No. 18-40057

In the United States Court of Appeals for the Fifth Circuit

M. D., BY NEXT FRIEND SARAH R. STUKENBERG; Z. H., BY NEXT FRIEND CARLA B. MORRISON; S. A., BY NEXT FRIEND JAVIER SOLIS; A. M., BY NEXT FRIEND JENNIFER TALLEY; J. S., BY NEXT FRIEND ANNA J. RICKER; H. V., BY NEXT FRIEND ANNA J. RICKER; L. H., BY NEXT FRIEND ESTELA C. VASQUEZ; C. H., BY NEXT FRIEND ESTELA C. VASQUEZ; A. R., BY NEXT FRIEND TOM MCKENZIE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF THE HEALTH AND HUMAN SERVICES COMMISSION OF TEXAS; HENRY WHITMAN, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES OF THE STATE OF TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi Division

BRIEF FOR APPELLANTS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
scott.keller@oag.texas.gov

SCOTT A. KELLER
Solicitor General

JOSEPH D. HUGHES
PHILIP A. LIONBERGER
Assistant Solicitors General

THOMAS A. ALBRIGHT
Assistant Attorney General

Counsel for Defendants-Appellants

Certificate of Interested Persons

No. 18-40057

M. D., by next friend Sarah R. Stukenberg; Z. H., by next friend Carla B. Morrison; S. A., by next friend Javier Solis; A. M., by next friend Jennifer Talley; J. S., by next friend Anna J. Ricker; H. V., by next friend Anna J. Ricker; L. H., by next friend Estela C. Vasquez; C. H., by next friend Estela C. Vasquez; A. R., by next friend Tom McKenzie, individually and on behalf of all other similarly situated,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his official capacity as Governor of the State of Texas; CHARLES SMITH, in his official capacity as Executive Commissioner of the Health and Human Services Commission of Texas; HENRY WHITMAN, JR., in his official capacity as Commissioner of the Department of Family and Protective Services of the State of Texas,

Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs[1]	Plaintiffs' Counsel
M.D., *by next friend* Sarah R. Stukenberg Z.H., *by next friend* Carla B. Morrison S.A., *by next friend* Javier E. Solis A.M., *by next friend*	Aaron Finch Joshua Rosenthal Adam Dembrow Adriana Teresa Luciano Christina Wilson Elizabeth Pitman Ira Lustbader Jessica Polansky

[1] Defendants use "Plaintiffs" to refer to all members of the general class or either subclass, and "Named Plaintiffs" to refer to representatives of the general class or either subclass.

Jennifer Talley J.S. and H.V., *by next friend* Anna J. Ricker L.H. and C.H., *by next friend* Estela C. Vasquez A.R., *by next friend* Tom McKenzie	Michael Kenneth Bartosz Marcia Robinson Lowry Melissa Cohen Sara Bartosz Patrick Almonrode Rachel Brodin Nili Sarah T. Russo Stephen Dixon William Kapell CHILDREN'S RIGHTS, INC. Reagan Simpson R. Paul Yetter Christian J. Ward Lonny Hoffman Dori Kornfeld Goldman Christopher D. Porter Wynn B. McClosekey YETTER COLEMAN LLP Barry F. McNeil David Allen Dodds Richard Thaddeus Behrens HAYNES BOONE LLP

Defendants	Defendants' Counsel
Greg Abbott, *in his official Capacity as Governor of the State of Texas* Charles Smith, *in his official capacity as Executive Commissioner of the Health and Human Services Commission ("HHSC") of the State of Texas* Henry Whitman, Jr., *in his official capacity as Commissioner of the Department of Family and Protective Services ("DFPS") of the State of Texas*[2]	Ken Paxton Jeffrey C. Mateer Brantley Starr James E. Davis Scott A. Keller Joseph D. Hughes Philip A. Lionberger Angela V. Colmenero Thomas A. Albright Todd L. Disher Andrew B. Stephens Marc Rietvelt OFFICE OF THE ATTORNEY GENERAL

/s/ Scott A. Keller
Scott A. Keller
Solicitor General
Lead Counsel for Defendants

[2] In 2015, Greg Abbott succeeded Rick Perry as Governor of Texas, and Charles Smith succeeded Dr. Kyle Janek as Executive Commissioner of HHSC; and in 2016, Hank Whitman succeeded John Specia as Commissioner of DFPS. By rule, Governor Abbott and Commissioners Smith and Whitman were automatically substituted as defendants. Fed. R. App. P. 43(c)(2).

Statement Regarding Oral Argument

In 2015, one year after a two-week bench trial, the district court issued a 255-page opinion concluding that Defendants' management of Texas's foster-care system met the exceptionally high substantive-due-process standard of conscience-shocking deliberate indifference for all 12,000 class members in Texas's permanent managing conservatorship. Defendants could not appeal that ruling at that time, however, because the court declined to issue final injunctive relief then. Instead, it appointed special masters to craft institutional reforms for Texas's foster-care system. The special-master process lasted two years and culminated in the masters' submission of an Implementation Plan containing copious recommendations. In January 2018, the district court issued an additional 116-page Final Order incorporating the masters' recommendations in nearly 100 separate injunctive provisions.

This appeal challenges both the district court's injunctive orders as well as the findings of constitutional violations they purport to remedy. Those rulings and remedies involve the application of substantive-due-process and class-action legal doctrines to issues of governmental child-welfare policy. The law is complex, the appellate record is voluminous, and the policy implications are enormous. Fundamentally at stake is the question whether a federal court can impose system-wide injunctive relief to remake a State's foster-care system based on the court's policy preferences, instead of reliable evidence of class-wide constitutional harm. Oral argument would help the Court resolve this important case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rules

INTRODUCTION

By bringing this case as a substantive-due-process class action, Plaintiffs placed upon themselves the extremely high burden of proving that Defendants' challenged policies reflect conscience-shocking deliberate indifference to a substantial risk of serious harm for all 12,000 class members in Texas's foster-care permanent managing conservatorship ("PMC"). Plaintiffs did not satisfy their heavy burden. Instead, the evidence showed that the challenged policies amply protect PMC children, most of whom do not experience maltreatment. Thus, the district court's sweeping injunction and judicial takeover of Texas's foster-care system are manifestly improper.

Because the shocks-the-conscience standard is extremely high, proving class-wide substantive-due-process violations is quite difficult. Plaintiffs' presented no studies showing that any challenged policy or practice of Defendants posed a substantial risk of serious, class-wide harm—much less conscience-shocking deliberate indifference. Plaintiffs' sole expert who attempted to quantify risk observed that Texas foster children are 58% *safer* than children in the general population. That is not a substantial risk of serious harm to anyone—let alone all 12,000 PMC children.

Plaintiffs made their daunting task even harder by seeking overbroad injunctive relief. For example, Plaintiffs' chief complaint is that conservatorship caseworkers carry high caseloads based on the number of foster children they are responsible for, which allegedly overburdens caseworkers and puts children at risk. After a class of *all* children in Texas's PMC was certified, Plaintiffs required proof that all 12,000 PMC children—including the roughly 8,400 whose caseworkers are, even by Plaintiffs' own proposed standard, *not* constitutionally overburdened—face a substantial

risk of serious harm from overburdened caseworkers. But Plaintiffs offered no such proof. Indeed, neither Plaintiffs nor the district court ever identified the point at which caseworker caseloads reach the conscience-shocking threshold. Nonetheless, the court imposed a caseload cap below both Plaintiffs' proposed constitutional threshold and even the level that Plaintiffs' own expert called a "best practice."

Plaintiffs also failed to prove causation. Their own experts testified (and the court acknowledged) that nearly all foster children experienced severe abuse or neglect in their birth homes and enter state custody with significant psychological or emotional problems. Plaintiffs also acknowledged that separating psychological harm that occurs in foster care from pre-existing harm requires studying foster children's case histories. Plaintiffs vowed to prove class-wide causation by analyzing a random, representative sample of 400-500 PMC children's case histories. But Plaintiffs abandoned that analysis. They thus lacked proof that governmental policies, as opposed to abuse and neglect suffered before entering foster care, caused class-wide harm.

In place of the legitimate analysis they promised, Plaintiffs substituted the tragic histories of a dozen hand-picked Named Plaintiffs. Notwithstanding abundant evidence that Named Plaintiffs' experiences were highly atypical, the district court declared their experiences representative of all 12,000 PMC children. That finding, which was largely based on testimony of an expert who did not address the PMC in his expert report—and believed that it contains only 300 children, instead of 12,000—is clearly erroneous. As Texas's strong scores on federal Child and Family Services Review ("CFSR") metrics reflect, the overwhelming majority of PMC children do not experience maltreatment in foster care.

The Supreme Court has held that system-wide injunctive relief cannot be granted absent proof of system-wide injury. *Lewis v. Casey*, 518 U.S. 343, 357-58 (1996). And the First Circuit affirmed the denial of system-wide injunctive relief in a foster-care class-action much like this one, where the plaintiffs proved injury to a select handful of children but failed to prove system-wide constitutional violations. *Connor B. ex rel. Vigurs v. Patrick*, 985 F.Supp.2d 129 (D. Mass. 2013) ("*Connor B.(I)*"), *aff'd*, 774 F.3d 45 (1st Cir. 2014) ("*Connor B.(II)*"). In that case, the courts denied relief even though Massachusetts' foster-care system—which was in much worse shape than Texas's system by any objective measure—was recognized to be in urgent need of major reform. Accordingly, upholding the district court's injunction in this case would contravene *Casey* and create a circuit split with *Connor B*.

Statement of Jurisdiction

The district court entered its Final Order on January 19, 2018. ROA23669-784. Defendants timely appealed that same day. ROA.23785. The district court's jurisdiction rested on 28 U.S.C. §§1331 and 1343(a)(3). This Court's jurisdiction rests on 28 U.S.C. §1291.

Issues Presented

1. The overarching issue is whether the district court correctly concluded that Defendants' PMC-related policies reflected conscience-shocking deliberate indifference to substantial risks of serious harm for all 12,000 class members, and, consequently, whether the court erred in issuing permanent injunctive relief. Defendants

also challenge the evidentiary support for those rulings, including the relevance and reliability of expert testimony, regarding policies relating to:

a. The caseloads of conservatorship caseworkers (General Class);

b. The quantity and geographic distribution of available foster-care placements (Licensed Foster-Care ("LFC") subclass);

c. Investigations of abuse or neglect in, and inspections of, licensed foster-care facilities (LFC subclass); and

d. Foster-group homes (FGH subclass).

2. Whether the district court abused its discretion in certifying the general class or subclasses.

3. Whether the scope of the district court's injunction was improper.

STATEMENT OF THE CASE[3]

I. BACKGROUND

A. Overview of Texas's Foster-Care System

The Texas Department of Family and Protective Services ("DFPS") is the department within the Texas Health and Human Services Commission ("HHSC") that administers Texas's foster-care system. DFPS has approximately 12,000 employees, ROA.21956, and an annual budget of approximately $1.37 billion, about half of which is federally-funded, ROA.14348.

DFPS cares for foster children through its Child-Protective-Services ("CPS") division. CPS investigates allegations of abuse and neglect involving children. When

[3] Unless otherwise noted, all statements refer to circumstances at the time of trial (in 2014).

CPS determines that a child's home is unsafe, it petitions a state court for removal and Temporary Managing Conservatorship ("TMC") of the child. ROA.21923. If TMC is granted, DFPS takes custody of the child and places her with a family member or verified caregiver. ROA.21923. TMC lasts up to one year, although a court can extend it for another six months. ROA.21923. During this time, CPS determines whether parental-reunification is safe, and may seek termination of parental rights. Tex. Fam. Code §161.001.

CPS's goal is finding a permanent parental situation for every child. ROA.21923, 41390. Permanency can be achieved through parental reunification, placement with a relative, or adoption. ROA.21923.

If a child has not otherwise achieved permanency after 12-18 months, she enters the Permanent Managing Conservatorship ("PMC"). ROA.21924. The change from TMC to PMC is one of formal legal status; it does not affect a child's existing placement, and the goal of achieving a permanent parental situation remains. ROA.27104. Nor does it generally involve reassignment of a child's primary caseworker, as most caseworkers serve both TMC and PMC children. ROA.24939. Among other tasks, caseworkers work to find children permanent homes in either kinship or adoptive placements. ROA.22078. There are approximately 12,000 children in PMC and 17,000 in TMC. ROA.21924.

DFPS's other major division is Child-Care Licensing ("CCL"). CCL contains two main subdivisions relevant to this case: Residential Child-Care Licensing ("RCCL"), and the Performance-Management Unit ("PMU"). RCCL primarily inspects licensed foster-care facilities for compliance with minimum standards and

regulations, and investigates allegations of maltreatment of foster children in licensed facilities.[4] ROA.25489, 27334-35, 27337-38. RCCL annually performs about 2,000 inspections of foster-family and FGHs, and about 1,000 inspections of general-residential operations. ROA.10353. PMU does quality assurance for CCL, primarily by reviewing RCCL investigations. ROA.22118.

B. Foster Children in PMC

DFPS places all PMC children in foster-care facilities, 90% of which are verified by licensed private child-placing agencies and the other 10% directly verified by DFPS. ROA.21926. Foster-care placements are made based on children's specific needs. ROA.27124. The four main placement types are foster-family homes, foster-group homes ("FGHs"), general-residential operations, and kinship placements. ROA.21926.

By law, foster-family homes may contain up to six children, including foster children and any other children. ROA.21926.

FGHs contain 7-12 children but are otherwise similar to foster-family homes. ROA.21926. They are useful for keeping large sibling groups together. ROA.26254-55.

General-residential operations, or congregate-care facilities, are licensed facilities containing 13 or more children. ROA.21926. Residential-treatment centers, which are mostly located near large cities, are a type of general-residential operation

[4] Licensed foster care is a home verified by a child-placing agency. Tex. Hum. Res. Code §42.002.

that provide therapeutic treatment for children with serious emotional disturbances or mental-health issues. ROA.21926-27.

Kinship placements are when a child lives with a relative or someone else with a significant relationship to the child. ROA.21927.

A child who does not find a permanent home by age 18 (or later in some cases) "ages out" of foster care. ROA.21923. CPS offers preparation-for-adult-living services to all PMC children starting at age 16. ROA.26886-87. About 10% of PMC children age out annually. ROA.21953.

C. Programmatic Reviews of Texas's Foster-Care System

1. Child-and-Family-Services-Review Process

DFPS's performance regarding foster care is scrutinized by the federal Children's Bureau of the U.S. Health and Human Services Department through its CFSR process. CFSRs evaluate whether States' child-welfare systems meet federal statutory requirements. ROA.21944.

At the time of trial, the Children's Bureau was on its third round of CFSRs. The initial Round-Three data indicators were published in 2014. For Round Three, the CFSRs assessed two safety-related and five permanency-related statewide data indicators. The safety indicators evaluated abuse and neglect. The permanency indicators evaluated children's living situations. All seven indicators used "ambitious" national standards to "challenge states to improve their performance." ROA.39596.

Texas performed well, exceeding national standards on 6 indicators and narrowly missing on the seventh. ROA.21944. Only 8 other States met the national standard on at least 6 indicators. ROA.39618-56. Texas's results were:

- *Rate of victimization of children in foster care during a 12-month period.* The national standard is 8.04 victimizations per 100,000 days. ROA.39619. Texas outperformed the national standard with a risk-adjusted score of 7.83, ranking 22nd among all States. ROA.39632.

