No. 21-30580

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. A., BY AND THROUGH HIS MOTHER, P.A.; B. B., BY AND THROUGH HER MOTHER, P.B.; C. C., BY AND THROUGH HER MOTHER, P.C.; D. D., BY AND THROUGH HIS MOTHER, P.D.; E. E., BY AND THROUGH HIS MOTHER, P.E.; F. F., BY AND THROUGH HER MOTHER, P.F.,

Plaintiffs - Appellees

v.

COURTNEY N. PHILLIPS, DR., IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH; LOUISIANA DEPARTMENT OF HEALTH,

Defendants - Appellants

On Appeal from the United States District Court
for the Middle District of Louisiana,
Civil Action No. 3:19-CV-00770
Hon. Judge Brian A. Jackson

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Kimberly Ulasiewicz Boudreaux
Rebecca Clement
Ryan Romero
Kimberly Sullivan

LOUISIANA DEPARTMENT OF HEALTH
Bureau of Legal Services – Bin #20
Post Office Box 3836
Baton Rouge, LA 70821-3836
Phone: (225) 342-1128
Fax: (225) 342-2232

Counsel for Defendants-Appellants

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INTRODUCTION

As explained in Defendants' opening brief, the district court made several critical errors in granting Plaintiffs' motion for class certification. Among other things, the district court erred in approving an unascertainable class that is defined based on a child's need for a vague set of "intensive home- and community-based services" ("IHCBS"); it erred in failing to conduct a rigorous analysis prior to resting on the class certification decision; it erred in reading Plaintiffs' Second Amended Complaint ("SAC") as alleging that the Louisiana Department of Health ("LDH") fails to cover *any* IHCBS; it erred in concluding that Plaintiffs' claims involve issues that can be addressed in "one stroke" on a classwide basis; and it erred in holding that Plaintiffs met their burden of proving that they have been harmed in the same way.

In their response brief, Plaintiffs do not dispute that the district court erred in concluding that Plaintiffs' SAC alleged that LDH fails to cover *any* IHCBS, and Plaintiffs continue to struggle to define "IHCBS." Moreover, Plaintiffs still cannot explain how the district court could identify members of the class, resolve the central issues in dispute, or fashion a remedy without an individualized review of the needs and circumstances of every putative class member. Defendants urge this Court to hold Plaintiffs and district court accountable to the rigorous standards necessary to justify class certification, and to vacate the district court's order.

ARGUMENT

1. The district court abused its discretion when it failed to conduct a rigorous analysis before certifying the class.

A district court is required to take a "close look" at the parties' claims and evidence in making its decision under Federal Rule of Civil Procedure ("Rule") 23(f). *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). "Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). A rigorous analysis ensures effective appellate review. *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020).

As explained in Defendants' opening brief, Plaintiffs' SAC alleged that *some* children are not receiving *enough* behavioral health services, but the district court erroneously read the SAC as alleging that LDH does not provide "*any*" IHCBS, which infected the logic of the district court's entire opinion and is reason alone to reverse. **Defs.' Br. 10, 28-29 (citing ROA.392-393)**.[1] In their response brief, Plaintiffs do not dispute that their SAC does not allege that LDH does not provide

[1] Defendants refer to brief page numbers as they are designated by the Court's electronic filing system for Document No. 00516111473 (Defendants' principal brief) and Document No. 00516150132 (Plaintiffs' principal brief).

"*any*" IHCBS, nor do they dispute that the district court erroneously read such an allegation into the SAC. **Pls.' Br. 43-44**.

In addition, the district court failed to conduct the necessary "rigorous analysis" by accepting the allegations in Plaintiffs' pleadings as true and relying almost entirely on third-party reports cited in the SAC. However, these reports do not even mention "IHCBS," and, in any event, they are outdated, unscientific, and irrelevant. For example, the November 2014 Mental Health America report was published over seven years ago and was based on "national survey data," not data from Louisiana Medicaid regarding the services covered for Medicaid beneficiaries under 21 years old with mental health conditions.[2] In addition, the 2018 Performance Audit conducted by the Louisiana Legislative Auditor (LLA) was based upon information from informal "surveys" and interviews with "stakeholders" and primarily covered the time period of 2012 through 2016.[3] Similarly, the 2017 LLA Performance Audit,[4] which pertained to the network adequacy of specialized

[2] Mental Health America, *Parity or Disparity, The State of Mental Health in America 2015*, https://www.mhanational.org/sites/default/files/Parity%20or%20Disparity%20Report%20FINAL.pdf at pp. 5, 7.

[3] Louisiana Legislative Auditor, *Access to Comprehensive and Appropriate Specialized Behavioral Health Services in Louisiana* (Feb. 14, 2018) (the "2018 LLA Performance Audit"), https://www.lla.la.gov/PublicReports.nsf/B99F834BF8F4AB908625823400758F9B/$FILE/000179B4.pdf, at "Appendix B: Scope and Methodology," pp. B.1 – B.2.

