APPEAL NO. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL WILLDEN, Director of the Nevada DHHS; FERNANDO SERRANO, Administrator of the Nevada Division of Child and Family Services; JOHN DOE, Bureau Chief of the Bureau of Services for Child Care of the Division of Child and Family Services; VIRGINIA VALENTINE, Clark County Manager; TOM MORTON, Director of Clark County Department of Family Services; BRUCE L. WOODBURY, TOM COLLINS, CHIP MAXFIELD, YVONNE ATKINSON GATES, MYRNA WILLIMAS, LYNNETTE BOGGS MCDONALD and RORY REID, Clark County Commissioners; and CLARK COUNTY,

Defendant/Appellee,

vs.

CLARK K., by his next friend Sherry Anderson; JALEN, SIA, ROSHAUN, CALEB, and KIND A. by their next friend Tarrah Logan; TONI, SUMMER, AND FRANK B., by their next friend Marilyn Paikai; and DONNA C., by her next friend Jacquelyn Romero,

Plaintiff/Appellant.

On Appeal from the United States District Court for the District of Nevada
Case No.: 2:06-cv-01068-RCJ-RJJ
The Honorable Robert C. Jones

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. PROC. 23(f)

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I. INTRODUCTION

Plaintiffs are abused and neglected children in the custody of the Clark County Department of Family Services (DFS) in Nevada. They filed this class action lawsuit, which seeks solely declaratory and injunctive relief, to redress widespread and systemic violations of their federal statutory and constitutional rights. Plaintiff foster children have presented substantial evidence of the widespread harm to the class resulting from Defendants' system-wide policies and practices, including powerful admissions from Defendants themselves. Defendant Tom Morton, DFS Director, has referred to his agency as a "crippled child welfare system" that has been "designated by Federal officials as the 'worst child welfare system' in the nation." He has also admitted "it is probably somewhat of a miracle that more tragedies have not occurred." (Docket No. 196, Ex. D at 8 & 17).[1]

Despite Defendants' admissions and plaintiffs' extensive evidentiary record, the district court denied plaintiffs' renewed motion for class certification. The court held that plaintiffs had met the numerosity requirement, but had not satisfied the other requirements of Federal Rule of Civil Procedure 23 ("Rule 23"). The court manifestly erred by imposing dramatically heightened standards for demonstrating the commonality and typicality requirements – standards that simply

[1] Docket No. 196 is the Declaration of William Grimm in Support of Plaintiffs' Renewed Motion for Class Certification. Fifty-three exhibits, labeled A through AAA, were attached to this declaration. Hereinafter, plaintiffs cite to those exhibits by referencing the letter of the exhibit.

do not exist in the Ninth Circuit. Disregarding Defendants' express admissions of systemic problems, the district court opinion went so far as to require plaintiffs to provide expert statistical evidence in order to meet these requirements. Additionally, the court ignored directly controlling precedent and repeatedly applied incorrect legal standards.

Both the Supreme Court and Rule 23 give special providence to precisely the sort of injunctive relief case plaintiffs bring. Although a long line of cases dictate that the commonality and typicality requirements must be construed permissively, the district court took exactly the opposite approach and forged a path that is unprecedented in the Ninth Circuit. Accordingly, plaintiffs' case exemplifies exactly the type of manifest error for which Rule 23(f) was intended.

II. QUESTION PRESENTED

Whether this Court should grant permission to appeal the district court's order denying class certification to a class of 4,000 Clark County foster children, pursuant to Rule 23(f).

III. RELIEF SOUGHT

Plaintiffs request that this Court permit an interlocutory appeal of the order denying class certification.

IV. STATEMENT OF FACTS

The nearly 4,000 foster children in Defendants' custody regularly suffer injury as a direct and foreseeable result of Defendants' deficient policies and

practices. While the type of injury may vary – from physical abuse and neglect, to denial of medical care and mental health services, to lack of a permanent place to call home – they all stem from Defendants' common course of conduct. Among the system-wide practices that have led to the current level of dysfunction are an ill-qualified, poorly trained, and inadequately supervised workforce burdened with overwhelming caseloads; the failure to effectively investigate reports of abuse and neglect; the failure to provide adequate support to foster parents; and the failure to provide children with advocates to make their voices heard. These systemic deficiencies affect all class members.

Defendants, themselves, do not dispute these problems and admit that they result in dangerous situations for foster children. Significantly, some of the most powerful evidence comes from the State and County Defendants' own admissions, reports, and records. Among the key admissions corroborating the systemic failures are the following:

- Clark County hires caseworkers who generally "come without the critical skills needed to ensure the safety, permanency and well-being of children and to plan and facilitate family change" and provides them with only "stop-gap" training. (Ex. D at 10 (DFS Director Morton's Report to U.S. Rep. Berkeley) & Ex. YY at 157:17-20 (testimony of DFS Assistant Director Lisa Ruiz-Lee)).

- "The consequences of this [lack of training] can be seen in reviewing almost every case. ... Safety and risk factors are often missed or misinterpreted. Many caretaker and child needs are never identified..." (Ex. D at 10).
- Caseloads are "dangerously high" and place children "at an unacceptable level of risk" causing "a preeminent threat to [their] safety, permanency, and well-being." (Ex. JJ at 2 (Oct. 19, 2007 Letter from DFS Director Morton and County Manager Valentine to Governor Gibbons)).
- Numerous sources have documented DFS's chronic failure to visit foster children regularly and Defendant Morton has stated "I consider this situation very dangerous . . ." (Ex. MM).

Widespread systemic failures were also documented in a review of nearly 1,400 foster care case files performed by Ed Cotton, a consultant hired by Defendants.[2] Mr. Cotton, found, among other problems, that investigators' failed properly to identify child abuse in two-thirds of the cases reviewed and that investigations of child abuse and neglect were inadequate in 50% of the cases reviewed. (Ex. LL at 4, 18, 23-25). Mr. Cotton's report described a litany of common practices, including infrequent visits to foster homes, non-existent or out-of-date case plans, high caseloads, and inadequate supervision and training of caseworkers. (Docket No. 227 at ¶¶ 24-38). Mr. Cotton also found that

[2] DFS Director Morton relied substantially on the findings of Mr. Cotton's report in his own report to U.S. Representative Berkley. (Ex. D).

Defendants' practices prevent caseworkers from exercising professional judgment in their work with foster children. *Id.* at ¶¶ 31, 36, 38, 41-43, 49. Compounding these systemic problems, it is undisputed that only about 35% of children in Clark County are provided with a guardian *ad litem* or attorney to represent them while in foster care due to the chronic shortage of advocates. (*See* Ex. AAA at 48:11-13; Docket No. 201 at ¶ 8).

Plaintiffs' undisputed class certification record demonstrates that the harms suffered by both the named plaintiffs and class members are the inevitable result of the system-wide practices described above. The ten named plaintiffs' tragic histories illustrate the harms the class members suffer, which include witnessing the death of an infant sibling; enduring further abuse and neglect in foster homes selected and licensed by Defendants; being denied basic health, mental health, and educational services; and experiencing a revolving door of foster placements.

Plaintiffs' evidence of harm is by no means limited to these ten foster youth. Defendants' documents demonstrate that foster children face alarming rates of abuse and neglect even after they have been removed from their parents' custody and placed in Clark County foster homes; that half of all Clark County foster children lack appropriate health and mental health services; and high percentages of children are bounced from one foster care placement to the next, resulting in

disruptions in all aspects of their lives. (*See, e.g.*, Exs. N & P; Docket No. 192-2 at 2; Ex. V at 227105; Ex. DD at 31-33).

These and countless other sources underscore the inescapable fact that Defendants' foster care system is miserably failing the children placed in its care. Plaintiffs seek (1) declaratory relief establishing that Defendants system-wide deficiencies result in violations of foster childrens rights under the federal Due Process Clause and federal statutes enacted for the benefit of foster children, and (2) injunctive relief compelling Defendants to comply with the mandates of those federal statutes and to adhere to constitutionally mandated professional standards designed to ensure foster children's safety and well-being.

V. THE PROCEEDINGS AND DECISIONS BELOW

On August 30, 2006, plaintiffs filed their initial complaint in this action. On October 19, 2006, plaintiffs filed a First Amended Complaint. (Docket No. 57). Plaintiffs assert the majority of their legal claims pursuant to 42 U.S.C. § 1983, seeking to enforce their statutory and constitutional rights. All claims are brought on behalf of the class as a whole.

Plaintiffs first moved to certify their class on November 21, 2006. (Docket No. 74). On May 14, 2007, the district court ruled that plaintiffs satisfied Rule 23(a)(1)'s "numerosity" requirement, but deferred consideration of the remaining certification requirements. (Docket No. 134 at 45-47).

In its May 14, 2007 Order, the district court also ruled on Defendants' motions to dismiss, upholding the majority of plaintiffs' claims.[3] (Docket No. 134). The district court held that children in foster care have enforceable rights under the federal Due Process Clause and under several federal statutes. Following this ruling, plaintiffs filed a Second Amended Complaint to address issues raised by the court. (Docket No. 142). Currently, plaintiffs' action includes claims based on substantive due process, the federal Adoption Assistance Act, the Child Abuse Prevention and Treatment Act, and the Medicaid Act.

Plaintiffs filed a renewed motion to certify their class on March 28, 2008. Plaintiffs proposed to certify a class of:

> all child abuse or neglect victims who are or will be involuntarily placed outside the homes of their parents or guardians by Clark County Department of Family Services pursuant to an order of the court under Nev. Rev. Stat. § 432B.

The district court heard oral argument on June 9, 2008. July 14, 2008 Order ("Order") at 1 (Docket No. 243). At the court's request, County Defendants filed a proposed order denying class certification on June 23, 2008, to which plaintiffs objected. The district court entered County Defendants' order on July 14, 2008.

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[3] Subsequently, the Court ruled upon a second motion to dismiss from State Defendants. September 4, 2007 Order at 9-10 (Docket No. 161).

VI. REASONS FOR GRANTING INTERLOCUTORY REVIEW

A. Plaintiffs Meet The Standard For Granting Interlocutory Review.

Rule 23(f) grants this Court "unfettered discretion" to review the denial of class certification based on "any consideration [this Court] finds persuasive." Fed. R. Civ. P. 23 Advisory Committee Notes 1966 Amendment. In *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005), this Court found that interlocutory review is "warranted when the district court's decision is manifestly erroneous." *Chamberlan*, 402 F.3d at 959.[4] *Chamberlan* explains that a decision is manifestly erroneous when it contains a "significant" error, generally involving the application of an incorrect Rule 23 standard or the failure to apply a directly controlling case. *Id.* at 959, 962.

Here, the district court's order contains several significant errors. While the court properly found that plaintiffs satisfied numerosity, the court held plaintiffs to incorrect and heightened legal standards in its analysis of the remaining Rule 23 requirements. In doing so, the district court ignored directly controlling Ninth Circuit case law. Rule 23(f) review is appropriate based on this manifest error.

In *Chamberlan*, this Court also found that review is proper when "there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the

[4] However, these criteria are not "an exhaustive list of factors [nor] intended to circumscribe the [court's] broad discretion . . ." *Chamberlan*, 402 F.3d at 960.

district court that is questionable." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).[5]

Here, individual plaintiffs only bring claims for system-wide injunctive and declaratory relief. As such, the denial of class certification seriously hinders their ability to obtain the relief they seek. *See Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728 (9th Cir. 1983); *National Center for Immigrants Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1371 (9th Cir. 1984). Accordingly, Rule 23(f) review of the district court's decision is also appropriate on the basis that it creates a "death knell" situation.

B. The District Court's Analysis Of Commonality And Typicality Was Manifestly Erroneous.[6]

1. The District Court Manifestly Erred By Ignoring Directly Controlling Ninth Circuit Authority.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class . . ." This Court has repeatedly underscored that the commonality requirement is not a difficult hurdle and should be "construed permissively." *Staton v. Boeing, Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In civil-rights cases such as this one,

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[5] Courts have not explicitly addressed how a death knell situation would arise for plaintiffs seeking injunctive relief. However, the Fifth Circuit's holding in *Fox v. City of West Palm Beach*, 383 F. 2d 189 (5th Cir. 1967), suggests that a decision that extinguishes a plaintiff's claim for injunctive relief may be constitute a "death knell" situation.

[6] Plaintiffs address the district court's errors in its commonality and typicality analysis in one section because the court's analysis of these factors overlapped.

this Court has established that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985)); *Walters v. Reno*, 145 F.3d 1032, 1045, 1047 (9th Cir. 1998).

This Court has adopted the Rule 23 analysis laid out by the Third Circuit in *Baby Neal v. Casey*. *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *See also Hodgers-Durgin v. de la Vina*, 165 F.3d 667, 675-676, 678-679 (9th Cir. 1999) (opinion withdrawn on re-hearing, case decided on a separate basis on rehearing).[7] In *Baby Neal*, the Third Circuit found that a class of foster children easily met the commonality requirement, holding that "putative class members in this case share the common legal claim that DHS's systemic deficiencies result in widespread violations of their statutory and constitutional rights." *Baby Neal v. Casey*, 43 F.3d 48, 61 (3d Cir. 1994); *see also Id.* at 57.

Here, plaintiff foster children raise the common legal claim that Clark County DFS's systemic deficiencies result in widespread violations of their statutory and constitutional rights. Plaintiffs challenge "a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275

[7] Several Ninth Circuit district courts have recognized this Court's adoption of the Rule 23 analysis in *Baby Neal*. *See, e.g., Xiufang Situ v. Leavitt*, 240 F.R.D. 551 (N.D.Cal. 2007); *Von Colln v. County of Ventura*, 189 F.R.D. 583 (C.D.Cal. 1999); *Doe v. Los Angeles Unified School District*, 48 F. Supp. 2d 1233 (C.D.Cal. 1999).

F.3d 849, 868 (9th Cir. 2001) (citations omitted). As such, plaintiffs meet the Ninth Circuit's permissive commonality standard.

Disregarding Ninth Circuit precedent, the district court concluded that plaintiff foster children had not met the commonality requirement as expressed by the Tenth Circuit, stating:

> This Court is in agreement with *J.B. v. Valdez*, in which the Tenth Circuit said that it would not "read an allegations [sic] of systemic failures as a moniker for meeting the class action requirements. [sic] 186 F.3d 1280, 1289 (10th Cir. 1999).

Order at 6. The district court justified its reliance on *J.B. v. Valdez* by asserting that there is no Ninth Circuit case law with common questions similar enough to those in the present case. Order at 6. Such analysis was manifestly erroneous.

As described above, there is a wealth of case law in the Ninth Circuit establishing how to apply the Rule 23 requirements. Legal precedent by its very nature applies to new factual scenarios that inherently will arise with each new case. Moreover, the Ninth Circuit has already adopted the Rule 23 analysis established by *Baby Neal*, a case with facts extremely similar to the present case. To the extent the district court sought guidance from a case with similar facts, the reasoning of *Baby Neal* is certainly instructive.

The district court erred by following the commonality analysis of *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999). *J.B.* stands in stark contrast to this Court's adoption of *Baby Neal*'s Rule 23 analysis. In *J.B.*, foster children in New Mexico

asserted the common claim that systemic failures in the Defendants' child welfare system denied plaintiffs services and benefits guaranteed to them by constitutional, federal, and statutory law. The Tenth Circuit held that this showing was not sufficient for a finding of commonality. *Id.* at 1289. In so holding, the Tenth Circuit explicitly stated that its refusal to recognize commonality based on systemic failures differed from the Third Circuit's conclusion in *Baby Neal*; a "similar case." *Id.* at 1289 fn.5.

As discussed above, the Third Circuit followed a different approach in *Baby Neal*, holding that plaintiff foster children met the commonality requirement because "putative class members . . . share the common legal claim that DHS's systemic deficiencies result in widespread violations of their statutory and constitutional rights." *Baby Neal v. Casey*, 43 F.3d at 61. The Ninth Circuit has chosen to rely on the Third Circuit's *Baby Neal* approach to commonality, not the Tenth Circuit's *J.B. v. Valdez* approach. As such, it was manifest error for the district court to follow *J.B. v. Valdez*.

2. The District Court Manifestly Erred By Imposing An Incorrect Evidentiary Standard For Demonstrating Commonality And Typicality.

As discussed above, this Court applies a permissive standard in construing the commonality and typicality requirements. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Similarly, there is no strict requirement for the type or

amount of evidence that is necessary to support a finding of commonality or typicality. The Supreme Court has established that in some cases, a court may not need to examine any evidence at all to determine whether the class certification requirements have been met. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). In other cases, a court may choose to "probe behind" the pleadings before certifying a class. *Id.* There is no requirement that plaintiffs provide a specific type of evidence in order to obtain certification.

Following this standard, plaintiffs have exceeded the "permissive and minimal burden" of establishing commonality and typicality. Plaintiffs presented extensive evidence, including *Defendants' own admissions,* of systemic problems as part of their record of over 50 exhibits and multiple declarations. These admissions demonstrate the existence of common questions.[8]

Contrary to the Ninth Circuit's flexible standards, the district court held that plaintiffs must provide "statistical expert evidence based on well-established statistical evidence"[9] in order to satisfy the commonality and typicality requirements. Order at 4. In so holding, the district court cited to *Dukes v. Wal-Mart*, 509 F.3d 1168 (2007), which is an employment discrimination case raising

[8] *See supra* Section IV. Furthermore, multiple exhibits did contain statistical evidence of the harms experienced by children in foster care, even though such evidence was not required. *See, e.g.,* Ex. E.

[9] In addition to being incorrect, the legal standard applied by the district court is impossibly vague. The court did not define its new standard or provide any guidance as to the type of evidence that *would* meet the standard.

Title VII claims. Order at 4. However, the stringent legal standard set forth in the district court's decision is nowhere to be found in *Dukes*. In fact, the Ninth Circuit held that the plaintiffs' evidence in *Dukes*, which happened to include statistical evidence, "*exceeded* the permissive and minimal burden of establishing commonality." *Dukes,* 509 F.3d at 1177 (2007) (emphasis added). It did not find that statistical expert evidence was *required* to satisfy commonality or typicality, as the district court suggests in its order.

The district court also failed to recognize that statistical evidence may have particular relevance at the certification stage of employment discrimination cases, such as *Dukes,* that does not exist for other types of cases. In such cases, plaintiffs may have to rely on statistical evidence to raise an inference of intent to discriminate, because such intent is rarely revealed through direct admissions. *See*, *Dukes*, 509 F.3d at 1180 ("[i]t is well-established that commonality may be established by raising an inference of class-wide discrimination through the use of statistical analysis."); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 n. 20 (1977). However, even in the employment discrimination context, statistical expert evidence is not required or even prioritized. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003); *Staton v. Boeing*, 327 F.3d 938, 954 (9th Cir. 2003).

Accordingly, neither the Supreme Court nor the Ninth Circuit has held that statistical expert evidence is required to satisfy the Rule 23(a) factors. The court manifestly erred in applying this heightened standard.

3. The District Court Erroneously Applied A More Stringent Typicality Requirement Than That Established By The Ninth Circuit.

The Ninth Circuit has explicitly held that in suits challenging system-wide practices affecting all class members differences in the nature of the specific harms various class members experience do not preclude a finding of commonality or typicality. *Armstrong v. Davis*, 275 F.3d 849, 868-869 (9th Cir. 2001) (citing *Baby Neal*, 43 F.3d at 56). In fact, in a 23(b)(2) action, plaintiffs need not even show actual injury on behalf of all class members; it is "sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters v. Reno*, 145 F.3d 1032, 1045, 1047 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999); Fed. R. Civ. P. 23 Advisory Committee Notes 1966 Amendment.

As such, the typicality requirement has never demanded the same or substantially identical injuries. *See Dukes,* 509 F.3d at 1184. Plaintiffs need not experience factually similar injuries, but simply must be subject to the same or similar legal violations. *See Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir. 1992). This is particularly true where plaintiffs are seeking injunctive relief.

In such cases, the focus is on whether both named plaintiffs and unnamed class members were affected by defendants' system-wide practices and policies and not on the nature of their specific injuries. *See Armstrong,* 275 F.3d at 868-869, citing *Baby Neal*, 43 F.3d at 56).

Rather than applying the above legal standard to the present case, the district court imposed a much more demanding standard, focusing far too narrowly on the named plaintiffs' individual factual circumstances. The district court interpreted the "same or similar injury" language from *Armstrong* to mean that class members must have endured the same specific experiences as the named plaintiffs. Order at 5. Based on this incorrect interpretation, the district court concluded that the fact that named plaintiffs have experienced a range of specific harms was itself sufficient reason to find that they had not satisfied Rule 23. Order at 5-6. This interpretation was directly at odds with the Ninth Circuit case law described above and constituted manifest error.

Here, plaintiffs' claims all arise from Defendants' common course of conduct. Despite the range of harms plaintiff foster children experience and the variations in their needs and circumstances, plaintiffs all suffer injury by virtue of their membership in the larger class of children in foster care in Clark County. This unfortunate status results in violations of their statutory and constitutional rights to be free from harm, among other rights. The named plaintiffs' claims are

one and the same as those of absent class members. Both are based on Defendants' common conduct, making their interests fully aligned.

C. The District Court's Analysis Of Adequacy Of Representation Was Manifestly Erroneous.

The district court held that the adequacy of representation requirement was not satisfied because of the risk that named plaintiffs or absent class members could have "their potentially substantial money damages claims barred by statutes of limitations and *res judicata* concerns." Order at 7-8. In so holding, the district court ignored directly controlling Ninth Circuit case law.

The Ninth Circuit has established that plaintiffs are not at risk of losing any potential damages claims by bringing a lawsuit seeking only injunctive and declaratory relief. In *Hiser v. Franklin*, the Ninth Circuit held "that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events." 94 F.3d 1287, 1291 (9th Cir. 1996); *see also Akootchook v. United States*, 271 F.3d 1160, 1165 (9th Cir. 2001). This holding is in accordance with the "general rule" followed by "*every* federal court of appeals that has considered the question..." *Hiser*, 94 F.3d at 1291 (emphasis added).

As such, named plaintiffs' decision to bring claims only for declaratory and injunctive relief does not prevent them or unnamed class members from bringing

damages claims in the future.[10] The district court's failure to acknowledge the controlling authority of *Hiser* constituted manifest error.[11]

D. The District Court's Analysis Of Rule 23(B)(2) Is Manifestly Erroneous.

Rule 23(b)(2) certification is proper if

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

Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998). Actions seeking injunctive or declaratory relief to remedy violations of constitutional rights "are precisely the sort . . . that Rule 23(b)(2) was designed to facilitate." *Id.* at 1046-47; *Amchem Products, Inc., v. Windsor,* 521 U.S. 591, 614 (1997); Fed. R. Civ. P. 23 Advisory Committee Notes 1966 Amendment. In order to meet the requirements of 23(b)(2), class members must "complain of a pattern or practice that is generally applicable to the class as a whole." *Walters v. Reno*, 145 F.3d at 1047; *see Stolz*,

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[10] The district court's suggestion that plaintiffs run the risk of having their potential claims barred by statute of limitations "concerns" ignores the fact that the Nevada statute of limitations for tort and Section 1983 claims is tolled until children reach the age of majority. Nev. Rev. Stat. Ann. § 11.250; *see also Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478, 484-85 (1980).

[11] The court also erred by citing to the "scope of injunctive" relief section of *Armstrong*, which dealt with post-adjudication relief, to support its adequacy of representation analysis. In addition, to the extent the court's adequacy of representation analysis relied on its commonality/typicality analysis, the court manifestly erred for the reasons discussed in Section B.

620 F. Supp. 396, 407 (D.C. Nev. 1985) (initial inquiry is "whether the defendants have allegedly acted on grounds generally applicable to the entire class.").

In making its determination that plaintiffs' class should not be certified, the district court relied exclusively on the legal standard for injunctive relief "at the remedy stage of the proceedings." *Armstrong*, 275 F.3d at 871 & fn. 28. The court cited extensively to the section of *Armstrong* titled "Scope of Injunctive Relief," while failing to provide a single citation addressing the relevant Rule 23(b)(2) standard. Order at 8-9. Applying this standard, the court ruled that certification would not be "appropriate until plaintiffs are able to show systemwide [sic] violations mandating systemwide [sic] relief . . . ." Order at 9.

The district court's application of this incorrect legal improperly required plaintiffs to prove the merits of their claims in order to obtain class certification, in direct conflict with Ninth Circuit case law. *See Blackie v. Barrack*, 524 F.2d 891, 901 fn.17 (1975); *see also Dukes v. Wal-Mart, Inc.* 509 F.3d at 1177-1180.[12] This was manifest error.[13]

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[12] The court also failed to follow the instruction in *Dukes* to consider the evidence before it relating to the existence of common questions. *Dukes,* 509 F.3d at 1177-1178 fn.2. The order does not include a single cite to plaintiffs' substantial evidentiary record.

[13] The district court also erroneously applied the standard for determining predominance of injunctive relief over money damages to the present case, which does not seek money damages. Order at 8. While it may be appropriate to apply the predominance test to cases seeking both damages and injunctive relief, it is nonsensical to do so when plaintiffs do not seek damages. *See Molski v. Gleich,*

VII. CONCLUSION

Plaintiffs respectfully request that this Court grant their petition to file an interlocutory appeal.

Respectfully submitted this 28th day of July, 2008.

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318 F.3d 937, 947 (9th Cir. 2003). The court's application of this test was both illogical and manifestly erroneous.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CLARK K., by his next friend Sherry Anderson; JALEN, SIA, ROSHAUN, CALEB, and KING A. by their next friend Tarrah Logan; TONI, SUMMER, and FRANK B., by their next friend Marilyn Paikai; and DONNA C., by her next friend Jacquelyn Romero,

Plaintiffs,

vs.