- *Percentage of children who were victims of a substantiated or indicated incident of maltreatment and were revictimized within 12 months of their initial report.* The national standard is 9.0%. ROA.39619. Texas outperformed that standard with a risk-adjusted score of 7.3%, ranking 15th among all States. ROA.39634.

- *Percentage of children entering foster care who obtain permanency within a 12-month period.* The national standard is 40.4%. ROA.39619. Texas outperformed that standard with a risk-adjusted score of 41.2%, ranking 25th among all States. ROA.39622.

- *Percentage of children who have been in foster care between 12 and 23 months who obtain permanency within a 12-month period.* The national standard is 43.7%. ROA.39619. Texas outperformed that standard with a risk-adjusted score of 53.5%, ranking 6th among all States. ROA.39624.

- *Percentage of children in foster care for more than 24 months who obtain permanency within 12 months.* The national standard is 30.3%. ROA.39619. Texas's risk-adjusted score of 28.7% slightly underperformed that standard, ranking 33rd among all States and second among States not meeting the standard. ROA.39627.

- *Percentage of children who re-enter foster care within 12 months after being discharged.* The national standard is 8.3%. ROA.39619. Texas outperformed the national standard with a risk-adjusted score of 4.9%, ranking 4th among all States. ROA.39628.

- *Rate of placement moves per day of foster care for children in foster care during a 12-month period.* The national standard is 4.12 moves per 1,000 days in care. ROA.39619. Texas outperformed the national standard with a risk-adjusted score of 3.98 moves, ranking 24th among all States. ROA.39630.

2. Sunset Advisory Commission ("Sunset") Report

Separately, Texas's foster-care system was reviewed shortly before trial as part of the state-legislative "sunset" review process. *See* Tex. Gov't Code §325.011. Following a year-long review of DFPS, the Sunset Advisory Commission issued a comprehensive report in May 2014. ROA.21941. Despite offering numerous constructive criticisms of DFPS's management, the Sunset Report never suggested that DFPS's policies are deliberately indifferent to foster children or that DFPS exercises no professional judgment. To the contrary, it concluded:

> Despite the inherent difficulty of its protective mission, DFPS is expected to answer for every bad outcome. As a result, the agency frequently finds itself on the defensive and in a constant state of putting out fires and responding to crisis and criticism, creating a continual cycle of both legislative and self-imposed change in which outside pressures dominate its agenda.
>
> What DFPS sorely needs is a timeout to breathe and a chance to regroup after being in near constant transition for so long. The agency needs to roll up its sleeves and get down to the mundane business of effective management, long lost in a culture of addressing every problem that pops up with new policy or initiative. The agency is already getting this message, having identified it repeatedly through its own internal efforts, yet distractions persist.

PX.1861@9.[5]

[5] The district-court clerk excluded numerous trial exhibits from the ROA-stamped appellate record, despite the parties' requests. ROA.24274-75, ROA.24278-79. Defendants cite those exhibits herein as "PX.[exhibit number]@[page number]" or "DX.[exhibit number]@[page number]."

3. The Stephen Group ("TSG") Report

DFPS commissioned TSG, a well-known consulting organization, to review CPS and recommend possible improvements. ROA.21941. TSG issued an initial report in April 2014 containing findings, ROA.41576, and a final report in June 2014 containing recommendations, ROA.41608.

TSG's reports provided constructive criticisms of CPS and recommended managerial improvements in several areas. But like the Sunset Commission, TSG did not accuse DFPS of deliberate indifference to substantial risks of serious harm. To the contrary, "TSG's assessment found many aspects of CPS's performance and plans to be exemplary." PX.1993@9. For example, TSG wrote that department professionals have "[s]trong dedication at all levels to child safety well-being and permanence[]" that "extends far beyond compliance with rules and policy to true dedication," and recognized self-started efforts at "change and improvement [that were already] underway, including Foster Care Redesign." PX.1993@9.

In a section of its initial report entitled "CPS Has Many Strengths," TSG wrote:

- "One thing that stood out clearly to our team was that this is talent-rich, dedicated group of workers who are deeply committed to their mission. They work cohesively, as a team, to keep children safe and they represent a strong mix of younger and older individuals from many walks of life."
- "DFPS has made a considerable commitment to enhancing child protective services over the years. These include improving technology, training and data analysis, as well as significant research of safety/risk assessments. There is currently an extensive amount of development within the organization to upgrade the ability of staff to maximize their ability to protect children."
- "Throughout the Regions, we also observed a strong culture of doing whatever it takes to respond to the needs of children."

ROA.41594.

In its final report, TSG concluded:

> CPS is filled with talented people who are utterly committed to the children and families of the state. It's time to let them do their jobs with the tools and empowerment they need. While our investigation found numerous areas for improvement we came away with the overwhelming sense of optimism that the potential in the organization is outstanding when all of CPS's energies are focused in the same direction for a clear goal. While the challenges will be great, real change in CPS—change for the better that everyone understands and supports—is within reach. The goal of the recommendations in this report is to set the clear direction and remove obstacles to getting there. These will make CPS a model organization and will accomplish this goal quickly.

PX.1995@4-5.[6]

D. DFPS Efforts at System-Wide Self-Improvement

1. DFPS "Transformation"

DFPS initiated a self-improvement plan called "Transformation" in 2014 in response to the Sunset and TSG reports. ROA.26746. Its focus was improving: (1) employee recruitment and retention; (2) child safety, permanency, and well-being; and (3) departmental organization and operations. ROA.7749, 26747. DFPS submitted its Transformation plan to the Sunset Commission in October 2014. ROA.7744.

[6] The district court cited several older outside reports addressing Texas's foster-care system. ROA.21940-41. Like Sunset and TSG, however, none concluded that DFPS's policies or practices reflect deliberate indifference to substantial risks of serious harm.

2. Foster-Care Redesign

DFPS's plan to improve its geographic distribution of foster-care placements (its "placement array"), initiated in 2010, is called Redesign. ROA.25184, 26583-84. Redesign was created by the 26-member Public-Private Partnership, a DFPS advisory committee comprised of judges, foster-care providers, child-and-family advocates, provider associations, foster-care alumni, a DFPS Advisory-Council member, and DFPS staff. 40 Tex. Admin. Code §702.509; ROA.40249-50, 25183, 27164-65. The Partnership made recommendations to DFPS, and since 2010, it has served as the guiding body for Redesign, meeting quarterly. ROA.27165-66. The Texas Legislature passed legislation to implement Redesign in 2011. ROA.27178-79, 28019, 8128-30.

Under Redesign, DFPS contracts with single-source-continuum-of-care contractors to provide services in 16 designated regions (or "catchment areas") of Texas. ROA.6704, 25180-81, 25185, 27168. These general contractors subcontract with child-placing-agencies to provide placement services within a catchment area. ROA.25181-82. One shortcoming of the existing system, in which DFPS contracts directly with child-placing-agencies, is the lack of assurance that providers will be located where services are needed. ROA.9007, 27168. Under Redesign, general contractors bid competitively to provide a "full continuum" of placement services for children in the catchment areas. ROA.25185, 27168.

DFPS planned to phase in Redesign incrementally, to "minimize risk and maximize opportunities for success." ROA.8133, 9009, 25180. The program roll-out was

initiated in 2013 with two catchment areas. ROA.25180, 25186, 26591. Another region was added in 2014. ROA.25181-82, 27182. At the time of trial, DFPS had not identified a specific date for fully implementing Redesign. ROA.25196-97.

II. PROCEDURAL HISTORY

A. Plaintiffs' Claims

Named Plaintiffs sued Defendants in 2011 under 42 U.S.C. §1983, seeking certification of a class of all children who are, or will be, in Texas's PMC. They requested injunctive relief to redress alleged class-wide injuries caused by purported systemic failures in the PMC's administration that allegedly deprived Plaintiffs of their Fourteenth Amendment substantive-due-process rights, including departmental policies that fail to: (1) hire enough caseworkers, ROA.149; (2) maintain an "adequate number and array of placements," ROA.154; (3) adequately supervise children in licensed foster care, ROA.159-60; and (4) ensure sufficient oversight and inspection of foster-care facilities, ROA.162-65.

Plaintiffs advised the district court that they would prove class-wide harm and causation by analyzing a representative sample of approximately 400-500 children's case files, as reflected in numerous case-management plans:

> Plaintiffs anticipate conducting a review of a sample of case records of children in the [PMC] drawn according to generally accepted standards of social science research. This review will enable collection of information not generally available regarding actual patterns of events and practices in the cases of children in the [PMC]. In order for the conclusions drawn from this case record review to be statistically significant, it is expected that the sample will include approximately 400-500 case records.

ROA.387, 444, 478, 497. Defendants had produced some of the requested case records when the initial class-certification order was issued, but Plaintiffs then abandoned their representative-sample analysis. ROA.25098-100.

B. Class Certification

In May 2011, "[w]ithout examining any of Named Plaintiffs' legal claims with any specificity," the district court certified the requested class. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012). This Court granted Defendants' Rule 23(f) petition and vacated the certification order. *Id.* at 839-49.

On remand, Plaintiffs sought certification of a general class of all present and future PMC children, ROA.3918-19; an LFC subclass of all members of the general class who are or will be in a licensed or verified foster-care placement, excluding verified kinship placements, ROA.3919; and an FGH subclass of all members of the general class who are or will be in a foster-group home. ROA.3919. For the general class, Plaintiffs alleged that conservatorship caseworkers' caseloads were excessive. ROA.3920. For the LFC subclass, Plaintiffs alleged that DFPS failed to properly (1) conduct inspections of licensed foster-care facilities and investigations of allegations of abuse and neglect, (2) track incidents of child-on-child abuse, and (3) maintain an adequate placement array. ROA.3922-28, 21929-30. For the FGH subclass, Plaintiffs complained that caregivers are improperly trained, homes are understaffed and inadequately supervised, and DFPS does not categorically prohibit the placement of unrelated children of different genders, ages, and service levels in the same foster-group home. ROA.3928-29, 21930.

The district court certified the General Class and the LFC and FGH subclasses. ROA.4070-4115. Defendants did not file a timely Rule 23(f) petition to seek interlocutory review of that class-certification order. *M.D. ex rel. Stukenberg v. Perry*, 547 F.App'x 543 (5th Cir. 2013).

C. Trial

A two-week bench trial was held in December 2014, at which none of Plaintiffs' experts defined the point at which high caseloads or any other challenged policy or practice creates a significant risk of serious harm to foster children generally, much less the entire general class of 12,000 PMC children. Nor did Plaintiffs present any statistical analyses showing how the risk of harm from Defendants' policies or practices exceeds constitutional limits. The court struck Dr. Zeller, Plaintiffs' statistical expert, and purported to disregard "any part of testimony by other experts that relied on Zeller's data or report." ROA.21959.

Substantial evidence rebutted Plaintiffs' claims of class-wide constitutional harm. For example, the federal Round-Three CFSR report reflected strong performance by Texas on safety-and-permanency indicators, including Texas's maltreatment score of only 7.83 incidents of abuse or neglect per every 100,000 days in foster care, ROA.39632. Even according to Plaintiffs' expert Zeller, this meant that a child in Texas's foster care has a 0.59% chance per year of being abused or neglected, ROA.25052—which makes PMC children 58% *safer* than children in the general population, PX.2051@31.

D. Liability Opinion

In December 2015, the district court issued a 255-page "memorandum opinion and verdict" concluding that Plaintiffs had proven constitutional harm to all members of the general class and subclasses. ROA.21918-22177. Based on its rulings, the court ordered Defendants to "establish and implement policies and procedures to ensure that Texas's PMC foster children are free from an unreasonable risk of harm." ROA.22162. The court stated that it would appoint a state-funded special master to "effect this injunction," ROA.22162, and help DFPS implement 30 general and specific goals, ROA.22165-71. And it enjoined Defendants to "immediately stop placing PMC foster children in unsafe placements, which include foster group homes that lack 24-hour awake-night supervision." ROA.22162.

Defendants appealed and sought a stay pending appeal. This Court interpreted the unsafe-placements injunction to immediately require only 24-hour-awake-night supervision in FGHs, and the Court refused to stay that order. ROA.24095. Based on that narrow interpretation, Defendants dismissed their appeal, ROA.22328, and continued complying with the awake-night-supervision order.

Subsequently, the district court appointed two special masters to craft an injunction, ROA.22247, and approved a staff of four assistants, ROA.22327. Defendants unsuccessfully sought mandamus relief from the special-master appointment order. ROA.22380.

In November 2016, the masters issued injunctive-relief recommendations. ROA.22490. In January 2017, the district court issued an interim order. ROA.23006. The court praised Defendants' cooperation with the special masters, ROA.23006,

and acknowledged Defendants' "tremendous accomplishments," but stated that it was "not prepared to enter a final order." ROA.23035. Instead, it ordered the special masters to develop various remedial plans. ROA.23018-35.

The special-master process thus continued throughout 2017, even after the Texas Legislature passed legislation bringing many improvements to—and appropriated hundreds of millions of additional dollars for—Texas's foster-care system. ROA.41631-42. In December 2017, the special masters submitted an Implementation Plan recommending nearly 100 injunctive provisions. ROA.23170.

E. Final Order

On January 19, 2018, over Defendants' objections, ROA.23611, the court issued its Final Order largely adopting the special-master recommendations, ROA.23669. Even though over three years had passed since the 2014 trial, and over two years since the court made its liability rulings in 2015, Defendants were ordered to comply with dozens of injunctive provisions "effectively immediately," and dozens more in the coming months. ROA.23669-784. Defendants immediately appealed and sought both a temporary administrative stay and a stay pending appeal. This Court granted an administrative stay on January 19. ROA.624-25. On February 15, the Court heard oral argument on Defendants' stay motion and accelerated the briefing schedule.

Summary of Argument

Plaintiffs failed to prove any of the three elements required for their substantive-due-process class-action claims: culpability, causation, or class-wide harm. Plaintiffs' substantive-due-process claims require them to meet the "extremely high" standard that state officials shocked the conscience through their subjective, "[d]eliberate indifference" to a substantial risk of serious harm—for all 12,000 class members. *Domino v. TDCJ*, 239 F.3d 752, 756 (5th Cir. 2001). But instead of even trying to meet that exceedingly high standard, Plaintiffs' experts improperly used a negligence standard—"unreasonable risk of harm"—that the Supreme Court has repeatedly rejected in substantive-due-process cases. And Plaintiffs' experts made no attempt to quantify the purported risks they identified.

Worse yet, Plaintiffs invited the court to extrapolate the experiences of all 12,000 PMC children from the tragic, atypical case histories of 12 Named Plaintiffs. That tiny, hand-picked subset was the antithesis of the random, representative sample of 400-500 case files Plaintiffs had promised to analyze. Yet the court nonetheless declared these 12 experiences "typical" based on testimony from a witness who was wildly inaccurate in guessing that the PMC contained only 300 children. That cherry-picking exercise fell far short of proving deliberate indifference to every PMC child in the 12,000-member class. And as the Supreme Court has made clear, a system-wide injunction cannot be issued absent system-wide harm. *E.g.*, *Casey*, 518 U.S. at 357-58.