[4] Louisiana Legislative Auditor, *Network Adequacy of Specialized Behavioral Health Providers*, (Oct. 18, 2017) (the "2017 LLA Performance Audit"), https://www.lla.la.gov/PublicReports.nsf/E4DC58E4CFC93F01862581BC0062D8A8/$FILE/000166B0.pdf.

behavioral health ("SBH") providers, covered a period that occurred over five years ago, from 2015 through 2016,[5] and focused on an outdated professional licensure process, which was significantly changed by LDH in 2018.[6]

Plaintiffs attempt to inflate the importance of these outdated LLA reports by asserting that Defendants admitted "systemic service deficiencies in failing to deliver mental health services to eligible children," because LDH did not specifically refute some of the findings in some of the audits. **Pls.' Br. 21-22, 35**. This assumption is unfounded. While LDH may *voluntarily* respond to LLA's recommendations to clarify, agree, or disagree with LLA's position (**Defs.' Br. 21 n. 7**), neither federal nor state law require LDH to respond to a performance audit conducted by the LLA, and a lack of response from LDH does not amount to an admission of all findings and comments asserted by LLA. Moreover, Defendants did respond to the LLA's *recommendations* in the 2018 LLA Performance Audit,[7] but none of the recommendations in that audit pertained to the State's alleged failure to

[5] *Id.* at "Appendix B: Scope and Methodology," p. B.1.

[6] Neither party raised the 2017 LLA Performance Audit in their pleadings. However, the district court's class certification order remarks that the 2017 LLA Performance Audit noted that 45 percent of certain providers did not meet licensure requirements. **ROA.758.** The district court failed to review LDH's response to the 2017 LLA Performance Audit, which clarified that after the audit was conducted, only 19.7 percent of providers did not meet professional licensure requirements. 2017 LLA Performance Audit, *supra* n.4, at "Appendix A: Management's Response," p. A.2. More importantly, the professional licensure process significantly changed after the 2017 LLA Performance Audit was issued. In 2018, a new provider credentialing system was implemented, which allows LDH's Office of Behavioral Health to identify services in encounter data more accurately. *Id.*

[7] 2018 LLA Performance Audit, *supra* n.3, at "Appendix A: Management's Response," pp. A.1-A.4.

provide IHCBS, and therefore, LDH's response did not address that issue.[8] This response in no way constitutes an agreement by LDH that "adequate community-based SBH services do not exist," as suggested by the district court and Plaintiffs. **ROA.759; Pls.' Br. 19-20, 35**. In fact, throughout this suit, Defendants have maintained that there are many SBH services available to Medicaid beneficiaries, and that the Defendants cover all medically necessary services for children enrolled in Medicaid. **ROA.395-396 at ¶8; ROA.437-438 at ¶ 8**. Additionally, Defendants continue to object to the district court's reliance on outdated, third-party reports for the premises advanced by Plaintiffs. **ROA.811-815, 818; Defs.' Br. 23-25**.

Other than these reports, the only evidence Plaintiffs submitted in support of class certification were self-serving declarations (**ROA.511-551**) and Medicaid's 2018 Annual Report[9] that does not mention "IHCBS." **Defs.' Br. 20-25**; **Pls.' Br. 33**. Plaintiffs did not conduct any discovery. That is, as Plaintiffs themselves acknowledge (**Pls.' Br. 33**), Plaintiffs' case for class certification relied entirely on their own declarations and outdated reports that do not even mention "IHCBS." From this scant evidence, the district court concluded that LDH has a "policy" of not providing "IHCBS" beyond medication management and counseling sessions. **ROA.754, 757-758, 776**. This was an abuse of discretion, and it was inconsistent

[8] *Id.*

[9] Louisiana Department of Health, Louisiana Medicaid 2018 Annual Report, https://ldh.la.gov/assets/medicaid/AnnualReports/MedicaidAnnualReport2018_v4.pdf.

with the Supreme Court's instruction that the district court must conduct a "rigorous analysis" into whether the requirements for class certification have been met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *see Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question").

2. The district court abused its discretion in finding the class to be ascertainable.

a. Class members are not identifiable.

Plaintiffs assert that class members are identifiable because "the district court need only confirm whether there exists a recommendation [for IHCBS] from a licensed practitioner of the healing arts based on a diagnosed condition." **Pls.' Br. 26**. This does not provide the Court with an objective measure to identify class members, because licensed practitioners do not recommend or prescribe "IHCBS," but rather recommend specific services to ameliorate a patient's condition. **Defs.' Br. 17-22**. For example, a licensed practitioner may recommend that a child receive a certain amount of hours of a certain service. However, a licensed practitioner does not recommend that a child receive "IHCBS," and Plaintiffs did not introduce any evidence to the contrary in the proceedings below.

As a result, the district court cannot confirm that a child has been recommended for "IHCBS," and thus meets the class criteria, simply by reviewing the practitioners' recommendations. Rather, if a recommendation for "IHCBS" will

determine class membership, the district court must ask: What behavioral health services qualify as "IHCBS"? This question remains unanswered. Further, even if there was a clear definition of IHCBS (which there is not), the district court would still need to review each and every practitioner recommendation to determine whether the services recommended meet the definition of IHCBS.

