clapper v. Amnesty Internat'l USA*, 568 U.S. 398, 410 (2013) (Article III imposes "the requirement that threatened injury must be certainly impending"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III requires that the injury-in-fact be "actual or imminent, not conjectural or hypothetical") (internal quotation marks omitted). The Supreme Court has indicated that this requirement of Article III standing is equally applicable in class actions. *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.").

Thus, a plaintiff who lacks a valid constitutional claim, because he does not face an "imminent" injury that is "sure or very likely" to occur under *Baze*, will typically also lack Article III standing because he or she does not face an "imminent" injury that is "certainly impending" under *Lujan* and *Clapper*—and vice versa. If an individual plaintiff who faced no imminent, certainly impending injury purported

to file a claim outside of a class action, that plaintiff's complaint would be subject to dismissal both for lack of standing and ripeness, and for failure to state a claim. Thus, meaningful enforcement of the requirements that constitutional injuries be imminent and sure or very likely to occur also tends to ensure that class members have Article III standing. By contrast, if those requirements are ignored (as in *Parsons*), the result is the certification of a class that includes large numbers of plaintiffs who not only have no claim, but also lack standing to sue altogether—a situation which raises grave constitutional concerns under Article III.

The panel in this case held that, in a class action, only the named plaintiffs—and not other class members—need demonstrate Article III standing. This holding conflicts with decisions of the Eighth Circuit holding that every class member must have Article III standing for a class to be certified. *See, e.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed by a favorable decision."); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, (8th Cir. 2010) ("The constitutional requirement of standing is equally applicable to class actions. . . . [A] class cannot be certified if it contains members who lack standing."). A rigorous application of

the requirements of *Baze* would eliminate this conflict with the Eighth Circuit. This Court should grant en banc rehearing to clarify that, in class actions raising constitutional claims, every class member must face an imminent, certainly impending injury, or the class cannot be certified.

D. The panel opinion gives short shrift to grave federalism concerns.

As the Supreme Court stated in *Lewis*, "[i]t is the role of courts to provide relief to claimants, in individual or class actions who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Similarly, the Eighth Circuit has observed that sweeping class actions against state agencies raise grave federalism concerns: "By certifying a single class action to litigate this broad array of claims and prayers for relief, the district court has essentially conferred on itself jurisdiction to assert control over the operation of . . . a major component of Nebraska state government. A federal court may not lightly assume this power." *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006). "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved

between federal equitable power and State administration of its own law." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (citation omitted). "[T]his concern [for federalism] is heightened in the class action context because of the likelihood that an order granting class certification 'may force a defendant to settle … and run the risk of potentially ruinous liability.'" *Elizabeth M.*, 458 F.3d at 784 (quoting Advisory Committee Notes to 1998 Amendments adopting Rule 23(f)). Where some class members have no plausible claim, or where the claims of certain class members are "highly dubious," *id.* at 785, a class should not be certified.

Applying a "rigorous analysis" to claims of constitutional injury will properly safeguard these federalism concerns. Where *every* class member faces a constitutionally intolerable risk of injury that is "imminent" and "sure or very likely to occur," class certification under Rule 23(b)(2) may be proper, assuming other requisites of Rule 23 are met. But where, as here, many class member lack any imminent, certainly impending injury—but instead face injuries that are merely possible or conjectural—a federal court should not arrogate to itself the authority to dictate state policymaking under the aegis of class certification. This authority to dictate state policy priorities "should not be lightly assumed." *Elizabeth M.*, 458 F.3d at 784.

CONCLUSION

The Court should grant the Petition for Rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a copy of the foregoing was served on all counsel of record through CM/ECF on June 3, 2019.

In addition, I certify that this brief contains 2,270 words in compliance with F.R.A.P. 29(b)(4) and Circuit Rule 29-2(c)(2) and complies with the other requirements of Rule 29 and the type-volume limitations in F.R.A.P. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Tomes New Roman font.

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