To top it off, Plaintiffs (and their experts) fundamentally evaded the extremely high shocks-the-conscience constitutional standard by advocating for policies that

incorporate "best practices." As the First Circuit recognized in *Connor B.* when it rejected substantive-due-process claims against Massachusetts' significantly worse foster-care system, "aspirational" best-practice "standards" are not "constitutional requirements." 774 F.3d at 55. In contrast with the First Circuit, the district court ultimately embraced Plaintiffs' best-practices approach (while claiming otherwise)—and often went even farther beyond the purported "best practices" Plaintiffs requested. Relatedly, both Plaintiffs and the court improperly cited Defendants' efforts to *improve* Texas's foster-care system as somehow being evidence of deliberate indifference. That approach ignores the vast contrast between sub-optimal conditions and unconstitutional ones that shock the conscience.

Even beyond these legal errors permeating all the district court's findings, the court made further errors about specific aspects of the Texas foster-care system:

1. Caseloads. Plaintiffs alleged that caseloads higher than 25 children per caseworker were unconstitutional, and they offered evidence that capping caseloads at 20 was a "best practice." The district court's injunction, nevertheless, went even further and capped caseloads at 17 children-per-caseworker.

Although it recognized that fewer than half of all PMC children's caseworkers had caseloads above 20, the court found DFPS's caseloads unconstitutional (that is, they reflect conscience-shocking deliberate indifference to a substantial risk of serious harm to 12,000 class members) based on even lower "best practice" standards recommended by child-welfare advocacy groups. But few (if any) States cap caseloads based on those aspirational standards, and the federal government does not require States to cap caseloads at *any* level to receive federal funding. No competent

trial evidence proved that a cap of 17—or *any* caseload cap—is needed to mitigate a substantial risk of serious harm to all PMC children.

2. Placement array. The district court found Defendants' policies relating to the quantity and distribution of available foster-care placements unconstitutional without identifying any standard—even an aspirational, best-practice standard—that DFPS's placement array purportedly violates. It acknowledged that foster children have no constitutional right to be placed in the most family-like settings, in their home communities, or with siblings. Yet the court nonetheless found DFPS's placement array conscience-shockingly deficient because, despite Defendants' self-initiated reform efforts, the court believed Plaintiffs too often are placed outside of family-like settings, are placed outside of their home communities, or are separated from siblings.

3. Monitoring and oversight. Plaintiffs failed to prove that DFPS's policies relating to investigations and inspections of licensed foster-care facilities reflect conscience-shocking deliberate indifference to substantial risks of serious harm. In finding otherwise, the district court (1) improperly extrapolated to all investigations a high error rate from a tiny subset of investigations; (2) required DFPS to adopt the court's preferred way of tracking incidents of child-on-child abuse incidents as the only constitutionally acceptable method, notwithstanding the fact that the federal government does not require it and other States do not use it; (3) disregarded DFPS's professional judgment regarding inspections of licensed foster-care facilities; and (4) determined that RCCL investigator caseloads are constitutionally excessive based on unreliable expert testimony.

4. Foster-group homes. The district court declared that FGHs reflect deliberate indifference to substantial risks of serious harm and ordered DFPS to eliminate them immediately, based on expert testimony identifying several "risk factors" in FGHs. But that testimony was based on data from a small, admittedly biased sample that examined only FGHs *where abuse or neglect was reported*, and the expert had no idea how frequently the risks she identified occurred in all foster-group homes. In finding FGHs categorically unconstitutional based on this unreliable testimony, the court ignored a policy decision made by Texas legislators and DFPS professionals in favor of its own preference for foster-family homes.

STANDARD OF REVIEW

Factual findings are reviewed for clear error; legal conclusions are reviewed de novo. *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam). A court abuses its discretion if, in granting injunctive relief, it relies on clearly erroneous factual findings, relies on erroneous legal conclusions, or misapplies factual findings or legal conclusions. *Id.* at 916-17. Fact-findings that "are based on an erroneous view of the law" are "not insulated by th[e] deferential standard of review." *Mid-Continent Cas. Co. v. Chevron Pipeline Co.*, 205 F.3d 222, 229 (5th Cir. 2000) (internal quotation marks omitted). In this case, the "real dispute" is not over the historical facts concerning what happened to Named Plaintiffs, but "with the legal conclusions . . . drawn" from the district court's findings, which are reviewed de novo. *Connor B.(II)*, 774 F.3d at 52; *see*, *e.g.*, *United States v. Tomkins*, 130 F.3d 117, 120 (5th Cir. 1997); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990).

ARGUMENT

I. NUMEROUS LEGAL ERRORS PERMEATE THE DISTRICT COURT'S CONSTITUTIONAL ANALYSIS OF TEXAS'S FOSTER-CARE SYSTEM.

Regardless of which aspect of Texas's foster-care system was being analyzed, the district court made numerous legal errors that infect its analysis. These errors establish that Plaintiffs failed to meet all three elements for their substantive-due-process, class-action claims: culpability, causation, and class-wide harm. Moreover, Plaintiffs' expert testimony was no evidence of class-wide deliberate indifference, because their experts applied the wrong legal standard and made no attempt to quantify the risk of serious harm to class members.[7]

A. The District Court Misapplied All the Elements of Plaintiffs' Substantive-Due-Process Class-Actions Claims.

1. The court misapplied the extremely high shocks-the-conscience, deliberate-indifference test for determining substantive-due-process culpability.

The Due Process Clause "prevent[s] government from abusing [its] power, or employing it as an instrument of oppression" to the detriment of constitutional rights. *DeShaney*, 489 U.S. at 196 (internal quotation marks omitted). It protects individuals from "arbitrary" government action. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Government action is "fatally arbitrary" only if it "shocks the

[7] Although this Court has previously described foster care as creating a "special relationship" out of which a substantive-due-process right arises, *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990), the Supreme Court has not yet decided that question. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989). Defendants contend that they have not "restrain[ed] [the plaintiffs'] freedom to act on [their] own behalf" in a way that "trigger[s] the protections of the Due Process Clause" and preserve that argument for en banc or Supreme Court review. *Id.* at 200.

conscience," and "only the most egregious official conduct" meets that high standard. *Id.* at 846. It is not enough to "offend some fastidious squeamishness or private sentimentalism"; the government action must "offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 172 (1952). The need for more or different action must be "so obvious, and the inadequacy [of the government policy] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). This is a "stringent test." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001).

Proving that a defendant acted with deliberate indifference is a "significantly high burden for plaintiffs to overcome." *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 882 (5th Cir. 2004). "To act with deliberate indifference, a state actor must consciously disregard a known and excessive risk to the victim's health and safety." *Id.* at 880 (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Accordingly, "'the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Id.* at 881 (quoting *Farmer*, 511 U.S. at 837). This is the same subjective standard that is required for proof of criminal recklessness. *Id.*

The district court acknowledged that, in this Circuit, deliberate indifference is the test for substantive-due-process culpability in the foster-care context. ROA.21937; *see Hernandez*, 380 F.3d at 880. But other circuits have applied an even

more stringent test, requiring proof that state officials exercised no "professional judgment" whatsoever to find a substantive-due-process violation.[8]

In all events, the district court disregarded the shocks-the-conscience, deliberate-indifference standard by asking whether an amorphous "right to be free from an unreasonable risk of harm" was violated. ROA.21932, 21934. That reformulation improperly constitutionalized a negligence standard repeatedly rejected by the Supreme Court in substantive-due-process cases. *See*, *e.g.*, *Lewis*, 523 U.S. at 849. Moreover, the court's freedom-from-unreasonable-risk standard allowed it to greatly expand the types of actionable harm. In its view, foster children have an "unlimited" right to be free from *any* harm, because "[a]ll harms affect either a foster child's person or environment." ROA.21934; *see* ROA.24689 (theorizing that constitutional harm is "like pornography, you just know it when you see it"). Neither the Supreme Court nor this Court has ever held that the Fourteenth Amendment guarantees such an unlimited right. *Cf. Griffith*, 899 F.2d at 1439 (foster children have no liberty interest in optimizing their psychological development); *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1208-09 (5th Cir. 1977) (foster children have no liberty interest in a stable environment). To the con-

[8] Defendants preserve the argument that this even-higher professional-judgment standard applies here. The district court noted that several circuits have eschewed the deliberate-indifference standard in the foster-care context in favor of the professional-judgment standard from *Youngberg v. Romeo*, 457 U.S. 307 (1982). ROA.21938-39.

trary, the Supreme Court has warned that "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

The district court also failed to properly apply the "extremely high" deliberate-indifference standard. *Domino*, 239 F.3d at 756. For each policy area, the court essentially labeled Defendants' efforts to make improvements in that area as acknowledgment of constitutionally deficient policies, and then classified any failure to attain the court's desired outcome as deliberate indifference. But there is a wide gulf separating optimal conditions from unconstitutional ones, and self-improvement efforts reflect purposeful concern, not conscience-shocking indifference. The court's acknowledgment of Defendants' "best intentions to run an effective foster care system," ROA.22172, should have precluded a deliberate-indifference finding.

2. The district court misapplied the proximate-causation requirement, which is very difficult to establish in system-wide class-action challenges to a State's foster-care system.

Section 1983 creates a cause of action against any person who deprives a plaintiff of federally guaranteed rights under color of state law. *Filarsky v. Delia*, 566 U.S. 377, 383 (2012). To have a valid official-capacity §1983 claim, the deprivation of a federally guaranteed right must be tied specifically to a specific governmental policy or practice. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[I]n an official-capacity suit 'the entity's "policy or custom" must have played a part in the violation of federal law.'") (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

The law requires "more than a mere 'but for' coupling between cause and effect." *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992). Instead, "there must be a direct causal link between the [governmental] policy and the constitutional deprivation." *Piotrowski*, 237 F.3d at 580. This is a "high threshold of proof." *Id.* Moreover, as the district court acknowledged, "[t]he 'question of causation is intensely factual.'" ROA.22077 (quoting *Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999)). Thus, proving that the injuries of an entire class or subclass were directly caused by a challenged policy or practice is an especially difficult task.

Plaintiffs in foster-care class-action suits typically attempt to prove injury and causation by having experts analyze a representative, random sample of children's case files—often called a "case reading" or "case read." *See*, *e.g.*, *Connor B.(I)*, 985 F.Supp.2d at 136-37; *Cassie M. ex rel. Irons v. Chafee*, 16 F.Supp.3d 33, 62 (D.R.I. 2014), *vacated on other grounds sub nom. Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825 (1st Cir. 2015); *Baby Neal ex rel. Kanter v. Ridge*, No.90-2343, 1996 WL 4050, at *2-3 (E.D. Pa. Jan. 2, 1996) (noting that "[c]ase readings have been used in cases dealing with similar allegations of systematic deficiencies"). Using case reads, experts examine both agency policies and individual children's characteristics "to figure out the relative importance of those factors" in determining children's outcomes. ROA.25073. Plaintiffs' experts acknowledged that a comprehensive case read is "the most effective way to know what's going on with [foster children]." ROA.26132-33. Yet Plaintiffs failed to conduct one.

Plaintiffs planned to have Dr. Zeller conduct a case read of a representative sample of 400-500 PMC children's files "to establish whether there were correlations

between a particular outcome and some claimed insufficiency or inadequacy of DFPS." ROA.25072. But they abandoned their analysis, purportedly because "it would have been difficult" to accomplish. ROA.25100. Accordingly, Plaintiffs did not "study any of the specific outcomes for any of the children in the PMC." ROA.24999; *see* ROA.25095. That failure left Plaintiffs without any reliable way to prove causation—particularly on a class-wide basis.

And proving causation was already going to be extraordinarily difficult. The district court recognized that "children in the PMC are practically guaranteed to have experienced significant trauma *before* entering the State's care." ROA.4061 (emphasis added). Plaintiffs' experts agreed. ROA.25531-32, 26217. The court observed: "[H]ere we've got children who are already damaged when they come into the system," ROA.27469, including "children [who] are so damaged that nothing good can be done," ROA.27470. Accordingly, the court initially demanded strict proof of causation. ROA.25050. But Plaintiffs, who lacked statistical evidence linking any challenged state policy or practice to a specific risk of harm, did not provide it.

The court attempted to sidestep Plaintiffs' evidentiary shortcoming by labeling the causal link between the challenged policies and Plaintiffs' alleged injuries "obvious." ROA.22077. But considering the severe trauma experienced by children before entering foster care, causation was anything but obvious. *See*, *e.g.*, PX.2015@46, 48 (describing a Named Plaintiff who "entered state care as a young child who was already psychologically disturbed," and recognizing the "close connection between

[her] abysmal life experiences and problems such as persistent aggression, weak social skills, and a willingness to violate reasonable rules"); ROA.27470 (district court stating that "children [who] have significant issues act out in very strange ways").

3. The district court erred by granting system-wide relief without requiring proof of system-wide injury to all 12,000 class members.

Because Plaintiffs brought a class-action lawsuit, they had to establish that the alleged inadequacies of Texas's foster-care system were "widespread enough to justify systemwide relief." *Casey*, 518 U.S. at 359; *accord Guajardo v. TDCJ*, 363 F.3d 392, 397 (5th Cir. 2004) (per curiam) ("[T]he Supreme Court has required system-wide injury for system-wide injunctive relief."). But "class-wide challenges to a state agency's entire set of practices for care of foster children are difficult to bring successfully." *Connor B.(II)*, 774 F.3d at 55. And by alleging class-wide *substantive-due-process* violations, "Plaintiffs set themselves to climb a virtually unscalable peak." *Connor B.(I)*, 985 F.Supp.2d at 166. Like the plaintiffs in *Connor B.*, Plaintiffs here failed to prove system-wide constitutional injury.

In *Connor B.*, the plaintiffs proved that six named plaintiffs were harmed by the defendants' foster-care practices, but that was inadequate "to obtain class-wide federal injunctive relief mandating federal court oversight of the enormously complex state foster care system." 774 F.3d at 55. Massachusetts's foster-care system was substandard in numerous respects; by practically any objective measure, it was in far worse shape than Texas's. *See id.* at 52 (noting that Massachusetts "lags behind other states and national metrics" in key areas). Nonetheless, the *Connor B.* plaintiffs lost because they failed to prove that the challenged practices "caused direct harm

to the entire class or even a majority of the class," *id.*, and the court properly "decline[d] to substitute its judgment for that of duly elected [state officials]." 985 F.Supp.2d at 162.

a. To prove class-wide injury here, Plaintiffs told the district court they would perform a statistical analysis of a representative, randomly-selected sample of PMC children's case histories. *Cf. L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 121 (4th Cir. 1988) ("[P]laintiffs presented a statistical study of the case records maintained by the officials on children in foster care prepared by an expert in research methodology and child welfare services."). But Plaintiffs abandoned their promised analysis of a random, representative sample. Instead, they attempted to prove class-wide constitutional violations using anecdotal evidence—principally, the troubling experiences of 12 hand-picked Named Plaintiffs. Because those children represent only 0.1% of the approximately 12,000 PMC children, however, their experiences could indicate a class-wide risk of harm only if those experiences are representative of the experiences of PMC children. They are not.

Undisputed evidence demonstrates the *atypicality* of Named Plaintiffs' experiences. For example, while PMC children experience 4.5 placements on average, ROA.4082, Named Plaintiffs experienced far more. S.A. had 33 placements; K.E. had 27; A.M. had 21; M.D. had 19; C.H. had 15; L.H. and H.V. each had 13; J.S. had 10; and Z.H. had 9. ROA.21999, 22049, 22013, 21974, 22067, 22044, 22021, 22046. Former Named Plaintiff D.P. had 54. ROA.22143. Similarly, the amount of abuse and neglect described in Named Plaintiffs' histories, ROA.21973-22072, is exponentially higher than Texas's average of 7.83 incidents per 100,000 days in foster care.