Contrary to Plaintiffs' allegations, Defendants do not attempt to "avoid class certification by arguing that their failure to develop policies and billing codes renders the term IHCBS unascertainable." **Pls.' Br. 31**. Instead, Defendants merely request that Plaintiffs identify the actual services recommended by a provider that Medicaid-enrolled children are not receiving. For example, what services in 42 U.S.C. § 1396d(a) fall within the umbrella of "IHCBS," and how many hours per week of those services are required for the service to be considered "intensive"? If a licensed practitioner recommends a child for one hour of behavioral health counseling a week, is that "IHCBS"? Since before this suit was filed, Defendants have repeatedly sought this information from Plaintiffs, so that LDH could investigate their allegations and assist Plaintiffs in accessing the services they allege they are not receiving. **ROA.613-614**. At every occasion, Plaintiffs have refused to reference specific services recommended by providers that they allege they are not receiving. *See e.g.*, **ROA.613-614, 632-634; Pls.' Br. 24-31**.

The Court should consider why Plaintiffs will not specify the services at issue in this suit. Defendants suspect that Plaintiffs do not yet know which behavioral health services they want to qualify as "IHCBS." By including the nebulous term "IHCBS" in the class definition, Plaintiffs set themselves up to engage in a fishing expedition to search for specific services to bring into this suit.

b. The extraneous documents cited by Plaintiffs do not make the term "intensive home- and community-based services" ascertainable.

Plaintiffs claim "the term IHCBS is ascertainable in its own right," (**Pls.' Br. 30**), citing a 2006 article by the U.S. Department of Health & Human Services and a 2013 Informational Bulletin from the Centers for Medicare & Medicaid Services. **Pls.' Br. 28-29.** Plaintiffs' reliance on a 15-year-old report and an eight-year-old bulletin is revealing; apparently, and not surprisingly, Plaintiffs cannot find a single federal or Louisiana state statute or regulation that refers to or defines IHCBS. Further, the 2006 and 2013 federal documents only use "intensive home and community services," or "intensive in-home services," as an umbrella description of services, and they do not define the term "IHCBS" or provide a list of services that universally qualify as "IHCBS."

Plaintiffs also point to documents from other states' Medicaid programs that Plaintiffs allege "use the term [IHCBS]," or "close variations of it." **Pls.' Br. 29-30.** This argument misses the point. Defendants do not dispute that some entities use the

language "IHCBS"; rather, the problem is that "IHCBS" does not have a universal and easily ascertainable definition, nor have Plaintiffs provided one. The program documents from these other states do not define IHCBS, and Plaintiffs are not even arguing that the district court used or should use a definition provided in one of those other states' program documents.

c. The Court should not follow the non-binding cases cited by Plaintiffs.

Plaintiffs repeatedly aver that "district courts around the country," (*i.e.*, courts not within the Fifth Circuit) use similar terms to define the class and therefore, the class is ascertainable. **Pls.' Br. 27-28; ROA.632-633 n.8**. But the out-of-circuit case law cited by Plaintiffs is inconsistent with the Fifth Circuit's standards for class certification, which require, *inter alia,* an adequately defined class that identifies a particular group of persons. *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *John v. Nat'l Sec. Fire & Cas. Co*., 501 F.3d 443, 445 n.3 (5th Cir. 2007); *see also* **Defs.' Br. 16-17**. Here, the district court cannot "identify class members at some stage of the proceeding" under a class definition that applies to those recommended for "IHCBS." *Frey v. First Nat. Bank Sw.*, 602 Fed. Appx. 164, 168 (5th Cir. 2015).[10]

[10] This case is unlike *Frey*, where the class was ascertainable because it was limited to 1,500 identifiable consumers who, during a specified period, were charged fees for using a particular automated teller machine (ATM) without notice. *Frey,* 602 Fed. Appx. at 168. Those class members were identifiable through several measures (*e.g.*, account numbers, bank identification

The current class definition encompasses a sweeping range of interventions that "IHCBS" may represent. **Defs.' Br. 15, 17-19**. It remains unclear which behavioral health services actually qualify as "IHCBS." Therefore, Defendants cannot identify a particular group of class members. This prevents Defendants from adequately defending the suit or submitting data to refute Plaintiffs' claims and to demonstrate that LDH provides the relevant services when recommended as medically necessary.

Further, many of the cases cited by Plaintiffs from other circuits are clearly distinguishable from this case. For example, several of the cases do not define the class using the term "IHCBS." *See S.R., by & through Rosenbauer v. Pa. Dep't of Hum. Servs*., 325 F.R.D. 103, 112 (M.D. Pa. Apr. 3, 2018); *M.H. v. Berry*, No. 1:15-CV-1427-TWT, 2017 WL 2570262, at *2 (N.D. Ga. June 14, 2017); *O.B. v. Norwood*, 15 C 10463, 2016 WL 2866132, at *1 (N.D. Ill. May 17, 2016). Additionally, in *Dreyfus*, the parties *stipulated* to a class definition that included the term "IHCBS" and reserved the right "to challenge class certification and the class definition upon ongoing discovery." **Pls.' Br. 73**; *T.R. et al. v. Dreyfus*, No. 2:09-cv-01677-TSZ (W.D. Wash. July 23, 2010). Moreover, the classes in *Norwood* and *Berry* were limited to specific services and had lists of all potential class members.

numbers, and administrative tasks). *Id.* at 168-169. Here, there are no similar qualifiers, like a particular event, to identify the group at issue in this lawsuit.

