CALIFORNIA COURT OF APPEAL

FOR THE FIRST APPELLATE DISTRICT - DIVISION FOUR

No. A113168

Capitol People First, et al.,

Appellants,

v.

Department of Developmental Services, et al.,

Respondents.

Civil Case No. 2002-038715

Appeal From the Superior Court
of California, County of Alameda
Honorable Judge Ronald M. Sabraw

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A113168 Division Four

Case Name: Capitol People First, et al. v. Department of Developmental Services, et al.

Please check the applicable box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 14.5(d)(3).

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Please attach additional sheets with Entity or Person information if necessary.

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CONSTITUTIONAL PROVISIONS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a civil rights class action brought on behalf of thousands of Californians with developmental disabilities who are needlessly isolated and segregated from mainstream society in large congregate institutions. Plaintiffs challenge Defendants' policies and practices that result in such unnecessary and unlawful segregation. At issue in this appeal is the Superior Court's denial of Plaintiffs' motion for class certification.

The representative Plaintiffs did not bring this lawsuit to obtain individualized outcomes for each class member. Rather, Plaintiffs seek to correct the unlawful policies and practices in place throughout California that deny Californians with developmental disabilities their right under federal and state law to live as part of, rather than apart from, our neighborhoods and communities.

In its order denying class certification, the Superior Court held that Plaintiffs had demonstrated ascertainability, numerosity, typicality and adequacy of counsel but had failed to establish commonality, adequacy of the class representatives and superiority (the "Order"). *See* 14JA3606-22.[1] The Superior Court committed reversible error by refusing to certify

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[1] Citations to the Joint Appendix ("JA") or Joint Appendix of Documents Filed Under Seal ("JS") are by volume and page number; citations to the

(Footnote Continued on Next Page.)

the class:

Commonality: Every member of Plaintiffs' class has identical legal rights and this lawsuit seeks only to enforce those common legal rights without seeking individual determinations or individual placement decisions. The Superior Court held that Plaintiffs had met the test for commonality under *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 through evidence that Defendants have acted or refused to act on grounds generally applicable to the class. The Superior Court should have stopped there but, instead, it improperly relied on a federal case that is out of step with California precedent and the majority rule in federal cases. The Superior Court also erred by not considering Plaintiffs' evidence from admissions, sampling, statistics and experts to establish the existence and effect of Defendants' policies and practices — modes of establishing commonality long accepted in California.

Adequacy: The Superior Court turned binding case law and common sense upside down when it held that objection from less than 1% of the class members was a reason to deny class certification. That holding violates *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462 and cannot stand.

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Reporters' Transcript ("RT") are by page and line number.

Superiority: Although the Superior Court rightly recognized that Plaintiffs seek systemic relief, not individual relief, it held that the class members must seek relief through a statutory fair hearing. In so holding, the Superior Court ignored the fact that such fair hearings would be useless because that forum is incapable of either granting systemic relief or otherwise addressing Plaintiffs' challenge to Defendants' systemic policies and practices.

The Superior Court thus made three errors of law and its Order should be reversed so that the legal rights common to every Californian with developmental disabilities can be adjudicated in a single forum.

II. STATEMENT OF APPEALABILITY

A trial court's denial of a motion for class certification "to an entire class" is subject to an immediate appeal. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. The Order at issue here (14JA3606-3622) falls squarely within that rule. Appellants previously explained why this Court has appellate jurisdiction in their opposition to the State Defendants' motion to dismiss, and this Court's May 8, 2006 Order denying that motion is dispositive of the issue.

III. STATEMENT OF THE CASE

A. BACKGROUND AND STATEMENT OF FACTS

1. Californians with developmental disabilities share a common set of rights under federal and state law, entitling them to be served in the least restrictive setting.

Forty years ago, the primary setting for providing out-of-home services and supports to people with developmental disabilities was in large, congregate "institutions." 6JA1486. Changes came as state legislatures, Congress, and the courts recognized that unnecessary segregation of people in institutions is stigmatizing, socially isolating, and a form of unlawful discrimination. In enacting the Americans with Disabilities Act ("ADA"), Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination . . . continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(z). In holding that unnecessary institutionalization violates the ADA, for example, the Supreme Court, in *Olmstead v. L.C.* (1999) 527 U.S. 581, 597, 600-01, recognized that unnecessary institutionalization "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."

With the enactment of the Lanterman Developmental

Disabilities Services Act ("Lanterman Act"), Welfare and Institutions Code section 4500 *et seq.*,[2] the California Legislature established a comprehensive statutory scheme to provide services to people with developmental disabilities.[3] The purpose of the Lanterman Act is to promote integration and inclusion of people with developmental disabilities in the community — that is, "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community [citations], and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." *Ass'n for Retarded Citizens–Cal. v. DDS* (1985) 38 Cal.3d 384, 388 ("*ARC*").

Today, under California and federal law, the primary and preferred settings for providing services to people with developmental disabilities — regardless of the nature or severity of their disabilities or treatment needs — are in the community. *See* §§ 4501, 4502(a) & (b), 4750; *Olmstead*, *supra*, 527 U.S. at p. 589 n.1, 600 (recognizing the

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[2] Statutory cites are to the Welfare and Institutions Code unless otherwise indicated.

[3] "Developmental disability" is defined in § 4512(a) and refers to a disability that originates before age 18, continues or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. It includes mental retardation, cerebral palsy, epilepsy, and autism, among other conditions.

enactment of the Rehabilitation Act of 1973, the ADA, and changes to Medicaid law that promoted home and community-based care); Gov. Code § 11135; 6JA1486-88. Nevertheless, almost 3,000 Californians with developmental disabilities still live in the state's large public congregate institutions (known as "Developmental Centers" or "DCs") and some 4,600 others living in other institutions. 6JA1463-64 & 1466. Community placements can be found when Defendants comply with the law. 4JA1066(n.5). For example, a number of the named Plaintiffs who had been institutionalized for many years were placed into the community only after commencement of this action — in one instance after 40 years of institutionalization. *Id.*

2. All class members are served by the same comprehensive statutorily created service system involving the coordination of services of many state departments and community agencies.

All class members are entitled to the rights guaranteed under the Lanterman Act. Direct responsibility for implementation of the Lanterman Act service system is allocated between the State Department of Developmental Services ("DDS") and 21 Regional Centers ("RCs"),[4] which, pursuant to contracts with DDS, provide services to individuals who

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[4] RCs are private nonprofit entities established pursuant to the Lanterman Act that contract with the DDS to carry out many of the state's responsibilities under the Act. They are monitored and funded by DDS.

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reside or once resided in a specified geographic area. § 4620 *et seq*. RCs are to "assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices in living, working, learning and recreating in the community." § 4640.7(a). DDS allocates funds to the RCs for both operations and purchase of services, including funding to purchase community-based services and supports. §§ 4620, 4787.

DDS is responsible for ensuring that the Lanterman Act is fully implemented, § 4416, and must monitor the RCs to ensure that they operate in compliance with federal and state law, provide high quality service coordination, and secure services and supports for individuals and their families. *E.g.*, §§ 4416, 4434, 4500.5, 4501, 4620.

Lanterman Act services are intended to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and to promote his or her integration into the mainstream of the community. § 4501. Moreover, such services must protect the personal liberty of the individual, be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services or supports, and enable the individual to approximate the pattern of

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See, e.g., § 4620.

every day living available to people without disabilities of the same age. §§ 4501, 4502(a)(b), 4750.

Under the Lanterman Act, each Californian with a developmental disability is legally *entitled* to "treatment and habilitation services and supports in the least restrictive environment." § 4502. The California Supreme Court explained that this "entitlement" consists of a "basic right and a corresponding basic obligation: the right which it grants to the developmentally disabled person is to be provided with services that enable him to live a more independent and productive life in the community; the obligation which it imposes on the state is to provide such services." *See ARC, supra,* 38 Cal. 3d at p. 391.

Services provided to people with developmental disabilities — including those residing in the community, DCs and in other public and private institutions — are determined through an individual planning process that must meet uniform statutory requirements. *E.g.*, §§ 4418.3, 4512(j), 4646, 4646.5, 4647. Under this process, planning teams, which include, among others, the person with a developmental disability — referred to in the Act as "consumers" (§ 4512(d)) — his or her legally authorized representative, and one or more regional center representatives, jointly prepare an Individual Program Plan ("IPP") based on the consumer's needs and choices.