ROA.39632. Thus, while abuse and neglect may have been common experiences *among Named Plaintiffs*, that is no evidence that their experiences were typical of PMC children generally, most of whom do *not* experience maltreatment. ROA.25052 (Zeller testifying that Texas foster children have a 0.59% chance per year of experiencing maltreatment); PX.2051@31 (complaining that Texas foster children "are only 58 percent safer" than "children in the general population").

b. The district court nonetheless found that the dismal experiences of nine Named Plaintiffs examined by Plaintiffs' expert Dr. Carter were "typical . . . of the entire foster care system in the State of Texas, especially in the PMC." ROA.21990, 21996, 22077, 22014, 22022, 22045, 22049, 22057, 22069 (citing ROA.26321-22, 26383). To support that conclusion, the court cited Carter's answers to several leading questions from the bench:

> THE COURT: Of these descriptions of learned helplessness and disturbed children, and being victimized in foster care that you talk—tell about these, is this typical, in your experience, of the entire foster care system in the State of Texas?
>
> [Carter]: It is.
>
> THE COURT: Is it worse in [PMC]?
>
> [Carter]: Yes, in my experience.

ROA.26321-22.

> THE COURT: Is what happened to these [Named Plaintiffs] typical of foster care in general in [PMC]?

[Carter]: Unfortunately, yes.

ROA.26383. That reliance on Carter's eight-word *ipse dixit* was misplaced because, as the court said of another expert, Carter "ha[d] no expertise in that area and was not retained to offer opinions on that topic." ROA.21968.

Carter knew virtually nothing about the PMC. *Cf.* Fed. R. Evid. 702(a). When asked how many children it contained, Carter responded: "Three hundred-ish? I don't know." ROA.26341. This stunning admission—unmentioned by the district court—completely debunked Carter's purported expertise concerning the 12,000-member PMC and disqualified him from proffering opinions about it.

Nowhere in his expert report had Carter stated that Named Plaintiffs' experiences were typical of PMC children. *Cf.* Fed. R. Civ. P. 26(a)(2)(B)(i) (expert reports must provide "a complete statement of all opinions the witness will express and the basis and reasons for them"); Fed. R. Evid. 703. Experts may "testify about matters discussed in their own reports, not new matters" outside their reports. *Garza v. Allstate Tex. Lloyd's Co.*, 284 F.App'x 110, 113 (5th Cir. 2008) (per curiam) (unpublished). The sole mention of the PMC in Carter's report was his statement that his opinion was limited to the Named Plaintiffs he analyzed: Carter was hired to "opine on the type of harm, if any, that are common to *these children* as a result of *their* time in the State's PMC." PX.2015@2 (emphases added).

Carter's observation that certain harms were common *among the 12 Named Plaintiffs* constitutes no evidence that all 12,000 PMC children face a substantial risk of serious harm. As the First Circuit in *Connor B.* concluded:

> We agree that the six individual plaintiff children were in fact harmed. But the plaintiffs do not ask for a determination as to whether the constitutional rights of those six were violated. This lawsuit was not framed to bring relief to the named plaintiffs, but to obtain class-wide federal injunctive relief mandating federal court oversight of the enormously complex state foster care system.

774 F.3d at 55. Named Plaintiffs' experiences likewise fail to support class-wide injunctive relief in this case.

c. Implicitly acknowledging the unreliability of Carter's PMC testimony, the district court stated that "[n]umerous witnesses testified that the Named Plaintiffs' experiences are typical for children in Texas's PMC," citing the testimony of ad litem attorneys Ricker, Solis, Stukenberg (Klager), and Vasquez. ROA.21973 (citing ROA.26405, 26414, 25323, 25823-25, 26794-97). But none of those four *lay* witnesses had personal knowledge of the entire PMC, which contains 12,000 children in 254 counties. *See* Fed. R. Evid. 701. Thus, they were incompetent to testify about what is typical of PMC children *generally*.

Indeed, they did not even purport to describe what is typical for PMC children statewide. Ricker, who represents children near Levelland, ROA.26386-87, testified that it is common among children she represents to have experienced sexual abuse, ROA.26405, or have an adoption delayed by an overburdened caseworker, ROA.26413-14. Solis, who practices in Cameron, Hidalgo, and Willacy Counties, ROA.25310-11, testified that high caseworker turnover was "typical of the clients [he had] represented," ROA.25323. Stukenberg testified about the lack of placement options in Nueces County. ROA.25823-25. And Vasquez testified that caseworkers in Cameron County often file reports late. ROA.26794-97. This scattershot testimony

does not support the findings that "the Named Plaintiffs' experiences are typical for children in Texas's PMC," ROA.21973; that PMC children "almost uniformly leave State custody more damaged than when they entered," ROA.22171; or that "rape, abuse, psychotropic medication, and instability are the norm" in PMC, ROA.22172.

d. Those findings are flatly contradicted by Texas's strong federal-CFSR scores on statewide safety and permanency indicators. ROA.39622-34. The court stated that Texas's performance "provides little, if any, reliable evidence in this case." ROA.21945. That reasoning is significantly flawed.

First, the court noted that most CFSR indicators used data for both TMC and PMC children, whereas "Plaintiffs' claims only relate to children in Texas's PMC." ROA.21944. But if rape and abuse were truly "the norm" in the PMC, ROA.22172, it would be impossible for Texas to be meeting (or even approaching) the ambitious national standard of 8.04 victimizations per 100,000 days in foster care for TMC and PMC combined—even if no victimizations were substantiated in the entire TMC. ROA.39632-34. Similarly, if caseworkers (who serve both TMC and PMC children) were so overburdened as to be effectively absent, Texas would be nowhere near meeting the ambitious national standards for permanent placements. ROA.39622-31. Regardless, the court's finding that Named Plaintiffs' experiences were typical of Texas's "entire foster care system," *e.g.*, ROA.21990, defeats the mixed-data complaint.

Second, the court stated that whether Texas meets the Children's Bureau's national standards "does not answer whether Texas's PMC foster children are placed

at an unreasonable risk of harm." ROA.21945. But in suggesting that CFSR performance is irrelevant to substantive-due-process liability, the court failed to recognize that the constitutional floor must be far *below* the lofty heights set by the Children's Bureau's ambitious national standards. If a State is anywhere close to satisfying those ambitious standards, it cannot be deliberately indifferent to substantial risk. For example, Massachusetts' maltreatment scores, which were "consistently in the bottom quartile of all states," did not prove a due-process violation. *Connor B.(I)*, 985 F.Supp.2d at 160.

Third, observing that States' CFSR scores are based on self-submitted data, the court complained that Texas's safety-related data is "unreliable" because DFPS's investigations are "often inaccurate." ROA.21945. As discussed below, however, the court's categorical condemnation of DFPS investigations is based on improper extrapolation from a tiny, unrepresentative sample—much like the court's reliance on 12 Named Plaintiffs' experiences to find constitutional harm to all 12,000 PMC children. *See infra* Part.II.C.1. Moreover, that data-quality argument does not explain Texas's strong *permanency* scores, which are not based on investigation data. ROA.39622-31. Regardless, when the federal Children's Bureau has concerns about the quality of States' foster-care data, it excludes that data from CFSR reports. *E.g.*, ROA.39620. Texas was not among the 18 States that had data excluded from the 2014 CFSR report for data-quality concerns. ROA.39620. The district court simply refused to accept the reality of Texas's functioning foster-care system.

Named Plaintiffs' stories are undeniably tragic. But "[t]ragedy does not necessarily presuppose a constitutional violation." *Griffith*, 899 F.3d at 1441. Moreover,

the "harrowing accounts of the Named Plaintiffs" fail to prove "that the deprivations complained of were felt *class-wide*." *Connor B.(I)*, 985 F.Supp.2d at 162. The atypical experiences of the 12 hand-picked Named Plaintiffs, together with the testimony of several attorneys ad litem about aspects of foster care in Levelland and four south-Texas counties, were "a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Casey*, 518 U.S. at 359.

B. Plaintiffs' Expert Testimony Applied the Wrong Legal Standard and Failed to Quantify the Risk of Class-Wide Constitutional Harm.

Plaintiffs' expert testimony was unreliable and should not have been admitted. Plaintiffs' experts failed to quantify the risk of harm caused by the State's foster-care policies. And they expressly applied a negligence standard instead of the exceptionally high, substantive-due-process shocks-the-conscience standard.

1. An expert's opinion testimony is admissible only if, *inter alia*, "the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d); *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993). "To establish reliability under *Daubert*, an expert bears the burden of furnishing 'some objective, independent validation of [his] methodology.'" *Brown v. Ill. Cent. R.R.*, 705 F.3d 531, 536 (5th Cir. 2013) (quoting *Moore*, 151 F.3d at 276). This inquiry's focus "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S at 594-95.

Plaintiffs thus needed reliable expert testimony to prove that Defendants' policies created "substantial risks of serious harm" to all class members. *Hernandez*, 380 F.3d at 881; *see Helling v. McKinney*, 509 U.S. 25, 36 (1993) (discussing need for "a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury . . . will actually be caused"). The Supreme Court has described substantial risk as "a significant risk," *Farmer*, 511 U.S. at 838, one so high as to be "objectively intolerable," *id.* at 846. Similarly, this Court has stated that "a substantial risk requires a strong probability that the event . . . will occur." *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999) (per curiam).

When constitutional liability turns on proving a substantial risk of serious harm, an expert's failure to quantify the risk is fatal. *See*, *e.g.*, *Emmett v. Johnson*, 532 F.3d 291, 302-03 (4th Cir. 2008); *Garrett v. Athens–Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004) (per curiam); *Hott v. Hennepin County*, 260 F.3d 901, 908 (8th Cir. 2001); *see also Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278-79 (5th Cir. 1998) (en banc). But remarkably, none of Plaintiffs' experts whose testimony was deemed reliable by the court even *attempted* to ascertain the likelihood of occurrence of the potential harms they addressed. Carter's and Burry's expert reports addressed only certain Named Plaintiffs, who represent less than 0.1% of all PMC children. PX.2015; PX.2003; *see supra* Part I.A.3. And the district court struck Zeller, Plaintiffs' expert

who was designated to provide testimony regarding class-wide constitutional harm. ROA.21957-59.[9]

Plaintiffs' only other experts who testified about risk of harm to children in the general class or either subclass were Miller, Richter, and Chansuthus. None of them even attempted to quantify the risk of harms they testified about. ROA.25784, 26230, 26055. That failure alone rendered their testimony fatally unreliable. *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354-55 (2011) (expert's inability to determine "with any specificity" how frequently gender-stereotyping affected defendant's employment decisions—"the essential question on which [plaintiffs'] theory of commonality depends"—allowed reviewing court to "safely disregard what he has to say"). Accordingly, their testimony provides no support for the district court's findings. *See Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) ("[T]he existence of sufficient facts and a reliable methodology is in all instances mandatory."); *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) (courts "look to the basis of the expert's opinion, and not the bare opinion alone," because a claim cannot stand "on the mere *ipse dixit* of a credentialed witness").

2. Plaintiffs attempted to circumvent their experts' inability to quantify risk by substituting objective "unreasonable risk" for subjective deliberate indifference of "substantial risk." ROA.25542, 25850, 25864, 25870, 25884, 25886-87, 25780, 25784-85, 26220, 26229. But those terms are not synonymous. *See supra* Part I.A.1.

[9] In any event, Zeller's disallowed testimony that Texas foster children annually face a 0.59% risk of abuse or neglect, ROA.25052, only *undermined* the court's class-wide liability rulings.

"Unreasonable risk of harm"—a negligence standard—is not a basis for liability under the Due Process Clause. *See Collins*, 503 U.S. at 117, 128-29; *Lewis*, 523 U.S. at 849. And Plaintiffs' experts used "unreasonable risk of harm" to mean something far different from a "substantial risk of serious harm," or a deprivation of "personal security and reasonably safe living conditions." *Hernandez*, 380 F.3d at 880-81.

Chansuthus defined "unreasonable risk" to encompass any risk of harm that results when someone was "negligent" in failing "to prevent that risk from happening." ROA.25784-85. Miller's definition of "unreasonable risk"—risk that "is not acceptable to a normal, reasonable person's perceptions," ROA.26051—likewise incorporated an objective negligence standard. But "negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849. Richter used an even lower standard, stating: "I would not place a child in these homes." ROA.26220.

In sum, Plaintiffs' unreliable expert testimony that DFPS policies create "unreasonable," "undue," or "unnecessary" risks of harm is no evidence that any policy or practice poses a substantial risk of serious harm to all class members—much less that Defendants are deliberately indifferent to any such risk.

II. THE DISTRICT COURT MADE FURTHER LEGAL ERRORS AND CLEARLY ERRONEOUS FACT FINDINGS WHEN ANALYZING DISCRETE POLICIES OF TEXAS'S FOSTER-CARE SYSTEM.

The district court found DFPS's policies or practices constitutionally deficient in several areas. For the general class, the main issue is caseworker caseloads. For the LFC subclass, the issues are the number, type, and geographic distribution of foster-care placements ("placement array"), and the oversight exercised by RCCL. For the FGH subclass, the issues are the oversight and staffing of foster-group homes. For each class, the district court committed further errors requiring reversal.

A. Caseloads (General Class)

Plaintiffs asked the district court to cap Defendants' conservatorship-caseworker caseloads at 25 children-per-caseworker—the threshold at which they alleged caseworkers become so overburdened that they effectively fail to provide services to children. ROA.24829, 25570. Plaintiffs' caseloads expert, Dr. Miller, testified that capping caseloads at 20 children per caseworker was a "best practice." ROA.25560. The court found DFPS's caseloads unconstitutional, ROA.22086, and ordered Defendants to cap caseloads at an even more aggressive limit of 17 children-per-caseworker, ROA23727.

There was no basis for this injunction. The court acknowledged that "best practices" are not constitutional minima, ROA.4068, and it declined to identify the point at which caseloads become unconstitutional, ROA.22081. Nonetheless, it found that "excessive caseloads plac[e] PMC children at an unreasonable risk of harm," ROA.22086; that DFPS's caseload-related policies violate PMC children's "right

to be free from an unreasonable risk of harm," ROA.22103; that DFPS is "deliberately indifferent toward excessive caseworker caseloads," ROA.22115; and that DFPS's failure to reduce its excessive caseworker caseloads demonstrated a failure to exercise professional judgment, ROA.22116. As discussed above, however, the constitutional liability standard is subjective deliberate indifference to a "substantial risk of serious harm," not objective "unreasonable risk of harm." *See supra* p.24. And no credible evidence supports the court's finding of class-wide constitutional harm.

1. No evidence of substantial risk or class-wide harm

While the constitutional standard required Plaintiffs to prove state officials' policies regarding caseworker caseloads showed subjective deliberate indifference to a substantial risk of class-wide harm, Plaintiffs did not even establish an objective substantial risk of class-wide harm.

a. At a minimum, Plaintiffs needed to establish (1) the point at which caseworkers become so overburdened as to impose a substantial risk of harm to children in their care; (2) that so many caseworkers are so overburdened that *all* PMC children face a substantial risk of harm from overburdened caseworkers; and (3) that Defendants' policies reflected deliberate indifference to that class-wide risk. But neither Plaintiffs nor the district court could even identify the threshold at which caseworkers become so overburdened as to create constitutionally excessive risks. ROA.22018.