Norwood, 2016 WL 2866132, at *2 (wherein class membership was determined by referring to the department's records, which listed all Medicaid-enrolled children approved for in-home shift nursing services); *Berry*, 2017 WL 2570262, at *4 (wherein class members were determined to be the 763 members in Georgia's Pediatric Program approved for in-home skilled nursing services). Not only are the cases cited by Plaintiffs non-binding on the instant matter, they are also unpersuasive.

Notably, the district court essentially embraced the same class definition approved by an Illinois district court in *N.B. v. Hamos*, 26 F. Supp. 3d 756 (N.D. Ill. 2014), and Plaintiffs have latched onto this case in support of their position. **Defs.' Br. 24**; **Pls.' Br. 27-28, 36, 48-49**. The *N.B.* case utilized the term "IHCBS" in its class definition. However, Fifth Circuit precedent does not support the use of a catch-all phrase, like "IHCBS," in a class definition. *DeBremaecker*, 433 F.2d at 734; *John*, 501 F.3d at 445 n.3; *Frey*, 602 Fed. Appx. at 168. Moreover, *N.B.* is clearly distinguishable from the present case because those defendants did not dispute the plaintiffs' basic factual allegations or reject the use of the term "IHCBS," which led the district court to adopt the facts as alleged in the complaint. **Defs.' Br. 24-25**. Here, unlike in *N.B.*, Defendants object to the facts alleged by Plaintiffs and reject the use of the term "IHCBS" in the proposed class definition. **Defs.' Br. 17-22, 24-25; ROA 589-593**; **ROA.808-815**.

3. The Rule 23(b)(2) class must be ascertainable under Fifth Circuit precedent.

Plaintiffs now attempt to argue that the class definition need not be ascertainable for this Rule 23(b)(2) class and cite to more out-of-circuit case law. **Pls.' Br. 31-32**. Again, Plaintiffs want the Court to look beyond its own precedent and follow the decisions of other circuits. The Fifth Circuit has not found that ascertainability is dispensed with when class certification is sought under Rule 23(b)(2).[11] In fact, the Fifth Circuit has held that a Rule 23(b)(2) class must be ascertainable. *DeBremaecker*, 433 F.2d at 734. Defendants strongly urge the Court to follow its own precedent on ascertainability.

4. The district court abused its discretion in finding that Plaintiffs met their burden to satisfy the numerosity requirement.

In finding numerosity among the class, Plaintiffs and the district court relied upon Medicaid's 2018 Annual Report, which does not mention "IHCBS." **Defs.' Br. 25-27**. In order to cure this defect, the district court determined, without explanation, that "SBH services" and "IHCBS" are synonyms. As explained previously, both of these terms are ambiguous and unhelpful in defining the class. **Defs.' Br. 17-19, 21**. Plaintiffs conclude, without any support, that all children who receive SBH services

[11] Plaintiffs' brief includes misleading citations to *In re Monumental Life Ins. Co*., 365 F.3d 408 (5th Cir. 2004). **Pls.' Br. 32**. *Monumental* did not hold that a Rule 23(b)(2) class need not be ascertainable. Instead, *Monumental* stated in *dicta* that, "[s]ome courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2)." *Monumental*, 365 F.3d at 413.

will require IHCBS. **Pls.' Br. 39-40**. There is no proof in the record, or elsewhere, to show that all children who receive SBH services will automatically be recommended for "IHCBS." Plaintiffs demonstrate an awareness of this fact, as they admit that "even if only a small percentage of SBH recipients need IHCBS, the class would still far exceed the numerosity threshold." **Pls.' Br. 40**. It is clear that the district court did not conduct a rigorous analysis prior to finding numerosity, as the record is devoid of any evidence regarding the number of Medicaid beneficiaries under 21 years old who have been diagnosed with mental health conditions and recommended for "IHCBS."

5. The district court abused its discretion in finding that Plaintiffs met their burden to satisfy the commonality requirement.

a. Plaintiffs did not suffer the same injury.

Plaintiffs and the district court acknowledge that the mental health interventions will vary among class members. **Pls.' Br. 42; ROA.776**. Implicit in this admission is the recognition that Plaintiffs have not suffered the same injury and have not been allegedly deprived of the same service. Because each Plaintiff is entitled to different services under the Medicaid Act's Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") mandate based on their respective needs and providers' recommendations (**Defs.' Br. 13 n.1**), each Plaintiff will seek the provision of different services through this suit. Therefore, Plaintiffs do not and cannot allege that they are deprived of the same service. Plaintiffs' allegations

(**ROA.416-427**) and declarations (**ROA.511-551**) show that they have not suffered the same injury. A one-size-fits-all solution to Plaintiffs' diverse claims does not exist. A class that suffers different harms (*i.e.*, a class of children allegedly deprived of different services and entitled to different services) does not share a common contention capable of classwide resolution. *Wal-Mart*, 564 U.S. at 350.

Contrary to Plaintiffs' allegations, Defendants did not argue that the district court relied on Plaintiffs' "conflicting allegations" to find that Plaintiffs suffered the same injury. **Pls.' Br. 43**. Instead, Defendants point out that the district court found a common injury and question based on its finding that Plaintiffs alleged that Defendants did not provide *any* IHCBS to *any* class member, even though the SAC (**ROA.392-435**) does not allege that LDH does not provide *any* IHCBS, but rather alleges that LDH fails to provide *some* services to *some* Plaintiffs. **Defs.' Br. 10, 29**. It was a critical and reversable error by the district court to create a common injury that was not alleged, in order to cure the commonality defect among class members and facilitate class treatment. **ROA. 776;** *see also* **ROA.754, 757-758**.

b. Plaintiffs fail to adequately rebut Defendants' argument that the common contention is not capable of classwide resolution.

In analyzing the commonality among class members, Plaintiffs gloss over Defendants' argument that the common questions will not generate common answers to drive the resolution of the litigation in one stroke. **Defs.' Br. 28-35**. In response to Defendants' argument that analyzing the merits of Plaintiffs claims

require an individualized inquiry to determine whether each class member receives "necessary and timely IHCBS," (**Defs.' Br. 30**) Plaintiffs argue that "no individualized analysis is required because the deprivation of IHCBS has already occurred and the relevant criteria for class membership has already been determined based on objective criteria." **Pls.' Br. 48**. Plaintiffs did not explain how the district court will determine whether "the deprivation of IHCBS has already occurred" without analyzing the extent to which the individual child needs IHCBS and whether that child did or did not receive those services. In fact, Plaintiffs did not substantively address actual or potential differences in the purported class members' individual circumstances and claims, besides noting that providers will make individualized recommendations for each class member.

Perplexingly, Plaintiffs argue that key individualized questions related to why a child did not receive prescribed services are not relevant to the claims in this lawsuit. **Pls.' Br. 47.** However, the answers to those questions will ultimately determine the merits of Plaintiffs' claims. For example, if a minor child was recommended for specific services by a provider and the child did not receive those services because his mother failed to engage with providers and consent to the services, then LDH has not failed to provide services to the child, and LDH has not violated the provisions of the EPSDT mandate. The district court cannot resolve, on a classwide basis, whether each Plaintiff received "necessary and timely IHCBS"

(**ROA.401 at ¶ 28**) without including processes in the trial plan that address the following questions: (1) what 42 U.S.C. § 1396d(a) services were recommended by a provider for an individual Plaintiff; (2) did that Plaintiff receive those services; and (3) if not, what prevented that Plaintiff from receiving those services. These common questions will clearly produce different answers depending on the individualized circumstances of each child.

c. Contrary to Plaintiffs' allegations, Fifth Circuit precedent does not support class certification in this suit.

Plaintiffs wrongly assert that "Defendants rely on three cases to support their position on commonality." **Pls.' Br. 47**. Defendants' principal brief clearly relies on *Wal-Mart* and four cases from the Fifth Circuit to support their position on commonality, in addition to several other instructive cases from other circuit courts. **Defs.' Br. 28-35**. *See M.D. v. Perry*, 675 F.3d 832, 841-846 (5th Cir. 2012); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 767 (5th Cir. 2020) (citing *Wal-Mart* 564 U.S. at 352); *Chavez*, 957 F.3d at 548; *Ward v. Hellerstedt*, 753 Fed. Appx. 236, 246 (5th Cir. 2018)*; see also*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497-98 (7th Cir. 2012); *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 31 (1st Cir. 2019); *AW v. Magill*, CV 2:17-1346-RMG, 2018 WL 6680941, at *3 (D.S.C. Aug. 21, 2018).

Plaintiffs argue that "the common answer will result in resolution of the litigation in one single stroke: by an injunction requiring Defendants to develop

policies and procedures to ensure coverage of services that have been recommended by a licensed practitioner of the healing arts to Medicaid-eligible children and youth." **Pls.' Br. 49**. This does not explain how the common questions can be resolved in "one stroke" but rather restates Plaintiffs' requested relief. Such abbreviated and conclusory reasoning cannot withstand scrutiny under *Wal-Mart*, *M.D.*, *Flecha*, *Chavez*, and *Ward*. Here, like *Ward* and *Chavez*, the district court and Plaintiffs stated that common questions will generate common answers but failed to explain how the common questions are capable of resolution on a classwide basis. *Ward*, 753 Fed. Appx. at 246; *Chavez*, 957 F.3d at 549. Defendants, on the other hand, have explained why the common questions identified by the district court will not resolve the litigation in one stroke. **Defs.' Br. 29-35**.

Plaintiffs and the district court wrongly presume that Rule 23's commonality requirement is satisfied if the class members allege harms by the same defective system. For example, Plaintiffs and the district court posit that the common contention is whether there exists a system-wide failure by LDH to provide prescribed interventions. **Pls.' Br. 46-50; ROA.775**. This presents a common contention capable of adjudication "in one stroke" only at the most abstract level and asks: does LDH's behavioral health system for Medicaid-enrolled children suffer from systematic deficiencies in ensuring the provision of necessary and timely "IHCBS"?

This Court's precedent does not support class certification when the "common questions" are based on broad and systemic conduct. *M.D.*, 675 F.3d at 844–45 (holding that the district court failed to perform the rigorous analysis in finding commonality because the class's proffered common issues stretched the notions of commonality by attempting to aggregate several amorphous claims of systemic or widespread conduct into one super-claim); *Stewart v. Winter*, 669 F.2d 328, 337 (5th Cir. 1982) ("A common question can be said to exist here only in the most abstract form: all of the putative class members are prisoners, and all may raise the question whether the conditions of their confinement violate a general legal standard. If [this abstract issue raises] a 'common' question within the meaning of Rule 23(a)(2), any allegation of a breach of legal duty by any class of defendants—no matter how vast or diverse—could be impressed into a single case").[12]

[12] Before *Wal-Mart*, other courts rejected a common claim of systemic failures under Rule 23(a)(2). *See J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) ("Plaintiffs respond that the common claim is 'that systemic failures in the defendants' child welfare delivery system deny all members of the class access to legally-mandated services which plaintiffs need because of their disabilities'…We refuse to read an allegation of systematic failures as a moniker for meeting the class action requirements"); *Lightfoot v. D.C.*, 273 F.R.D. 314, 325 (D.D.C. 2011) (commonality not met because employees failed to show that they shared a common injury from the same policy or custom, and instead relied on allegations that a large number of class members appeared to have suffered some deprivation of due process as a result of a wide-ranging and poorly defined set of practices and policies); *see also Reinholdson v. Minnesota*, No. 02 Civ. 795, 2002 WL 31026580, at *8 (D. Minn. Sept. 9, 2002) ("The reciting of the word 'systemic' in mantra-like fashion...does not overcome the prerequisites to class certification"), *vacated in part on other grounds*, 346 F.3d 847 (8th Cir. 2003). The cases were cited by the *M.D.* Court. *M.D.*, 675 F.3d at 844.

The Fifth Circuit cases cited by Plaintiffs in support of their commonality position are clearly distinguishable. For example, Plaintiffs assert that this case is similar to *Yates* (**Pls.' Br. 47**), where the court found commonality among prison inmates who challenged the prison housing areas' policy on climate control and heat-mitigation measures. *Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017). However, unlike *Yates*, this class action lawsuit is not limited to specific practices or policies by LDH.

Plaintiffs also reference *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), where a lawsuit arose after an explosion on an offshore drilling rig. **Pls.' Br. 43-44.** That case was in a settlement posture, leaving only damages to be decided. *Deepwater Horizon*, 739 F.3d at 795. Additionally, *Deepwater* involved "an instance of injurious conduct," that could be productively litigated at once. *Id.* at 810-811. The instant matter, like *Wal-Mart*, does not arise from a single episode of tortious conduct but rather arises from Plaintiffs' claims that they have all suffered a violation of the same provision of law (EPSDT mandate of the Medicaid Act). *Wal-Mart*, 564 U.S. at 350. Here, Plaintiffs' alleged harms, unlike *Deepwater*, arise from various asserted violations under the EPSDT mandate that occur in numerous and diverse ways due to supposed systemic shortcomings. These harms cannot be addressed and litigated in one stroke, which is ultimately fatal to Plaintiffs' commonality argument.

d. Plaintiffs and the district court place an overreliance on *N.B. v. Hamos*.

The district court's reliance on *N.B.* demonstrates that it did not rely upon binding precedent in reaching its class certification decision but rather was inspired by an outside circuit's class certification decision. **Defs.' Br. 32**. *N.B.* allowed movants to certify a class based on allegations of system-wide deficiencies. *N.B.*, 26 F. Supp. 3d at 772. Fifth Circuit precedent, as discussed above, does not support such an action. Notably, even the *N.B.* Court recognized that a proposed class's commonality must turn on a concrete policy to survive certification:

> [T]here remains a risk that **the liability determination will require these individual determinations**…if discovery reveals that the plaintiffs' assertion of a systemic policy not to cover intensive home and community-based care is untenable, then decertification of the class could be required if liability turns on individual assessments of whether the services provided by the state fall within the category of "home or community-based services." **Class-wide determination of liability is likely possible only in the context of a generally applicable policy that violates EPSDT.**

Id. at 768 n.9 (emphasis added).

Here, contrary to Plaintiffs' broad allegations, Plaintiffs do not seek to compel LDH to provide a specific service or challenge a specific LDH policy or practice applied uniformly to the class. Instead, Plaintiffs allege that their proposed common contention is: whether there exists a system-wide failure by LDH to provide prescribed interventions (**Pls.' Br. 46-50; ROA.775**); and/or the deprivation of "necessary and timely IHCBS." **Pls.' Br. 42, 44; ROA.400 at ¶ 24; ROA.401 at ¶**

28. A liability determination of this common contention necessarily requires child-specific inquiries regarding the particular treatments prescribed and administered to address each child's needs. Therefore, since the resolution of the common question turns on the consideration of the individual circumstances of each class member, commonality is not met.

6. The district court abused its discretion in finding that Plaintiffs met their burden to satisfy the typicality requirement.

