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17
18 UNITED STATES DISTRICT COURT
19 DISTRICT OF NEVADA
20

21 CLARK K, et al.,
22 Plaintiffs,
23 vs.
24 KENNY C. GUINN, et al.,
25 Defendants.

Case No.: 2:06-CV-01068 RCJ

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION**

MOTION FOR CLASS CERTIFICATION

TO EACH PARTY AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that as soon as the matter may be heard by the above-titled Court, located at 333 S. Las Vegas Blvd., Las Vegas, NV 89101, in the courtroom of Judge Robert C. Jones, plaintiffs will move the Court to issue an order as follows:

Certifying that this action is maintainable as a class action under Federal Rule of Civil Procedure 23(a) and 23(b)(2);

1. Certifying the class of persons described in plaintiffs' complaint as the plaintiff class;
2. Designating the individual named plaintiffs as representatives of the plaintiff class and their counsel of record as attorneys for the plaintiff class; and
3. Declining to require plaintiffs to provide notice to absent class members prior to judgment.

This motion will be made upon the grounds that, pursuant to Fed. R. Civ. P. 23(a): (1) the proposed class is so numerous that joinder of all members individually is impracticable; (2) there are questions of fact or law common to the class; (3) the claims and defenses of the class representatives are typical of the class; and (4) the class representatives will fairly and adequately protect the interests of the class. *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Plaintiffs' also bring this motion on the grounds that the class is maintainable under Fed. R. Civ. P. 23(b)(2).

Plaintiffs' motion is based on this Notice of Motion and Motion For Class Certification; the Memorandum of Points and Authorities in support thereof; the Declarations of William Grimm, Gregory M. Schulman, Katina Ancar, Clark K., Tarrah Logan, Marilyn Paikai, and Jacquelyn Romero; the pleadings and papers on file herewith; and upon such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS OF AUTHORITIES**I****INTRODUCTION**

Named plaintiff children Clark K.; Jalen, Sia, Roshaun, Caleb, and King A.; Summer, Frank, and Toni B.; and Donna C. move the Court to certify a class of Clark County foster children pursuant to Federal Rule of Civil Procedure 23. Although defendants collectively bear the responsibility of assessing, protecting, and providing for the needs of foster children, they have overwhelmingly shirked these duties. For years, Clark County's abused and neglected children have been placed in an unlicensed shelter facility from which they are replaced into foster homes that are inadequately screened, supported, and supervised. While in foster care, they are deprived of necessary medical and mental health care, their special needs go unattended, and their prospects for the future worsen rather than improve. Others are left in abusive homes to be revictimized, unnecessarily removed from homes in which reasonable efforts could safely sustain and protect the child, and returned to homes where their health and safety is endangered and re-abuse frequently occurs.

Pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), plaintiffs seek to represent a county-wide class consisting of all children

who have been, are, or will be victims of child abuse and neglect, and who have been, are, or will be in the legal custody of Clark County Department of Family Services ("DFS").

First Amended Complaint ("FAC") ¶ 37.

Prosecution of this litigation as a class action is the most appropriate – and the only realistic – means for redressing the injuries suffered by the thousands of children who are members of the class. Reliance upon any one class member's claims will not effectively remedy the class-wide issues raised in this suit. Resolving these common issues in a single action is the most appropriate and efficient vehicle for obtaining effective relief for plaintiff children.

By contrast, if this action does not proceed as a class action, these foster children will be unable to address the system-wide deficits that have caused their injuries. It is not feasible for

1 any individual foster child to carry the burden of developing, preparing and presenting the proof
2 required to establish and remedy these system-wide failures.

3 Plaintiffs absolutely satisfy each of Rule 23's requirements for class certification. First,
4 plaintiffs meet the Rule's "numerosity" criterion. The class of foster children in Clark County is
5 much too large to accomplish joinder. Second, plaintiffs' claims challenging defendants'
6 harmful, system-wide practices by definition share the requisite common questions of law and
7 fact to fulfill the Rule's "commonality" factor. Similarly, plaintiffs easily comply with the
8 "typicality" standard. The named representatives' claims are characteristic of those of the
9 proposed class. Finally, based on the class members' compelling joint interests in pursuing their
10 shared claims and the engagement of qualified legal counsel, the adequacy of plaintiffs'
11 representation is without question.

12 Plaintiffs therefore respectfully request that the Court follow the mandate of Federal Rule
13 of Civil Procedure 23 and enter an order (1) certifying the proposed class in this case under
14 Rule 23(b)(2) and (2) declining to require plaintiffs to provide notice to absent class members of
15 this action prior to final judgment.

16 II

17 STATEMENT OF FACTS

18 On August 11, 2006, the United States Department of Health and Human Services
19 acknowledged that Clark County's foster care system suffers from "serious deficiencies" that
20 child welfare officials are currently unable or unwilling to address. *See* August 11, 2006 Letter
21 from Sharon M. Fuji to Michael J. Wilden (hereinafter "Fuji Letter") at 1, Exh. B to Declaration
22 of Katina Ancar ("Ancar Decl."). These deficits are causing grave harm to the approximately
23 5,000 children who enter foster care each year due to abuse and neglect, and thus depend on
24 defendants to provide appropriate care and services. The children who have suffered the worst
25 fates are the seventy-nine – including the infant sibling of class representatives Jalen, Sia,
26 Roshaun, Caleb and King A. – who died from abuse during the last four years. *See* Report of
27 Findings and Recommendations Child Deaths 2001-2004 ("Blue Ribbon Panel Report") at 8,
28 Exh. C to Ancar Decl.