The court concluded that DFPS's caseloads surpassed that unidentified constitutional limit because they were higher than (1) the 15 children-per-caseworker maximum caseload recommended by the Child Welfare League of America ("CWLA") and the Council on Accreditation ("COA"), and (2) the 20 children-per-caseworker maximum caseload that Miller testified was a "best practice." ROA.22018. But the court erred in assuming that such "best practices" establish the constitutional floor. As the court itself acknowledged, aspirational "standards such as [CWLA and COA's] do not control liability in a Fourteenth Amendment case." ROA.4068. And what Miller found to be a "best practice" in Tennessee—a State whose foster-care system and demographics are unlike Texas's, ROA.26058-59—provides no credible basis for her conclusion that Texas's caseloads present an unreasonable risk of harm, much less a substantial risk of serious harm.

At trial, Defendants successfully objected to Plaintiffs' efforts to have Miller testify to a constitutional limit of 25 children-per-caseworker because she had not provided any such threshold number in her expert report. ROA.25554-55. The district court eventually told Miller: "Forget about the 25. Just tell me what you think is appropriate." ROA.25555. Miller then described limiting caseloads to 20 or fewer children per caseworker as a "best practice." ROA.25560. But there is an enormous difference between having a caseload higher than what one expert deems "appropriate" or a "best practice" and being "so grossly overloaded that [caseworkers] effectively give no services . . . to the children under their protection," which is what Plaintiffs alleged. ROA.24827.

The court acknowledged that only 43% of caseworkers assigned at least one PMC child had caseloads above Miller's "best-practice" limit of 20. ROA.22081 (citing ROA.40047). Plaintiffs' own evidence showed that fewer than half of all PMC children's caseworkers' caseloads exceeded 20. ROA.40047. And 70% of PMC children had caseworkers whose caseloads did not exceed 25—Plaintiffs' alleged constitutional threshold. ROA.41629. Thus, there were *thousands* of class members whose caseworkers were not overburdened under either Miller's best-practice standard or Plaintiffs' proposed constitutional threshold.

To circumvent this problem, Plaintiffs argued (and the court accepted) that all class members are legally injured if they are merely at some risk of being assigned an overburdened caseworker. ROA.21934. But the Supreme Court rejected this risk-of-being-at-risk approach in *Casey*, reasoning that "a healthy inmate who had suffered no deprivation of needed medical treatment" cannot claim a "violation of his constitutional right to medical care" simply because "the prison medical facilities were inadequate" and he may need medical care at some point. 518 U.S. at 350.

b. Moreover, Miller's opinion was unsupported by reliable data. Fed. R. Evid. 702. Accordingly, her *ipse dixit* testimony is "worlds away" from proving that Defendants' policies impose substantial risk of serious harm. *Wal-Mart*, 564 U.S. at 355.

First, Miller made no attempt to quantify the risk of harm posed by DFPS's caseloads; indeed, she was unsure whether risk even "can be quantified." ROA.26055. For example, Miller testified that high caseloads can delay permanency, but she had no idea how often that occurs in Texas. ROA.26098. Nor could Miller square Texas's strong federal CSFR scores, ROA.39622-34, with Plaintiffs' position

that DFPS's caseworkers are so overburdened as to be effectively non-existent, ROA.26125-26. Miller, who lacked firsthand knowledge of PMC children or Texas's foster-care system, ROA.25514-20, essentially assumed that "anything less than best practices harms children." ROA.21524.

Second, Miller relied on Zeller's analysis of PMC caseloads to support her opinion that overburdened caseworkers pose an excessive risk of harm. ROA.41141-42 (discussing "Zeller Findings on Caseloads"); *see also* ROA.41154, 41156, 41158, 41160, 41162, 41164-66, 41173, 41183, 41185-88, 41190 (citing Zeller's expert report); ROA.26075-76 (acknowledging her "huge number of references" to Zeller's report). Miller's reliance on Zeller's expert report was fatal because the court found Zeller's conclusions unreliable, disregarded his testimony, and purported to disregard any "testimony by other experts that relied on Zeller's data or report." ROA.21959; *see* ROA.25007 ("[I]f you've got a bunch of experts relying on [Zeller's testimony], forget about bringing them").

Third, Miller's opinion was partly based on her assumption that "caseworkers are spending only 26 percent of their time in direct service," *i.e.*, with children. ROA.41190; *see* ROA.26083. But Miller ultimately opined that *caseworkers with caseloads of 26 or more* who spend only 26% of their time in direct service cannot effectively serve the children in their care. ROA.25542. Even if that testimony were supported by reliable data (which it was not), only 22% of PMC children's caseworkers have caseloads above 25. ROA.22081. Miller's testimony undermined the notion that all PMC class members face a substantial risk of harm from excessive caseloads.

Moreover, neither the district court nor Miller explained how this 26% figure demonstrates substantial risks of serious harm to PMC children. Neither accused Texas of failing to meet some minimum time-with-children standard required by the federal government, or even an aspirational best-practices standard. Miller opined that spending "40 to 50 percent" of time in direct service would be an appropriate "goal," but she cited nothing to support her view. ROA.25541. In accepting Miller's *ipse dixit* as the constitutional-liability threshold, the district court ignored this Court's warning to "be wary lest the expert become nothing more than an advocate of policy." *In re Air Crash Disaster*, 795 F.2d 1230, 1233 (5th Cir. 1986).

As Miller acknowledged, many tasks that caseworkers do to protect children are done outside of their presence. ROA.25541. Miller herself testified that whether caseworkers who spend 26% of their time in direct service pose a threat "[d]epends on what the caseload is." ROA.25542. Caseloads vary widely among caseworkers. ROA.41629. The amount of time children require of their primary caseworkers varies depending on children's individual needs. ROA.26063-64. And because caseworkers have varying levels of skill and experience, some caseworkers can carry heavier caseloads than others. ROA.26066-67. Miller's testimony simply underscores that the need to consider individual circumstances makes Plaintiffs' caseloads complaint ill-suited to class-wide resolution.

c. Like Miller, the district court relied heavily on aspirational standards recommended by the COA and CWLA in finding DFPS's caseloads excessive. ROA.21942, 25545. Both groups, which advocate "stringent standards for best practice in child welfare systems," ROA.25690, recommend maximum caseloads of 15

children per caseworker, ROA.22080. But standards recommended by advocacy groups "do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979). Even the court recognized that aspirational "standards [like CWLA and COA's] do not control liability in a Fourteenth Amendment case." ROA.4068. The First Circuit and Washington Supreme Court agree. *See Connor B.(II)*, 774 F.3d at 55 (rejecting plaintiffs' efforts "to take aspirational [foster-care] standards . . . and convert each of them to constitutional requirements"); *Braam v. State*, 81 P.3d 851, 861 (Wash. 2003) (error to admit CWLA standards to prove substantive-due-process violation in foster-care case).

Tellingly, neither Miller nor the district court identified *any* States that cap caseloads at CWLA's recommended limit. ROA.26073. Miller testified that "four or five" states are COA-accredited, ROA.26073, and the court counted six, ROA.21942, but regardless, most States are *not* COA-accredited. Nor does the federal government require states to cap caseloads *at any level* as a condition for receiving foster-care funding. ROA.26074-75.

That few (if any) States cap caseloads following CWLA's or COA's idealistic standards is unsurprising, because foster care is "an area where professional judgments regarding desirable procedures are constantly and rapidly changing." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 855 (1977). For example, in 2013, the district court in *Connor B.* discussed COA's recommended caseloads,

which were then described as being "between twelve and eighteen children per caseworker." 985 F.Supp.2d at 151. By 2014, however, COA's recommended caseload range was "8 to 15 children." ROA.22080.

d. The district court also erroneously relied on several categories of statements made by DFPS officials to find that harm was class-wide. First, officials acknowledged that foster children tend to have better outcomes when caseworkers have lower caseloads. ROA.22080. But that unremarkable proposition is no admission that DFPS's caseloads present an unconstitutional substantial risk of serious harm to all PMC children. *See*, *e.g.*, *Collins*, 503 U.S. at 128-29 ("Decisions concerning the allocation of resources to individual programs . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.").[10]

Second, many observers (including some DFPS officials and employees) have concluded that caseworkers are overburdened. For example, the court stated that "[o]ver 55% of DFPS's caseworkers agree that 'they do not have adequate time during the workday to successfully do their job.'"[11] ROA.22082 (citing ROA.14361). But whether caseworkers feel (or are) "overworked" is not the constitutional standard. *Connor B.(I)*, 985 F.Supp.2d at 166; *see Connor B.(II)*, 774 F.3d at 52 (noting that

[10] Lowering caseloads appreciably requires significant legislative funding. Ironically, the district court cited Defendants' legislative appropriation requests for additional caseworker-related funding as evidence of Defendants' deliberate indifference. *E.g.*, ROA.22105-08.

[11] Furthermore, the 55% statistic is not what it is represented to be. The quoted text described the views not of 55% of DFPS conservatorship caseworkers, but of 55% of *those DFPS caseworkers who participated in Sunset's anonymous online survey*. ROA.14361. Only 62% of all DFPS employees responded to that survey. ROA.14358.

Massachusetts "protected about 99% of children in its care from maltreatment" despite "lag[ging] behind other states and national metrics in . . . caseworker caseloads").

The court's reliance on the testimony of former caseworker Beth Miller, who described feeling stress from an excessive caseload, was similarly misplaced. ROA.2082-83. Evidence that some caseworkers feel overworked does not prove that all foster children face unconstitutional substantial risks of serious harm from excessive caseloads. Caseworkers testified that preventing harm is their priority, even when they feel overburdened. ROA.25341, 25356, 25386. And an outside-consulting group praised CPS's "[s]trong dedication at all levels to child safety, well-being, and permanence," PX.1993@9, and "observed a strong culture of doing whatever it takes to respond to the needs of children," PX.1993@32.[12]

Third, the district court relied on DFPS witnesses' testimony that children face a risk of harm if their caseworkers are so overburdened as to effectively be non-existent. ROA.22079. Contrary to the court's suggestion, however, those witnesses did not testify that DFPS's caseworkers actually *are* that overburdened. According to

[12] The district court also relied on its own reported experience of spending hundreds of hours reviewing Named Plaintiffs' histories to conclude that DFPS caseworkers lack sufficient time to do their jobs. ROA.22083. This reveals little about trained caseworkers' job performance. Moreover, the court's conclusion that it would take a caseworker with a 20-child caseload "around eleven uninterrupted workweeks" just to review those children's files, ROA.22083, wrongly assumes that the files of Named Plaintiffs—among the most troubled children in foster care—are typical of an average PMC child.

the court, "McCall agreed that overburdened CVS caseworkers create an unreasonable risk of harm for foster children." ROA.22081 (citing ROA.24747-48). But McCall just testified that PMC children "need a caseworker," ROA.24747, and agreed that having hypothetical caseworkers who "really are too busy" to perform basic job functions can "create a risk for the children" in their care, ROA.24748. Thus, the assertion that Defendants "agree that excessive caseloads cause an unreasonable risk of harm to foster children," ROA.22081, both misunderstands the constitutional standard and manufactures an "admission" that Defendants did not make.

e. In its second class-certification order, the district court warned that "Plaintiffs have not established any connection between a particular caseload number . . . and a derogation of class members' Fourteenth Amendment rights," ROA.4070, and declared that Plaintiffs would have to provide that proof at trial, ROA.4083. But when Plaintiffs failed to provide it, the court declined to "establish the exact point at which caseloads . . . cause an unreasonable risk of harm." ROA.22081. Instead, it tasked special masters with making that determination. ROA.22167.

Unsurprisingly, the special masters were likewise unable to draw that constitutional line. They recommended a maximum caseload of 17 children based on a post-trial study that measured "how much time was actually spent on various caseload activities." ROA.22494. The district court also cited this study. ROA.23731-32. But the study "does not . . . address the issue of how much time *should* be spent on those activities." ROA.22494. And that objective measure is not the substantive-due-process standard anyway. Further, that study was not before the district court when it

made its constitutional-liability ruling in 2015, and thus cannot belatedly support that ruling. *See*, *e.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 805 (5th Cir. 2014) ("[U]nder the settled law of this circuit, 'an appellate court . . . may not consider facts which were not before the district court at the time of the challenged ruling.'") (quoting *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999)).

2. No deliberate indifference

Likewise, the district court erred in finding that DFPS was "deliberately indifferent toward excessive caseworker caseloads." ROA.22115. Undisputed evidence establishes that DFPS has never consciously disregarded caseworker caseloads but, rather, has promulgated numerous policies to address that concern. The district court's criticisms of those policies largely reflect mere "policy preferences" rather than "constitutional standards." *Grogan v. Kumar*, 873 F.3d 273, 278 (5th Cir. 2017).

a. The court castigated DFPS for not capping the caseloads of primary conservatorship caseworkers. ROA.22109, 22113-14, 22116, 22167, 23727-28. DFPS opposes caseload caps, ROA.24756-57, 24762-63, 25203, 26739, 27953-54, because, in its judgment, caseload caps are inefficient, and thus detrimental to children's safety, permanence, and well-being. ROA.24878, 26739, 26741, 28033.

In lieu of an inflexible *caseload* cap, DFPS takes a more holistic approach, ROA.24878-79, 26739-41, that focuses on caseworkers' *workloads*. ROA.24878, 24757, 27953, 27955. For instance, caseworkers whose assigned children have only basic needs can serve more children than caseworkers whose children have greater needs. Similarly, an experienced caseworker can handle more children than an inexperienced caseworker. Other holistic factors are travel distances for caseworkers and

families, sibling involvement, and court time. ROA.26645-47, 24877-78. Measuring workloads captures these and other nuances; measuring only caseloads does not.

Texas's decision not to impose caseload caps does not reflect deliberate indifference or a lack of professional judgment regarding how much work caseworkers must perform. To the contrary, it is consistent with federal mandates and other States' policies. ROA.27671, 26074-75. And as the Supreme Court has explained, there is a "presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces." *Collins*, 503 U.S. at 128.

b. DFPS actively manages caseworker workloads. Each of Texas's eleven regions has a regional director, program administrators, program directors, and supervisors. ROA.40137, 24875, 26617-18, 26667. Each supervisor is assigned approximately seven caseworkers. ROA.26668, 24875-76, 26619. DFPS relies on supervisors and program directors to manage caseworker workloads. ROA.24875, 26647.

DFPS considers the experience level, abilities, strengths, and needs of each caseworker when assigning cases. ROA.26731. This is particularly true for new caseworkers, who undergo a lengthy training and mentorship period. ROA.24772-73, 25444-45, 26729, 26703, 26713, 25445. The complexity of individual children's cases are also important factors in assigning cases. ROA.26732.

If workload adjustments are needed, the first step is communication between the caseworker and her supervisor and program director. ROA.24876. If a caseworker feels overwhelmed, her supervisor can get other caseworkers to help. ROA.25650-

52. Similarly, if a supervisor faces workload challenges in the supervisor's unit, program directors are expected "to be in close touch with supervisors." ROA.24877. Program directors "have resources at their disposal [to help supervisors and their units], [such as] other supervisors and other units that can step in and help," and there is additional "staff that can pitch in and help if a particular worker is struggling." ROA.24877. If one region is experiencing a shortage of case workers, regional directors can request assistance from other regions. ROA.24879, 26673, 26645. Ultimately, DFPS works as a team to ensure the safety and permanency of children. ROA.26615-16, 24879.