Plaintiffs allege that this case "is about Defendants' uniform failure to fulfill and ensure the EPSDT provisions of the Medicaid Act," and that Plaintiffs' individual conditions do not matter. **Pls.' Br. 56.** However, the facts of each Plaintiff's circumstance will dictate what services are required by the EPSDT mandate and, therefore, inform the Court as to what services were required to be provided by the LDH as to each Plaintiff. Thus, Plaintiffs' factual circumstances will ultimately dictate liability in this case. Therefore, the actual or potential differences in the class members' individual circumstances and claims cannot be ignored.

Contrary to Plaintiffs' allegations, Defendants do not attempt "to destroy typicality by raising superficial factual differences amongst the named plaintiffs." **Pls.' Br. 57**. Instead, Defendants alert the Court to the fact that Plaintiffs' claims do not turn on a specific service, policy, or practice applied uniformly to class members. **Defs.' Br. 36-37**. Given this fact, coupled with Plaintiffs' varying medical diagnoses

and service needs, it is evident that Plaintiffs will not benefit from the *same* remedial measures.

Plaintiffs suggest that the Court overlook the fact that two Named Plaintiffs (C.C. and E.E.) are in foster care, which means that the Louisiana Department of Children & Family Services ("DCFS") manages their Medicaid cases. Contrary to Plaintiffs' allegations (**Pls.' Br. 56**), LDH's legal obligation to manage the Medicaid case does in fact change when a Medicaid-enrolled child enters state custody through foster care. **ROA.688-689**. When a child enters foster care, DCFS, not LDH, becomes responsible for the Medicaid case and ensuring that the child in state custody receives all medically necessary services. **ROA.688-689**. This means that C.C. and E.E.'s claims are certainly not typical of the claims of a class of children whose Medicaid cases are administered by LDH.

7. The district court abused its discretion in finding that Plaintiffs met their burden to satisfy the adequacy of representation requirement.

Plaintiffs imply that rather than analyzing the adequacy of representation requirement, Defendants incorrectly restated their commonality and typicality arguments. **Pls.' Br. 58-59.** However, the requirements of commonality, typicality, and adequacy of representation tend to merge. *Wal-Mart*, 564 U.S. at 350 n.5 (quoting *Falcon*, 457 U.S. at 157-158 n.13). Therefore, the arguments are similar. For reasons intertwined with the lack of commonality and typicality in this case, the class also fails to satisfy the requirements of adequacy of representation. The Court

need not reach this issue, if it finds that the class fails to be ascertainable and/or fails to satisfy the other requirements of Rule 23(a) or Rule 23(b). **Defs.' Br. 38**. Even if the Court considered the adequacy of representation issues, the declarations submitted on behalf of the Named Plaintiffs do not demonstrate that they would be adequate representatives of the class, because the services sought through an injunction would differ greatly for even the Named Plaintiffs. **Defs.' Br. 38**.

8. The district court abused its discretion in finding that Plaintiffs met their burden to satisfy the requirements of Rule 23(b)(2).

a. The injunctive relief requested is not specific and does not describe in reasonable detail the acts required.

It is unclear why Plaintiffs assert that "Defendants misstate this Court's holdings as to the specificity required in a request for injunctive relief," as Plaintiffs cite most of the same cases as Defendants, including the same pinpoint citations. **Pls.' Br. 64**; **Defs.' Br. 39-41**. And that case law is clear: under Rule 23(b)(2), the requested relief must be specific and describe in reasonable detail the acts required. *M.D.*, 675 F.3d at 845, 848 (citations omitted). Plaintiffs' requested relief (**Pls.' Br. 64**) does not meet the moderate level of specificity anticipated by the reasonable detail standard, as articulated by *Maldonado v. Ochsner Clinic Foundation*, 493 F.3d 521 (5th Cir. 2007), *M.D.*, and *Yates*. **Defs.' Br. 39-41**. Plaintiffs attempt to distinguish this case from *Maldonado* by falsely stating that they "have identified the medical (mental health) services" that Defendants must provide. **Pls.' Br. 65**. In

actuality, Plaintiffs have not identified any actual service that must be provided to Medicaid beneficiaries, despite Defendants' repeated pleas for more specifics.

b. The class members' alleged injuries are not cohesive.

Plaintiffs acknowledge that the class members' alleged injuries are not cohesive, noting that "different class members will need different amounts, duration, or scope of IHCBS." **Pls.' Br. 26**. Plaintiffs attempt to dodge the cohesiveness requirement by framing its requested relief to require LDH to provide the abstract "IHCBS," which could encompass any service in the behavioral health realm.

Contrary to Plaintiffs' allegations, Plaintiffs do not have a *uniform* right to services under the EPSDT provisions of the Medicaid Act. **Pls.' Br. 65**. Instead, a Medicaid-enrolled child will be entitled to a service under the EPSDT mandate only if she meets two prerequisites: (1) the service is listed in 42 U.S.C. § 1396d(a) of the Medicaid Act; and (2) her provider recommended the service as medically necessary to ameliorate her condition. *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589 (5th Cir. 2004). This means that each Plaintiff will allege different harms, which prevents the courts from issuing a "single injunction" (**ROA.779-780**) to redress all of Plaintiffs' harms. **Defs.' Br. 41-42.** The court cannot order such broad relief without first determining that each individual child is entitled to the service ordered because she meets the prerequisites.