1 Named plaintiffs' circumstances are illustrative of the class members' condition. Plaintiff
2 Clark K., a seventeen year-old youth, came into Clark County DFS's legal custody in July 2003.¹
3 Before then, the department had received ten reports of abuse or neglect involving Clark and/or
4 his siblings. Declaration of Clark K. ("Clark K. Decl.") ¶ 3. Neither the multiple reports nor
5 Clark's eventual status as a DFS dependent prompted DFS to protect him from circumstances no
6 child should have to confront. In 1999, when Clark's mother moved from Las Vegas, she took
7 Clark with her where Clark endured horrible living conditions. He lived with approximately ten
8 other relatives in a filthy two-bedroom trailer and ate from trash dumpsters. When his mother
9 then moved in again this to Virginia he was often left with strangers while his mother bought,
10 dealt and took drugs. Clark K. Decl. ¶ 5. After Clark was able to contact his grandparents, he
11 came to live with them in Las Vegas. At the advice of Clark County DFS, Clark's grandparents
12 first became his legal guardians and later his licensed foster parents. Living with his
13 grandparents, Clark attended school regularly, got good grades, and was in good health. *Id.* ¶ 7.

14 However, Clark's lack of representation by an attorney or guardian *ad litem*, and DFS's
15 denial of the opportunity for Clark or his grandparents to attend dependency court hearing to
16 express Clark's wishes not to go back to his mother, resulted in his return to her. *Id.* ¶ 8-10, 14.
17 Prior to sending Clark back to Texas, his caseworker failed to assess whether it was safe for him
18 to return to his mother's custody. Had the caseworker conducted a reasonable investigation, he
19 would have learned that Clark's mother was on probation for burglary, had been without a job for
20 a very long time, had no suitable housing, and was continuing to abuse drugs and alcohol. *Id.*
21 ¶ 15. In her custody, Clark often went days without food. He also moved around among various
22 family members, while his mother disappeared on frequent drug binges failing to provide for his
23 basic needs. Often he had no transportation to school, and his grades plummeted. *Id.* ¶ 20.

24 In 2005, with help from his grandmother and sister, Clark took a Greyhound bus back to
25 his grandparents in Las Vegas. Despite the traumatic events Clark experienced in Texas, his DFS

26 _____
27 ¹ Plaintiffs are proceeding under fictitious names and satisfy the requirements of Rule 10(a) of the Federal Rules of
28 Civil Procedure. Pseudonym litigation should be permitted in this case because plaintiffs meet the following
requirements laid out in Rule 10(a): plaintiffs are children; they are challenging governmental activity; and pressing
the lawsuit using their real identities would compel plaintiffs to reveal highly intimate information.

1 caseworker has been unresponsive, making few efforts to provide him with counseling,
2 educational services, or independent living services. Clark K. Decl. ¶ 25.

3 Plaintiffs Jalen, Sia, Roshaun, Caleb, and King A. are siblings – four boys and one girl.
4 Declaration of Tarrah Logan (“Logan Decl.”) ¶ 2. In custody since December 2004, they have
5 fared no better than plaintiff Clark. While in DFS custody, these five children have been placed
6 in multiple inappropriate and dangerous placements that have been harmful to their physical,
7 mental, and emotional well-being. They have been placed in a restrictive, overcrowded, and
8 dangerous child care facility (Child Haven) for almost a year; subjected to further emotional,
9 physical, and sexual abuse and neglect while in foster and shelter homes; placed in shelter and
10 foster homes that lacked the information and services to care adequately for their basic needs;
11 denied treatment and care to address their history of abuse and neglect; denied visitation and
12 contact with relatives; denied representation by either a guardian *ad litem* or an attorney during
13 their first year in foster care; and separated from each other for long periods of time. Their baby
14 brother, Jerome, died in a DFS-licensed foster home on April 3, 2005, at the age of 14 months.
15 *See Generally* Logan Decl. ¶ 13.

16 Sibling seven-year-old Summer, five-year-old Frank, and four-year-old Toni B., who have
17 been in Clark County DFS’s custody since October 2002, have also had frightful experiences.
18 Declaration of Marilyn Paikai (“Paikai Decl.”) ¶ 2, 6. While in foster care, the children have been
19 placed with a series of foster parents who were given little background information about the
20 children or who were not trained or supported to meet the children’s special needs. Paikai Decl.
21 ¶¶ 6-7. As a direct and foreseeable result, the children changed placements many times, with
22 Frank and Summer experiencing between five and seven placements within three months. *Id.*
23 ¶¶ 7-10. The children were also physically and emotionally abused in at least one foster home,
24 and have been placed at Child Haven several times. In addition, Clark County DFS did not
25 conduct proper investigations of reports of abuse of Summer and Frank. *Id.* ¶¶ 11-12.

26 Instead of addressing the abuse and ensuring that the children had stable placements, the
27 children were returned to their mother. After additional reports of abuse, the children reentered
28 foster care. *Id.* ¶ 16. Since returning to foster care, DFS has refused to place them in the home of

1 the one foster family that has the experience to care for them properly. Even though Toni's
2 physician has advised that it is in Toni's best interest to have contact with this family, DFS has
3 refused to allow communication. *Id.* ¶ 17. Despite their disturbing experiences of abuse, both at
4 home and in foster care, DFS failed to provide the children with critical health and mental health
5 services. *Id.* ¶¶ 13-14. For the first year that they were in DFS custody, they were not
6 represented by a guardian *ad litem*. *Id.* ¶ 4.

7 Five-year-old plaintiff Donna C. came into Clark County DFS's legal custody in
8 December 2004. Declaration of Jacquelyn Romero ("Romero Decl.") ¶ 3. Since DFS assumed
9 responsibility for Donna's care, at no time has a guardian *ad litem* or attorney represented her at
10 court hearings, staffings, Child and Family Team meetings, or in any other decision-making
11 meetings held by DFS at which decisions were made about her placement, treatment, and/or
12 permanent plan. Romero Decl. ¶ 4. After Donna was returned to her mother on a trial visit, her
13 mother stole a car and, for months, drove Donna all over the United States and Canada. Donna
14 was subjected to a series of traumatizing experiences. Romero Decl. ¶ 7. DFS was not visiting
15 Donna's home as required. As a result, DFS did not learn of Donna's abduction until her mother
16 was arrested in New Mexico and law enforcement contacted the agency. Romero Decl. ¶ 10.

17 Upon her return to DFS custody, Donna was denied necessary and appropriate medical
18 and mental health care. *Id.* ¶ 13. When Donna's foster parent asked the juvenile court to
19 reconsider revising Donna's visitation plan to ensure her mother could not leave town with her
20 again. Donna was removed from this foster home in which she was receiving exemplary care.
21 *Id.* ¶¶ 15-16.

22 Horrific as these facts are, named plaintiffs' stories are by no means exceptional. Rather,
23 the descriptions of these children's lives are sadly indicative of DFS's daily disregard for the
24 health and safety of all of Clark County's foster children. These tragic accounts are merely the
25 latest signals of the need for defendants to institute an overarching reform of their child welfare
26 policies and practices to prevent further harm to the children in their care and to comply with
27 applicable state and federal laws.
28

1 Plaintiff foster children allege claims based on both state and federal statutory rights
2 pursuant to 42 U.S.C. § 1983 (“Section 1983”). Also under Section 1983, plaintiffs assert their
3 rights to substantive due process under both the United States and Nevada Constitutions and to
4 procedural due process under the Fourteenth Amendment to the United States Constitution. A
5 highly-structured framework of federal and Nevada state statutes obligate defendants to
6 affirmatively protect all plaintiffs from maltreatment and to ensure their physical, mental, and
7 emotional well-being. Each of these laws confers upon every foster child a specific, personal
8 right to receipt of the statutes’ contemplated benefits.

9 Primary within this design is the Federal Adoption Assistance and Child Welfare Act of
10 1980, as amended by the Adoption and Safe Families Act of 1997 (the “Adoption Assistance
11 Act”), 42 U.S.C. §§ 620, 671 *et seq.* The Adoption Assistance Act grants to foster children a
12 number of rights, including but not limited to entitlements to foster placements that meet national
13 professional standards; quality services that provide for their physical safety and overall health
14 needs; an up-to-date, written plan setting forth each child’s needs; and the provision of the
15 services required to meet those needs. *See generally* 42 U.S.C. §§ 671, 675. Defendants have
16 taken on the obligation of providing these critical services to foster children under the Act. In
17 return for accepting this responsibility, defendants receive federal funding for the day-to-day
18 operations of their foster care programs. 42 U.S.C. §§ 622, 671 *et seq.* To receive these federal
19 grants, as required, the State of Nevada has submitted a “State Plan,” outlining how it will use
20 these funds to comply with federal child welfare laws.

21 Defendants also receive federal contributions to sustain their foster care programs under
22 the Child Abuse Prevention and Treatment Act (“CAPTA”), 42 U.S.C. § 5101 *et seq.* As with the
23 Adoption Assistance Act, receipt of federal CAPTA funds is dependent upon the State Plan. By
24 submitting the State Plan, the State of Nevada pledged to comply with CAPTA’s mandates. This
25 includes providing every abused or neglected child with a trained guardian *ad litem* who has a
26 first-hand understanding of the child’s needs and makes appropriate recommendations to the
27 juvenile court. 42 U.S.C. § 5101a(b)(2)(A)(xiii).

1 To ensure that plaintiffs' physical and mental health needs are not overlooked, federal law
 2 provides for state and federal cooperative funding of health programs under the Medicaid Act.
 3 42 U.S.C. § 1396 *et seq.* Pursuant to the State Plan, defendants must provide certain health care
 4 services, such as Early Periodic Screening, Diagnostic and Treatment ("EPSDT") services, to
 5 foster children under the age of 21. Once defendants have provided the mandated diagnostic
 6 services, any medical or mental health treatment deemed necessary to remedy the illness is also
 7 required.

8 Plaintiff foster children are the direct beneficiaries of the services contemplated by each of
 9 these statutes. Federal courts around the country have determined that state and county violations
 10 of these statutes entitle plaintiffs to pursue their own private action to compel defendants to
 11 provide the care and services due them.² Therefore, foster children need not be satisfied with any
 12 penalty that the defendants may face from the federal government for failure to comply with
 13 statutory provisions. Rather, defendants' flouting of their obligations specifically authorizes
 14 plaintiffs to bring individual actions to achieve legal redress. Plaintiff children bring this suit to
 15 guard both their rights under these statutes, and to receive the protection and treatment that the
 16 United States and Nevada Constitutions guarantee them. To ensure that both named plaintiffs and
 17 *all* Clark County foster children get the care they deserve, plaintiffs request that the Court grant
 18 their motion for class certification.

19 III

20 LEGAL ARGUMENT

21 A. **Class Certification Requirements Must Be Construed Liberally To Foster The** 22 **Efficient Administration of Justice.**

23 Plaintiffs seek to prosecute their suit as a class action under Federal Rule of Civil
 24 Procedure 23. Federal Rule of Civil Procedure 23(a) seeks to promote judicial efficiency by
 25

26 ² See, e.g., *Watson v. Weeks*, 436 F.3d 1152, 1155 (9th Cir. 2006) (Medicaid Act creates private right of action);
 27 *Katie A.*, 433 F.Supp.2d at 1070-1071; *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 948 (M.D. Tenn.
 28 2000) (provisions of Adoption Assistance Act enforceable by private suit); *Marisol A.*, 929 F.Supp. at 682-683
 (provisions of Adoption Assistance Act and CAPTA enforceable by private suit); *Jeanine B. by Blondis v. Thompson*,
 877 F. Supp. 1268, 1284 (E.D. Wis. 1995) (private right of action implied in Adoption Assistance Act).