MICHAEL WILLDEN, Director of the Nevada DHHS; FERNANDO SERRANO, Administrator of the Nevada Division of Child and Family Services; JOHN DOE, Bureau Chief of the Bureau of Services for Child Care of the Division of Child and Family Services; VIRGINIA VALENTINE, Clark County Manager; TOM MORTON, Director of Clark County Department of Family Services; LOUIS PALMA, Manager of Shelter Care for the Clark County Department of Family Services; BRUCE L. WOODBURY, TOM COLLINS, CHIP MAXFIELD, YVONNE ATKINSON GATES, MYRNA WILLIAMS, LYNNETTE BOGGS MCDONALD and RORY REID, Clark County Commissioners; and CLARK COUNTY,

Defendants.

Case No.: 2:06-cv-01068-RCJ-RJJ
JUDGE: Hon. Robert C. Jones

CLARK COUNTY DEFENDANTS' PROPOSED ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

Plaintiffs' Renewed Motion for Class Certification (Court Docket (CD) # 195) came before this court for hearing on June 9, 2007. After considering the motion, the pleadings and papers on file in this matter, and oral argument by the parties, the Court issues the following Order.

Plaintiffs' Renewed Motion for Class Certification

Plaintiffs' Renewed Motion and accompanying briefs sought to certify a class of "all child abuse or neglect victims who are or will be involuntarily placed outside the homes of their parents or guardians by County Department of Family Services pursuant to an order of the court under Nev. Rev. Stat. § 432B." [1]

Under Fed. R. Civ. P. 23(a), "[a] district court may certify a class only if: '(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.' " *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007). "The district court must also find that at least one of the following three conditions are satisfied: (1) the prosecution of separate actions would create a risk of : (a) inconsistent or varying adjudications or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Fed. R. Civ. P. 23(b)." *Id.*

[1] *See* Plaintiffs' Combined Reply to Clark County Defendants' and State Defendants' Oppositions to Plaintiffs' Renewed Motion for Class Certification (CD # 224) at 5 (refining and narrowing the originally-proposed class definition).

Plaintiffs asserted in their briefs and at oral argument that nearly any evaluation of facts at this pre-certification stage of the litigation is impermissible as an assessment of the merits of the case. The Court disagrees and notes that it must apply a "rigorous analysis" to see that the class certification criteria have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F. 3d 1180, 1186 (9th Cir. 2001) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). This analysis fairly encompasses an evaluation of the factual record and allows for factual findings. *See Dukes*, 509 F.3d at 1175-76, 1178 n.2 (deferring to district court's broad discretion to make factual findings as to the applicability of Rule 23 criteria and to the district court's decision whether to certify class).[2]

As discussed below, the Court finds, based on the record before it, that Plaintiffs have met the numerosity requirement of Fed. R. Civ. P. 23(a) but have not met the rest of the 23(a) prerequisites or the maintainability requirement of Rule 23(b)(2).

Numerosity

This Court has previously ruled that the numerosity requirement of Rule 23(a) has been established. CD # 134 at 44-45. The Court further finds that the narrowed class definition advanced by Plaintiffs in their Combined Reply (CD #224 at 5) also meets the numerosity requirement.

Commonality

The commonality requirement for class certification is met if plaintiffs' grievances share a common question of law or of fact. *See Armstrong v. Davis*, 275 F. 3d 849, 868 (9th Cir. 2001). Additionally, the commonality test for class actions is qualitative rather than quantitative; one significant issue common to the proposed class may be sufficient to warrant certification. *Dukes*, 509 F.3d at 1184. Moreover, in a civil rights suit, the commonality requirement for class

[2] *See also* Advisory Committee Note to 2003 Proposed Amendments to Rule 23, 201 F.R.D. 560 at 592-93 (discussing how pre-certification discovery can illuminate, for example, nature of the issues, whether the evidence on the merits is common to members of the proposed class, whether the issues are susceptible to class-wide proof, and what trial management problems the case will present – "this discovery does not concern the weight of the merits or the strength of the evidence.")

certification is satisfied where the lawsuit challenges a system-wide practice or policy that affects all putative class members, despite individual factual differences among individual litigants or groups of litigants. *See Armstrong*, 275 F. 3d at 868.

In *Armstrong*, the Ninth Circuit held that differences in particular class members' disabilities did not justify requiring separate actions, since all disabled prisoners and parolees suffered similar harm from board's system-wide failure to accommodate their disabilities, i.e., the harm they suffered was all of a piece – they were denied parole and parole revocation proceedings without the appropriate administrative process being followed. *See Armstrong*, 275 F. 3d at 868.

In this case, by contrast, Plaintiffs' evidence presented to the Court has not shown that this suit challenges a systemwide practice or a policy affecting all putative class members, rather than alleged individual wrongs against the named plaintiffs. Plaintiffs contend that they have shown "overwhelming evidence" of systemwide violations as set forth in *Dukes v. Wal-Mart*. The Court disagrees.

In *Dukes*, the district court analyzed factual data showing evidence of company-wide policies and practices and statistical data presented by an expert statistician. 509 F.3d at 1178-1182. Additionally, the district court considered circumstantial and anecdotal evidence to bolster the statistical evidence of pattern and practice of discrimination and to bring the statistical numerical evidence to life. 509 F.3d at 1182. Here, on the other hand, plaintiffs have submitted only circumstantial and anecdotal supporting evidence without the underlying statistical expert evidence based on well-established statistical evidence. In making its discretionary and qualitative assessment of whether the commonality requirement had been fulfilled for certification purposes, this Court finds that the requirement has not been satisfied based on merely the circumstantial and anecdotal evidence before the Court at this time.

Typicality

The typicality requirement for class certification requires that claims of class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member make similar legal arguments to prove defendants' liability. *See Armstrong*, 275 F.3d at 868. The typicality requirement for class certification does not require that named plaintiffs' injuries be identical with those of other class members, only that unnamed class members have injuries similar to those of named plaintiffs and that injuries result from the same, injurious course of conduct. *See Armstrong*, 275 F. 3d at 869.

For example, in *Armstrong*, the Ninth Circuit stated that the undisputed facts from trial showed that the State of California regularly discriminated against disabled prisoners and parolees during its parole and parole revocation hearing processes. 275 F.3d at 854. The district court found that the California Board of Prison Terms (the state parole authority) failed to make proper accommodations for numerous disabled prisoners and parolees, with the result that a number of such individuals forfeited their rights to parole and parole revocation hearings and appeals, while others were unable to represent themselves adequately at such proceedings, all in contravention of federal law. 275 F.3d at 854. Therefore, it was undisputed on appeal that the unnamed class members had injuries similar to those of named plaintiffs and that the injuries (forfeiture of rights to parole and parole-determinative proceedings) resulted from the same, injurious course of conduct.

In this purported class action, by contrast, the alleged harms among the named plaintiffs alone are diverse and manifold, ranging from deprivation of educational assistance services, to deprivation of psychological services, to deprivation of psychotropic mediations, to improper reunification with a natural parent, to the emotional distress caused by the death of a sibling, and more. Each of these injuries is alleged to be caused by different courses of conduct by government actors, including failure to supervise, failure to provide educational services and psychological services, etc. Each of these alleged actions or inactions by government actors are, in turn, alleged to

be caused by larger systemic factors such as large caseloads per caseworker, insufficient training of caseworkers, shortage of guardians ad litem and CASAs to represent children in dependency proceedings, and other problems. The sheer number and complexity of issues that currently are asserted in this case among the named plaintiffs alone fail to meet Rule 23(a)'s mandate that unnamed class members have injuries similar to those of named plaintiffs and that injuries result from same, injurious course of conduct. *See* Armstrong, 275 F. 3d at 867 (Plaintiffs showed that each of them was discriminated against in violation of the ADA at parole or parole revocation hearings – each of them "suffered from the same injurious conduct; each incurred the same injury; and each is seeking the same relief.")

Plaintiffs point to case law from other jurisdictions but there is no Ninth Circuit case law with class certification based on "common" issues at the extreme level of generality urged here.[3] This Court is in agreement with *J.B. v. Valdez*, in which the Tenth Circuit said that it would not "read an allegations of systemic failures as a moniker for meeting the class action requirements. 186 F.3d 1280, 1289 (10th Cir. 1999).

The typicality question is tied into the commonality question discussed above, as the two inquiries of commonality and typicality tend to merge. *See Dukes*, 509 F.3d at 1184. Class representatives must show typical claims that are reasonably coextensive with those of the absent class members. *Dukes*, 509 F.3d at 1184. Because plaintiffs have not demonstrated any pattern or practice of violation of the putative class members' legal rights, there is no way for the Court to

[3] The Ninth Circuit's recent cases cited by the parties involving certified classes were certified for issues much more narrowly-drawn than the ones here. *See, e.g., Walters v. Reno*, 145 F.3d 1032 (class certified for aliens alleging a due process violation for inadequate notice of deportation following charges of document fraud); *Hanlon v. Chrysler*, 150 F.3d 1011 (certified class of minivan owners alleging defectively designed rear lift gate latch); *Dukes v. Wal-Mart*, 509 F.3d 1168 (certified class alleging sex discrimination against women employees resulting in systematically lower wages and fewer and delayed promotions); *LaDuke v. Nelson*, 762 F.2d 1318 (certified class of migrant workers seeking relief from random checks by INS of migrant worker housing buildings).

assess whether the named plaintiffs' claims are reasonably coextensive with those of the absent putative class members at this time. Therefore, the typicality requirement has not been satisfied.

Adequacy of Representation

The adequacy of representation factor for class certification requires that (1) the proposed representative plaintiffs do not have conflicts of interest with the proposed class; and (2) plaintiffs are represented by qualified and competent counsel. *Dukes*, 509 F.3d at 1185.

The Court cannot ascertain at this point that the proposed representative plaintiffs do not have conflicts of interest with the proposed class. As discussed above in the context of commonality, plaintiffs have not offered sufficient evidence of patterns or practices of systemwide violations. As discussed in *Armstrong*, "[f]or class certification to occur, the court must find that the named plaintiffs adequately represent the interests and experiences of the overall class. In making such findings, the trial court must be afforded a wide degree of discretion to determine when a particular number of inmate witnesses is sufficient to justify system-wide relief for the identified violation." 275 F.3d at 871. Here, there is insufficient evidence of justification for systemwide relief as opposed to individual relief for the named plaintiffs.

The Court also cannot ascertain at this time whether plaintiffs are adequately represented by current counsel, and the Court has a duty to protect the interests of class members. "Attorneys and parties seeking to represent the class assume fiduciary responsibilities and the court bears a residual responsibility to protect the interests of class members." 15 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 15.3 at 13 (4th ed. 2002) (quoting Manual for Complex Litigation (3d. ed.) § 30. Given the lack of classwide evidence at this point, it remains a possibility that plaintiffs' counsel are not providing zealous representation of their individual clients, including their claims for money damages, in order to pursue the larger class allegations on behalf of their organization and generate attorneys' fees. The named plaintiffs, not to mention the absent putative class members, run the risk of having their potentially substantial money damages claims barred by statutes of

limitations and res judicata concerns. Thus, the adequacy of representation requirement has not been fulfilled at this time.

Maintainability of Class Action Under Rule 23(b)(2)

In determining the applicability of Rule 23(b)(2), a court must examine the specific facts and circumstances of each case, focusing predominantly on plaintiffs' intent in bringing suit. At a minimum, the court must satisfy itself that (1) even in the absence of possible monetary recovery, reasonable plaintiffs would bring suit to obtain the injunctive or declaratory relief sought; and (2) that the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. *Dukes*, 509 F.3d at 1186.

As discussed above in the context of adequacy of representation, the Court is unable to satisfy itself at this time that the potential money damages claims of the named plaintiffs are protected adequately in this suit seeking only injunctive and declaratory relief for a putative class. Therefore, the Court cannot say that reasonable plaintiffs would bring suit to obtain the injunctive or declaratory relief.

Additionally, the Court cannot tell at this time that the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Inextricably tied into the consideration of whether class certification is appropriate is the question of the scope of injunctive relief. Plaintiffs contend that the scope or any details of the relief they seek is immaterial at this early stage of the litigation, but this assertion ignores the Ninth Circuit's discussion in *Armstrong* regarding the U.S. Supreme Court's hesitance in ordering systemwide relief against governmental actors rather than awarding individual damages for proven harms. As the *Armstrong* Court observed,

> [t]he scope of injunctive relief is dictated by the extent of the violation established . . . [t]he key question . . . is whether the inadequacy complained of is in fact 'widespread enough to justify system wide relief . . [under the] longstanding maxim that injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation. System-wide relief is required if the

> injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system . . . or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the class's injury. However, if injunctive relief is premised upon only a few isolated violations affecting a narrow range of plaintiffs, its scope must be limited accordingly. . . .
>
> We also note that the decision to grant system-wide prospective injunctive relief does not occur in a vacuum; it is intimately connected to determinations made earlier in the lawsuit . . . and the court's determination that relief may be sought by a class of plaintiffs is relevant to the scope of the relief to be awarded. In fact, class certification serves to alter that court's inquiry: when a class is properly certified, the injury asserted by the named plaintiffs . . . is asserted on behalf of all members of the class . . [and] the "plaintiff" has been broadened to include the class as a whole, and no longer simply those named in the complaint.

275 F.3d at 870-71. (citations and quotations omitted).

When plaintiffs seek injunctive relief against a state agency on behalf of a class, but relief on behalf of a large class is inappropriate, the court will limit relief to named plaintiffs. *See Armstrong* 275 F.3d at 870 n.27; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) (if a plaintiff "has suffered an injury barred under the Federal Constitution, he has a remedy for damages under § 1983").

On the other hand, in determining scope of injunctive relief that interferes with affairs of state agency, a federal court must ensure, out of federalism concerns, that any injunction heels closely to the identified violation, and is not overly intrusive and unworkable, and would not require for its enforcement the continuous supervision by a federal court over conduct of state officers. *See Armstrong*, 275 F.3d at 872. Because the issue of injunctive relief is tied in with certification of any class, this Court does not believe certification is appropriate until plaintiffs are able to show systemwide violations mandating systemwide relief rather than the individual claims of the named plaintiffs for damages.

Conclusion

For the reasons stated above, the Court hereby DENIES WITHOUT PREJUDICE Plaintiffs' Renewed Motion for Class Certification. While the numerosity requirement of Rule 23(a) has been

met, the other three requirements of Rule 23(a) have not been demonstrated, and plaintiffs have not shown the putative class to be maintainable under Rule 23(b)(2).

IT IS SO ORDERED.

Date: July 9, 2008

UNITED STATES DISTRICT JUDGE

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APPEAL NO. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL WILLDEN, Director of the Nevada DHHS; FERNANDO SERRANO, Administrator of the Nevada Division of Child and Family Services; JOHN DOE, Bureau Chief of the Bureau of Services for Child Care of the Division of Child and Family Services; VIRGINIA VALENTINE, Clark County Manager; TOM MORTON, Director of Clark County Department of Family Services; BRUCE L. WOODBURY, TOM COLLINS, CHIP MAXFIELD, YVONNE ATKINSON GATES, MYRNA WILLIMAS, LYNNETTE BOGGS MCDONALD and RORY REID, Clark County Commissioners; and CLARK COUNTY,

Defendant/Appellee,

vs.

CLARK K., by his next friend Sherry Anderson; JALEN, SIA, ROSHAUN, CALEB, and KIND A. by their next friend Tarrah Logan; TONI, SUMMER, AND FRANK B., by their next friend Marilyn Paikai; and DONNA C., by her next friend Jacquelyn Romero,

Plaintiff/Appellant.

On Appeal from the United States District Court for the District of Nevada
Case No.: 2:06-cv-01068-RCJ-RJJ
The Honorable Robert C. Jones

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DECLARATION OF SERVICE

I, MOLLY M. MCKAY, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 235 Montgomery Street, 17th Floor, San Francisco, California 94104. On July 28, 2008, I served a copy of the within document(s):

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. PROC. 23(f)

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 28, 2008, at San Francisco, California.

Molly M. McKay

MOLLY M. MCKAY