Management is proactive. ROA.26738-39. Regional directors have access to large amounts of data, including a monthly "data placemat" containing region-specific data that can be compared against statewide data, ROA.26636, and a "position control list," which keeps regional directors current on staffing vacancies, ROA.26636-37. An online version of the data placemat allows supervisors to "drill down all the way to" the caseworker" level to obtain detailed performance reports. ROA.26637-38, 27790-92.

c. Additionally, DFPS alleviates the burden on conservatorship caseworkers by using a support network of allied social workers, which is a major piece of the caseworker-workload policy. The foundation of the policy is the primary-caseworker/foster-child relationship. ROA.24746-47. Each foster child is assigned a primary caseworker within the child's home county. ROA.24881. Primary caseworkers are expected to meet monthly with their assigned children. ROA.24874. But there is also a network of secondary caseworkers who support primary caseworkers:

- When children are moved from their home community to a distant county or region, DFPS assigns secondary caseworkers called "I-See-You" caseworkers to meet with them and report back to their primary caseworkers. ROA.26621-23, 24881. The I-See-You program was created in response to legislative demands to decrease travel for primary caseworkers. ROA.24883. I-See-You caseworkers are experienced caseworkers who can visit many children because they do not make court appearances or do other time-consuming tasks that primary caseworkers do. ROA.24882.

- Child-placement specialists help primary caseworkers match children to available placements. ROA.24886-88.

- Foster-and-adoptive-development workers visit children in their placements (in addition to visits made by primary caseworkers). ROA.24898. They observe habitation conditions and check on children's emotional connections with caregivers. ROA.24904-05.

- Kinship workers help primary caseworkers with kinship placements. ROA. 24914-15. They screen kinship homes and provide support to kinship caregivers. ROA.26625.

- Preparation-for-adult-living workers are independent contractors who instruct foster youth age sixteen and older in life skills, such as managing bank accounts, to prepare them for independent adult living. ROA.24916.

- In some regions, adoption-preparation workers work exclusively with children transitioning into adoption. ROA.24918-20. Similarly, Texas-Adoption-Resource-Exchange specialists collect information about adoption-eligible foster children from primary caseworkers and enter it in an online adoption database. ROA.24920.

- DFPS also employs many specialists to assist primary caseworkers, including education specialists, developmental-disability specialists, well-being specialists for foster children's medical needs, child-safety specialists, eligibility specialists, adoption-subsidy negotiators, and community-initiative specialists, ROA.26623-26.

Despite the obvious effect of lessening the primary caseworkers' workloads, the district court ordered DFPS to eliminate the use of I-See-You workers and designate

all secondary caseworkers as primary caseworkers within 30 days. ROA.23741. But the court's view that DFPS should use only primary caseworkers and cap their caseloads at best-practice levels is simply a policy judgment. DFPS's preference to support its primary caseworkers with a network of specialized secondary workers is not conscience-shocking deliberate indifference; it is a purposeful choice to mitigate primary caseworkers' workloads based on sound professional judgment.

d. The district court criticized DFPS for its caseworker turnover. ROA.22077, 22099, 22100, 22106, 22109. But DFPS is not deliberately indifferent towards caseworker turnover and retention; rather, DFPS "constantly work[s] on" it. ROA.26531. DFPS holds regular meetings to discuss retention and hiring of conservatorship caseworkers. ROA.26633-34, 26625-26. In some regions of the State, retention committees were formed to study and implement best hiring practices. ROA.26629-31. DFPS's Transformation program extended the retention-committee concept to all regions of the State. ROA.26631. DFPS has also implemented training programs for supervisors and program directors and worker-recognition initiatives to reduce caseworker turnover. ROA.26630. Although these initiatives have not ended turnover, DFPS is actively working to reduce it.

B. Placement Array (Licensed-Foster-Care Subclass)

1. No evidence of substantial risk or class-wide harm

Plaintiffs alleged that "Defendants have failed to maintain a sufficient number, geographic distribution, and array of foster care placements." ROA.4155. As a result, they alleged, foster children are too often (1) not being placed "in the least restrictive, most family-like settings where their needs can be met," (2) being put "in

placements far from their home communities," (3) experiencing "frequent moves from one placement to another," and (4) being "separated from . . . their siblings." ROA.4156-57. The district court recognized that foster children do "not have a constitutional right to be placed in the least restrictive, most family like placement, or placed with their siblings, or placed close to their home community." ROA.22135. And it rejected Plaintiffs' theory "that DFPS's inadequate array causes frequent placement moves." ROA.22137. Nonetheless, it used Plaintiffs' family-placement, out-of-county, and sibling-separation arguments to conclude that "DFPS's inadequate placement array causes an unreasonable risk of harm to the LFC Subclass," ROA.22144, and "DFPS is deliberately indifferent toward its inadequate placement array," ROA.22149.

Those rulings are unsupported. "Unreasonable risk" is not the exceptionally high substantive-due-process standard. Moreover, the court's belief that not enough children are placed in foster-family homes, with siblings, or in their home communities does not prove that all class members face an unconstitutional risk of harm—particularly when the Constitution does not require those policies. No credible evidence shows that Defendants' placement-array policies create substantial risks of serious harm to all children in licensed foster care.

a. Plaintiffs' allegation that DFPS maintains an inadequate placement array does not complain about any existing DFPS policy. As the court acknowledged, DFPS policy (1) specifies placements in the same county as (or within 50 miles of) the parental home whenever possible; (2) seeks placements "with families as opposed to group care facilities"; and (3) seeks to place siblings together "'[w]henever

possible.'" ROA.22135. Instead, Plaintiffs' inadequate-array claim essentially complains of the *absence* of a policy—specifically, a requirement that DFPS maintain at least one foster-family placement (or "bed") for every PMC child in that child's home county. ROA.24832. Miller testified that PMC children face an unconstitutional risk of harm when that standard is unmet. ROA.25919.

Foster children, however, "do not have a substantive due process right . . . to be housed in the least restrictive, most appropriate and family-like placement while in state custody." *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 507 (D.N.J. 2000). That holding is consistent with this Court's decisions recognizing that States have no obligation to "maximize[] [foster children's] personal psychological development," *Griffith*, 899 F.2d at 1439; and that foster children have no liberty interest in a stable foster-home environment, *Drummond*, 563 F.2d at 1208; *see also Feagley v. Waddill*, 868 F.2d 1437, 1440 (5th Cir. 1989) (holding that involuntarily-committed mental-health patients have no constitutional right to treatment in the least-restrictive setting).

The district court recognized that Plaintiffs do "not have a constitutional right to be placed in the least restrictive, most family like placement, or placed with their siblings, or placed close to their home community." ROA.22135, ROA.23710. Yet its conclusion that Defendants violated Plaintiffs' constitutional rights by sometimes placing children in placements other than single-family homes, in placements that separated siblings, or outside of their home communities effectively confers the very rights the court admits do not exist. And the court's certainty "that DFPS's place-

ment array is inadequate," ROA.22135, is like the *Griffith* plaintiffs' failure to identify the amount of information, training, and services the Due Process Clause purportedly requires be provided to adoptive parents:

> The Griffiths do not tell us precisely what information, training or services they should have received from the state before deciding to adopt five hard-to-place children, but they are sure that what they received was not enough. "Not enough" therefore should "shock the judicial conscience" and entitle them to a remedy founded on the Constitution.

899 F.2d at 1438. Here, as in *Griffith*, "not enough" does not prove a constitutional violation.

b. The district court did not base its substantive-due-process ruling on Defendants' failure to adopt Plaintiffs' one-bed-per-child-per-county policy. Instead, it cited: (1) "an imbalance in geographic distribution of services," ROA.22135; (2) the statistic that all siblings are placed together in 64.7% of sibling groups, ROA.22136; (3) the court's belief that "DFPS relies too heavily on congregate care facilities," ROA.22136; and (4) the fact that DFPS sometimes places child victims of sexual abuse in homes with other children, ROA.22137. Those reasons do not support a finding that DFPS's placement-array policies cause class-wide, substantial risks of serious harm.

To support its geographic-imbalance rationale, the court noted that "while some counties have excess capacity, other counties have fewer than 0.5 beds per child entering care." ROA.22135. Plaintiffs' own expert acknowledged, however, that it would be impossible for DFPS to require that every county maintain the same chil-

dren-to-placements ratio. PX.2051@43 (noting "regional variations in the availability of beds"). Moreover, the court did not identify the minimum number of beds-per-child-per-county the Constitution purportedly requires, or how many counties fail to meet the court's ad hoc 0.5-bed-per-child standard. The federal government does not condition federal foster-care funding on any placements-to-children ratio. COA and CWLA do not even recommend aspirational children-to-placements ratios. PX.2051@42 (admitting there is "no accepted quantified standard for the appropriate ratio of beds to children"). Even Miller's report devoted several pages to "Professional Standards on Placement Array" without identifying any numerical standard that DFPS violates. PX.2037@38-40.

The court recited testimony that "39% of children are placed out of region and 60% out of county," ROA.22135, and commented: "This is a 'high number.'" ROA.22136 (quoting ROA.25935). But it did not claim that DFPS violates any federal requirement (much less a best-practices standard) for in-region or in-county placements, much less a constitutional standard. PX.2051@26 (admitting that "there is no quantified standard for out-of-county or out-of-region placements").

Moreover, Plaintiffs' failure to examine DFPS's reasons for placing *any* individual children outside their home counties, ROA.26132, renders the bare statistics meaningless. As both Plaintiffs and the court acknowledged, it is in some children's best interest to be placed outside their community of origin. ROA.26132, 25018-19. Placement decisions are "based on the needs of the child," and "[t]here are many different reasons why a child would be placed out of the region." ROA.25437. For example, out-of-county or out-of-region placements may be appropriate for children

going into kinship or adoptive placements. ROA.25649, ROA.25437-38. And unless DFPS builds specialized treatment facilities in all 254 Texas counties—a remedy even Plaintiffs did not seek—it is inevitable that some foster children with specialized needs will be placed out-of-county.

Regarding sibling placements, the court described as "alarming" the statistic that, "[a]s of June 2014, only 64.7% of sibling[] groups were placed together." ROA.22136.[13] Plaintiffs conceded, however, that "sibling groups are hard to place," ROA.26254, and there is no constitutional right to be placed with siblings, ROA.22135. Moreover, the court identified no constitutional threshold (nor a best-practices threshold) requiring some higher percentage of sibling placements than what DFPS achieves. Instead, it identified *one* State with a higher percentage of unified sibling placements. ROA.22136. And again, Plaintiffs' failure to examine any of the individual cases comprising the 64.7% figure renders the bare statistic meaningless, as the court acknowledged elsewhere. ROA.25006.

Similarly flawed is the court's assertion that "DFPS relies too heavily on congregate care facilities," ROA.22136—which was based on a statistic that 13.2% of PMC children age 12 or younger "were placed in either [foster] group homes or institutions," compared to a "nationwide average [of] 4.9%." ROA.22136-37. That ar-

[13] That is, in 64.7% of sibling groups, all siblings are placed together. DX.142@1. The court did not mention that at least two siblings are placed together in 83.6% of sibling groups. DX.142@1. And closing all foster-group homes—as the district court ordered, ROA.23773-74—will make it harder to placekeep large sibling groups together.

gument fails for several reasons. First, as the court acknowledged, there is no substantive-due-process right to familial placements. ROA.22135. Second, just because FGHs are unique to Texas does not make them unconstitutional; it makes the court's statistical comparison inapt. Third, Plaintiffs' failure to analyze a representative sample of case histories precluded the court from determining whether any of the placements comprising the 13.2% statistic were not in children's best interest.

Finally, the court's statement that "sexually abused children are frequently placed with other children," ROA.22137, does not support its inadequate-placement-array ruling. While the court stated that "sexually abused children often become 'sexualized' and initiate abuse in the future," and that "sexually abused children are frequently placed with other children," ROA.22137, it failed to quantify (even roughly) the frequency of either occurrence—the crucial variable in determining whether risk is class-wide. *See Wal-Mart*, 564 U.S. at 353. Nor did the court cite any data to support its finding that "child-on-child physical and sexual abuse is typical, common, and widespread throughout Texas foster care." ROA.22124. Instead, it relied on anecdotal evidence to conclude that, regardless what foster-care professionals might determine is best for a child who has been sexually abused, a solo placement is the *only* "safe and appropriate placement." ROA.22137. That unsupported conclusion is undermined by the court's own injunction that allows sexual-abuse victims to be placed with other children on a case-by-case basis. ROA.23766.

c. The court's inadequate-array finding is fundamentally flawed in that a placement array is not a policy or practice that can be enjoined with the kind of single-stroke injunctive relief required for Rule 23(b)(2) classes. *See Wal-Mart*, 564 U.S. at

350. Crucially, DFPS does not control key variables that affect placement array: the number of children needing foster care, the number of foster-family-home placements available, or the geographic distribution of those children and placements. *See*, *e.g.*, *Cassie M.*, 16 F.Supp.3d at 48 (noting that "the State, although it is mandated to protect the health and safety of the children it . . . places into the foster care system, can control neither the volume of its intake, nor the characteristics and needs of its individual charges"); *see K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (noting that "[g]ood foster parents are difficult to find"). And the court acknowledged that neither it nor DFPS can force individuals to become foster parents. ROA.24833. These realities are reflected in the court's vague orders that "DFPS shall take whatever steps are necessary to ensure that it has available to it at all times an adequate placement array," ROA.22170, and "[t]he Special Master shall recommend other provisions deemed necessary to ensure that DFPS's placement array no longer causes an unreasonable risk of harm to foster children," ROA.22171. *Cf. M.D.*, 675 F.3d at 845 (in a Rule 23(b)(2) class, injunctive relief "must be specific") (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007).[14]

As Miller recognized, placement-array concerns are "common to child welfare systems around the country." ROA.25913. Tellingly, neither the special masters nor the district court offered specific solutions for DFPS's purportedly unconstitutional

[14] Plaintiffs asked the court to "order the State to go recruit [foster] families." ROA.24833. But DFPS already recruits families, and the court did not find Defendants' recruiting efforts constitutionally insufficient, nor did it enjoin them to increase those efforts.

array. After studying the issue for six months, the special masters recommended that DFPS itself propose solutions. ROA.22500. The court ultimately ordered DFPS to "ensure it has at least as many foster home placements for children . . . as [DFPS] found it requires to meet [children's] needs." ROA.23766-67. This inability to identify specific injunctive relief to redress the alleged constitutional violation confirms the absence of any violation capable of class-wide resolution "in one stroke." *Wal-Mart*, 564 U.S. at 350; *see* Fed. R. Civ. P. 23(b)(2) ("final injunctive relief" must be "appropriate respecting the class as a whole"); *M.D.*, 675 F.3d at 845-48.

2. No deliberate indifference

The district court's finding that DFPS's response to purportedly unconstitutional risks of harm caused by its placement array was "unreasonable" and, therefore, "deliberately indifferent," ROA.22149, is legally unsound. The court's deliberate-indifference analysis focused on DFPS's Foster-Care Redesign project.