The Lanterman Act requires that the IPP promote community

integration. § 4646(a). To this end, DDS and RCs must ensure that planning teams develop goals that maximize opportunities and teach skills needed for each person to develop relationships, be part of community life, increase control over his or her life and acquire increasingly positive roles in the community. § 4646.5. The IPP must give the highest preference to those services and supports that allow minors to live with their families and adults to live as independently as possible in the community. *E.g.*, § 4648(a)(1), (2). Thus, the planning team is required to consider for each resident of a Developmental Center or other institution what barriers exist that must be addressed to enable the individual to live in an alternative, integrated community setting. *See* § 4509. Once services or supports are included in an individual's IPP, the RC has a mandatory non-discretionary duty to provide these services and supports. § 4648.

To enable people with developmental disabilities, and their representatives, to participate meaningfully in the IPP process, the Lanterman Act requires that DDS and RCs provide information in an understandable form to help people make choices. § 4502.1. This entails providing information on the range of alternative living arrangements and the community services and supports that would enable the individual to live in a non-institutional setting.

If the services and supports needed by an individual to live in the least restrictive community setting are not currently available, the

Lanterman Act requires RCs to engage in program development. §§ 4648(e), 4651, 4677. DDS and RCs are specifically required to provide emergency and crisis intervention services so people with developmental disabilities do not lose their community homes. § 4648(a)(10).

To ensure that the mandated array of quality living arrangements, services and supports is available, DDS is required to establish and maintain equitable systems of payment for providers that reflect the actual costs of ensuring high quality, stable services, and ensure that people live in the least restrictive setting. §§ 4648(a)(5), 4680, 4690, 4697, 4786.

The Lanterman Act pays special attention to the needs of people who are dually diagnosed — meaning they have a psychiatric disability as well as a developmental disability. § 4646. DDS is required to consider, with the Department of Mental Health ("DMH"), higher rates for living arrangements for the dually diagnosed. § 4681(d). And the Lanterman Act mandates cooperative efforts between RCs and county mental health agencies. § 4696.1(c).

In addition to its general oversight and monitoring responsibilities with respect to the entire Lanterman Act service system, DDS directly operates seven public institutions known as developmental centers, which house approximately 3,000 Californians with developmental disabilities. DDS has primary responsibility, with participation by RCs, for

conducting assessments and developing IPPs for developmental center residents that meet the same requirements for assessments and IPPs that apply to all other consumers under the Lanterman Act. *E.g.*, §§ 4440-4499.

Federal laws and programs, such as the ADA and the Medicaid Act, also play a role in the system's structure. The ADA regulations require a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); *see also* 28 C.F.R. §41.51(d) (Section 504 regulations).

Medicaid is a federal program jointly funded by federal and state governments to provide health, rehabilitation, and other services to help low-income people attain or retain capability for independence and self-care. 42 U.S.C. §§ 1396 *et seq.* To receive federal funds, states must comply with the requirements of the federal Medicaid Act and with the federal regulations governing state Medicaid programs. 42 U.S.C. § 1396 *et seq.*, 42 C.F.R. § 430 *et seq.* Federal law authorizes the "waiver" of some federal rules so that a state can provide extra Medicaid services to a targeted group of individuals who would otherwise receive care in an institution to receive services in their own homes or in home-like settings in the community. 42 C.F.R. § 441.300. California has several waiver programs that apply to class members, including the Developmental Disabilities waiver. 42 U.S.C. § 1396(c)(1); 42 C.F.R. § 441.300. These

waivers operate after federal approval.

In addition to DDS and the RCs, other state agencies — including those that are defendants in this action — have roles and responsibilities in the provision of community-based services and supports to class members. DMH, in collaboration with DDS and the RCs, is responsible for ensuring that Californians with developmental disabilities who also have psychiatric disabilities or mental health service needs receive needed services and supports. §§ 4510, 4681.1(d), 4691.1. The Department of Health Services ("DHS") is the single state agency responsible for administrating all aspects of the Medicaid program in California ("Medi-Cal"), which provides "waiver" services to encourage states to assist people with disabilities, including people with developmental disabilities, to avoid institutionalization. 42 U.S.C. § 1396a(a)(5); § 14137. DDS, DMH and DHS operate under the administration and oversight of the California Health and Human Services Agency ("CHHS"). §§ 4400 *et seq.,* 4415, 4500 *et seq.;* Gov. Code §§ 12803(a), 12801, 12850, 12850.6, 12851, 12852. California's Department of Finance ("DOF") is the department of the state with the authority to approve, revise, alter or amend the budget of any state agency, including CHHS, DHS, DMH and DDS. Gov. Code §§ 13291 *et seq.* DOF

also has the authority to approve budget augmentations and has oversight responsibility with respect to any regulation with a fiscal impact.[5] Gov. Code §§ 13070, 13075, 13877.

3. Similarly common issues relating to Defendants' practices were previously resolved on a class-wide basis in an earlier lawsuit where a settlement class was certified.

In the early 1990s, DDS and certain other defendants in this action were sued for violating Californians' entitlement to community inclusion by failing to provide community living arrangements and ancillary services and supports to developmental center residents whose planning teams had recommended that they be moved to the community. A stipulated class action settlement provided an effective remedy. *See Coffelt et al. v. Dep't of Developmental Serv. et al.*, (San Francisco Superior Court No. 916401); 12JA3146-299, at 3275.

At that time, DDS maintained a wait list whereby 2,000 persons with developmental disabilities remained institutionalized in developmental centers despite being recommended for community placement. Several institutionalized individuals and other interested parties brought a class action against DDS and four Northern California RCs that

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[5] Collectively, the State, DDS, DHS, DMH, DOF, and the Directors of these agencies, CHHS and its Secretary, are jointly referred to as State Defendants.

had among the highest numbers of individuals placed in the DCs. The lawsuit sought to enforce the Lanterman Act entitlement to live and receive services and supports in the least restrictive settings. *Id.* In 1994, the *Coffelt* court approved a settlement agreement, including certification of a class comprised of DC residents recommended for community placement. The settlement required systems reforms and a net reduction of 2000 residents in the DC population in California over a five-year period. *Id.* During the five-year period of the *Coffelt* settlement, the DC population declined by 2,452 — approximately 490 individuals per year. 7JA1815-16.

But the trend of moving people from DCs to community settings slowed after the *Coffelt* settlement period ended. 12JA3093. In the succeeding five years, from January 2000 to January 2005, the DC population declined by an average of only 131 persons per year. 7JA1815-16.

Defendants have acknowledged that the decline in community placements post-*Coffelt* was due to the fact that the motivation of the settlement agreement no longer existed. 6JA1638-42; 7JA1678-79 & 1797-1800; 10JA2614 & 2619 ("When the terms of the *Coffelt* consent decree were met and scrutiny was removed, we saw the number of movers dwindle to a trickle."). Simply put by DDS Chief Deputy Director, Julie Jackson, the "pressure was off." 7JA1678-79.

It was this state of affairs that led to the filing of the instant

lawsuit.

4. Defendants admit that most if not all of the more than 7,600 individuals currently institutionalized could live in less restrictive settings.

The proposed class definition includes not only people living in or at risk of placement in DCs, but also people living in or at risk of placement in other public and private institutional settings.[6] As of July 2005, there were 3,133 Californians with developmental disabilities living in DCs and 4,642 living in non-DC institutions. 6JA1463-64 &1466.

Defendants, themselves, acknowledge that the vast majority — if not all — of these institutionalized class members could live in less restrictive settings with the appropriate supports and services:

- Julie Jackson, Acting Chief Deputy Director, DDS: "I believe that it is possible to serve the majority of people in the community if the appropriate resources are there and if the capacity of the community exists as a general principle." 7JA1683-84.

- Julia Mullen, Deputy Director of Community Services and Supports Division, DDS: "100%" of developmental center residents could live in the community if they were provided with appropriate services and supports. 12JA3137. "I agree . . . that 'even people with the most significant support challenges can be and are served in non-institutional settings.'" 9JA2408(¶ 12(e)).

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[6] Non-developmental center institutions include skilled nursing facilities ("SNFs"), large intermediate care facilities ("ICF-DDs"), psychiatric and sub-acute care facilities, and other settings housing 16 or more persons (*e.g.*, large community care facilities ("CCFs")). 12JA1086.

