

1st Civil No. 113168

**IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DISTRICT THREE**

CAPITOL PEOPLE FIRST, *et al.*,
Plaintiffs/Petitioners,

v.

DEPARTMENT OF DEVELOPMENTAL SERVICES, *et al.*,
Respondents/Defendants,

v.

CALIFORNIA ASSOCIATION OF STATE HOSPITAL/PARENT
COUNCILS FOR THE RETARDED, *et al.*,
Intervenors.

**APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF
AMICI CURIAE THE IMPACT FUND, AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA, ASIAN
PACIFIC AMERICAN LEGAL CENTER, EQUAL RIGHTS
ADVOCATES, INC., LAWYERS' COMMITTEE FOR CIVIL
RIGHTS OF THE SAN FRANCISCO BAY AREA, MEXICAN
AMERICAN LEGAL DEFENSE & EDUCATION FUND, PUBLIC
ADVOCATES, INC., WESTERN CENTER ON LAW AND
POVERTY IN SUPPORT OF PETITIONER CAPITOL PEOPLE
FIRST, ET AL**

Petition from the Superior Court of Alameda County,
The Honorable Ronald M. Sabraw
Trial Court Case No. 2002-038715

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TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

The Impact Fund, American Civil Liberties Union of Northern California, Asian Pacific American Legal Center, Equal Rights Advocates, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Mexican American Legal Defense and Education Fund, Public Advocates, and Western Center on Law and Poverty request permission to file a brief as *amicus curiae* in support of Petitioner Capitol People First. This case presents the important question of the ability of plaintiffs to pursue broad injunctive relief class actions.

Amici are California nonprofit organizations dedicated to advancing and protecting the civil rights of minority groups, persons with disabilities, and other classes protected by anti-discrimination laws through the class action process.

Amicus The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other cases. It offers training programs, advice and counseling, and amicus representation to nonprofit organizations regarding class action and related issues. It is also a California State Bar Legal Services Trust Fund Support Center, and provides services to legal services projects across the state. The Impact Fund is Lead Counsel in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2002), and other major class action lawsuits.

Amicus American Civil Liberties Union of Northern California is the regional affiliate of the American Civil Liberties Union, a nationwide, nonprofit nonpartisan membership organization dedicated to the defense and promotion of the guarantees of individual liberties secured by the federal and state constitutions.

Amicus Asian Pacific American Legal Center is the largest, most diverse legal service and civil rights organizations focusing on Asian Pacific Americans in the United States. Since its founding in 1983, its legal and community services have had a far reaching impact at the local level, where much of its work is

focused, as well as at the state and national level, particularly in the areas of employment discrimination, voting rights, and language rights.

Amicus Equal Rights Advocates is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women.

Amicus Lawyers' Committee for Civil Rights of the San Francisco Bay Area is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco.

Amicus Mexican American Legal Defense and Education Fund is the leading nonprofit Latino litigation, advocacy and educational outreach institution in the United States. Established in 1968, MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 40 million Latinos living in the United States and to empower the Latino community to fully participate in our society. MALDEF achieves its mission by concentrating its efforts in the areas of employment, education, immigration, and political access. MALDEF has litigated numerous class action cases since the organization's founding.

Amicus Public Advocates, Inc. is a nonprofit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases to challenge the persistent, underlying causes and effects of poverty

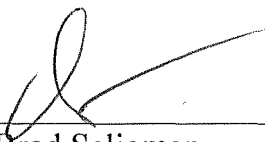
and discrimination. Public Advocates was co-counsel in *Serrano v. Priest*, 18 Cal. 3d 728 (1976), a major class action lawsuit seeking injunctive relief.

Amicus Western Center on Law and Poverty is California's oldest and largest state support center for the State's neighborhood legal aid programs. The Western Center has frequently brought and won class actions on behalf of thousands of persons in suits with statewide impact. *See, e.g., Serrano v. Priest*, 18 Cal. 3d 728 (1976) (invalidating state school finance system); *Hunt v. Superior Court*, 21 Cal. 4th 984 (1999) (counties must base health care eligibility standards on ability to pay). Western Center would not have been capable of achieving victories for these plaintiffs without the ability to bring broad injunctive relief class actions.

These organizations and the undersigned attorneys are familiar with the questions involved in this case and the scope of their presentation. We submit that additional briefing is necessary and appropriate and thus request leave to file the attached brief.