1 allowing the parties to litigate their claim and the court to award full relief in one action. Class
2 certification thus serves the goal of eliminating the need for multiple and duplicative litigation.
3 *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Rule 23(a) requires that a party moving to
4 certify a class show that: (1) the proposed class is so numerous that joinder of all members
5 individually is impracticable (“numerosity”); (2) there are questions of fact or law common to the
6 class (“commonality”); (3) the claims or defenses of the class representatives are typical of the
7 class (“typicality”); and (4) the class representatives will fairly and adequately protect the
8 interests of the class (“adequacy of representation”). *Hanlon v. Dataproducts Corp.*, 976 F.2d
9 497, 508 (9th Cir. 1992). In addition to these requirements, the party requesting class
10 certification must show that the suit falls within one or more of the three kinds of actions
11 permitted under Rule 23(b). In this case, plaintiffs seek certification under Rule 23(b)(2).

12 In evaluating a motion for class certification, the district court has broad power and
13 discretion, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997), but “is bound to take the
14 substantive allegations of the complaint as true.” *Thomas v. Baca*, 231 F.R.D. 397, 399 (C.D.
15 Cal. 2005). Rule 23 requirements are construed liberally, rather than restrictively. *Equal*
16 *Employment Opportunity Commission v. General Tel. Co. of Northwest, Inc.*, 599 F.2d 322,
17 328 (9th Cir. 1979). Furthermore, in determining the propriety of class certification, the question
18 is not whether [plaintiffs] have stated a cause of action or will prevail on the merits, but rather
19 whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177
20 (1974); *see also Jordan v. Los Angeles County*, 669 F.2d 1311, 1321 (9th Cir. 1982), *vacated on*
21 *other grounds*, 459 U.S. 810 (1982).

22 “It is well settled that class actions are an appropriate procedure in government benefits
23 cases where statutes and policies are likely to have an impact upon a broad class of recipients.” 5
24 H. Newberg, *Class Actions*, § 23.7 at 510 (4th ed. 2002); *see also Califano v. Yamasaki*, 442 U.S.
25 682, 684 (1997) (class certification was appropriate where plaintiff class requested
26 reconsideration or waiver of recoupment under Section 204 of the Social Security Act). Federal
27 district courts around the country have recognized that class action certification is an appropriate
28 vehicle for foster children to pursue reform of state and county child welfare systems. *See, e.g.*,

1 *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (affirming certification of class of New
2 York foster children alleging injuries based on systemic conduct); *Baby Neal v. Casey*, 43 F.3d
3 48, 56 (3d Cir. 1994) (ruling that district court abused discretion in refusing to certify class of
4 Philadelphia's foster children requesting injunctive relief); *Katie A. v. Bonta*, 433 F.Supp.2d
5 1065, 1067 (C.D. Cal. 2006) (finding certification appropriate where class alleged state's foster
6 children with behavioral, emotional or psychiatric impairments were denied adequate mental
7 health services); *David C. v. Leavitt*, 13 F.Supp.2d 1206, 1207 (D. Utah 1998) (court noted its
8 earlier certification of a statewide class of foster children). Clark County's foster children assert
9 claims similar to those that these courts have acknowledged as suitable for class action
10 certification. Accordingly, plaintiffs' motion should be granted.

11 **B. Plaintiffs' Ascertainable Class Is So Numerous That Joinder of All Parties Is**
12 **Impracticable.**

13 The proposed class plainly meets the Federal Rule of Civil Procedure's numerosity
14 requirement for class certification. Plaintiffs' class, though identifiable, is too numerous to
15 permit joinder under other available procedures. In such a situation, class certification is proper.

16 Rule 23(a)(1) provides that a class action is appropriate when "the class is so numerous
17 that joinder of all parties is impracticable." Where a class is large enough to effectively preclude
18 joinder of all parties into a single action, courts have found joinder impracticable. *Harris v. Palm*
19 *Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964) (where the "classes involved are
20 self-evidently large," the numerosity requirement is met); *Stolz v. United Broth. of Carpenters*
21 *and Joiners of America*, 620 F. Supp. 396, 404 (D. Nev. 1985). Although Rule 23(a) contains no
22 numerical minimum, using case law interpreting Rule 23 as a guide, a class of plaintiffs' size
23 certainly satisfies the numerosity condition.

24 Plaintiffs need not establish the precise size of the class to obtain certification. *See, e.g.*,
25 *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1039 (5th Cir. 1981) (stating that
26 "federal trial courts are quite willing to accept common sense assumptions in order to support a
27 finding of numerosity"); *Marisol A.*, 929 F. Supp at 689, *aff'd* 126 F.3d 372 (2d Cir. 1997).
28 However, according to the most recent records, the State of Nevada estimated that 5,262 foster

1 children were in foster care in July 2004. *See* UNITY Placement Summary for State, Clark and
2 Washoe at 1, Exh. D to Ancar Decl. Clark County alone retained responsibility for nearly 4,000
3 of these children. *See id.* However, the placement summary estimate is merely a one-time
4 snapshot of the number of children of care. The calculation does not include those children taken
5 into foster care *after* July 2004, and does not take into account those children released from DFS
6 custody *before* July 2004. Nor does the summary include similar estimates for prior and
7 subsequent years. As a result, the proposed class is not a static entity, but rather constitutes a
8 fluid group that may fluctuate over the course of months or even days. Thus, without additional
9 statistics, the state's placement data represent the lowest possible estimate of the proposed class.
10 Nonetheless, even this minimum approximation confirms that the proposed class numbers
11 exceeds 4,000 children. Accordingly, even under defendants' own estimate, there is no doubt that
12 the class' size makes joinder of the plaintiffs in this action impracticable. *Stolz*, 620 F. Supp. at
13 404 (holding that class numbering "close to 700 . . . clearly makes joinder . . . impracticable"). A
14 proposed class of 4,000 or more members is simply too large to accomplish joinder of all parties.

15 Plaintiffs' status as abused and neglected minors placed in the care and custody of the
16 very defendants against whom they seek relief, further elucidates why joinder is impracticable. A
17 group of plaintiffs suffering from either the realistic fear of retaliation or lacking the financial
18 means to pursue individualized remedies may severely hinder attempts at joinder. *Robidoux v.*
19 *Celani*, 987 F.2d 931, 935 (2nd Cir. 1993) (where plaintiffs' status as public benefits recipients
20 indicated that they were too financially disadvantaged to pursue individual claims, joinder
21 impracticable); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir.
22 1999) (factors weighing in favor of certification include plaintiffs' reluctance to file individual
23 suit against employer on whom plaintiffs' continued to depend for livelihood); *Caroline C. v.*
24 *Johnson*, 174 F.R.D. 452, 463 (D. Neb. 1996) (class requiring psychological treatment in
25 institutional setting places members "in a poor position to seek legal redress individually"). All
26 of these deterrent factors apply to plaintiff children.

27 Here, the proposed class is composed of children in foster care who have been, are, or will
28 be victims of child abuse and neglect, and who have been, are, or will be in the legal custody of

1 Clark County DFS. Children in foster care clearly lack the economic means to pursue individual
2 claims for denial of services such as adequate medical and health care, educational services and
3 legal representation. Further, these children's challenge to the policies and actions of the
4 agencies that control their placement and basic needs understandably leaves plaintiffs (and their
5 foster caregivers) hesitant to attempt individual action against defendants. *Mullen*, 186 F.3d at
6 625 (factors weighing in favor of certification include plaintiffs' reluctance to file individual suit
7 against employer on whom plaintiffs continued to depend for livelihood); *see also* Romero Decl.
8 ¶¶ 15-17 (plaintiff removed from foster parent after foster parent advised court that unconditional
9 return to mother would be detrimental). Foster children have neither the independent financial
10 resources nor the legal knowledge necessary to prosecute claims against the government entities
11 on which they depend for their care. As a result, plaintiffs labor under financial and practical
12 deficits that make joinder of their individual claims nearly impossible.

13 Finally, plaintiffs proposed class is readily discernable under the Rule 23 standard. A
14 class is sufficiently definite when it is administratively feasible to determine whether a given
15 individual is a member. *Stolz*, 620 F. Supp. at 403-404. Just as plaintiffs need not provide the
16 precise size of the class, identification of each individual member is also not necessary. Instead,
17 one must simply be able to ascertain membership when measured against an objective standard.
18 *Id.* The prospective class consists of children who have been, are, or will be victims of child
19 abuse and neglect, and who have been, are, or will be in the legal custody of Clark County DFS.
20 Defendants themselves have the means to identify, and are required to monitor, the children who
21 constitute this class. Consequently, the proposed plaintiff class surpasses the numerosity
22 threshold.

23 **C. Questions of Law and Fact Are Common to the Class.**

24 Certification is proper under Rule 23(a)(2) when the class members' claims share a
25 common question of law or fact. Because defendants' systematic failure to fulfill their statutory
26 and regulatory obligations deprives each class member of the right to receive proper care,
27 adequate medical treatment, and other necessary services, plaintiffs satisfy the Rule's
28 commonality requirement.

1 Similar to its interpretation of Rule 23 as a whole, the Ninth Circuit has permissively
2 construed the commonality prerequisite of Rule 23(a)(2). *Hanlon v. Chrysler Corp.*, 150 F.3d
3 1011, 1019 (9th Cir. 1998); *see also Jordan*, 669 F.2d at 1321 (courts' permissive application of
4 Rule 23(a)(2) means that plaintiffs usually meet commonality requirement). Rule 23(a)(2) does
5 not demand that all members of the proposed class share identical legal claims. Nor must each
6 class member share exactly the same factual circumstances. Rather, the commonality prerequisite
7 is satisfied if plaintiffs share *at least one* question of law or fact. *Hanlon*, 150 F.3d at 1019 ("All
8 questions of fact and law need not be common."); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th
9 Cir. 2001) (quoting *Baby Neal*, 43 F.3d at 56 (commonality met if class representatives share "at
10 least one question of fact or law with the grievances of the prospective class"))).

11 The named plaintiffs share a number of common questions of law and fact with members
12 of the proposed class. These common questions include

- 13 • Whether plaintiff children are placed in overcrowded, unlicensed congregate care
14 facilities that fail to meet their needs;
- 15 • Whether plaintiff children are left in dangerous situations due to defendants'
16 failure to conduct timely investigations of reports of abuse and neglect;
- 17 • Whether class members are deprived of needed medical, mental health, and dental
18 care services;
- 19 • Whether upon entry into foster care class members' placement in Child Haven, an
20 unlicensed child care facility, violates Nevada and federal laws;
- 21 • Whether the failure to conduct timely investigations of complaints of child abuse
22 or neglect involving class members violates their rights under Nevada and federal
23 law; and
- 24 • Whether the failure to provide class members with timely necessary medical and
25 mental health screenings, assessments, and treatment denies their rights under
26 Nevada and federal law.

27 Defendant DFS Director Tom Morton himself has confirmed that the sheer breadth of
28 defendants' failings produce shared factual and legal issues for plaintiffs. In his *Safe Futures*

1 plan, submitted to the Clark County Board of Commissioners after plaintiffs filed this suit,
2 defendant Morton lists over 100 goals and strategies necessary merely to bring DFS performance
3 up to baseline. *See generally Safe Futures: Strategies to Improve the Safety, Permanence and*
4 *Well-being of Clark County Children and Families at Risk of Child Maltreatment (Phase I)*, Exh.
5 E to Ancar Decl. Defendant Morton admits that plaintiff foster children are placed in often
6 overcrowded conditions and with families who are not provided the necessary support to prevent
7 shuffling them from one placement to another. *Id.* at 4. The completion of initial investigations
8 and safety plans for children reported to Child Protective Services (“CPS”), full assessment of
9 children’s developmental and educational needs, and EPSDT medical screenings are all critical to
10 the wellbeing of abused and neglected children. *Safe Futures* catalogs these measures as
11 “objectives” that defendants have yet to meet. *Id.* at 4, 7, 14, 16. Defendant Morton also
12 corroborates plaintiffs’ allegations that children and families are not seen by caseworkers each
13 month nor do they received needed services. *Id.* at 4.

14 These and other acknowledged deficiencies are not confined to a small number of foster
15 children. *Safe Futures* concedes that “crisis in performance” extends to the entire agency, and
16 thus potentially to every child for whom DFS bears responsibility. *Safe Futures* at 4, Exh. E to
17 Ancar Decl; *see also* Enclosure to Fuji Letter at 1, Exh. B to Ancar Decl. (widespread lack of
18 services to Clark County’s foster children is a “significant system issue”). This common course
19 of conduct in and of itself creates common questions among plaintiffs.

20 The Ninth Circuit has repeatedly held that civil rights suits challenging a system-wide
21 practice or policy affecting all members of a prospective class fulfill Rule 23’s commonality
22 requirement. *Armstrong*, 275 F.3d at 868 (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th
23 Cir. 1985)). Each child plaintiff need not actually experience precisely the same injury as a result
24 of the legally objectionable practice. *Walters*, 145 F.3d at 1047. Rather, because the proposed
25 class alleges that systematic failure to fulfill statutory and regulatory obligations *places all*
26 *members at risk of similar injury*, plaintiffs share common questions of law and fact. Variations
27 among individual plaintiffs’ factual circumstances cannot defeat a finding of commonality.
28 *Armstrong*, 275 F.3d at 868 (citing *Baby Neal*, 43 F.3d at 56).

1 Suits seeking to remedy statutory and regulatory violations are particularly favored for
2 class action certification and meet the commonality requirement. *Walters*, 145 F.3d at 1047
3 (certification proper because class sought injunctive relief rather than money damages). Where
4 injunctive and declaratory relief is requested against a defendant “engaging in a common course
5 of conduct,” common questions naturally arise. *Baby Neal*, 43 F.3d at 57; *see also Walters*, 145
6 F.3d at 1047. Accordingly, the proposed class easily achieves commonality.

7 **D. The Named Plaintiffs’ Claims and Defenses Are Typical of Those of the Class.**

8 Plaintiffs’ proposed representatives and members of the prospective class have suffered
9 similar harms. These injuries stem directly from defendants’ refusal to conform its child welfare
10 practices to state and federal law. As victims of defendants’ improper policies and practices –
11 and potential recipients of the proposed class relief – the named plaintiffs have every incentive to
12 forcefully assert the class claims.

13 Rule 23(a)(3) requires that the named plaintiffs’ claims are typical of those of the class.
14 The goal of the typicality prong of Rule 23 is to ensure that the named representatives’ and class
15 members’ interests are sufficiently aligned such that the named plaintiffs will provide effective
16 representation for the class. *Baby Neal*, 43 F.3d at 57-58. The determination of typicality rests
17 on whether a comparable course of conduct resulting in similar injury gives rise to the class
18 members’ legal claims. *Hanlon*, 976 F.2d at 508.

19 The named plaintiffs and the proposed class allege that each has been similarly harmed by
20 the identical course of conduct: defendants’ practice of violating their legal obligations to institute
21 proper investigations, assessments, and supervision to ensure plaintiffs safe day-to-day care; to
22 offer adequate medical, dental, and mental health treatment; and to provide other required
23 services, including proper educational placements and dependency court representation.
24 Defendants’ legal duties to each plaintiff originates from the same equally-applicable statutory
25 scheme. As a consequence of their receipt of monetary appropriations under the federal Adoption
26 Assistance, Medicaid, and CAPTA laws, defendants are obliged to meet certain federal standards
27 for the provision of necessary services to foster children. *See generally* 42 U.S.C. §§ 620, 670 *et*
28 *seq.*, 42 U.S.C. § 1396 *et seq.*, 42 U.S.C. § 5101 *et seq.* The State of Nevada further articulated its

1 obligations by enactment of statutory and regulatory standards governing its child welfare system.
2 *See generally* Nev. Rev. Stat. Ann. § 422 *et seq.*; Nev. Admin. Code § 422-424, 432A-B *et seq.*
3 Through the passage of Assembly Bill 1 (“AB 1”) in 2001, Clark County also accepted direct
4 responsibility from the state for services to foster children. Nonetheless, AB 1 did not relieve the
5 state of its responsibility and oversight for child welfare programs. 2001 Nev. Stat. 1. (commonly
6 known as AB 1).

7 Defendants’ conduct in refusing to fulfill their duties has deprived the class and its
8 representatives of the services to which they are entitled under federal and state child protection
9 laws. *Baby Neal*, 43 F.3d at 58 (even prominent factual differences among foster children could
10 not defeat typicality where class challenged effects of defendants’ policies and practices). The
11 claims of the named plaintiffs and proposed class rest on the identical legal theories that each has
12 been denied, legally-mandated services and constitutionally-protected civil rights as a result of
13 defendants’ refusal to properly implement this statutory scheme. *Armstrong*, 275 F.3d at 869
14 (typicality requirement satisfied where defendant’s refusal to provide legally-required
15 accommodations to persons with diverse physical disabilities); *Baby Neal*, 43 F.3d at 58
16 (similarity of foster children’s legal theories adequately addresses typicality). Neither the class
17 claims nor their factual underpinning need be identical (or even “substantially identical”) to
18 satisfy the typicality requirement. *Hanlon*, 150 F.3d at 1020; *see also Marisol A.*, 929 F. Supp. at
19 691. The representatives’ and class claims need merely be “reasonably coextensive” to make
20 certification appropriate. *Armstrong*, 275 F.3d at 869.

21 The fact that each and every child has not been subjected to the overcrowded conditions at
22 Child Haven or placed in an unlicensed foster home will not prevent named plaintiffs from
23 pursuing the class claims certification. Nor must a foster child be compelled to wait until she is
24 specifically denied the right to speak in court for lack of a guardian *ad litem*, or hope that she will
25 not personally become the subject of a child death review before seeking systematic relief. *Kenny*
26 *A. v. Perdue*, 218 F.R.D. 277, 301 (N.D. Ga. 2003) (each plaintiff not required to “personally
27 experience every difficulty outlined in the complaint”). Rather where, as here, plaintiffs present a
28

1 central allegation of systematic failure to provide legally-mandated services and protection,
2 typicality is satisfied.

3 The named plaintiffs' injuries are characteristic of those endured by the child plaintiffs.
4 Even though plaintiffs' injuries are necessarily based on factually different circumstances, named
5 plaintiffs' claims and interests align so fully with those of the class that their pursuit of their own
6 claims for injunctive relief by definition further the claims of all class members. Consequently,
7 plaintiffs' claims easily fulfill the requirement of typicality.

8 **E. Named Plaintiffs and Their Attorneys Will Fairly and Adequately Protect Class**
9 **Interests.**

10 Plaintiffs have established that they meet the numerosity, commonality, and typicality
11 requirements of Rule 23. The Rule's final prong requires that plaintiffs show the ability and
12 willingness to protect fairly and adequately the interests of the class. Plaintiffs' collective
13 interests and their representation by experienced class counsel ensure that named plaintiffs will
14 zealously guard and pursue the interests of the class at every stage of the case.

15 The Ninth Circuit has held that adequate class representation as required by Rule 23(a)(4)
16 is conditioned upon four factors: the quality of class counsel, the absence of antagonism within
17 the class, a shared interest between the absent class members and their representatives, and the
18 "unlikelihood that the suit is collusive." *Walters*, 145 F.3d at 1046.

19 The named plaintiffs have previously established their compelling joint interests in
20 forcefully pursuing their shared claims, which include numerous common questions of both law
21 and fact. *See infra* § B. With the common goal of ending the widespread violation of their legal
22 rights and instituting systematic reform of Clark County's child welfare system, no animosity
23 exists among class members. *Stolz*, 620 F. Supp. at 405 (plaintiffs' aim of remedying statutory
24 violations of class member rights inherently removed threat antagonism); *Marisol A.*, 929 F.
25 Supp. at 629 (request for injunctive relief to force compliance with the law eliminates potential
26 for conflict). Conversely, there is no indication of collusion between plaintiff children and the
27 defendants in this action. To the contrary, defendants' recently filed motions to dismiss suggest
28 that defendants intend to litigate this action as any individual suit.

1 Rule 23's standard is conditioned upon plaintiffs' attorneys' quality, experience, and
 2 general capability to conduct the litigation. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d
 3 Cir. 1968); *Jordan v. Los Angeles County*, 669 F.2d 1311, 1323 (9th Cir. 1982). Plaintiffs' lead
 4 counsel is the National Center for Youth Law, a privately-funded, non-profit organization with
 5 extensive state and federal court experience in litigating complex class actions involving child
 6 welfare systems. *See generally* Declaration of William Grimm ("Grimm Decl.") ¶¶ 2-8. The Las
 7 Vegas offices of Wolfenzon Schulman and the San Francisco law firm of Farella Braun & Martel
 8 also represent plaintiffs. Together these firms bring sophistication in resolving and litigating a
 9 broad range of high-stakes actions. Declaration of Gregory M. Schulman ("Schulman
 10 Decl.") ¶¶ 4-6; Ancar Decl. ¶¶ 3, 5. Counsel have knowledge of state and federal child welfare
 11 laws and have represented plaintiffs in certified class action litigation. Ancar Decl. ¶ 4.
 12 Collectively, plaintiffs' attorneys bring more than 50 years of legal practice, covering the full
 13 range of civil litigation from initiation of the action to trial representation. Grimm Decl. ¶ 2-3, 7-
 14 8; Schulman Decl. ¶ 2, 4; Ancar Decl. ¶ 2, 5. Plaintiffs' legal representatives have the resources,
 15 expertise, and experience to meet the test for highly-competent class counsel.

16 **F. The Proposed Class Satisfies the Prerequisites of Rule 23(b)(2) Because Defendants**
 17 **Have Acted on Grounds Generally Applicable to the Class Making Injunctive Relief**
 18 **Appropriate.**

19 Having established that the plaintiff class is entitled to certification under Rule 23(a),
 20 plaintiffs also assert that the class may be properly maintained under the second category of
 21 Rule 23(b). Rule 23(b)(2) certification is proper if

22 the party opposing the class has acted or refused to act on grounds
 23 generally applicable to the class, thereby making appropriate final
 24 injunctive relief or corresponding declaratory relief with respect to
 25 the class as a whole.

26 *Walters*, 145 F.3d at 1047.

27 Subdivision (b)(2) is closely linked to the commonality prerequisite. Actions seeking
 28 injunctive relief to remedy practices violative of civil and constitutional rights fall easily within
 the commonality guidelines. *See infra* § C. Consequently, these same suits "are precisely the
 sort . . . that Rule 23(b)(2) was designed to facilitate." *Walters*, 145 F.3d at 1046-47 (plaintiff

1 class challenged constitutionality of the INS's official forms and procedures); *see* Fed. R. Civ.
2 Proc. 23 Advisory Committee Notes 1966 Amendment (civil rights actions requiring final
3 injunctive relief "illustrative" of actions suitable for this category); *Armstrong*, 275 F.3d at 868
4 (suits challenging practice or policy affecting all class members meets commonality requirement).

5 Plaintiff children's action sets forth the model class for certification under
6 subdivision (b)(2). Defendants' have subjected plaintiffs to a unitary course of conduct that
7 systematically violates state and federal law and deprives each class member of their rights to
8 receive essential protections and services. Suits raising challenges to defendants who have acted
9 in a manner generally applicable to all plaintiffs exemplify "the classic type of action envisioned
10 by the drafters" of the Rule 23(b)(2) category. *Elliot v. Weinberger*, 564 F.2d 1219, 1229 (9th
11 Cir. 1977), *aff'd in part and reversed in part on other grounds sub nom Califano v. Yamaki*, 442
12 U.S. 682 (1979) (Subdivision (b)(2) proper for certification of nationwide class of recipient of
13 old-age and disability social security benefits alleging lack of hearing violated due process).
14 Plaintiffs' request for declaratory and final injunctive relief to correct defendants' conduct are
15 also particularly appropriate for Rule 23(b)(2) certification. *Stolz*, 620 F. Supp. at 407
16 (Rule 23(b)(2) certification proper even where monetary relief is an ancillary element of
17 requested damages).

18 Finally, a primary goal of class certification is the *efficient administration of justice*.
19 *Elliot*, 564 F.2d at 1230. Thus, class certification serves not only the goal of relieving the court
20 of the burden of adjudicating duplicative litigation, *see Walters*, 145 F.3d at 1047, but also to
21 provide a vehicle for plaintiffs with similar grievances to "have their day in court." *Eisen v.*
22 *Carlisle*, 391 F.2d 555, 563 (2^d Cir. 1968). Absent class action certification and broad-based
23 institutional reform, thousands of child plaintiffs would be left to pursue multiple and identical
24 actions. Even were some plaintiffs able to maintain and succeed in individual suits, singular
25 judgments would not carry the guarantee that defendants would consistently fulfill their legal
26 obligations to other children in their care, providing no benefit to the class. *Cf. generally*
27 *Complaint, Cabrera v. Balane*, No. 06-CV-1285 (JCU) (D. Nev. October 12, 2006) (parents
28 brought individual civil rights suit seeking damages for disappearance of two year-old daughter

1 while in DFS custody in summer 2006), Exh. F to Ancar Decl. Neither efficiency nor justice
2 would be served by permitting defendants to continue to evade their legal obligations by
3 compelling plaintiff children to pursue individual suits.

4 **G. Notice Prior to Judgment Is Not Required in a Class Action Certified Pursuant to**
5 **Rule 23(b)(2).**

6 Unlike class actions certified under other subdivisions of Rule 23, due process does not
7 require named plaintiffs representing subdivision (b)(2) class to issue pre-judgment notice to
8 absent class members. *Elliot*, 564 F.2d at 1228 (citing *Eisen*, 417 U.S. at 177). Class notification
9 under this category is discretionary. A court should impose such an obligation only when
10 necessary to ensure that the class is fairly and adequately represented or to permit absent
11 members to assert additional claims. *Stolz*, 620 F. Supp. at 408.

12 Plaintiffs' circumstances do not indicate that notice is necessary to protect their due
13 process rights. As demonstrated above, the proposed class is adequately represented by skilled,
14 knowledgeable counsel with significant class action and child welfare experience. Where counsel
15 is competent and the named representatives claims' are typical of the class, notice to the class
16 serves no further goal. *Elliot*, 564 F.2d at 1228. To the contrary, compelling provision of notice
17 may in fact be detrimental to the class' legal interests, as the financial cost associated with notice
18 to a subdivision (b)(2) class can thwart plaintiffs' ability to maintain an action seeking broad-
19 based reform. *See* Fed. R. Civ. Proc. 23 Advisory Committee Notes 1966 Amendment (noting
20 the "crippl[ing]" cost of notice where money damages not requested).

21 To ensure that plaintiff children's ability to vigorously pursue their claims is not severely
22 undermined, should the Court grant the plaintiffs' motion for class certification, plaintiffs should
23 not be required to provide notice to absent class members.

24 **IV**

25 **CONCLUSION**

26 Through their dismal failure to provide mandated services to the foster children in their
27 care, defendants have abandoned their legal obligations to plaintiffs. Without proper care,
28 medical treatment and supervision, Clark County's foster children have faced unsafe living

1 conditions, continued physical abuse, and, in far too many documented cases, death. To ensure
2 that plaintiff children do not continue to suffer in defendants' custody, the interests of justice
3 require that the Court permit that plaintiffs each place their claims before this Court at one time.
4 For the reasons stated above, plaintiffs request that the Court grant their motion for class
5 certification.

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