- Richard Jacobs, Executive Director of Valley Mountain RC: "We believe that everyone who is in the [developmental centers] can be served in a community setting." 7JA1728-29.

- James Shorter, Executive Director of Tri-Counties RC: "all of the approximately 125 people that reside at the [developmental centers] from the Tri-Counties area are capable of living in the community successfully." 7JA1751-54.

Thus, by their own admission, Defendants' systemic policies and practices fail to fulfill the integration mandate for the vast majority of class members.

Defendants have demonstrated the feasibility of moving the substantial majority of DC residents to less restrictive, community placements when they focus their efforts and develop a systematic plan. For example, the State Defendants and three RC Defendants have developed a comprehensive plan for closing one DC (Agnews DC) and moving 85% of the residents to the community. 7JA1691-92 & 1826-36. DDS's goal is to provide a range of community service options to meet the needs of Agnews residents — the majority of whom have lived at Agnews for over 20 years. 7JA1821 & 1826. Yet, there are no plans to provide similar opportunities to comparable numbers of residents of the other DCs, notwithstanding the acknowledged similarity of the populations served (7JA1682) and, of course, the equality of those consumers' rights under state and federal law.

a. Defendants' process for providing more integrated options to residents of the State run developmental centers fails to serve the majority of those residents.

The Agnews closure plan was developed using the Lanterman Act "community placement plan" process, or CPP. § 4418.25. Through the CPP, RCs receive funds to engage in activities to prevent DC placement and set annual goals and identify specific individuals for placement from DCs to the community. Except for its application to the Agnews closure plan process, however, the CPP, as implemented by RC's and administered by DDS, is woefully inadequate in meeting the Lanterman Act's least restrictive environment requirement and the requirements of other laws.

DDS is responsible for establishing policies and procedures for the development of annual CPPs by RCs. § 4418.25(a). Nonetheless, DDS has an essentially *laissez faire* policy with respect to RCs annual CPP goals. 7JA1716-23. The guidelines that DDS has developed for implementing the CPP do not include even basic standards that require, for example, that RCs set numerical goals that are related to the numbers of DC residents whose needs could be met in a less restrictive setting and that would enable all such individuals to move to a less restrictive setting within a reasonable timeframe. 7JA1716. As a result, even the lowest-performing RCs are not directed to increase the goals they set. 7JA1721 & 1737. In fact, DDS's guidelines create incentives that encourage RCs to set low

annual goals rather than incentives to encourage goals that would more effectively reduce unnecessary DC placements. *E.g.*, 7JA1649-53 & 1712-16.

As a result, except for residents of Agnews DC, the chances of being selected for the CPP are quite small. 12JA3093-4. For example, the largest DC (Sonoma) — with a population of 754 as of August 31, 2005 (7JA1888) — places only about 20 people per year in the community. 7JA1772. At that rate, most Sonoma DC residents will likely not be on the CPP, let alone moved to the community, in their lifetimes. That is particularly troubling because Sonoma serves a population of persons with developmental disabilities no more severe or challenging than those in the Agnews DC, where 85% of the population will have moved to the community within the next two years. 7JA1682, 1826-36.

b. Defendants have completely failed to address the community integration needs of residents in non-developmental center institutions.

DCs are not the only institutional settings addressed by this case. Also at issue is whether Defendants are meeting their obligations under the Lanterman Act, the ADA and other laws to provide services in the least restrictive setting for the 4,462 class members who live in non-DC institutions. Clearly they are not.

The right to live in integrated community settings applies equally to all people with developmental disabilities, not only to those in

developmental centers. While the CPP applies only to people in DCs and those at risk of DC placement, the CPP "is not intended to limit [DDS's] or RCs' responsibility to otherwise conduct assessments and individualized program planning, and to provide needed services and supports in the least restrictive, most integrated setting in accord with the [Lanterman Act]." § 4418.25(b). Nonetheless, there is no systemic policy or plan whatsoever for ensuring that people unnecessarily placed in non-DC institutions like nursing facilities, ICF-DDs, and large community care facilities, are provided with opportunities to live in non-institutional settings within a reasonable timeframe. 7JA1698-99, 1701-04 & 1711; 10JA2616-17.

B. PROCEDURAL HISTORY

Plaintiffs filed suit on January 25, 2002. 1JA0001-0076. The current operative pleading—the Fifth Amended Petition for Writ of Mandate; Verified Complaint for Declaratory and Injunctive Relief—was filed on July 8, 2005. 4JA0936-1049. The action was brought by three organizations, two individual taxpayers and 16 Californians with developmental disabilities who are institutionalized or at risk of institutionalization, on behalf of themselves and approximately 7,775 similarly situated Californians. The proposed class definition is: All California residents with a developmental disability, as defined in Welfare

and Institutions Code section 4512(b), who are (or become) institutionalized,[7] and those who are at risk[8] of being institutionalized, in congregate residential facilities having a capacity of 16 or more individuals.

The causes of action assert violations of: (1) the Lanterman Act entitlement to the most integrated community living arrangements based on individualized assessments; (2) California nondiscrimination laws, Government Code section 11135 and Welfare and Institutions Code section 4502; (3) the Americans with Disabilities Act (ADA); (4) Section 504 of the Rehabilitation Act of 1973; (5) the California Constitutional right to due process and equal protection, Article 1, section 1; (6) the U.S. Constitutional right under the Fourteenth Amendment to due process, First Amendment right to freedom of expression, and Fourteenth Amendment right to equal protection; and (7) the Medicaid Act. 4JA0993-1036;

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[7] Under this definition, "institutions" include developmental centers and a variety of other public and private facilities with a capacity of 16 or more. 4JA1086.

[8] A person is "at risk" of institutionalization in a DC when "the regional center determines, or is informed by the consumer's parents, legal guardian, conservator, or authorized representative that the community placement of [the] consumer is at risk of failing and that admittance to a state developmental center is a likelihood." § 4418.7. In addition, individuals who are released from developmental centers may be on provisional placement for one year and have an "automatic right of return." § 4508. Under the class definition persons at risk of institutionalization also include individuals meeting the same criteria with respect to non-DC institutions. 4JA1086.

4JA1061. In addition, Plaintiffs assert a claim against the RC Defendants pursuant to Business & Professions Code section 17200, *et seq.,* for injunctive relief as a representative action on behalf of the general public. *Id.* The two individual taxpayer Plaintiffs have brought a claim for the illegal expenditure of taxpayer funds. *Id.*

On January 28, 2003, the Superior Court granted a motion to intervene by eleven persons with developmental disabilities institutionalized in DCs, and two organizations, CASH/PCR and California Association for the Retarded, that claim a membership of family, friends, and conservators of persons with developmental disabilities institutionalized in DCs. 2JA0545-548. The Court's order limited their intervention to "ensur[ing] that the legal rights of parents and guardians to participate in the planning process and the ability of professionals to recommend placement in development centers are not adversely affected by any judgment in this action." *Id.*

Plaintiffs filed a motion for class certification on February 18, 2004. 2JA0567-569. But, the Superior Court postponed the hearing on the motion three times because State Defendants filed intervening motions and writ petitions.

On April 30, 2004, this Court granted State Defendants' petition for writ of mandate seeking clarification on three inconsistent Superior Court orders relating to Plaintiffs' Lanterman Act cause of action.

The Court also noted, however, that Plaintiffs could amend their Complaint. 4JA0911-18. Plaintiffs subsequently filed an amended Complaint (4JA0936-1049), to which the State Defendants demurred as to Plaintiffs' Lanterman Act and Medicaid Act claims. The demurrer was granted in part and denied in part by the Superior Court by order of January 6, 2005. State Defendants again sought review in the Court of Appeal by petition for writ of mandate. On March 23, 2005, this Court denied State Defendants' writ petition. 4JA0921.

On September 29, 2005, Plaintiffs filed their renewed motion to certify a class of 7,775 people residing in institutions or at risk of placement in institutions within one year of their discharge. 4JA1072-1074. The Superior Court denied Plaintiffs' motion, resulting in this timely appeal. 14JA3606-22 & 3785-86. The Superior Court subsequently issued a "wrap-around" stay of all Superior Court proceedings to supplement the automatic stay under Code of Civil Procedure § 916. 14JA3793-3811

IV. STANDARD OF REVIEW

The Superior Court's Order is reviewed for an abuse of discretion and must be reversed if the Superior Court abused its discretion or based its decision upon (1) improper criteria, (2) erroneous legal assumptions, or (3) no substantial evidence. *See Linder*, *supra*, 23 Cal.4th at pp. 435-36; *Bartold v. Glendale Fed. Bank* (2000) 81 Cal.App.4th 816, 828. Importantly, moreover, this Court must limit its review to the

Superior Court's stated reasons for the Order and must ignore any other grounds that might support affirming the Order. *Bartold*, *supra*, 81 Cal.App.4th at p. 828; *Linder*, *supra*, 23 Cal.4th at pp. 435-36. Review in this context thus "presents an exception to the general rule that a reviewing court will look to the trial court's result, not its rationale." *Bartold*, *supra*, 81 Cal.App.4th at pp. 828-29.

V. ARGUMENT

A. THE SUPERIOR COURT ERRED BY FAILING TO APPLY THE STANDARD OF COMMONALITY SET FORTH IN *SAV-ON* AND OTHER CALIFORNIA CASES.

The Superior Court held that Plaintiffs demonstrated, as in *Sav-On, supra,* 34 Cal.4th at pp. 327-30, that the Defendants "acted or refused to act on grounds generally applicable to the class." 14JA3614. The Superior Court stated that "a different result" would have occurred — that is, it would have found common issues predominated — if it had followed *Sav-On* and focused on Defendants' policies instead of the class members' individual claims. *Id.* The Superior Court was correct on this point because California law requires as much. The Court erred, however, by then turning its focus away from Defendants' policies and practices despite having recognized that common practices are what is at issue in the case.

1. The Superior Court was required to determine commonality based on Plaintiffs' theory of recovery emphasizing Defendants' conduct.

In *Sav-On*, the plaintiffs emphasized the defendant's conduct by alleging liability based on the illegality of the defendant's policies and practices that applied uniformly to the class. *Id.* at 328-29. The defendant argued that no meaningful generalizations about the employment circumstances could be made because liability depended upon individual proof of a multitude of factors that made up each class member's tasks and the duration of time he or she spent on each task. *Id.* at 325, 328-29.

The California Supreme Court held that the plaintiffs' "theory of recovery" — as framed by the plaintiffs' allegations and declarations of legal counsel — governed the court's ruling. *Id.* at 327. To hold otherwise, the court noted, would constitute an impermissible adjudication of the merits of the case. *Id.*

Under the plaintiffs' theory of the recovery, the *Sav-On* court described the predominant issue as whether the various tasks the class members engaged in should be classified as exempt or non-exempt. *Id.* at 330. The court rejected the defendant's emphasis on the differences among class members' circumstances and held that "[p]laintiffs' theory does not depend on class members having identical claims, nor does the law of class certification require such." *Id.* at 338. The court held that "even if some individualized proof of such facts ultimately is required to parse class

members' claims, that such will predominate in the action does not necessarily follow." *Id.* at 334. This accommodation of individual issues exists because commonality is a "comparative concept." *Id.*

> The relative comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefit of proceeding by numerous separate actions–*not* between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding what so ever.

Id. at 339 n.10. Accommodation of individualized inquiries has been encouraged by the California Supreme Court for decades. *Id.* at 339. Courts recognize that subsidiary individual issues can be accommodated judicially, or are better suited for later proceedings or administrative proceedings after a determination of the legality of the defendants' conduct. *See, e.g., Employment Dev. Dep't v. Superior Court* (1981) 30 Cal.3d 256, 266 ("a court can devise remedial procedures which channel the individual determinations that need to be made through existing administrative forums.").

Similar to *Sav-On*, in *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 350, 378, the court held that a group of screen writers properly pled "a systemwide policy or practice of age discrimination" throughout the entire television industry without pleading individual claims or discrete wrongs. The court considered 23 separate class action lawsuits filed by hundreds of television writers against 12 different groups of related

television networks, studios and production companies ("employers"), and 11 talent agencies. *Id.* The writers challenged the industry's openly discriminatory employment practices as well as "facially neutral" discriminatory practices such as the employers' failure to use defined criteria to evaluate applicants, using word of mouth and nepotistic hiring practices, and refusing to accept script submissions except through talent agents, that facilitated the discriminatory practices. *Id.* at 353-55. The writers alleged injury in that the systemic discrimination deterred them from seeking employment or caused their rejection for employment opportunities. *Id.* at 350.

The *Alch* defendants contended that the conduct alleged consisted of "multiple, discrete acts" each being "an adverse act that constitutes a single unlawful practice." *Id.* at 378. *Alch* rejected this approach. The court clarified that under the defendants' "discrete acts" approach "every plaintiff in a class action would be required to plead facts supporting an individual prima facie case of discriminatory refusal to hire . . . . No such rule of law exists." *Id.* "These are classwide claims of systemic discrimination, where the writers' ultimate evidentiary burden is to prove that age discrimination was the employers' standard operating procedure." *Id.* at 382. "Plaintiffs in a class action need not prove each class plaintiff was a victim of discrimination; they must prove the existence of a discriminatory policy and, if they do so, they are entitled to classwide

relief." *Id.* at 380-81.

Alch recognized that individual relief issues were separate and distinct from the issue of the illegality of the defendants' conduct:

> the question whether a deterred applicant will be able to obtain individual relief is a different question, and one that will not arise until and unless the writers prove the employers have enforced a companywide policy of discrimination. If the writers are able to do so, they will be entitled to injunctive and perhaps other classwide relief. It is only at this point that individual claims of class members become germane.

Id. at 383.

In *Reyes v. Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1277, a government benefits case, the court held that the common goal of the class, which was to change the defendant's conduct, was sufficient to establish commonality. The *Reyes* court rebuked the defendants' assertion that, even if they had a common duty to all class members, proof of whether they did in fact improperly administer the subject program depended entirely on the facts of each individual case. *Id.* at 1279.

These cases exhibit that it is proper under California law to look to the defendant's common conduct for purposes of class treatment and for liability. Indeed, this approach is particularly appropriate in cases where only systemic injunctive relief is sought. In *Mendoza v. County of Tulare* (1982) 128 Cal.App.3d 403, 416-18, a prisoners' rights case, the court rejected the defendants' argument that "each prisoner's right to relief

in this case depends on 'facts peculiar to his case,' thus amounting to a mere aggregation of individual claims." The court held that the plaintiffs could focus on the defendants' policies and practices without proving individual facts.

> Appellants' claims could focus primarily on respondents' actions or omissions, and the similarly situated class members would not be required to prove individual facts. If the Court ultimately finds statutory or constitutional violations, declaratory and injunctive relief will lie to redress violations common to the class even though some apply only to individuals.

Id. at 418. The court recognized that because the plaintiffs had not sought money damages, individual relief issues and two cases denying class treatment based on individual relief issues did not bar class treatment. *Id.*

2. Plaintiffs' theory of recovery is indistinguishable from those held sufficient under California law.

Akin to the plaintiffs' challenges to the defendants' practices in *Sav-On*, *Alch*, and the other cases above, Plaintiffs' allege — *i.e.* their "theory of recovery" — that Defendants, through their common policies and practices, acts and omissions, have prevented class members from receiving the appropriate assessments, supports and services needed to live in non-institutional settings. 4JA0942-43, 0978-1036 & 1043-49. Without access to such assessments, supports and services, these class members remain unnecessarily institutionalized in violation of their rights under the Lanterman Act, Government Code Section 11135, the ADA, the Medicaid

Act and Section 504 of the Rehabilitation Act, and their statutory and constitutional rights of freedom, liberty, association, privacy, and equal protection. *Id*; 4JA1061-1072; 10JA2638. To remedy these violations, Plaintiffs prayed for systemic mandamus, injunctive and declaratory relief only. 4JA1036-42.

In their motion for class certification, Plaintiffs set out the following *factual* issues as common to the class:

- Whether Defendants fail to properly conduct individualized assessments by qualified professionals that are sufficiently person-centered and comprehensive to determine the community-based services class members want and need to end or to prevent unnecessary institutionalization.

- Whether Defendants fail to provide or ensure the development of community-based services and placement options sufficient to enable all class members for whom institutionalization is not necessary to actually receive the services to which they are entitled in a timely manner.

- Whether Defendants have failed to meet their oversight and monitoring responsibilities to prevent violations of class members' rights under state and federal law, including oversight and monitoring of DDS by CHHS and oversight of RCs by DDS.

4JA1076-1077. In their motion for class certification, Plaintiffs set out the following *legal* issues as common to the class:

- Whether Defendants' policies and practices violate class members' rights under the Lanterman Act, Government Code section 11135, the ADA, the Medicaid Act and Section 504 of the Rehabilitation Act to avoid unnecessary institutionalization and receive services in the least restrictive, most integrated setting consistent with

their needs and choices.

- Whether Defendants' policies and procedures resulting in actual or potential unnecessary institutionalization violate or place at risk class members' constitutional rights, including the rights to equal protection, liberty, privacy, and freedom of association.

- Whether RCs' violations of these statutory and constitutional rights also violate Business and Professions Code section 17200.

4JA1076-1077. Based on these allegations and others, the Superior Court held that Plaintiffs had demonstrated, as in *Sav-On*, that Defendants "acted or refused to act on grounds generally applicable to the class." 14JA3614. But the Superior Court then turned its back on its own holding when it erroneously applied a different legal standard.

3. The Superior Court's erroneous assumptions and "discrete wrongs" approach amount to improper criteria.

a. The Superior Court erred in applying the "discrete wrongs" approach and holding that systemic violations did not create common issues.

The Superior Court should have stopped after finding that Plaintiffs established commonality under *Sav-On*. But, instead, the Superior Court disregarded *Sav-On* and followed its own "discrete wrongs" approach based on erroneous legal assumptions contradicting California law. Under the "discrete wrongs" approach, the Superior Court failed to consider Plaintiffs' allegations concerning Defendants' common conduct. Instead, it focused on individual issues, such as the individual class

members' placements and the individualized content in each of their IPPs. 14JA3610-11, 3612-14 & 3619. Following this approach was reversible error.

As the basis for its "discrete wrongs" approach, the Superior Court erroneously followed *J.B. by Hart v. Valdez* (10th Cir. 1999) 186 F.3d 1280, 1289 ("*J.B.*") for the propositions that "an allegation of systemic failures does not create a common legal issue." 14JA3610. That proposition is contrary to California law. Each of the cases described in Section V.A.1 above based its commonality finding on the central issue of the illegality of the defendants' common systemic conduct. Indeed, *Sav-On* held that "[p]laintiffs' theory does not depend on class members having identical claims, nor does the law of class certification require such." *Id.* at 338. The Superior Court committed reversible error by following the holding of a case from the Tenth Circuit rather than established California law.

The "discrete wrongs" approach is irreconcilable with *Alch*, *supra*, 122 Cal.App.4th at p. 382, in which the Court of Appeal held that under the defendants' "discrete acts" approach "every plaintiff in a class action would be required to plead facts supporting an individual prima facie case of discriminatory refusal to hire . . . . No such rule of law exists." Rather, classwide claims require the plaintiffs to establish that discrimination was the defendants' "standard operating procedure." *Id.* at

382. "Plaintiffs in a class action need not prove each class plaintiff was a victim of discrimination; they must prove the existence of a discriminatory policy and, if they do so, they are entitled to classwide relief." *Id.* at 380-81.

As discussed above, under Plaintiffs' theory of recovery the illegality of Defendants' systemic policies and practices and the systemic effect thereof are the central issues in the case. 4JA0942-43, 0978-1036 & 1043-49. Each Plaintiff need not plead facts supporting individual entitlement claims which have not been alleged, are not prayed for, and are better suited for post-judgment determination by the proper administrative processes. 6JA1500; 14JA3607-08; *Sav-On*, *supra*, 34 Cal.4th at p. 338; *Mendoza*, *supra*, 128 Cal.App.3d at pp. 416-18 (recognizing subsidiary nature of individual issues when only injunctive relief sought).

The Superior Court also wrongly assumed *J.B.*'s disallowance of the aggregate approach to the plaintiffs' legal claims was consistent with California law. 14JA3610. The Superior Court erred because California courts routinely aggregate claims when deciding whether or not to certify a class action. *See*, *e.g.*, *Sav-On*, *supra*, 34 Cal.4th at p. 324 (aggregating alleged violations of overtime statutes and California's unfair competition law, as well as conversion, for which plaintiffs sought damages and injunctive and declaratory relief); *Employment Dev. Dept.*, *supra*, 30 Cal.3d at p. 265 (aggregating alleged violations of Title VII, equal protection and

due process clauses of the United States and California Constitutions, where declaratory and injunctive relief were sought as well as a writ of mandate to compel retroactive benefits); *Richmond supra* 29 Cal.3d at p. 462 n.3 (aggregating violations of section 11010 and 11025 of the Business and Professions Code, as well as common law fraud, negligent misrepresentation, failure of consideration, unjust enrichment, breach of trust, and seeking declaratory relief and rescission); *Gonzales v. Jones* (1981) 116 Cal.App.3d 978, 984 (aggregating numerous federal and state constitutional grounds seeking declaratory and injunctive relief as well as mandate); *Mendoza*, *supra*, 128 Cal.App.3d at pp. 414, 417 (rejecting defendants' argument that plaintiffs' aggregate right to relief based on ten causes of action amounted to a "mere aggregation" of individual claims). Thus, the Superior Court's sole purpose for relying on *J.B.* was misplaced.

The Superior Court's citation to *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908 adds nothing to its "discrete wrongs" approach. 14JA3612. The Superior Court initially cited *Hicks* for the proposition that "[c]lass certification is determined with reference to the claims asserted and the court may take into account whether a class is appropriate for each claim." 14JA3609. But, this citation is inapposite. The Superior Court did not analyze any of Plaintiffs' legal claims or specify why any particular claim lacked commonality. The Superior Court instead took a collective approach based solely on its assumptions that neither

commonality based on systemic violations nor claim aggregation were appropriate. Thus, by citing *Hicks*, the Superior Court implies that Plaintiffs' legal claims are prevented from class treatment by *J.B.'s* holding. 14JA3610. The *Hicks* citation is intertwined with the erroneous assumption regarding *J.B.* — and neither case prevents class treatment.

In fact, *Hicks* supports class treatment of Plaintiffs' claims. *Hicks* held that "[a]s a general rule, if the defendants' liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Hicks, supra*, 89 Cal.App.4th at p. 916. Having found Plaintiffs met the *Sav-On* standard, which is akin to the *Hicks* standard above, the Superior Court's only substantive reason for denying class treatment was its misplaced reliance on *J.B.* *Hicks* is inapposite.

b. The Superior Court's use of the "discrete wrongs" approach is also inconsistent with the Ninth Circuit and federal majority view.

The proposition in *J.B.* the Superior Court relied on has been rejected by most federal courts. *Baby Neal for & by Kanter v. Casey* (3d Cir. 1996) 43 F.3d 48 ("*Baby Neal*") — consistent with *Sav-On* and *Mendoza* — held that the differences among the plaintiffs were "largely irrelevant" in light of the nature of the systemic injunctive relief sought and the defendant's common course of conduct towards the plaintiffs. *Id.* at 57. The court noted that Federal Rule of Civil Procedure 23(b)(2) classes "have

been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of the individualized circumstances and the disparate effects of the conduct." *Baby Neal*, *supra*, 43 F.3d at p. 57. *Baby Neal* represents the majority rule.

The Second Circuit adopted *Baby Neal* in a civil rights action brought by children against the New York City child welfare system. *See Marisol A. v. Giuliani* (2d Cir. 1997) 126 F.3d 372, 375-76. In *Marisol A.*, the defendants emphasized the plaintiffs' individuality, arguing that each plaintiff challenged a different aspect of the welfare system, thus implicating different statutory, constitutional and regulatory schemes. *Id.* at 367-77. In other words, the court found that no one single legal claim affected all class members and no single class member was affected by each alleged legal violation. *Id.* The plaintiffs, by contrast, alleged that their injuries derived from a unitary course of conduct in a single welfare system, which the lower court found subject to a single regulatory scheme for delivering child welfare services. *Id.* at 377. The court affirmed the lower court's certification of the class holding that the plaintiffs' class claims were sufficiently related for certification and noting that *Baby Neal* holds that it is an abuse of discretion to hold otherwise. *Id.*

The Ninth Circuit relied on both *Baby Neal* and *Marisol A.* in a case involving prisoner's rights under the ADA and the Rehabilitation

Act. *See Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849, 867-69. In *Armstrong*, the defendant argued that the variations in class members' disabilities precluded a finding of commonality. *Id.* Rejecting the defendant's argument, the court held that it was sufficient that all of the class members suffered from the defendant's failure to accommodate their disabilities although there was "a wide variation in the nature of the particular class members' disabilities." *Id.* The court reaffirmed the Ninth Circuit's approach "that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Id.* at 668 (citations omitted). "In such a circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Id.* at 688 (citing *Baby Neal*, *supra*, 43 F.3d at p. 56.)

Baby Neal is consistent with California law and is the law in the Second, Third, and Ninth circuits, while *J.B.* is inconsistent with California law and remains an outlier as a matter of federal law. The Superior Court erred by failing to follow established California law and then compounded that error by relying on *J.B.*

c. By following the "discrete wrongs" approach instead of Plaintiffs' theory of recovery, the Superior Court contravened *Sav-On*.

Erroneously concluding that systemic violations were insufficient to establish commonality, it appears the Superior Court was

unable to reconcile Plaintiffs' theory of recovery and proffered methods of proof with the individualized nature of IPP assessments and placements. 14JA3610-14, 3616, & 3618. Based on *J.B.* and against *Sav-On*, the Superior Court disregarded both Plaintiffs' theory of recovery and its evidence. Thereafter, the Superior Court analyzed class certification using *its own* theory of recovery: "the Court will not permit Plaintiffs to proceed on a 'super-claim' alleging that the DDS/Regional Center system is broken because it consistently fails to place persons in the least restrictive setting. The Court will . . . require Plaintiffs to identify common discrete wrongs that affect the individual class members." 14JA3612.

This substitution of the Superior Court's "discrete wrongs" approach instead of Plaintiffs' theory of recovery — evidenced by the Superior Court's wholesale disregard of Plaintiffs' commonality arguments and evidence — was irreconcilable with *Sav-On*'s instruction to follow the plaintiff's theory of recovery to avoid an adjudication of the merits of the case. *Sav-On*, *supra*, 34 Cal.4th at p. 327; *see also Linder*, *supra*, 23 Cal.4th at pp. 443-44.

Moreover, the Superior Court's approach to Plaintiffs' commonality showing exposes the Superior Court's flawed approach and improper focus on individual issues. The Superior Court cited only five "discrete alleged wrongs" to determine commonality. 14JA3612-14. But, instead of citing to and discussing the common factual and legal issues

Plaintiffs identified in their brief, the Superior Court based its discussion on a list of facts and evidence that Plaintiffs had offered to illustrate *typicality*. 4JA1080. The evidence submitted for typicality consisted of declarations by Plaintiffs and their guardians *ad litem*, while Plaintiffs supported their commonality arguments with testimony of Defendants' staff and expert testimony. 4JA1078-1080. *Compare* 4JA1062-77 *with* 4JA1078-1080.

Although the Superior Court found that typicality existed, it used Plaintiffs' inapposite typicality examples to hold that, under its theory of "discrete wrongs," common issues did not predominate. 14JA3612-14. Nowhere in its Order did the Superior Court cite to or analyze Plaintiffs' commonality arguments or other examples of common issues of fact and law. *Id.*

For each typicality example, the Superior Court found class treatment improper because the "discrete wrong" would — in its opinion — depend solely upon the individualized IPP assessment of the class member. *Id.* For example, Plaintiffs claim that Defendants base IPP recommendations on factors unrelated to the class members' needs and choices in violation of § 4501 and § 4502. 4JA1080. The Superior Court found that "the evidence suggests" that Plaintiffs are right. 14JA3613. But, rather than stopping at Defendants' improper conduct, the Superior Court pondered the different types of improper factors that could apply in each class member's assessment. *Id.* This and the other four examples of

the Superior Court's approach to this case expose its dogged focus on subsidiary individual issues. The Superior Court erred in thinking it would have to look at each class member's IPP at the expense of the central common issues of Defendants' policies and practices that lead, *inter alia*, to deficient assessments and IPPs for all class members. The Superior Court's individualized focus was its principal legal error that doomed Plaintiffs' motion, an error that would have been avoided if the Superior Court had just rested on its conclusion that Defendants' common practices are sufficient for commonality under *Sav-On*. 14JA3612-14.

4. The Superior Court erred by rejecting Plaintiffs' pattern and practice evidence.

By relying solely on Plaintiffs' typicality examples, the Superior Court applied improper criteria when it disregarded Plaintiffs' pattern and practice evidence — methods of proof well-supported by California law.

In *Sav-On*, the plaintiffs proffered pattern and practice evidence of the defendant's policies and practices and the common effects of those policies and practices using documents, deposition testimony of the most knowledgeable staff of defendants, discovery responses, and declarations. 34 Cal.4th at 328-29. The court quickly dismissed the defendant's argument that the plaintiffs' pattern and practice evidence was insufficient and irrelevant:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of defendants' centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs make class certification appropriate.

Id. at 333 n.6; *see also Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App.4th 715, 750 (characterizing statistical sampling as "a different method of proof" and "a particular form of expert testimony").

Time and time again, as in *Sav-On*, California courts have certified classes where the plaintiffs' theory of recovery emphasized the defendants' illegal conduct common to and affecting a large set of class members. Courts have done so because such claims are provable on a common basis through pattern and practice evidence, including anecdotal evidence and statistical sampling. *See Employment Dev. Dep't, supra,* 30 Cal.3d at pp. 265-66 ("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."); *Alch*, *supra*, 112 Cal.App.4th at p. 379 ("[A] class action is, by definition, a pattern or practice claim."); *Reyes*, *supra*, 196 Cal.App.3d at p. 1279 (proof can be based on "*sampling* of representative cases" combined with testimony from knowledgeable witnesses).

In *Alch*, the writers proffered public statements, statistics and

anecdotal evidence as evidence of the alleged age discrimination of the employers and the talent agencies. *Id.* at 352-53, 355. *Alch* found this evidence sufficient: "[p]laintiffs normally seek to establish a pattern and practice of discriminatory intent by combining statistical and nonstatistical evidence, the latter most commonly consisting of anecdotal evidence of individual instances of discriminatory treatment." *Id.* at 380-81.

a. Consistent with California law, Plaintiffs proffered common proof of the deficiencies in Defendants' policies and practices that cause unnecessary institutionalization.

Defendants' systemic policies and practices and the systemic effect thereof are the central issues in the case — not individualized needs or entitlement issues. 4JA0942-43 & 0978-1036; 10JA2638; 4JA1074-1078.

Similar to *Sav-On*, *Alch*, *Reyes*, and *Mendoza*, Plaintiffs demonstrated that these central issues are provable by common means. Plaintiffs submitted primarily pattern and practice evidence consisting of testimony from Defendants about their policies and practices, admissions, documents, expert testimony, sampling and other evidence. 1JS0042-238; 4JA1095-1101; 5JA1102-1355; 6JA1356-1500 & 1547-1644; 7JA1645-1927; 11JA2719-3011; 12JA3012-3306; RT 48:9-51:11. Additionally, Plaintiffs described their intended use of statistics and further sampling for trial. 12JA3097-3100; RT 50:13-51:11.

Because the Superior Court found Defendants' conduct common to the class, it should have relied upon, instead of disregarding, this proffered evidence. Such reliance would necessarily have established a finding that the alleged systemic violations could be proved without individualized inquiries, and thus the Superior Court should have granted class certification.

(i) Plaintiffs proffered common evidence of the common factual issues alleged.

Plaintiffs proffered common evidence that Defendants common practices and policies result in a legally insufficient assessment process and thus, improper assessments. For example, Plaintiffs proffered expert testimony and testimony from Defendants' representatives that Defendants:

- Fail to conduct comprehensive assessments for class members who have not been selected for the CPP. 6JA1472-73 & 1601-02.
- Base placement recommendations on improper criteria — such as the availability of services — or fail to recommend community placement based solely on a family member's objection. *See* §§ 4501, 4502 & 4646.5; *Richard S. v. Dep't of Developmental Servs.*, 2000 U.S. Dist. LEXIS 22750 *29 (C.D. Cal. 2000) (enjoining DDS policy of giving parents, conservators and other legal representatives of DC residents unilateral veto authority over IPP team recommendations), *rev'd on other grounds*, (9th Cir. 2003) 317 F.3d 1080; 6JA1571, 1575-76 & 1625-26; 7JA1655-63, 1764-69 & 1791-94.
- Fail to provide sufficient or understandable information about service opportunities in the community to enable informed choices. *See* § 4502.1; 42 U.S.C. § 1396n(c)(2)(C), (d)(2)(C); 42

C.F.R. § 441.302(d)(1); 6JA1576-77 & 1584-87.

- Fail to ensure regional center attendance at developmental center IPP meetings (*see* §§ 4512(j) & 4646(d)), thereby limiting the IPP team's knowledge of available community services and supports. 6JA1572-74; 7JA1654-55, 1761-63 & 1782.

Plaintiffs proffered common evidence that Defendants fail to provide or ensure the development of community-based services and placements. For example, Plaintiffs proffered expert testimony and testimony from Defendants that Defendants fail to comply with Plaintiffs' legal rights under state and federal law to live in an integrated settings in the least restrictive environment because they:

- Fail to ensure timely provision of less restrictive community services because, in part, they fail to keep wait lists of persons referred to less restrictive settings. *See* 7JA1700 & 1774-76.

- Fail to ensure the development of community services and supports adequate to meet the needs of individuals who could be served in the community because, in part, they fail to collect system-wide data on gaps in available services. *See* 7JA1705-07 & 1779-80

- Fail to develop sufficient resources and equitable systems of payments to establish needed services as required by §§ 4612(b), 4648(a)(5), 4680, 4681(d), 4690, 4697, 4786; 6JA1472, 1578-1583, 1590-1599, 1611-23 & 1627-35; 7JA1670-72, 1738-41, 1744-45 & 1787-90.

- Fail to assess, move and deflect individuals from non-DC institutions because, in part, there is no plan comparable to the CPP for these class members. *See* 7JA1664-65, 1702-04 & 1730-34.

Plaintiffs proffered common evidence — testimony of DDS's Chief Deputy Director — that State Defendants have not met their

oversight and monitoring responsibilities to prevent violations of class members' rights under state and federal law. For example, DDS:

- Fails to establish policies governing the CPP that set standards for RCs community placement plans in accord with the CPP requirements. *See* § 4418.25; 7 JA1716.

In addition, Plaintiffs described their intent to submit sampling and statistical evidence to establish the merits of their contentions, such as the Defendants' failure "to inform" consumers and their family members of alternatives to institutionalization, or "often" base IPP recommendations on improper factors. 12JA3098-99. As Plaintiffs' counsel explained regarding Defendants' failure to perform comprehensive assessments: "Statistical sampling of individual records might be some of the evidence that we would submit to confirm and corroborate that claim, but the reason that we know that that claim is accurate is that it's been testified to." RT at 26:17-27:3 & 50:13-51:11.

Plaintiffs' proffered methods of proof are typical of pattern and practice claims and are supported by California case law.

(ii) Both Plaintiffs' and Defendants' proffered common evidence on the illegality of Defendants' conduct.

Because Plaintiffs have shown that the deficiencies in Defendants policies and practices are provable on a common basis, Plaintiffs need only demonstrate that these deficiencies are illegal. Plaintiffs have established this illegality with common proof. 12JA3089.

Plaintiffs used DDS, Regional Center and expert testimony to demonstrate that the vast majority — if not all — of the class members are unnecessarily institutionalized because they could live in less restrictive settings with appropriate supports and services. 4JA1064. Both Plaintiffs' and State Defendants' experts agreed on this point. 12JA3089.

Plaintiffs put these and other systemic deficiencies into context for the Superior Court by exposing the fact that Defendants are capable of moving scores of individuals into community settings, but have not done so because they lack the motivation. 6JA1638-42; 7JA1678-79 & 1797-1800; 10JA2614 & 2619. Plaintiffs used statistics to show that the *Coffelt* settlement effectuated a net decrease in the DC population of 490 persons per year. 7JA1815-16; 12JA3093. After the *Coffelt* settlement period ended, "the pressure was off" and DDS and the RCs lacked the motivation to continue the pace of community placements; thus, the net decrease dropped to 131 persons per year. 6JA1638-42; 7JA1678-79, 1797-1800 & 1815-16; 10JA2614 & 2619.

Expert testimony submitted to the Superior Court confirms that the legality of Defendants' conduct will be based on issues and proof common to all class members. In a sweeping class-wide generalization, the State Defendants submitted expert testimony from Julia Mullen, a DDS Deputy Director, explaining that one reason for the decreased pace of community placements after the *Coffelt* settlement period was that the

individuals remaining in institutions after *Coffelt* are the most difficult to serve. 9JA2406. Ms. Mullen also asserted that Defendants' system-wide Community Placement Plan is sufficient to address the issue of unnecessary institutionalization. 9JA2402-05 & 2409-10.

Plaintiffs' expert, Lyn Rucker, disagreed, pointing out that Ms Mullen's statement regarding individuals remaining institutionalized after *Coffelt* contradicts her other generalization that *all* institutionalized individuals could live in the community. 12JA3093-95.[9] Furthermore, the fact that the Defendants are working contemporaneously to place into community settings 85% of the Agnews DC population — the majority having resided there for over two decades and having a multitude of severe disabilities — hollows Ms Mullen's explanation. *Id*; 7JA1821 & 1826; RT 20:7-21:1148:13-49:25. Ms Rucker also exposes the false promise of the CPP because under its current pace the majority of people currently institutionalized will need to wait for decades for an opportunity for community placement. 12JA3093 & 3096-97. These issues do not involve the type of individual factors that the Superior Court erroneously assumed were central to this case.

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[9] Ms. Rucker has extensive experience, nationally and internationally, as an administrator, consultant and federal court monitor on issues of systems planning and implementation of community services and supports for people with developmental disabilities. 6JA1475-86.

b. The Superior Court erred by ignoring Plaintiffs' proffered methods of proof and misconstruing Plaintiffs' examples of typicality.

By disregarding Plaintiffs' standard evidentiary methods for proving systemic conduct, the Superior Court committed reversible error. California law promotes establishing liability and class treatment in systemic violation cases through pattern and practice evidence, including the statistical and anecdotal evidence explicitly rejected by the Superior Court. 14JA3612 & 3619. Indeed, courts have recognized that pattern and practice evidence is essential to balancing issues central to the case, while subsidiary issues concerning subjective individual determinations are best left to administrative processes, such as the content of IPPs. *See Lynn v. Regents of Univ. of Cal.* (9th Cir. 1981) 656 F.2d 1337, 1343 & n.3 (explaining that reliance on statistical proof is practical and matter of "sound policy"); *see also Gonzales*, *supra*, 116 Cal.App.3d at p. 985.

When the Superior Court focused its analysis on Plaintiffs' typicality examples and the anecdotal evidence proffered in connection with them, it disregarded Plaintiffs' proffered evidence using standard methods of proving pattern and practice. 14JA3612-14. It did not cite an evidentiary or legal basis for doing so. The Superior Court explicitly ignored Plaintiffs' statistical and sampling evidence even though such evidence would largely eliminate any need to focus on individual matters.

c. The Superior Court erred by disregarding Plaintiffs' intended statistics and sampling evidence under the guise of manageability.

To the extent the Superior Court's "serious questions" about Plaintiffs' anecdotal and statistical evidence were based on manageability concerns, the Superior Court erred because such concerns provide no basis for denying a motion for class certification "unless manageability of the class action is essentially without dispute or clearly established." *Reyes*, *supra*, 196 Cal.App.3d at p. 1275; *c.f. Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 140 (potential problems in discovery, trial, individualized damages of class members are not fatal to class certification). The Superior Court did not (and could not) cite to any authority for an across the board conclusion that statistics and sampling evidence would be unmanageable. That sampling is unmanageable is not established. 12JA3097-3100. To the contrary, Plaintiffs' expert, Ms. Rucker declared that sampling would be appropriate in this case, and in fact, the State itself relies upon sampling in many contexts for monitoring and evaluation purposes, including sample IPP reviews. 12JA3097-3100. To the extent that the Superior Court considered unmanageability of Plaintiffs' evidence to be a reason for denying class certification, it abused its discretion in doing so.