The court acknowledged that the basic plan of Redesign made "sense," ROA.25182; was "encouraged by the idea of" Redesign, ROA.22147; and recognized that Redesign was "conceived with good intentions," ROA.22149. Those findings alone should have negated any subjective deliberate-indifference finding regarding Redesign. But the court was "discouraged by [Redesign's] results," even though Redesign was only in its nascent stage at the time of trial. ROA.22147. In addition, the court unfairly criticized Redesign for not being completed more swiftly and reaching more counties than it had. ROA.22147.

That is no evidence of subjective deliberate indifference. To the contrary, Redesign's phase-in process and sequenced roll-out reflect a thoughtful plan to address

placement-array concerns. The rollout involved a process of evaluating performance within a catchment area before starting the Redesign model in the next catchment area. *See supra* p.13. Significantly, the court's criticism about Redesign's rollout contained no finding that DFPS had dragged its feet in implementing the program, or that hasty implementation was even desirable. Had DFPS rushed the rollout, the court presumably would have faulted that, too.

The court also complained that, at the time of trial, DFPS had no definitive target date for completing Redesign's rollout. ROA.22147. But that is no evidence of deliberate indifference. Redesign's possible completion date depended on lessons learned from the staged-implementation-rollout-sequencing process. ROA.26597-98. Attempting to innovate and adapt a program as it develops instead of rigidly adhering to a hurried statewide-implementation schedule is prudent management, not deliberate indifference.

Remarkably, the court faulted DFPS for being innovative, declaring Redesign "troubling because no other state has a similar model that DFPS can use as a guidepost," and calling it "a risky endeavor." ROA.22147, 41324. States do not violate the Constitution whenever they try novel solutions to intractable public-welfare issues.

Finally, the court's finding that Redesign is a "proven failure that Texas has not attempted to fix," ROA.22149, is unsound. It was premature to declare Redesign a "proven failure" after only two years and a limited rollout, or that Redesign "was defective and half-baked from the start." ROA.22149. The court cannot have it both

ways; it cannot be the case that Redesign makes "sense," ROA.25182, and was also "half-baked from the start," ROA.22149.

C. Monitoring/Oversight (Licensed-Foster-Care Subclass)

The district court declared unconstitutional several DFPS policies relating to monitoring and oversight of licensed-foster-care facilities. Specifically, it held that RCCL was insufficiently staffed, RCCL performed inadequate investigations and inspections of such facilities, and DFPS's method of tracking incidents of child-on-child sexual abuse was deficient. ROA.22125, 22128. The court further concluded that DFPS is deliberately indifferent to risks posed by these purported deficiencies. ROA.22131.To support these findings, the court relied on (1) statistics related to two quality-control reviews of RCCL investigations conducted by CCL's Performance-Management-Unit during a one-year period in 2012-2013, ROA.22118-20; (2) DFPS's policy of recording child-on-child abuse in individual children's case records instead of a central database, ROA.22123-25; (3) RCCL's practice of using corrective plans and probation to address violations instead of initiating enforcement actions against licensed facilities, ROA.22125-27; and (4) Chansuthus's opinion that inspectors and investigators are overburdened, ROA.22127-28.

The court's findings of constitutional violations are erroneous. "Unreasonable risk of harm" is not the substantive-due-process standard. And the cited evidence—a hodgepodge of anecdotes, unreliable expert testimony, and misleading statistics—does not support the court's findings and conclusions.

1. No evidence of substantial risk or class-wide harm

a. The district court heavily relied on a purported RCCL investigation error rate of 75%, which—in its view—"means that many abused children . . . go untreated and could be left in abusive placements." ROA.22119. That extrapolation was grossly improper, much like court's extrapolation of all 12,000 PMC children's experiences from the histories of 12 hand-picked Named Plaintiffs. The errant investigators in that sample overwhelmingly erred on the side of *over*-reporting possible abuse or neglect. And the sample from which the 75% statistic arose was a tiny, unrepresentative sample of one investigative-disposition category. Thus, the purportedly "staggering" 75% error rate is not probative of RCCL's operations generally and does not reveal deliberate indifference towards class-wide risks.

The 75% statistic was derived from data in Performance-Management-Unit quality-assurance reviews. Those reviews examined statewide RCCL investigations for a one-year period (2012-13) in which an "Unable-to-Determine" finding was made in cases involving alleged physical abuse, sexual abuse, or negligent supervision of foster-care children. ROA.22118-19. An Unable-to-Determine finding means the evidence was insufficient to justify finding or conclusively ruling out abuse or neglect. ROA.22118. An internal review concluded that 84 of the 111 Unable-to-Determine dispositions studied (75%) were incorrect. ROA.22119. But it does not follow that all—or even most—of those 84 cases involved undetected abuse or neglect, as the court inferred. Instead, *only 8* of the 84 incorrect Unable-to-Determine dispositions should have found reason to believe that abuse or neglect occurred; the other 76 should have affirmatively ruled it out, or been administratively closed. ROA.25251-

52. Thus, only 8 of 111 Unable-to-Determine dispositions reviewed (7%) failed to detect potential abuse or neglect, and the remaining 76 dispositions involved erring on the side of child protection.

Moreover, the sample from which the 75% statistic arose was patently unrepresentative. Unable-to-Determine dispositions—one of four disposition types—are meant for borderline cases where the evidence is inconclusive. ROA.22118. Relatively few investigations receive Unable-to-Determine dispositions. ROA.25291. Thus, that batch of 84 erroneous Unable-to-Determine dispositions represents a tiny fraction of the thousands of investigations RCCL performs annually—a subset of a subset. ROA.27211, 25291. No expert testified that an error rate derived from that miniscule sample can properly be extrapolated to judge the accuracy of thousands of investigations conducted over multiple years.[15]

The court's reliance on an even smaller subset of 85 physical-abuse investigations in 2012-2013, consisting of 48 Unable-to-Determine and 37 Reason-to-Believe dispositions, is similarly improper. ROA.22118. PMU reviewers concluded that 31 of the 48 Unable-to-Determine dispositions (65%) were incorrect. But only 11—35% of those 31 incorrect Unable-to-Determine dispositions, or 23% of all 48 Unable-to-

[15] Notably, Plaintiffs requested (and Defendants provided) a statistically valid sample of RCCL investigations and data on thousands of Texas foster children. ROA.24402-03, 25070-71, 27487. If Plaintiffs analyzed that data, they did not share the results. And Plaintiffs' anecdotal testimony regarding inadequate investigations of abuse in one foster-care facility in Levelland, and one former foster child's reluctance to report abuse, ROA.22121-23, is an inadequate substitute for expert analysis of a random, representative sample.

Determine dispositions—erroneously failed to detect possible abuse or neglect. Extrapolating sweeping conclusions about thousands of investigations from 11 improper dispositions is error, and operates as a strong and perverse disincentive for States to undertake meaningful self-examination and critique. To the extent this miniscule sample suggests anything about RCCL investigations more broadly, it indicates that investigators tend to *over*-report potential abuse—the opposite of what the court inferred.

b. The district court excoriated DFPS for what it called the "shocking revelation[] . . . that RCCL does not track child-on-child abuse in LFC placements." ROA.22123. But it acknowledged that RCCL *does* document child-on-child abuse "in each child's records." ROA.22123. Thus, the court's actual complaint is that RCCL does not track child-on-child abuse *in a centralized database*. Other States do not track information in the court's preferred manner, ROA.27474, nor does the federal government require it, ROA.27472.

The court theorized that lacking a centralized child-on-child-abuser database poses an unconstitutional risk of harm because caseworkers might miss prior child-on-child abuse in children's individual case records, which—according to the court—"are often tens of thousands of pages long, unorganized, inconsistent, and contradictory." ROA.22123. But it based that assessment on Named Plaintiffs' abnormally lengthy case histories. ROA.22086. And while the court described a single tragic incident of child-on-child abuse that occurred after prior abuse was not recorded "in any centralized place," ROA.22124, such meager anecdotal evidence

hardly proves that the absence of a centralized perpetrator database poses a substantial risk of harm to all licensed-foster-care children.

The court also relied on Dr. Miller's statement: "I can't imagine not tracking child-on-child abuse." ROA.22123 (quoting ROA.25851). But RCCL does that in each child's records. ROA. 22123. Plus, Miller did not identify any other States (except Tennessee) that centrally track child-on-child abuse, even after the court invited her to do so. ROA.25851. Miller had no idea what most other States do. Nor did Miller have any data showing that lacking a centralized child-on-child perpetrator registry increases risk of harm—her expert report did not even address the subject. One expert's unsupported opinion and an anecdotal example are insufficient to conclude that harm is "[t]he obvious result" of taking a different policy approach, ROA.22123, or that RCCL's policy was maintained "with deliberate indifference to the known or obvious consequences that constitutional violations would result." *Piotrowski*, 237 F.3d at 579 (internal quotation marks omitted).

c. The district court also criticized DFPS's practice of working with foster-care facilities to bring them into compliance with licensing standards by using measures like corrective-action plans and probation rather than bringing enforcement actions to suspend or revoke operating permits. ROA.22125. But it acknowledged that revoking or suspending facility licenses would aggravate existing placement-array concerns. ROA.22127. And the court cited no expert testimony demonstrating that this policy decision posed substantial risks of serious harm to all class members. Chansuthus testified only that "[c]hildren are placed *unnecessarily* at risk

of harm" by RCCL's reluctance to implement corrective actions. ROA.25757 (emphasis added).

d. The court relied on Chansuthus's testimony to conclude "that RCCL workers are vastly overburdened." ROA.22127. Chansuthus based her inadequate-staffing conclusion on data showing a decrease in RCCL caseworkers between 2009 and 2014. ROA.41052-53, 25726-27. But she did not identify the point at which an investigative workload or staffing level poses a significant risk of serious harm to foster children. Instead, she apparently *assumed* that RCCL was already operating at or below that unspecified threshold in 2009, such that any increase in workload necessarily rendered RCCL unconstitutional. Moreover, her testimony was speculative and generalized: RCCL "*seemed to be* understaffed," and "[s]taffing *seemed to be* related to [RCCL's performance] deficiencies." ROA.25726-27 (emphases added).

Chansuthus performed no statistical analysis to demonstrate a causal relationship between investigative workloads and risk of serious harm. Nor did she attempt to quantify the risk of harm posed by overworked investigators and inspectors, ROA.25784, so she could not say "with any specificity" how often class members are being harmed. *Wal-Mart*, 564 U.S. at 354. And instead of addressing *substantial* risks of *serious* harm, her testimony discussed risk in vague and conclusory terms. ROA.25711 ("risk of harm"); ROA.25757 ("[c]hildren are placed unnecessarily at risk of harm"); ROA.25716 ("[c]hildren can get hurt"); ROA.25739 ("[c]hildren were left at risk"). Chansuthus's unreliable testimony provides no evidence that RCCL's staffing levels posed substantial risks of serious harm to all class members.

2. No deliberate indifference

a. The district court erred in finding that Defendants are deliberately indifferent toward RCCL's purportedly "faulty investigations." ROA.22129. There was uncontroverted testimony that RCCL supervisors, program administrators, regional managers, and directors monitor the field work of investigators and inspectors. ROA.25456. Quality-assurance data is regularly reviewed within this hierarchy, and RCCL follows up on observed deficiencies. ROA.25456-57. And persons within RCCL's chain of command regularly communicate with supervisors to stay apprised of field operations. ROA.25457. In addition, RCCL analysts do "read behinds" of casework to identify problems with investigations and inspections. ROA.25461. If a deficiency is observed, RCCL's director is notified, and a meeting with the regional manager is held to ensure that appropriate steps are taken to address the concern. ROA.25462. This active-management structure reflects concern, not deliberate indifference.

CCL's Performance-Management-Unit provides an intra-agency quality-assurance function. ROA.25466-67. Its evaluates the policies, training, and development of RCCL staff and identifies areas needing improvement. ROA.25467. PMU's recommendations are recorded in a follow-up log, which is discussed by CCL's management team at monthly meetings. ROA.25471, 25473. PMU's quality-assurance actions contradict a finding of deliberate indifference to investigations.

In addition, the extensive training that investigators undergo before they are permitted to perform abuse-and-neglect investigations shows that RCCL treats investigations seriously, not with conscience-shocking deliberate indifference. ROA.27339.

Investigators must complete 30 days of on-the-job training that includes educational tasks; exposure to RCCL's policies, procedures, and standards; and shadowing RCCL field staff on investigations and inspections. ROA.27339. After the initial 30-day period, new hires start basic-skills-development training, which involves two months of classroom and fieldwork. ROA.27339. And upon completing the basic-skills course, abuse-and-neglect investigators attend specialized training. ROA.27339.

b. The district court criticized RCCL for conducting "faulty investigations" and not "act[ing] reasonably to this known risk." ROA.22129. The court pointed to internal agency reviews conducted in 2012 and 2013 as evidence of deliberate indifference. ROA.22129-30. As discussed above, however, the court's extrapolation of system-wide deficiencies from the error rates in several small, unrepresentative samples was highly improper. Moreover, the immediate and thoughtful attention that CCL paid the 2013 PMU study belies deliberate indifference:

- CCL promptly investigated the 11 placements the PMU determined should have been classified reason-to-believe to determine if "there were any children at risk." ROA.25261. None were. ROA.25261. Follow-up inspections were also done at all other facilities subject to the PMU case rereads. ROA.25261, 25477-78, 27353. And CCL directed the PMU to "to look for any [negative] trends with any of the providers" and RCCL staff. ROA.25262, 25479. None were identified. ROA.25262.

- CCL management held a mandatory "all-hands meeting" of RCCL supervisors and program managers in Austin. ROA.25262, 25481, 27355-57. Commissioner Specia personally attended. ROA.27356-57. CCL "point[ed] out . . . areas that needed improvement . . . and [laid] out the expectations that [RCCL] needed to improve [investigations]."

ROA.27357. RCCL's Director also held a separate three-day meeting with RCCL staff regarding investigations. ROA.25480-81, 27358.

- In 2015, CCL also submitted a Legislative Appropriations Request to hire "20 more investigators, 20 more inspectors, and support staff." ROA.25262, 25265, 25483, 25485, 25492.

c. The district court also found that DFPS was deliberately indifferent toward its purportedly faulty investigations because it does not track child-on-child abuse "in a centralized, easily retrievable fashion." ROA.22130. That finding is clearly erroneous because the evidence established that DFPS's policies do not consciously disregard child-on-child abuse; rather, the court's disagreement was simply with DFPS's *methods* for tracking child-on-child abuse.

Before 2010, RCCL investigators could check a box on a record if child-on-child abuse occurred. ROA.27246-47. After 2010, the check-box was discontinued. ROA.27247. This was a policy decision; DFPS professionals believed, as do many child-welfare experts, that it is undesirable to "track children as perpetrators or label them as perpetrators." ROA.27248-49, 27472-73, 27483-84, 27249. DFPS's decision to track child-on-child abuse through children's individual records rather than a centralized database reflects a policy choice regarding how best to assure child safety while avoiding the stigmatizing effect of labeling children as predators.