Dated: 9/27/00

Respectfully submitted,

By 

Brad Seligman
THE IMPACT FUND

Attorney for Amici Curiae
American Civil Liberties Union of
Northern California
Asian Pacific American Legal Center
Equal Rights Advocates
Lawyers' Committee for Civil Rights of
the San Francisco Bay Area
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INTRODUCTION

The trial court denied class certification because it believed individual class member claims would undermine commonality. This conclusion fundamentally misconstrued the nature of this action and should be reversed. *Amici* submit this brief because the trial court's error, if not corrected, would make litigation of many critical systemic and pattern and practice cases all but impossible.

ARGUMENT

I. THERE ARE NO INDIVIDUAL ISSUES IN A SYSTEMIC CLASS INJUNCTIVE RELIEF ACTION

In assessing whether common questions predominate, the focus must be on the nature of the claim asserted and the theory of recovery. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 327 (2004). In this case, the only relief sought is injunctive and declaratory relief. Such relief is required, plaintiffs allege, in part because of California's systemic failure to exercise proper oversight and to enforce statutory and regulatory mandates to place class members in less restrictive settings.

Courts have consistently held that class certification is *particularly* warranted where the focus of the case is systemic conduct and remedies. In such cases, there are only common questions to resolve. *See Gonzales v. Jones*, 116 Cal. App. 3d 978, 984 (1981) (noting that where the harm at issue in the case was the result of a systemic governmental practice, "only as a class can the rights of all the recipients be protected"); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (noting that class certification was appropriate especially where "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue"); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.

2001); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (noting that cases in which “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,” are particularly well-suited for class certification).¹

The California Supreme Court noted that “many cases have recognized that a class action is a ‘peculiarly appropriate’ vehicle for providing effective relief when, as here, a large number of applicants or recipients have been improperly denied governmental benefits on the basis of an invalid regulation, statute or administrative practice.” *Employment Dev. Dept. v. Superior Court*, 30 Cal. 3d 256, 265 (1981) (*citing, inter alia*, *Califano*, 442 U.S. at 701; *Gonzales*, 116 Cal. App. 3d at 984-85). “These and many other authorities demonstrate that a class action is not inappropriate simply because each member of the class may *at some point* be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.” *Id.* (emphasis added).

Essentially, plaintiffs’ theory in this case is that there has been a pattern and practice of failure to meet statutory and regulatory mandates. *See* Petitioners’ Opening Brief at 28-30. Plaintiffs challenge defendants’ systemic policies and practices and the systemic effect of those policies and practices on plaintiffs’ rights under state and federal law. This claim is not novel—there is a well-established framework for assessing such claims in the class action context.

¹ The California Supreme Court has urged trial courts to be procedurally innovative and “incorporate procedures from outside sources in determining whether to allow the maintenance of a particular class suit. More specifically, we have directed them to Rule 23 of the Federal Rules of Civil Procedure.” *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 453 (1974); *see also Sav-On*, 34 Cal. 4th at 339; *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1603 (1991); *Lowry v. Obledo*, 111 Cal. App. 3d 14, 22 (1980).

Contrary to the trial court's assumption that class relief is precluded by individual issues that arise for each class member, such issues do not even arise in assessing class wide liability and injunctive relief.

The pattern and practice model was comprehensively described in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).² In that nationwide employment discrimination case, the United States alleged that the defendant company had a pattern and practice of employment discrimination against minority applicants and would-be applicants for truck driver positions. The Court explained that at the liability stage of the case, the government must prove “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” *Id.* at 336. The government made this showing through a combination of statistical and anecdotal evidence. *Id.* at 337-38.

At the liability stage of a pattern and practice case, the plaintiffs need not offer

evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy. Its burden is to show that such a policy existed. The burden then shifts to the employer to defeat a prima facie showing of a pattern or practice by demonstrating that the Government’s proof is either inaccurate or insignificant.

Id. at 360.

The point is that at the liability stage of a pattern or practice trial, the focus often will not be on individual hiring decisions. While a

² Although *Teamsters* was not a class action, the Supreme Court has confirmed that “the elements of a prima facie pattern-or-practice case are the same in a private class action.” *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 n.9 (1984).

pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy.

Id. at 360 n.46. In other words, the liability stage focuses on the defendant's policy as it applies to the entire class.

If the defendant fails to rebut the prima facie case, liability is established and the trial court determines the appropriate remedy. “*Without any further evidence* from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice” *Id.* at 361 (emphasis added); *see also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (“[A] finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class”). Importantly, such relief is issued without any requirement of assessing the claims of individual class members. If individual relief is sought, “a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief.” *Teamsters*, 431 U.S. at 361.³

The *Teamsters* pattern and practice approach has been approved by the California Supreme Court. *See Sav-On*, 34 Cal. 4th at 333-34 & n.6. Because *Sav-On* was not a discrimination case, the California Supreme Court's endorsement of the pattern and practice approach indicates that it is applicable to the full range of potential class cases. *See id.* (“California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical

³ In such additional proceedings, all class members are presumed entitled to relief, but a defendant can defeat individual relief by proving that an individual was denied an employment opportunity for a lawful reason. *Teamsters*, 431 U.S. at 431-32

evidence, sampling evidence, expert testimony and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.”); *see also Alch v. Superior Court*, 122 Cal. App. 4th 339, 379-381 (2004) (applying *Teamster*'s pattern and practice theory in California Fair Employment & Housing Act case); *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1279 (1987) (holding that whether County applied an unlawful process in terminating General Assistance benefits did not require examining facts of each class member but could be determined through review of evidence about “standard practices followed in making . . . decisions, as well as a *sampling* of representative cases” (emphasis in original)). Here, too, plaintiffs have offered common evidence of defendants' practices and policies sufficient to establish common factual issues and the illegality of defendants' conduct. *E.g.*, Petitioners' Opening Brief at 41-46. Plaintiffs' intended use of expert testimony, statistics, and sampling evidence is consistent with recognized methods of proof in class litigation. *See, e.g., Sav-On*, 34 Cal. 4th at 333 & n.6; *Reyes*, 196 Cal. App. 3d at 1279.

The trial court erroneously assumed that “individual inquiries” would be necessary in order to provide class relief.⁴ The court never explained how or why such individual inquiry would be necessary in order to establish an overall illegal policy or practice, or to issue systemic injunctive relief. Contrary to the assumption of the court, plaintiffs do not seek individualized relief at all. As plaintiffs repeatedly emphasize, they seek only systemic relief; any individual entitlement claims would be handled post-judgment through established administrative processes. *E.g.*, Petitioners' Opening Brief at 32, 47.

⁴ The trial court's decision is ambiguous, however, since the court suggests that an “alternative approach” focusing on whether the defendant “acted or refused to act on grounds generally applicable to the class” would establish commonality. Opinion at 9. Inexplicably, however, the court rejected this approach and opted for what it called the “standard commonality analysis.” *Id.* at 14.

Individual facts may arise where individual relief—such as damages or person-specific injunctive relief—is sought. That is why “additional proceedings” may be necessary in pattern and practice cases where such individual relief is sought. *Teamsters*, 431 U.S. at 361. In this case, however, no such relief is sought. Just as the court in *Teamsters* did not need to determine the individual discrimination claims of class members to issue injunctive relief, the trial court in this case may order systemic relief without addressing whether any individual class member was denied appropriate placement.

II. THE TRIAL COURT’S APPROACH WOULD PRECLUDE SYSTEMIC RELIEF IN MANY CASES

The approach taken by the trial court is inconsistent with many of the historic systemic class action cases in California. In *Serrano v. Priest*, 18 Cal. 3d 728 (1976) for example, the California Supreme Court affirmed injunctive relief as a remedy for the state government’s systemic failure to finance the public schools in a nondiscriminatory manner. The individual issues relating to each child’s educational needs were irrelevant to this determination. Likewise, in *Hunt v. Superior Court*, 21 Cal. 4th 984 (1999), the Court upheld an injunction requiring a county to base health care eligibility standards on the ability of residents to pay. *See also White v. State of California*, 195 Cal. App. 3d 452, 456 (1987) (allowing class of developmentally disabled children to pursue claim for injunctive relief against state officials to remedy failure to spend federal Education for Handicapped Children funds on their education). In each of those cases, individual issues *could have* been raised, such as the need of each child for particular school services or the ability of residents to pay. The focus of the litigation, however, was system-wide, and therefore such individual issues were irrelevant.

Similarly, federal courts recognize that not all cases involving individuals necessarily implicate individual issues. As the Third Circuit has noted, although it may be true that “each plaintiff here has his or her own circumstances,” they all share the common circumstance of being affected by the actions or inactions of the state. *Baby Neal*, 43 F.3d at 61. Such “[i]ndividual factual differences do not affect the central allegation that the [State] violates various statutory and constitutional rights in its provision of child care services to the class.” *Id.*

Courts have also issued broad injunctive relief in many cases such as this one, involving failure of a governmental entity to enforce statutory obligations on those it supervises. For example, in *Raymond v. Rowland*, 220 F.R.D. 173 (D. Conn. 2004), the district court certified a class seeking broad injunctive relief for the failure of the governmental entity to institute policies and procedures and otherwise comply with its statutory mandates. The class of disabled recipients of state aid programs alleged that the Department of Social Services failed to adopt and codify policies and procedures to accommodate disabled people in accessing and maintaining eligibility for such programs. The court noted that the plaintiffs alleged a “lack of systemic process” and therefore satisfied the commonality prong of Federal Rule of Civil Procedure 23(a). *Id.* at 179. Furthermore, the court noted that cases “alleging systemic failure of governmental bodies to properly fulfill statutory requirements” are appropriate for class certification under Rule 23(b)(2). *Id.* at 181.

Likewise, a class of homeless children challenged the failure of state and local governments to fulfill their federal statutory obligations to assure that children of homeless individuals had access to free and appropriate public education. *Nat’l Law Ctr. on Homelessness & Poverty, R.I. v. New York*, 224 F.R.D. 314, 316-18 (E.D.N.Y. 2004). Again, because the plaintiffs challenged

systemic failure of government entities to comply with and enforce their statutory mandates, and because the plaintiffs sought injunctive relief to rectify that problem, class certification was appropriate.

In *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982), plaintiffs challenged the failure of the United States Department of Housing and Urban Development (HUD) to operate a program for subsidized housing that was free of racial discrimination. Although HUD did not actively segregate subsidized housing, its inaction perpetuated a system of segregation. *Id.* at 1030-31. The district court granted injunctive relief against HUD. *Young v. Pierce*, 640 F. Supp. 1476 (E.D. Tex. 1986).⁵ Similarly, in *Miller v. Carson*, 563 F.2d 757 (11th Cir. 1977), a broad injunction was granted against state and local officials for failure to operate the prisons properly. As an example, the court granted an injunction against the Secretary of the Florida Department of Offender Rehabilitation for failure to promulgate rules prescribing standards for the operation of the jail. *Id.* at 758-59.

As these cases demonstrate, class treatment has been approved to remedy systemic discrimination or other governmental failures through class actions and system-wide injunctions. In any of these cases, one could have argued that an individual's entitlement to relief turned on individually specific facts. Yet this was no bar to class certification of injunctive relief claims.

⁵ The Fifth Circuit vacated and remanded for reconsideration of the scope of the injunction but did not deny that the injunction was appropriate. *Young v. Pierce*, 822 F.2d 1368 (5th Cir. 1987).

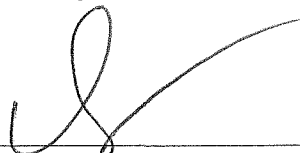
CONCLUSION

California's public policy encourages the use of class actions. *Sav-On*, 34 Cal. 4th at 340. The need for class litigation is particularly manifest where class members face systemic problems that cannot be redressed by individual litigation. The trial court order denying class certification should be reversed.

Dated: 9/27/06

Respectfully submitted,

By



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THE IMPACT FUND

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Equal Rights Advocates
Lawyers' Committee for Civil Rights of
the San Francisco Bay Area
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Education Fund
Public Advocates
Western Center on Law and Poverty

**CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 14(c)(1)**

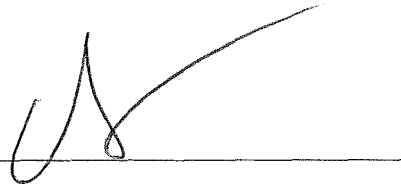
I, BRAD SELIGMAN, declare that:

I am Executive Director of The Impact Fund, counsel for *amici curiae* in the above-captioned case.

I certify that the forgoing **Brief of Amici Curiae** is at least thirteen point font and contains 2520 words, including footnotes, as counted by the Microsoft Word program used to generate this brief.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on September 27, 2006, at Berkeley, CA.

A handwritten signature in black ink, appearing to read 'Brad Seligman', is written over a horizontal line. The signature is stylized and cursive.

Brad Seligman

PROOF OF SERVICE
STATE OF CALIFORNIA
COUNTY OF ALAMEDA

I, the undersigned do hereby declare that I am over the age of eighteen, and am not a party to this action. My business address is 125 University Avenue, Berkeley, CA 94710.

On September 27, 2006, I served a true copy of the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE IMPACT FUND, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ASIAN PACIFIC AMERICAN LEGAL CENTER, EQUAL RIGHTS ADVOCATES, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, MEXICAN AMERICAN LEGAL DEFENSE & EDUCATION FUND, PUBLIC ADVOCATES, INC., WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF PETITIONER CAPITOL PEOPLE FIRST, ET AL

By placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, I deposited such envelope in the mail in Berkeley, California to the following parties at the addresses set forth on the Service List attached.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 27, 2006 in Berkeley, California.



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