Plaintiffs claim that they do not request individualized injunctions on behalf of the class members (**Pls.' Br. 61**), which would violate Rule 23(b)(2). *Wal-Mart*, 564 U.S. at 360. However, Plaintiffs indicate that they will seek out specific injunctions as they develop their claims. **Pls.' Br. 64** ("The precise contours of Defendants' responsibilities in implementing such relief can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony").

This Court has previously declined to certify Rule 23(b)(2) classes when they present individualized issues, differing injuries, and a lack of required cohesiveness. *Maldonado*, 493 F.3d at 524. Recognizing that the core question of whether a particular charge for medical services was reasonable would depend on the "specific circumstances of each class member," and that the plaintiffs were "unable to explain how a court could define or enforce meaningful injunctive relief" without examining individual circumstances, the *Maldonado* Court held that individualized issues "overwhelm[ed] class cohesiveness." *Id.* at 524-25. Plaintiffs' proposed class, like *Maldonado*, implicates individualized issues that overwhelm any potential class cohesiveness. Accordingly, the proposed class is unsuitable for Rule 23(b)(2) certification under the precedent of this Court and other courts. **Defs.' Br. 41-42.**

9. This Rule 23(f) appeal does not need to raise a novel area of the law or be dispositive of the litigation.

Plaintiffs attempt to mislead the Court regarding the circumstances in which a class certification order may be appealed. Plaintiffs suggest that this appeal should be dismissed because it does not raise a novel area of law or it is likely not dispositive of the litigation. **Pls.' Br. 20-21**. Neither Rule 23(f) nor *Seeligson v. Devon Energy Prod. Co., L.P.*, 804 F. App'x 304, 305 (5th Cir. 2020) require an interlocutory appeal of a class certification order to raise these issues. **Pls.' Br. 20-21**.

CONCLUSION

The district court's class certification order should be vacated and the case remanded with instructions to decertify the class.

[*Signature block on following page.*]

Respectfully submitted,

THE LOUISIANA DEPARTMENT OF HEALTH

/s/ Kimberly Ulasiewicz Boudreaux
KIMBERLY ULASIEWICZ BOUDREAUX (LBN 37341)
REBECCA CLEMENT, T.A. (LBN 31665)
RYAN ROMERO (LBN 35987)
KIMBERLY SULLIVAN (LBN 27540)
Bureau of Legal Services – Bin #20
Post Office Box 3836
Baton Rouge, LA 70821-3836
Phone: (225) 342-1128
Fax: (225) 342-2232
Email: kimberly.boudreaux@la.gov
Email: rebecca.clement@la.gov
Email: ryan.romero@la.gov
Email: kimberly.sullivan@la.gov

ATTORNEYS FOR DEFENDANTS-APPELLANTS, DR. COURTNEY N. PHILLIPS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH, AND THE LOUISIANA DEPARTMENT OF HEALTH

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, an electronic copy of the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. Notice of this filing will be sent by operation of this Court's electronic filing system in accordance with Federal Rule of Appellate Procedure 25(c)(2)(A) to the following counsel of record for Plaintiffs-Appellees:

Sophia Mire Hill, LA Bar No. 36912 (T.A.)
Lauren Winkler, LA Bar No. 39062
Will Bardwell, MS Bar No. 102910
SOUTHERN POVERTY LAW CENTER
201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170
Phone: (504) 486-8982
Facsimile: (504) 486-8947
sophia.mire.hill@splcenter.org
lauren.winkler@splcenter.org
will.bardwell@splcenter.org

Ronald Lospennato, LA Bar No. 32191
Evelyn Hsiao-Farn Chuang, LA Bar No. 38993
DISABILITY RIGHTS LOUISIANA
8325 Oak Street
New Orleans, LA 70118
Phone: (504) 522-2337
Facsimile: (504) 522-5507
rlospennato@disabilityrightsla.org
echuang@disabilityrightsla.org

Kimberly Lewis, CA Bar No. 144879
Abigail Coursolle, CA Bar No. 266646
NATIONAL HEALTH LAW PROGRAM
3701 Wilshire Boulevard, Suite 750
Los Angeles, CA 90010
Phone: (310) 204-6010
lewis@healthlaw.org
coursolle@healthlaw.org

Saima Akhtar, NY Bar No. 4661237
NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
275 Seventh Avenue, Suite 1506
New York, NY 10001-6860
Phone: (212) 633-6967
Facsimile: (212) 633-6371
akhtar@nclej.org

Darin W. Snyder, CA Bar No. 136003
Kristin M. MacDonnell, CA Bar No. 307124
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Phone: (415) 984-8700
Facsimile: (415) 984-8701
dsnyder@omm.com
kmacdonnell@omm.com

/s/ Kimberly Ulasiewicz Boudreaux
KIMBERLY ULASIEWICZ BOUDREAUX (LBN 37341)

CERTIFICATE OF COMPLIANCE

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/**s**/ Kimberly Ulasiewicz Boudreaux

Attorney for: Defendants-Appellants, Dr. Courtney N. Phillips, in her official capacity as Secretary of the Louisiana Department of Health, and the Louisiana Department of Health

Date: January 19, 2022