DFPS's professional judgment that a centralized database is undesirable does not mean that DFPS fails to keep track of child-on-child-abuse incidents. To the con-

trary, DFPS employs effective alternatives to a centralized database. First, an incident of child-on-child abuse is recorded in each child's "common application"[16] including the RCCL investigation report and any treatment plan. ROA.27132, 27134, 27138, 27141, 27143. This information "stays . . . with the child" and, as placement decisions are made, "follows them." ROA.27136, 27143. Second, a record of the placement at which an incident occurred is also generated in RCCL's computer database, "CLASS." ROA.27096-97, 27123, 27139. And, third, information about child-on-child-abuse incidents is separately kept in children's records by child-placing agencies. ROA.27140-41.

d. The district court also found that DFPS was deliberately indifferent because, in its view, RCCL had not issued enough corrective actions and revocations of foster-care facility licenses. ROA.22131. But that does not mean that DFPS is deliberately indifferent to the licensing-oversight function. Since 2005, DFPS has employed a Facility Intervention Team Staffing ("FITS") model to monitor and regulate facilities. ROA.27387. The FITS team is comprised of three separate divisions of DFPS that coordinate to ensure the safety and well-being of foster children within licensed facilities. ROA.5683, 27387-88, 25769. The FITS model operates on "the concept of redundant protective measures" by having several divisions within the system involved in making that determination. ROA.25766-67, 25774.

[16] The "common application" is a cumulative document that records all prior history for a foster child. ROA.27120. It includes, among other things, information about the circumstances of the child's entry into the conservatorship and any medical diagnoses, as well as the child's service level, basic biographical data, social history, educational history, juvenile-justice history, psychiatric hospitalizations, special needs, and any intellectual disability or disorder. ROA.27119.

The FITS process demonstrates that DFPS is mindful of facility oversight and consistently evaluates facilities' compliance with child-safety standards, not deliberately indifferent to licensing oversight, investigations, or enforcement. Chansuthus conceded that the FITS model was "prudent" and "certainly" can contribute to the "safety, permanency, and well-being" of foster children. ROA.25769. The actual situation in DFPS, as FITS demonstrates, is the opposite of officials recklessly disregarding facts from which an inference of a substantial risk of serious harm can be drawn. Instead, DFPS professionals take steps to remediate and correct facility noncompliance, especially serious child-safety-related concerns.

e. Lastly, the district court held that DFPS was deliberately indifferent towards RCCL workloads. ROA.22131. But as the court recognized, DFPS has not disregarded the need for more RCCL personnel to ameliorate workload challenges and had, in fact, requested additional staff at the time of trial. ROA.22132, 25267, 25484, 25490. The court even called this a "step in the right direction." ROA.22132.

Nonetheless, the court found this response to workloads to be unreasonable because, the court said, "the request [was] not grounded in any knowledge about RCCL's or [Licensed Foster Care] children's needs." ROA.22132. But this incorrectly assumes that DFPS and CCL officials—who confront these issues daily—cannot know RCCL's workload needs without conducting a workload study or establishing caseload caps. *Cf.* ROA.22132. The Constitution does not require workload studies as a prerequisite to requesting additional staff. There is no evidence that DFPS is deliberately indifferent to RCCL workers' caseloads.

D. Foster-Group Homes (FGH Subclass)

Richter's testimony complained that FGHs are understaffed and should not be allowed to contain children of mixed ages and service levels. ROA.26202-06. Tracking Richter's testimony and reciting the same complaints, ROA.22152-56, the district court concluded that DFPS's FGH-related policies and procedures "amount to a structural deficiency that causes an unreasonable risk of harm to the FGH subclass," ROA.22156, and that "DFPS is deliberately indifferent toward FGH's structural deficiencies," ROA.22157. The injunction orders: "Effective immediately . . ., no PMC child may reside in any family-like placement that houses more than six children, inclusive of biological, adoptive, non-foster and foster children." ROA.23779.

This injunctive order is unjustified. "Unreasonable risk" is not the constitutional liability standard. And no credible evidence supports a finding that Defendants' FGH policies reflect deliberate indifference to a substantial risk of serious harm to all children in foster-group homes.

1. No evidence of substantial risk or class-wide harm

a. Richter's "risk factors" are merely policy arguments in favor of the family-home placements to which, as the court acknowledged, Plaintiffs are not constitutionally entitled. ROA.22135. Richter did not perform (or rely on) an analysis of a representative sample of FGH children. Instead, Richter relied on (1) her view that FGHs deviate from CWLA and COA's best-practice standards, PX.2041@13, which she later conceded was "dumb," ROA.26251-52; and (2) her review of investigation

files addressing reported incidents of abuse or neglect in FGHs, mostly in 2012. PX.2041@7, ROA.26223. Richter's testimony was unreliable in numerous respects.

First, while Richter claimed she could "tell you in ten seconds" if a home "isn't a good place for kids," ROA.26243, she could not quantify any of the risks she identified, ROA.26225-26. Richter complained that "magnitude [of risk] is very hard to pin down." ROA.26226. Richter admitted that her analysis did not address the frequency of harm among FGH children—something vital to determining whether *all* class members face a substantial risk of serious harm. ROA.26230. Similarly, Richter had no idea what percentage of all foster-group homes were represented by the homes in her report. ROA.26226.[17] Richter's inability to identify risk "with any specificity," *Wal-Mart*, 564 U.S. at 354, is particularly problematic given her acknowledgement that, as of April 2014, fewer than *half* of all children in FGHs were in homes containing more than six foster children. ROA.26243-44.

Richter's lack of reliable data meant that she could provide only vague and conclusory risk testimony. ROA.26203 ("[T]he more of those children we place [in a home], the more at risk they are for harm."); ROA.26206-07 (older children "can sometimes victimize" younger children); ROA.26211-12 (placing younger children with older children "creates more risk"); ROA.26229 ("[A]re [bad things] happening [in foster group homes]? I think they probably are."). Such testimony

[17] Richter's ignorance of whether the homes in her biased study constituted 1% or 99% of all FGHs mirrored Zeller's ignorance of the total number of PMC children who experience sibling separation, ROA.25003-06—which made Zeller's sibling-separation testimony "worthless," ROA.25007.

provides no basis for drawing a constitutional line at six—the maximum number of children allowed in foster-family homes. Plaintiffs never answered the district court's question: "How are [children] harmed with seven and not six?" ROA.25088.

Second, Richter admitted that her review, which excluded foster-group homes that were *not* investigated for abuse or neglect, ROA.26225, involved a biased sample. ROA.26229 ("[I]t wasn't meant to be unbiased"); ROA.26224-25 ("It was not a statistical analysis."). Determining the risks posed by foster-group homes by examining only homes where abuse or neglect was reported is textbook selection bias. *See*, *e.g.*, *In re TMI Litig.*, 193 F.3d 613, 708 (3d Cir. 1999). The court should have found Richter's testimony unreliable on this basis alone. *Cf.* ROA.21964. Notably, it properly struck Zeller's testimony for comparable reliability problems. ROA.21958.

Third, Richter's use of anecdotal evidence from her admittedly biased subset to confirm her "assumption that bad things are happening" in FGHs, ROA.26224, reflects confirmation bias. Richter concluded that FGH children face "unreasonable risks" after her study confirmed "the things that I expected to see." ROA.26229. *See*, *e.g.*, *Williams v. Quarterman*, 293 F.App'x 298, 313 (5th Cir. 2008) (per curiam) (unpublished) (discussing confirmation bias).

b. Richter's perfunctory causation testimony was likewise unreliable. She acknowledged that "a statistical analysis would be something that might be beneficial," ROA.26226, but she did not perform one, ROA.26225. Instead, she relied on her admittedly biased sample to conclude: "I think we know that some very bad things are happening to kids in those homes." ROA.26226. Neither Richter's vague testimony nor any other evidence supports the conclusion that all children in foster-

group homes—regardless of how many caregivers and children they contain—face constitutionally excessive risks of serious harm.

2. No deliberate indifference

a. The district court concluded that DFPS's FGH policies were deliberately indifferent to a substantial risk of serious harm. ROA.22157. The court largely relied on the existence of the policies it found unconstitutional: the alleged mixing of children of different ages, genders, and service levels in FGHs; the purportedly insufficient supervision of children in FGHs; and alleged staffing inadequacies. ROA.22157. The court's findings are clearly erroneous.

There are approximately 900 children in FGHs, representing about 8% of the approximately 12,000-child PMC. ROA.39705, 27835. FGHs have more rules and structure than do foster-family and kinship placements. ROA.25635-36. FGHs are governed by minimum standards contained in agency rules. *See*, *e.g.*, 40 Tex. Admin. Code §§749.2553, .2556-57, .2563, .2567, .2903. Under these regulations, children are placed in FGHs thoughtfully, not indiscriminately.

Foster-group homes contain 7-12 children. ROA.26903, 27126-27. Each home must be verified for the exact number of children, and the count includes both foster and biological children. ROA.26903-04, 27127-28. RCCL monitors compliance through the family-home study, its CLASS database, and dialogue with child-placing agencies. ROA.27128-30. FGHs serve a vital role by allowing large sibling groups to be placed together. ROA.26254-55.

Furthermore, under Texas's minimum standards, if a FGH has 2 or more children with emotional disorders, there must be at least 1 caregiver for every 8 children.

ROA.27329. For medical-needs children, the required ratio is at least 1 caregiver for every 4 children. ROA.27329. Children under the age of five cannot be placed in a foster group home unless they are part of a sibling group being kept together. ROA.27330-31. In that case, the caregiver-to-child ratio must be at least 1:5. ROA.27328-29. Moreover, children over the age of six cannot share a bedroom with children of the opposite sex. ROA.27331.

These restrictions highlight an inherent contradiction in one of Plaintiffs' and the district court's criticisms. Plaintiffs complain that foster children should be placed in the least-restrictive placement possible, ROA.25635, yet they complain that FGHs are not restrictive enough. FGHs have more rules and structure than kinship placements and foster-family homes. ROA.25635-36. But Plaintiffs still complain that FGHs are too lax.

While DFPS cannot write rules for every possible placement scenario, there are rules that require child-placing agencies to assess children's behaviors to ensure that placements are appropriate. ROA.27131, 27332. DFPS provides yet another layer of protection by considering the appropriateness of placements involving mixed ages and genders as well. ROA.27131-32. In addition, if a FGH plans to serve children with heightened needs (*e.g.,* emotional disorders, pervasive developmental disorders, intellectual disabilities, or medical needs), the home and its caregivers must be verified through training courses conducted by child-placing agencies or DFPS. ROA.27324-25.

DFPS's policy regarding mixing ages and service levels is not vastly different from what the district court's injunction orders. The injunction forbids mixing unless DFPS certifies that mixing would be appropriate. ROA.23760. Thus, both the injunction and DFPS's existing policy allow mixing in appropriate circumstances.

In sum, DFPS is not placing children in FGH settings arbitrarily and without oversight. There are standards that must be followed, and training and monitoring that takes place. DFPS is not deliberately indifferent and has not consciously disregarded any substantial risk of serious harm to children in FGHs.

b. The district court stated that its "biggest concern about the whole case," ROA.24910, was DFPS's failure to require awake-night supervision in all FGHs, ROA.22156. The district court condemned DFPS's policy of mandating overnight supervision in foster-care facilities housing 13 or more children but not in FGHs. ROA.22156, 25164-65. This is merely a disagreement over appropriate line-drawing, with the court substituting its policy preference for that of legislators and executive officials. *See* ROA.24912. Those policymakers determined that 13 was an appropriate threshold to require constant supervision, and Plaintiffs offered no evidence that the Constitution requires a lower threshold. *See* ROA.24912. Plaintiffs did not complain about the lack of mandatory awake-night supervision in foster-family homes with six children, nor did they present any data showing that seven children is the point where awake-night supervision is needed to prevent substantial risks of serious harm. ROA.24912. Reasonable people may disagree about where to draw that line, but it cannot be said that Defendants were deliberately indifferent or exercised no professional judgment whatsoever.

III. THE GENERAL CLASS AND SUBCLASSES NEVER SHOULD HAVE BEEN CERTIFIED IN THE FIRST PLACE.

Plaintiffs' inability to establish class-wide harm at trial demonstrates that the district court abused its discretion in certifying the general class and subclasses. Named Plaintiffs' commonality and typicality problems discussed above, *supra* Part I.A.3, along with the unavailability of appropriate single-stroke injunctive relief, *supra* Parts II.A.1.a, II.B.1.a., confirm that class certification should have been denied. Fed. R. Civ. P. 23(a)(2)-(3), (b)(2); *M.D.*, 675 F.3d at 840-48. While this legal error independently warrants reversal of the final judgment, Plaintiffs' failure to prove class-wide harm on the merits obviates the need to reach the class-certification issue. *Casey*, 518 U.S. at 357-58; *Connor B.(II)*, 774 F.3d at 57.

IV. THE INJUNCTION ORDERS IMPROPER RELIEF.

The district court's sweeping structural injunction wrongly imposes a federal district court's detailed policy preferences—enforced by monitors—for the administration of Texas's foster-care system in myriad respects. This astounding invasion of state sovereignty—based on "best practices" and anecdotal evidence—is wholly improper.

But even if Plaintiffs had provided credible evidence that Defendants' policies reflected conscience-shocking deliberate indifference to substantial risks of serious harm, the injunction would still be flawed in two crucial respects. First, numerous injunctive provisions are designed to address conditions that were not shown by ex-

pert testimony to present *any* risk of harm—even under the erroneous "unreasonable risk of harm" standard. And other injunctive provisions wrongly demand compliance from "the State of Texas," which is not a party.

A. Numerous Provisions Are Unsupported by Any Expert Testimony.

The district court included the following injunctive "remedies" for conditions that no expert testified presented any risk of class-wide harm:

- Development and implementation of "an integrated computer system" (accessible to all DFPS caseworkers and supervisors, plus others) containing "each PMC child's complete records," including all medical, dental, educational, legal, caseworker, and medical records. ROA.23693.
- Requiring all foster homes to "maintain a landline phone accessible to the child in the home." ROA.23707.
- Providing various services, including driver's-education classes, to older PMC children. ROA.23714-16.
- Ensuring that PMC youth age 16 or older have a plan for "safe, stable housing" upon exiting the PMC. ROA.23717.
- Providing an attorney ad litem for every PMC child. ROA.23721-23.
- Providing a plethora of advanced healthcare services to all PMC children. ROA.23724-26.
- Working with state-funded monitors, who have "free and complete access" to Defendants' records, personnel, partners, and foster-care children, to implement the court's injunctive orders and report on Defendants' compliance, ROA.23781-83.

B. The State of Texas is Not a Defendant.

The district court declared: "Since Defendants are state officials in their official capacities, the State of Texas is a Defendant in this case." ROA.23687. Accordingly,

it ordered "the State of Texas" to comply with eleven injunctive provisions. ROA.23747-48. But Texas has never been made a party to this suit. Accordingly, the injunctive provisions directed at "the State of Texas" should be vacated or reformed accordingly. *See Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978) (holding that defendant State was entitled to dismissal on immunity grounds despite presence of defendant state officials).

Conclusion

The Court should vacate the injunction and dismiss Plaintiffs' claims with prejudice. In the alternative, it should reverse and remand for further proceedings.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
scott.keller@oag.texas.gov

/s/ Scott A. Keller
Scott A. Keller
Solicitor General

Joseph D. Hughes
Philip A. Lionberger
Assistant Solicitors General

Thomas A. Albright
Assistant Attorney General

Counsel for Defendants

Certificate of Service

On March 12, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)—**as expanded by this Court's Order of March 12, 2018**—because it contains 19, 914 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller