

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

M.D., by her next friend, Sarah R. Stukenberg,)
D.I., by his next friend, Nancy G. Pofahl,)
Z.H., by his next friend, Carla B. Morrison,)
S.A., by her next friend, Javier E. Solis,)
A.M., by her next friend, Jennifer Talley,)
J.S., by his next friend, Anna J. Ricker,)
K.E., by her next friend, John W. Cliff, Jr.,)
D.P., by her next friend, Karen J. Langsley,)
and T.C., by his next friend, Paul Swacina,)
individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

CASE NO. 2:11-cv-00084

RICK PERRY, in his official capacity as)
Governor of the State of Texas,)

THOMAS SUEHS, in his official capacity as)
Executive Commissioner of the Health)
and Human Services Commission of the)
State of Texas, and)

ANNE HEILIGENSTEIN, in her official)
capacity as Commissioner of the)
Department of Family and Protective)
Services of the State of Texas,)

Defendants.)

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
AND APPOINTMENT OF CLASS COUNSEL AND MEMORANDUM OF LAW IN SUPPORT

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The Plaintiffs identified in the Original Complaint in this action (the “Named Plaintiffs”) file this Motion for Class Certification and Appointment of Class Counsel and Memorandum of Law in Support. In support of their Motion, Named Plaintiffs state as follows:

I. PRELIMINARY STATEMENT

This action seeks declaratory and injunctive relief on behalf of a class defined as “all children who are now and all those who will be in the Permanent Managing Conservatorship of the Texas Department of Family and Protective Services” (“DFPS”). These are the “forgotten children” of Texas – children who were brought into state custody because they were abused and neglected at home, but then are left to languish for years, too many of them suffering further abuse and neglect while the state does little to seek and secure permanent homes for them.

Named Plaintiffs, and the similarly situated class of approximately 12,000 Texas children in the state’s Permanent Managing Conservatorship they seek to represent (collectively, “Plaintiff Children” or “the Class”), are entirely dependent on Defendants – the Governor of Texas, the Executive Commissioner of the Texas Health and Human Services Commission, and the Commissioner of DFPS. Defendants are required by law to provide children in the Permanent Managing Conservatorship of DFPS with necessary care, protection, and services. However, as set forth in Plaintiffs’ Original Complaint, Defendants fail to meet their constitutional obligations and instead expose these children to ongoing harm and risk of harm through the very system that is designed to protect them. Plaintiffs challenge the systemic conditions that subject them to harm while in DFPS custody and seek injunctive relief to remedy those chronic problems.

Pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure, Plaintiffs seek an order certifying the Class. Named Plaintiffs also request that the Court appoint the undersigned counsel to represent the Class.

II. STATEMENT OF FACTS

A. Defendants Are Causing Harm and Risk of Harm to Plaintiff Children, Who Are in the State's Permanent Managing Conservatorship.

Abused and neglected children who cannot remain safely at home are brought into custody by DFPS and are placed in the state's Temporary Managing Conservatorship ("TMC"). As Temporary Managing Conservator, under Texas law, DFPS has one year to reunite the children with their families, if safe and appropriate, and if not, to place the children permanently with a relative or adoptive family. This one-year period may be extended to 18 months. *See* TEX. FAM. CODE ANN. § 263.401(a), (b) (West 2010).

Children for whom DFPS fails to find a permanent home within the period of TMC are placed in the Permanent Managing Conservatorship ("PMC") of the state. (Plaintiffs' Original Complaint for Injunctive and Declaratory Relief and Request for Class Action, Docket Entry No. 1, hereinafter "Compl. [DE #1]," ¶ 168). As Permanent Managing Conservator, the state is responsible for the safety, permanency, and well-being of Plaintiff Children. (Compl. [DE #1] ¶¶ 4, 168-74, 177.) However, Defendants, through their actions and inactions, expose Plaintiff Children to harm and the risk of harm, including the following: (a) Defendants frequently move Plaintiff Children from placement to placement; (b) Defendants make inappropriate use of congregate placements for Plaintiff Children; (c) Plaintiff Children suffer abuse and neglect in state custody; (d) Defendants deny Plaintiff Children necessary services while in state custody; (e) Defendants frequently and unnecessarily separate Plaintiff Children from their siblings and fail to ensure that children can visit with their families; and (f) Defendants allow Plaintiff

Children to languish in foster care for years and eventually to age out of state custody ill-prepared for independent adult life.

These harms are a direct result of Defendants' failures, including at least the following: (a) failure to maintain a caseworker staff sufficient, in both size and capacity, to perform the tasks critical to Plaintiff Children's safety, permanency, and well-being; (b) failure to focus resources on permanency planning, with the result that Plaintiff Children languish in state custody for years; (c) failure to establish and maintain an adequate number and array of placements and services, with the result that Plaintiff Children are subjected to unstable and inappropriately restrictive placements, many of which are far from their families and communities; and (d) failure to adequately oversee substitute care providers, with the result that Plaintiff Children are exposed to harm and risk of harm.

B. Defendants' Dysfunctional System Harms the Named Plaintiffs.

Defendants' conduct with respect to each Named Plaintiff illustrates the harms faced by all children in the state's PMC. Named Plaintiffs and Plaintiff Children entered state custody because they needed the state's protection. Instead, as set forth below, the state has subjected them to further harm and risk of harm while in its custody:

- **M.D.** is a fourteen-year-old girl who was first brought into state custody six years ago. (Compl. [DE #1] ¶ 21.) M.D.'s aunt and uncle were given permanent managing conservatorship of the child, but she was brought back into state custody in 2007 after she was sexually assaulted by a cousin who lived in the home. (*Id.* ¶ 22.) In the four years since she came back into state custody, M.D. has been cycled through at least seven different foster placements, most of them institutions, and some more than 300 miles from her home. (*Id.* ¶¶ 23-27.) She spent more than two years at a residential treatment center ("RTC"), where her mental state steadily deteriorated and she became suicidal. (*Id.* ¶ 24.) She was raped when she left the grounds of a subsequent RTC placement, but she was not given any special counseling to deal with the resultant trauma. (*Id.* ¶ 26.) M.D. has been treated with numerous psychotropic medications. (*Id.* ¶ 29.) She was not freed for adoption until July 2010, and Defendants have failed to seek and secure a permanent family for her. (*Id.* ¶¶ 31-32.)

- **D.I.** is a nine-year-old boy who has been in the state’s PMC since August 2010. (Compl. [DE #1] ¶¶ 34, 41.) Defendants put D.I. in an ill-matched foster home where he was sexually abused by older boys. (*Id.* ¶¶ 34, 38.) When DFPS removed D.I. from that placement, it sent him to a foster home that housed at least five other boys. That inappropriate placement disrupted after only ten days, necessitating another move for D.I. (*Id.* ¶ 39.) While in the state’s custody, D.I. has been administered psychotropic medications but has not been given adequate counseling to address either the severe neglect he suffered before removal or the trauma he has suffered while in state custody. (*Id.* ¶¶ 34, 40.) Defendants have failed to provide D.I. with the supports and services he needs to be able to become part of a safe and nurturing family. (*Id.* ¶ 43.)
- **Z.H.** is a 10-year-old boy who was brought into state custody in February 2009. (Compl. [DE #1] ¶¶ 45-46.) He was removed from his home after being sexually molested by his mother’s boyfriends, but he was not given appropriate services or therapy when he was brought into custody, and was instead prescribed powerful psychotropic drugs. (*Id.* ¶ 47.) In his two years in state custody, Z.H. has had at least five placements and three hospitalizations, some of them over 300 miles from his home. (*Id.* ¶¶ 46-53.) While in state custody, he has been overmedicated to the point of needing emergency medical attention. (*Id.* ¶ 50.) DFPS has failed to develop and implement an appropriate plan for him to leave state custody and grow up in a safe and nurturing family. (*Id.* ¶¶ 54-55.)
- **S.A.** is a 14-year-old girl who entered state custody in November 2001. (Compl. [DE #1] ¶ 57.) After ten years in DFPS custody, this young girl, who had no acute emotional or mental problems when she came into care, is currently placed in an RTC and is receiving multiple psychotropic medications to address what DFPS recognizes as her “anxiety and grief/loss issues.” (*Id.* ¶¶ 62, 63.) DFPS’s poor child-to-placement matching has resulted in great instability and frequent moves for this child. S.A. has endured at least 24 placements across the state and has had twelve different caseworkers – one for only a month. (*Id.* ¶¶ 57, 65.) Some of her placements have lasted only weeks or even days. (*Id.* ¶ 61.) Though S.A. has been legally eligible for adoption for almost eight years, Defendants have not made any individualized effort to find her a permanent home. (*Id.* ¶¶ 59, 66.)
- **A.M.** is a 13-year-old girl who has been in the state’s custody since she was six. (Compl. [DE #1] ¶ 68.) DFPS has separated A.M. from her sisters and shuffled her from one placement to another, including one foster home where she was subjected to abusive discipline. (*Id.* ¶¶ 68-73.) She spent three years at an RTC 300 miles from her home community and from the only relative who could visit her. (*Id.* ¶¶ 76-81.) While in that institution, A.M. was given psychotropic drugs and her face and arm were injured when she was improperly restrained by staff. (*Id.* ¶ 79.) During her stay at this institution, far from the DFPS Region where her case was being managed, her case was reassigned five times. (*Id.* ¶ 81.) She was

never visited by a DFPS caseworker during the three years she spent there. (*Id.*) A.M. was finally removed from this institution, and placed in a foster home after only one telephone conversation with the foster mother. (*Id.*)

- **J.S.** is a nine-year-old boy who entered foster care at age five, and has been shuffled by DFPS among RTCs, a group home, and several foster homes. (Compl. [DE #1] ¶¶ 83-84.) Early on, DFPS placed the young boy in a residential treatment center more than 500 miles from his home. (*Id.* ¶ 84.) He was the youngest child in this facility, which also housed adult mental patients. (*Id.*) DFPS later moved him to another institution, this one 300 miles from his home. (*Id.* ¶ 89.) J.S. is frequently restrained and as of October 2010 was receiving four psychotropic medications. (*Id.* ¶ 90.) Foster parents with whom he was previously placed want to adopt him, but DFPS still has not taken steps to make this legally possible. (*Id.* ¶¶ 88-89, 91.)
- **K.E.** is a 16-year-old girl who has been in state custody since she was eight. (Compl. [DE #1] ¶ 93.) Since then, Defendants have subjected K.E. to at least nineteen far-flung placements, many of them institutions. (*Id.* ¶¶ 93, 95.) At one point, DFPS kept her in an emergency shelter for almost three months, in violation of state law. (*Id.* ¶ 94.) Between July 2008 and January 2011, DFPS moved K.E. among numerous placements, not one of which was a foster family home. (Compl. [DE #1] ¶ 97.) While in foster care, K.E.'s condition has deteriorated markedly, and she is now medicated with powerful psychotropic drugs. (*Id.* ¶¶ 93, 98.) During the eight years that K.E. has been in the state's custody, Defendants have failed to find her a permanent home. (*Id.* ¶ 102.) K.E. will likely age out of care. (*Id.*)
- **D.P.** is a 16-year-old girl who entered state custody at age six. (Compl. [DE #1] ¶ 104.) During her ten years in its care, DFPS has moved D.P. through at least 28 placements, many of them institutions. (*Id.*) In fact, D.P. spent the entire five-month period from October 2007 through February 2008 in emergency shelters, contrary to Texas law. (*Id.* ¶ 111.) DFPS has separated D.P. from her sisters. (*Id.* ¶ 107.) DFPS placed D.P. in an unsupervised, unregulated kinship placement with her aunt and uncle where she was sexually abused. (*Id.* ¶ 113.) When she ran away from that placement to escape the abuse, DFPS sent D.P. to a detention center. (*Id.* ¶ 114.) Later, D.P. was shuffled among different institutional placements, and at one point was kept in a hospital a week past her discharge date simply because DFPS had no other placement for her. (*Id.* ¶¶ 115-17.) Defendants have failed to provide D.P. with critically needed mental health services, instead allowing her to be overmedicated with psychotropic medications and subjected to chemical restraints. (*Id.* ¶¶ 115, 119.)
- **T.C.** is a 16-year-old boy who entered Texas foster care when he was eight years old. (Compl. [DE #1] ¶ 125.) Since then, DFPS has moved T.C. through at least twenty placements across the state. (*Id.*) T.C. has spent almost five of his eight years in state custody in institutions. (*Id.*) Though he has been legally free for adoption for more than six years, T.C. remains in foster care without a permanent

home. (*Id.*) DFPS has separated T.C. from his siblings (*Id.* ¶¶ 126, 134), and his current placement in an institution is more than 450 miles from his home – too far for any visits. (*Id.* ¶ 133.)

C. DFPS Is Legally Obligated to Provide for Plaintiff Children’s Health, Safety and Welfare.

As Plaintiff Children’s legal custodian, DFPS is required by law to provide Plaintiff Children with care and services that ensure their safety and well-being, and to return them home where safe and appropriate or, when that is not possible, to timely find them alternative permanent homes. (Compl. [DE #1] ¶ 4.) Defendants’ specific constitutional obligations to Plaintiff Children are based in the First, Ninth, and Fourteenth Amendments to the United States Constitution. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 447-48 (1990); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (holding that taking children into state foster care custody imposes upon the state “the responsibility to provide constitutionally adequate care” under the Fourteenth Amendment); *see also Hernandez v. Tex. Dep’t of Protective and Regulatory Servs.*, 380 F.3d 872, 880-83 (5th Cir. 2004) (assuming without deciding that the state had “an affirmative duty” to protect a child in its foster care custody from violence in a foster home).¹ Named Plaintiffs seek to enforce these federal due process rights, as well as Plaintiff Children’s federal procedural due process rights to certain entitlements conferred by state statutes. (Compl. [DE #1] ¶¶ 347-50, 352, 354.)

¹ Courts across the country have applied the holding of *Youngberg* in cases involving children in foster care. *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 291-93 (8th Cir. 1993); *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987); *Connor B. v. Patrick*, No. 10-cv-30073-MAP, --- F. Supp. 2d ---, 2011 WL 31343, at *13 (D. Mass. Jan. 4, 2011); *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 555-56 (S.D. Miss. 2004); *Danielle v. Adiazola*, 284 F. Supp. 2d 1368, 1373-75 (S.D. Fla. 2003); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 953 (M.D. Tenn. 2000); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 674-77 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 372 (2d Cir. 1997); *Eric L. v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993-96 (D.D.C. 1991), *aff’d in relevant part*, 990 F.2d 1319 (D.C. Cir. 1993).

Defendants have long known of the failures of their foster care system, yet have failed to take effective, necessary actions to address those failures. As Plaintiff Children's legal custodians, Defendants have knowingly failed to meet their constitutional obligations to ensure their safety, permanency, and well-being. Until the system designed to protect them is fundamentally changed, Plaintiff Children will continue to be harmed and placed at risk of harm.

Named Plaintiffs have commenced this action to stop these and other ongoing legal violations by Defendants and the harms and risk of harm they impose on the entire proposed Class. Because these violations affect the entire Class, Named Plaintiffs seek declaratory and injunctive relief on behalf of the Class to end these violations and to ensure that Defendants comply with their constitutional obligations to Plaintiff Children.

III. ARGUMENT AND AUTHORITIES

Because the proposed class as defined in Plaintiffs' Original Complaint meets all the requirements of Rules 23(a) and 23(b)(2), the Court should grant certification.

A. Legal Standard for Class Certification.

Named Plaintiffs seek certification of a class consisting of "all children who are now and all those who will be in the Permanent Managing Conservatorship of DFPS." (Compl. [DE #1] ¶ 156.) To obtain class certification, Plaintiff Children first must satisfy the four threshold requirements of Rule 23(a). *See Casa Orlando Apts., Ltd. v. Fed. Nat'l Mortgage Ass'n*, 624 F.3d 185, 190 (5th Cir. 2010). Rule 23(a) requires that:

- (i) the class is so numerous that joinder of all members is impracticable;
- (ii) there are questions of law or fact common to the class;
- (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (iv) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Once the threshold requirements of Rule 23(a) have been met, the Court must then decide whether the proposed class satisfies the requirements of at least one of Rule 23(b)'s three subsections. *See Casa Orlando*, 624 F.3d at 190. Because Named Plaintiffs seek only injunctive and declaratory relief for civil rights violations, certification is appropriate under Rule 23(b)(2). This subsection "was promulgated essentially as a tool for facilitating civil rights class actions." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 284 (W.D. Tex. 2007) (citations and internal quotation marks omitted). It "focus[es] on cases where broad, class-wide injunctive or declaratory relief is necessary." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). Plaintiff Children comprise "the prototypical class" under Rule 23(b)(2): they are "a large group . . . seeking injunctive relief that benefits the group as a whole." *See Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 299 (5th Cir. 2001).

Courts nationwide, including three circuit courts, have supported certification of classes of foster children in lawsuits that, like this one, challenge systemic violations of these children's rights under federal law. *See, e.g., D.G. v. DeVaughn*, 594 F.3d 1188, 1193-94 (10th Cir. 2010) (affirming certification of class of "all children who are or will be in the legal custody of [the Oklahoma Department of Human Services] due to a report or suspicion of abuse or neglect or who are or will be adjudicated deprived due to abuse or neglect," in lawsuit alleging agency-wide deficiencies); *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (upholding certification of class of "[a]ll children who are or will be in the custody of the New York City Administration for Children's Services ('ACS'), and those children who . . . are or will be at risk of neglect or abuse and whose status is or should be known to ACS," in lawsuit challenging systemic violations of children's rights); *Baby Neal v. Casey*, 43 F.3d 48, 60-65 (3d Cir. 1994)

(reversing denial of certification of class of “all children in Philadelphia who have been abused or neglected and are or should be known to the Philadelphia Department of Human Services,” in lawsuit alleging systemic violations of federal statutory and constitutional law); *Olivia Y. v. Barbour*, No. 3:04-cv-251-LN, slip op. at 10 (S.D. Miss. Mar. 11, 2005) ([Ex. A](#))² (certifying class in lawsuit challenging systemic deficiencies in state’s child welfare system).³

B. The Class Satisfies Rule 23(a)’s Numerosity, Commonality, Typicality and Adequacy Requirements.

Plaintiff Children satisfy each of the requirements of numerosity, commonality, typicality, and adequacy.

² Named Plaintiffs have attached certain unpublished court opinions as exhibits to this Motion that are not available in the LEXIS or Westlaw databases.

³ See also *Connor B. v. Patrick*, No. 10-cv-30073-MAP, 2011 WL 693223, at *1, 10 (D. Mass. Feb. 28, 2011) (certifying class of “all children who have been (or will be) placed in the custody of the Massachusetts Department of Children and Families (‘DCF’) as a result of a state juvenile court order adjudicating them in need of ‘care and protection’ due to abuse or neglect by their parents”); *Dwayne B. v. Granholm*, No. 06-13548, slip op. at 1-2 (E.D. Mich. Feb. 15, 2007) ([Ex. B](#)) (certifying class of “all children who are now or will be in the foster care custody of Michigan’s Department of Human Services”); *Kenny A. v. Perdue*, 218 F.R.D. 277, 299-302 (N.D. Ga. 2003) (certifying class of “[a]ll children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS”); *Charlie & Nadine H. v. Whitman*, No. 99-3678, slip op. at 3, 18 (D.N.J. Mar. 7, 2002) (certifying classes of “(1) all children who are or will be in the involuntary custody of New Jersey DYFS; and (2) all African-American and Hispanic children who are or will be in the custody of the New Jersey DYFS, and who have been or are subject to the risk of being denied or delayed adoption placement in a proper foster home based on their race, color or national origin”); *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995) (certifying class of “(1) children who are in foster care custody in Milwaukee County and who come into foster care custody in Milwaukee County; and (2) children who are not in foster care custody in Milwaukee County, but about whom the County Department of Human Services has received reports of abuse or neglect, and children who become the object of such reports” in lawsuit challenging systemic violations of children’s rights); *David C. v. Leavitt*, No. 93-C-206 W, 1993 WL 764518, at *2 (D. Utah May 7, 1993) (certifying class of: “(1) All children who are now or who will be in the custody of DHS and who have been or who will be placed by DHS in a shelter care facility, foster-family home, group home or institutional care; and, (2) All children who are or who will be known to DHS by virtue of a report of abuse or neglect” in lawsuit challenging systemic violations of children’s rights); *LaShawn A.*, 762 F. Supp. at 994 n.28 (noting certification of class of all children in foster care custody of D.C. Department of Human Services and all children known to DHS because of reported abuse or neglect, in suit challenging systemic violations of children’s rights); *G.L v. Zumwalt*, 564 F. Supp. 1030, 1031 (W.D. Mo. 1983) (noting certification of class of children in the custody of the Jackson County Office of the Missouri Division of Family Services in lawsuit alleging systemic violations of children’s rights); *Wilder v. Bernstein*, 499 F. Supp. 980, 994 (S.D.N.Y. 1980) (certifying class defined as “all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home” in case alleging systemic racial and religious discrimination in foster care placements). *But see Carson P. v. Heineman*, 240 F.R.D. 456, 466 (D. Neb. 2007).

1. Numerosity: The Class Is So Numerous that Joinder Is Impracticable.

Rule 23(a)(1) requires that the Class be so numerous that joinder of all members is impracticable. To satisfy the numerosity requirement, a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of putative class members. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001). Approximately 12,000 children are in the state's PMC. (Compl. [DE #1] ¶¶ 1, 156.) Fifth Circuit courts have consistently certified classes that are much less numerous than the proposed Class. *See, e.g., James*, 254 F.3d at 570 (class of 580); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624-25 (5th Cir. 1999) (class of 100-150); *Boykin v. Ga.-Pac. Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) (class of 317). Indeed, "classes with as few as twenty-five or thirty members have been certified by some courts." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). The number of Plaintiff Children is therefore large enough to satisfy the numerosity requirement.

The numerosity of the proposed Class here makes joinder of all members impracticable. In determining impracticability, Fifth Circuit courts consider class size along with other relevant factors, including "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of the plaintiff's claim." *Mullen*, 186 F.3d at 624-25 (citations and internal quotation marks omitted). Joinder is impracticable in this case because Plaintiff Children are geographically dispersed across Texas and are frequently moved from placement to placement. *See id.* (holding that it was within district court's discretion to find joinder impracticable; transient nature of class members' employment made it likely that some were not available for joinder). Joinder is also impracticable because the number of Plaintiff Children changes over time. Virtually every day, new children enter the state's PMC; similarly, virtually every day, some children exit state custody to be reunified with their parents, adopted, or placed in guardianship, or by aging out without a permanent family.

Where, as here, the class members are difficult to identify because they change over time, joinder is impracticable. *Cf. Adver. Specialty Nat'l Ass'n v. Fed. Trade Comm'n*, 238 F.2d 108, 119 (1st Cir. 1956) (stating that members of plaintiff class who were not fixed in number, but changed from year to year, supported numerosity finding). Moreover, the Class includes future wards of the State's PMC, who are necessarily unidentifiable at this time. *Cf. Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981) ("joinder of unknown individuals is certainly impracticable.") (citations and internal quotation marks omitted). Accordingly, Plaintiff Children satisfy the numerosity requirement.

2. Commonality: There Are Questions of Law and Fact Common to the Class.

The test for commonality "is not demanding." *James*, 254 F.3d at 570 (internal quotation marks and citations omitted); *see also Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) ("[t]he threshold of 'commonality' is not high.") (citation omitted). There need only be one question of law or fact common to the Class. *James*, 254 F.3d at 570. "As long as class members are allegedly affected by a defendant's general policy and the general policy . . . is the crux or focus of the litigation, the commonality requirement is satisfied." *DeHoyos*, 240 F.R.D. at 280 (citation omitted). A commonality finding is especially warranted in cases where, as here, "plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is therefore no need for *individualized* determinations of the propriety of injunctive relief." *Baby Neal*, 43 F.3d at 57 (emphasis in original).

The proposed Class meets the commonality requirement because Named Plaintiffs challenge system-wide failures in the way that DFPS treats children in the state's PMC, and they do not seek redress for individual grievances. *See D.G.*, 594 F.3d at 1196 (commonality requirement met where district court found at least one common issue of fact and law, namely, whether defendants risked harm to foster children due to "policy or practice of failing to

adequately monitor the safety of plaintiff children,” and whether the “alleged policies or practices violate plaintiffs’ . . . right to be reasonably free from harm . . . while in state custody”); *Baby Neal*, 43 F.3d at 60 (commonality met where foster children were “challenging common conditions and practices under a unitary regime,” and are “subject to the risk that they [would] suffer from the same deprivations resulting from the [child welfare agency’s] alleged violations”); *Connor B. v. Patrick*, 2011 WL 693223, at *5 (“[T]he unreasonable *risk* of harm created by these alleged systemic failures within [the Massachusetts Department of Children and Families] and applicable to the entire Plaintiff class is sufficient to satisfy the requirement of commonality.” (emphasis in original)).

The proposed Class meets the commonality requirement because DFPS’s failures raise numerous questions of fact common to all Class members, including:

- a. whether Defendants fail to maintain a caseworker staff of sufficient size and capacity to perform the tasks critical to Plaintiff Children’s safety, permanency, and well-being;
- b. whether Defendants fail to provide timely and appropriate permanency planning and services necessary to ensure that Plaintiff Children are either safely reunited with their families when appropriate or, when they cannot return home, that they are freed for adoption and promptly placed in a permanent home as required by law and by reasonable professional judgment;
- c. whether Defendants fail to provide sufficient numbers and types of foster care placements necessary to assure Plaintiff Children safe, appropriate, and stable foster care placements;
- d. whether Defendants fail to provide Plaintiff Children with appropriate monitoring and oversight necessary to keep them safe; ensure their well being; and prevent them from deteriorating physically, psychologically, or otherwise while in custody, as required by law and by reasonable professional judgment;
- e. whether Defendants, by frequently placing Plaintiff Children far from their home communities, fail to provide Plaintiff Children with the supports necessary to maintain appropriate relationships with siblings, parents, and other family members;

- f. whether the actions or inactions of Defendants comprise a pattern or practice of depriving Plaintiff Children of the following, to which they are entitled under the laws of the State of Texas:
 - (i.) the monitoring by DFPS of contracted substitute care, including that DFPS ensure that such services are provided in accordance with federal law, the laws of the State of Texas, and the rules of the Department of State Health Services and the Texas Commission on Environmental Quality; and
 - (ii.) placement decisions made by DFPS using “clinical protocols to match a child to the most appropriate placement resource”; and
- g. whether the foregoing actions or inactions of Defendants cause harm and risk of harm to Plaintiff Children.

(Compl. [DE #1] ¶ 158.)

There are a number of questions of law common to the entire Class, including whether Defendants’ actions and inactions violate Plaintiff Children’s rights (1) to be free from harm while in state custody as required by the Substantive Due Process clause of the Fourteenth Amendment to the United States Constitution; (2) to family association under the First, Ninth, and Fourteenth Amendments to the United States Constitution; and (3) to procedural due process under the Fourteenth Amendment to the United States Constitution, not to be deprived of a range of state-created legal entitlements. (Compl. [DE #1] ¶ 159.)

The aforementioned questions of fact and law satisfy Rule 23(a)(2)’s commonality standard. Plaintiff Children are all wards of DFPS, a unitary state agency with specific affirmative duties to Plaintiff Children. Named Plaintiffs allege that DFPS’s pervasive, longstanding, and well-documented failures in providing safe and adequate living situations, services, and monitoring violate Plaintiff Children’s constitutional and statutory rights. Fifth Circuit courts have certified classes basing commonality on similar allegations. *See, e.g., Olivia Y.*, No. 3:04-cv-251-LN, slip op. at 4-7, 10 ([Ex. A](#)); *Chisholm v. Jindal*, 1998 U.S. Dist. LEXIS 2521, at *10-13 (E.D. La. Feb. 27, 1998).

In *Olivia Y.*, a federal district court in Mississippi certified a Rule 23(b)(2) class of “all children who are or will be in the legal and/or physical custody of [Mississippi’s Division of Family and Children’s Services]” in a lawsuit challenging the operation of the state’s child welfare system. *Olivia Y.*, No. 3:04-cv-251-LN, slip. op. at 1 ([Ex. A](#)). The *Olivia Y.* class asserted that “systemic deficiencies . . . resulted and continue to result in violations of [the class’s] federal and statutory and constitutional rights.” *Id.* at 4 ([Ex. A](#)). Because shortcomings in the state agency’s staffing, policies, and practices “could readily be found to place every child in [the state’s] custody at substantial risk of harm,” the court determined the class satisfied the commonality requirement “even though each plaintiff and each proposed class member may not yet have suffered the same type or degree of harm (though some surely have).” *Id.* at 7 ([Ex. A](#)). Similarly, Named Plaintiffs here allege that failures in Defendants’ treatment and oversight of Plaintiff Children place every child in the Class at a substantial risk of harm.

Likewise, in *Chisholm v. Jindal*, a federal district court in Louisiana certified a Rule 23(b)(2) class of “[a]ll current and future recipients of Medicaid in . . . Louisiana under . . . twenty-one who are now and will in the future be placed in [a] waiting list.” *Chisholm*, 1998 U.S. Dist. LEXIS 2521, at *20. The lawsuit challenged the state’s refusal to provide disability-related services required by constitutional and statutory law. *See id.* at *2. Because the plaintiffs all “deal with the same system and seek to have that system so changed that it complies with federal . . . requirements,” the court held that the proposed class satisfied the commonality requirement of Rule 23(a). *Id.* at *11. In so deciding, the court emphasized the complaint “is not based on [the plaintiffs’] individualized medical needs and the court will not need to review all class members’ medical conditions in order to decide th[e] case.” *Id.* at *11-12. Similarly, Named Plaintiffs here claim that the constitutional and statutory rights of the members of the

proposed Class are violated by systemic failures in Defendants' foster care system. The declaratory and injunctive relief that Named Plaintiffs request on behalf of the Class likewise focuses on reforming DFPS's systemic practices, not on redressing individual grievances.

Named Plaintiffs have identified common duties that Defendants owe to all Class members and specific systemic failures from which all unlawful harms to Named Plaintiffs and Plaintiff Children flow, thereby creating common questions of law and fact shared by all Class members. Accordingly, the commonality requirement is satisfied.

3. Typicality: Named Plaintiffs' Claims Are Typical of the Class's Claims.

Rule 23(a)(3) requires that the Named Plaintiffs' claims be typical of the Class's claims. "The test for typicality, like the test for commonality, is not demanding." *Lighbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). And as with commonality, "[t]ypicality does not require a complete identity of claims If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James*, 254 F.3d at 571 (5th Cir. 2001) (citations and internal quotation marks omitted); *see also D.G.*, 593 F.3d at 1195 ("[E]very member of the class need not be in a situation identical to that of the named plaintiff to meet Rule 23(a)'s commonality or typicality requirements.") (citations and internal quotation marks omitted).

Named Plaintiffs "do not assert claims unique to themselves." *DeHoyos*, 240 F.R.D. at 282. Rather, these children have had similar harmful experiences while in the state's custody. These harmful experiences are the direct result of the systemic failings alleged in the Complaint, and therefore are shared by other Plaintiff Children not named in the Complaint. For example:

- M.D, S.A., J.S., K.E., D.P., and T.C. have suffered great instability in their placements, moving frequently among multiple placements, often hundreds of miles from their home communities. (Compl. [DE #1] ¶¶ 23, 57, 59, 61, 89, 95-96, 100, 104, 108, 111, 122, 125, 128-31, 134.) Placement failures and consequent moves result from an overburdened and revolving DFPS workforce that does not timely and

adequately assess children's needs, Defendants' failure to create and maintain placements adequate to meet the needs of children, and poor child-to-placement matching practices. (*Id.* ¶ 187.)

- M.D., Z.H., S.A., A.M., J.S., K.E., D.P., and T.C. have been unnecessarily placed in congregate care when their needs could have been met in less restrictive placements. (Compl. [DE #1] ¶¶ 24-25, 27, 47-48, 51-53, 59-62, 75-76, 83-84, 94-96, 109, 111, 117-18, 125, 128-33.) Although congregate settings should be placements of last resort, the Named Plaintiffs have been moved from one institution to another and often kept in group settings longer than appropriate. For instance, D.P. was kept in a hospital because DFPS had no other placement for her; K.E. and D.P. were kept in emergency shelters for multiple months, contrary to state law and DFPS policy; and M.D., A.M., and T.C. have each spent *years* in institutions. (*Id.* ¶¶ 24, 75-79, 94, 111, 117, 125, 130.) This inappropriate use and overuse of congregate care is a result of Defendants' failure to develop an appropriate array of placements and supportive services and of DFPS's intake and assessment failures. (*Id.* ¶ 203.)
- D.I., and D.P. have suffered abuse while in the state's custody. D.I. was sexually abused by older children in a foster home, and D.P. was sexually abused by the uncle with whom DFPS had placed her. (Compl. [DE #1] ¶¶ 38, 113.) The abuse and neglect suffered by Plaintiff Children is a result of a system in which caseworkers carry heavy caseloads that hamper their ability to visit children in their placements, placement capacity is inadequate to meet the needs of children and Defendants fail to adequately oversee the state's substitute care providers. (*Id.* ¶ 225.)
- Defendants have deprived all of the Named Plaintiffs of necessary mental health or educational services. (Compl. [DE #1] ¶¶ 21, 34, 46, 57, 68, 83, 94, 104, 136.) Each of the Named Plaintiffs has been prescribed psychotropic medications, and not provided with adequate counseling, therapy, and treatment that meet reasonable professional standards. (*Id.* ¶¶ 29, 40, 47, 50, 63, 78-79, 90, 98, 115, 137.) The academic progress of M.D., D.I., S.A., D.P., and T.C. has been hampered by frequent placement moves. (*Id.* ¶¶ 30, 42, 64, 121, 136.) Defendants' failure to provide Plaintiff Children with necessary services is the result of their failure to maintain an adequate array of services, exacerbated by poor matching of children to inadequate placement options. (*Id.* ¶ 234.)
- Defendants have separated Z.H., A.M., and D.P. from their respective siblings, neither placing them together nor affording them reasonable visits, even when such separation served no therapeutic purpose, and even though federal and state policy require that siblings be placed together except under limited circumstances. (Compl. [DE #1] ¶¶ 46, 70, 107.) Defendants have also placed A.M., K.E., and T.C. far from their families, preventing visits. (*Id.* ¶¶ 76, 80, 100, 133-34.) DFPS's separation of siblings and failure to provide visits for children with their families when appropriate results from an inadequate array of placement options as well as an overburdened workforce that does not timely and adequately assess children's needs, does not make timely quality visits with children, and fails to plan for children's permanent placements in suitable family homes. (*Id.* ¶ 241.)

- S.A., A.M., K.E., D.P., and T.C. have each been in the state’s custody for at least seven years. (Compl. [DE #1] ¶¶ 57, 68, 93, 104, 125.) These and other Plaintiff Children languish in the state’s PMC and are likely to leave foster care only by aging out, because Defendants fail to adequately assess children’s needs or to plan appropriately for their permanent placements in suitable family homes. (*Id.* ¶ 258.)

The Named Plaintiffs’ claims arise from the same factual and legal foundations as do the claims of other members of the class: the alleged failures of the state’s foster care system. *See DeHoyos*, 240 F.R.D. at 282; *see also Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 194 (W.D. Tex. 1998). Moreover, Named Plaintiffs and Plaintiff Children all premise liability for DFPS’s systemic failures on the same constitutional and statutory grounds. *Cf. Mullen*, 186 F.3d at 625 (finding typicality where “the proposed class members’ legal and remedial theories appear to be exactly the same”). Accordingly, the typicality requirement is satisfied.

4. Adequacy of Representation: Named Plaintiffs and Their Counsel Are Adequate Representatives.

Rule 23(a)(4) requires that Named Plaintiffs fairly and adequately protect the Class’s interests. In determining adequacy, a court must consider “the zeal and competence of the representative’s counsel and [] the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees,” *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982), as well as any “conflicts of interest between the named plaintiffs and the class they seek to represent,” *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314 (5th Cir. 2007) (citations and internal quotation marks omitted). Named Plaintiffs satisfy each of these requirements.

a. Adequacy of Named Plaintiffs.

Named Plaintiffs’ proposed Next Friends, who sue on their behalf, are dedicated to the Named Plaintiffs’ best interests, familiar with this litigation, understand why the Named Plaintiffs seek relief, and are willing and able to pursue this case on the Named Plaintiffs’ behalf.

(Compl. [DE #1] ¶¶ 143-51, 161.) *See Sam M. v. Carcieri*, 608 F.3d 77, 92 (1st Cir. 2010) (defining these as “the hallmarks a Next Friend should bear”).

Moreover, there are no conflicts of interest between Named Plaintiffs and the other Class members. *Cf. James*, 254 F.3d at 571 (“Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs’ interests and the class members’ interests.”) (internal quotation marks and citations omitted). Named Plaintiffs seek only declaratory and injunctive relief ordering Defendants to develop and maintain a system that will ensure that all Class members receive the protection, care, and services to which they are legally entitled. (*See* Compl. [DE #1] ¶ 355.) For example, Named Plaintiffs seek to be assigned DFPS caseworkers whose overall caseloads meet professional standards and to be placed in homes or facilities that are licensed or verified and that meet professional standards. (*Id.*) Accordingly, Named Plaintiffs “seek relief which would benefit all members of the proposed class.” *See DeHoyos*, 240 F.R.D. at 283, 316 (discussing *Marisol A.*, 126 F.3d at 378, and noting that there was no conflict in *Marisol* between the class members and class representatives because “all class members shared [the] same interest in obtaining broad-based relief which would dramatically improve [the] quality of all services to beneficiaries of [the] child welfare system”).

b. Zeal and Competency of Named Plaintiffs’ Counsel.

Named Plaintiffs are represented by counsel recognized for their extensive experience in complex litigation, including class actions and civil rights litigation. (Compl. [DE #1] ¶¶ 162-63.) Named Plaintiffs are represented by Canales & Simonson, P.C., a Texas law firm based in Corpus Christi with substantial experience with complex litigation in federal courts. (*See Ex. C* [firm resume of Canales & Simonson, P.C.].) Named Plaintiffs are also represented by Haynes

and Boone, LLP, an international law firm with offices in multiple Texas cities, and by Yetter Coleman LLP, a law firm with offices in Houston and Austin. (See [Ex. D](#) [firm resume of Haynes and Boone, LLP]; [Ex. E](#) [firm resume of Yetter Coleman LLP].) Both firms have extensive experience litigating class actions and other complex litigation. In addition, Named Plaintiffs are represented by attorneys from Children’s Rights, a non-profit organization with extensive experience in complex class action litigation involving child welfare systems. (See [Ex. F](#) [Declaration of Marcia Robinson Lowry (the “Lowry Decl.”)] ¶¶ 2-5.) Children’s Rights attorneys have served as class counsel on much of the major child welfare litigation in the United States. (See *id.* ¶¶ 2-5.) Named Plaintiffs’ counsel have identified and thoroughly investigated all claims in this action and have committed sufficient resources to thoroughly and expeditiously bring this action. (See *id.* ¶¶ 6, 10-11.)

C. The Class, Which Seeks Only Declaratory and Injunctive Relief for Civil Rights Violations, Satisfies Rule 23(b)(2)’s Requirements.

In addition to satisfying the threshold requirements of Rule 23(a), the Class also satisfies the requirements of Rule 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate relating to the class as a whole.” FED. R. CIV. P. 23(b)(2). The archetypal case for Rule 23(b)(2) certification is one where, as here, the class challenges policies or practices that allegedly violate a large group’s civil rights. See *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981) (Rule 23(b)(2) “was intended primarily to facilitate civil rights class actions, where the class representatives typically sought broad injunctive or declaratory relief”); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975), *disapproved on other grounds*, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978) (“the 23(b)(2) class action is an effective weapon for an across-the-board attack against systemic abuse

. . . [and is particularly] useful[] in the civil rights area”); *see also Neff*, 179 F.R.D. at 195 (“[a] class of cases found to fall squarely within the category authorized by subpart (b)(2) are civil rights cases which seek ‘broad declaratory or injunctive relief for a large and amorphous class’”) (citations omitted); *Murillo v. Musegades*, 809 F. Supp. 487, 503 (W.D. Tex. 1992) (noting that a suit for injunctive relief to stop violations of the constitutional rights of a class “is precisely the type of remedial action for which Rule 23(b)(2) was designed”).

Fifth Circuit courts “readily” certify classes seeking, as Named Plaintiffs here do, only injunctive or declaratory relief. *See Allison*, 151 F.3d at 411. Those classes involve “uniform group remedies,” and therefore do not require “a specific or time-consuming inquiry into the varying circumstances and merits of each class member’s individual case.” *Id.* at 414. Indeed, the Rule 23(b)(2) requirement is “almost automatically fulfilled in actions where the relief sought is primarily injunctive.” *Neff*, 179 F.R.D. at 195. And “because of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogeneous and cohesive group with few conflicting interests among its members.” *Allison*, 151 F.3d at 413. As a result, “proposed (b)(2) classes need not withstand a court’s independent probe into . . . the degree to which common issues predominate over those affecting only individual class members, as (b)(3) classes must.” *Id.* at 414. Because Named Plaintiffs seek only injunctive and declaratory relief on behalf of the Class, they are prime candidates for Rule 23(b)(2) certification.

Fifth Circuit courts have repeatedly certified Rule (b)(2) classes that, as in this case, seek injunctive relief remedying universal violations of federal constitutional and statutory law. *See, e.g., James*, 254 F.3d at 573; *Lighbourn*, 118 F.3d at 425-26; *DeHoyos*, 240 F.R.D. at 284-85; *Neff*, 179 F.R.D. at 196. In this case, as noted above at § III.B.4.a, Plaintiffs also seek such

injunctive relief, for instance, relief requiring Defendants to limit DFPS workers' caseloads and to place Plaintiff Children in homes or facilities that are licensed or verified and that meet professional standards. (Compl. [DE #1] ¶ 355.) In similar lawsuits challenging violations of foster children's rights, courts have routinely certified classes seeking systemic relief to address chronic dysfunction. Thus, for instance, the Tenth Circuit certified a class of "all children who are or will be in the legal custody of [the Oklahoma Department of Human Services] due to a report of suspicion of abuse or neglect or who are or will be adjudicated or deprived due to abuse or neglect." *D.G.*, 594 F.3d at 1192. The court held that this class met Rule 23(b)(2) requirements where foster children requested relief including an injunction limiting caseworker caseloads, noting that "such an injunction applies to the proposed class as a whole without requiring differentiation between class members." *Id.* at 1201. Similarly, the Third Circuit has certified a similar class, noting that, even if "not all of the orders issued will immediately benefit every plaintiff, every plaintiff will benefit from relief designed to ensure [the foster care agency's] compliance with the applicable standards." *Baby Neal*, 43 F.3d at 64; *see also Marisol A.*, 126 F.3d at 378 (affirming certification of class seeking broad declaratory or injunctive relief); *Olivia Y.*, slip. op. at 7, 10 ([Ex. A](#)) (requirements of Rule 23(b)(2) satisfied where class of foster children sought declaratory and injunctive relief with respect to the class as a whole).

In sum, Named Plaintiffs seek injunctive and declaratory relief on behalf of the Class to address Defendants' failures to properly manage the DFPS foster care system. Those failures harm and place at risk of harm all Class members, and the injunctive and declaratory relief the Class seeks would have class-wide scope and effect. The proposed Class therefore satisfies Rule 23(b)(2).

D. Class Certification Would Promote Judicial Economy and Cost Efficiency.

“[T]he class action device exists primarily, if not solely, to achieve a measure of judicial economy . . . preserv[ing] the resources of both the courts and the parties by permitting issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion.” *Allison*, 151 F.3d at 410. The need for those economies is particularly apparent in this case. Each member of the Class has suffered or will suffer harm and imminent risk of harm resulting from DFPS’s failure to maintain a child welfare agency that can provide safe and adequate living situations for Plaintiff Children, meet their service needs, adequately monitor their safety, and develop and implement plans to secure permanent families for them. But each of the thousands of Class members, as a child in state custody, faces profound impediments to bringing an individual federal case challenging DFPS’s agency-wide deficiencies.

Rule 23 remedies this situation. “The class action is one of the few legal remedies the small claimant has against those who command the status quo.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974). And class actions enable individuals with legitimate claims but small resources to access the courts. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits . . . aggrieved persons may be without any effective redress unless they may employ the class-action device.”).

Certifying the Class would also promote judicial economy. Numerous individual suits attacking department-wide issues would require the Court to expend considerable resources to hear substantially the same evidence in each case. Certifying the Class would therefore conserve judicial resources by litigating the common questions of fact and law in a single proceeding.

E. Named Plaintiffs’ Counsel Will Fairly and Adequately Represent the Class’s Interests and Should Be Appointed Class Counsel.

An order that certifies a class action must appoint class counsel under Rule 23(g). *See* FED. R. CIV. P. 23(c)(1)(B). Rule 23(g) mandates that class counsel “fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(g)(4). In making this determination, courts should consider four factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A).

In this case, as noted above at § III.B.4.b, Named Plaintiffs’ counsel are eminently qualified to represent the Class’s interests fairly and adequately. Named Plaintiffs’ counsel have identified and thoroughly investigated all claims in this action and have committed sufficient resources to thoroughly and expeditiously bring this action. (*See* [Ex. F](#) [Lowry Decl.] ¶¶ 10-11.) In addition, attorneys at Children’s Rights and the law firms of Canales & Simonson, Haynes and Boone, and Yetter Coleman possess extensive experience in litigating class actions and other complex litigation. (*Id.* ¶¶ 7-9.) Moreover, the attorneys at Children’s Rights possess extensive experience in complex class action litigation involving child welfare systems. (*See id.* ¶¶ 2-5.) Named Plaintiffs’ counsel therefore satisfy Rule 23(g)’s standard for appointment of class counsel.

IV. CONCLUSION

As demonstrated above, this action satisfies the requirements of Rule 23(a) and Rule 23(b)(2). Named Plaintiffs request that the Court enter an order certifying this action as a class action for all purposes, with the Class composed of “all children who are now and those who will

be in the Permanent Managing Conservatorship of DFPS.” Named Plaintiffs also request an order appointing Named Plaintiffs’ counsel as class counsel under Rule 23(g). Named Plaintiffs further request that the Court hear oral argument with respect to this Motion.

DATED: April 5, 2011

Respectfully submitted:

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CERTIFICATE OF CONFERENCE

On Monday, April 4, 2011, counsel for Plaintiffs conferred with James C. Todd, counsel for Defendants, by telephone regarding this Motion. Mr. Todd indicated that the Defendants will likely oppose this Motion.

/s/ Barry F. McNeil

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2011, I served the foregoing document by Certified Mail, Return Receipt Requested on the following counsel, who has not yet appeared in this action:

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