* * *

In sum, after finding commonality existed under *Sav-On*, the Superior Court disregarded Plaintiffs' theory of recovery, commonality

arguments and methods of proof in order to deny class certification. The Superior Court erred as a matter of law and its ruling cannot stand.

B. THE SUPERIOR COURT ERRED IN DENYING CLASS CERTIFICATION BASED ON INTERVENORS' OBJECTIONS.

The Superior Court held that the Plaintiffs did not establish that they — as opposed to their counsel — adequately represented the class because a handful of class members — all of whom had been given leave to intervene in the case — opposed Plaintiffs' motion. 14JA3615-17 & 3619. The Superior Court's holding cannot be reconciled with the California Supreme Court's decision in *Richmond*, *supra*, 29 Cal.3d at p. 479, and thus must be reversed.

1. The Superior Court erred because courts cannot deny class certification based on opposition from a handful of class members.

In *Richmond*, 242 lot owners sued the developer of their subdivision for fraud and other statutory violations based on the developer's failure to plan for an adequate water supply and other amenities. *Id.* at 466. The Tahoe Donner Association, which included all of the approximately 2,000 lot owners in the subdivision as members, intervened and opposed the plaintiffs' motion to certify a class consisting of all lot owners. *Id.* at 467. The Tahoe Donner Association relied upon a survey indicating that at least 266 of the lot owners — or 13.3% of the class — were pleased with the defendant's work and the subdivision's status. *Id.*

at 468. The trial court relied primarily upon this survey to deny the motion. *Id.* at 465. The Supreme Court reversed, noting that whenever a minority of class members oppose class certification the trial court should — at most — allow the minority to intervene or form a subclass to protect their interests and similar interests of absent class members. *Id.* at 474. The Supreme Court squarely held that "class certifications should not be denied so long as the absent class members' rights are adequately protected." *Id*; *see also Fanucchi v. Coberly -West Co.* (1957) 151 Cal.App.2d 72, 82-83 (reversing order denying motion for class certification where 1/3 of the proposed class signed affidavits saying they did not want to be in the class).

Here, the Superior Court found the Intervenors to be adequately protected by their participation in the action. The Superior Court cited *Richmond* and explained that it had allowed the eleven Intervenors to "appear in this action" and "participate in all court proceedings." 14JA3617. The Superior Court thus concluded that "[t]he presence of the Intervenors protects their interests." *Id.*

Then, inexplicably, and contrary to the holding in *Richmond*, the Superior Court held that it would deny the motion for class certification because of the Intervenors' objections, stating that its conclusion "is based on a balancing of interests and case management concerns." *Id.* The Superior Court never articulated what interests or case management concerns led to that conclusion, but *Richmond* provides that the Superior

Court erred regardless of whatever unspecified interests or case management concerns the Superior Court may have had in mind.

Plaintiffs' proposed class consists of approximately 7,775 institutionalized persons with developmental disabilities — 3,133 remaining in developmental centers and 4,642 remaining in non-developmental center institutions. 6JA1463-64 & 1466. The Intervenors consist of only eleven individuals, which constitutes less than 1/10 of 1% of the approximately 7,775 class members. *Id.* Thus the amount of opposition here was far less than the opposition to the class in *Richmond.*

Moreover, just as the opposition of an association (TDA) did not justify denial of the motion for class certification in *Richmond* the views of the two intervening organizations — CASH/PCR and California Association for the Retarded — are irrelevant. Their membership allegedly consists of family, friends, and conservators (1JA0088), all individuals that cannot unilaterally veto class members' preferences or IPP team recommendations about community placement, no matter how well-intentioned they may be. *See, e.g., Richard S., supra,* 2000 U.S. Dist. LEXIS at p. *29 (enjoining DDS policy of giving parents, conservators and other legal representatives of DC residents unilateral veto authority over

IPP team recommendations).[10]

The intervening organizations broadly claim — along with other unnamed non-intervening affiliated organizations — to represent the family members, friends and conservators of less than 50% of the developmental center population. 8JA1993 ("Of the approximately 3,121 residents in California Developmental Centers, *nearly half* have family members or conservators who are members of CASH/PCR or affiliated organizations.") (citation omitted). They do not claim to represent any class members in non-DC institutions. Even if families, friends and conservators could defeat the claims of the class members themselves, the Intervenors would still represent less than 20% of the class. 6JA1463-64 & 1466. This is a far cry from the "vast majority" required by *Richmond.*

The Superior Court adequately protected absent class members' interests by allowing intervention and participation in all court proceedings. Thereafter, however, the Superior Court erred under *Richmond* in finding Plaintiffs failed to demonstrate representative adequacy based on a few intervening class members.

2. The Superior Court also erred in denying class certification based on Intervenors' objections

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[10] Plaintiffs do not seek to terminate or limit family involvement in the IPP process, except insofar as Defendants continue to implement a policy of allowing family members to unilaterally veto community placement recommendations for DC residents in violation of *Richard S.*

because the Intervenors' stated interests do not conflict with the relief Plaintiffs seek.

The Superior Court recognized that the interests of all class members, including Intervenors, are aligned: all class members would like thorough assessments and the best services possible. 14JA3616. Broadly stated, that is precisely the relief sought by Plaintiffs. 4JA1036-42. The Intervenors' interests, as alleged, do not conflict with these objectives.

The Intervenors state their objectives as a "desire to remain in a developmental center setting in accordance with the IPP recommendation because their needs are best met in such an environment." 8JA1992; RT 21:24-23:6. Such concerns do not prevent class certification because they are not "diametrically opposed" to Plaintiffs' objectives. *Richmond*, *supra*, 29 Cal.3d at p. 473. Plaintiffs do not seek to move any institutionalized individuals, including Intervenors or those they represent, into community settings against their will or against the recommendations of their IPP teams. 4JA1039-40; RT 74:11-75:1. Any decisions concerning the appropriate placement for individual class members, including Intervening class members would, as now, occur through the individual assessment and planning process. RT 10:18-11:28. Thus, the improvements Plaintiffs seek in the assessment and IPP process and in the enhancements they seek in the development of community resources are not inconsistent with Intervenors' professed interests.

C. THE SUPERIOR COURT ERRED IN FINDING THAT THERE IS A SUPERIOR ALTERNATIVE TO CLASS CERTIFICATION.

The Superior Court found that Plaintiffs had not established the superiority of class treatment, a finding infected by its erroneous decisions about commonality (Section V.A, above) and adequacy (Section V.B., above) and compounded by its *presumption* that individual "fair hearings" would be an adequate substitute for this action. 14JA3617-18. The Superior Court's holding is reversible error.

The Order rightly recognizes that "Plaintiffs are seeking systemwide injunctive relief only and are not seeking individualized relief." 14JA3607. The Superior Court thus stated that it "would not address variations in individual injunctive relief because Plaintiff would be seeking injunctive relief on the system level and not as applied to specific individuals." 14JA3608.

Yet when it came to address the issue of the superiority of the class action over the alternative of thousands of individual cases the Superior Court held that it "presume[d]" California's statutory fair hearing process (§§ 4700-4731) precludes resolution of Plaintiffs' claims on a classwide basis. 14JA3618. The presumption is false. The only relief Plaintiffs seek is systemic mandamus, injunctive and declaratory relief, and that is relief that the fair hearing process cannot provide.

1. California's statutory fair hearing process cannot remedy the systemic problems addressed or afford the class-wide relief sought in this action.

The Superior Court's presumption is wrong. The Lanterman Act fair hearing process is not empowered or designed to confront the systemic issues or provide the mandamus, injunctive and declaratory relief Plaintiffs seek. *See* Cal. Const. Art. VI, § 10 (Superior Court has original jurisdiction over injunctive relief); *Bell, supra,* 115 Cal.App.4th at pp. 745-46 (recognizing that Labor Commissioner hearing did not allow for injunctive relief).

As an initial matter, the fair hearing process can be used only to challenge the actions of a "service agency," (§ 4710.5(a)), defined as a "developmental center or regional center" (§ 4704). DDS and the other State Defendants are not service agencies, except insofar as DDS operates the DCs and provides services directly to individuals placed in DCs, which means it is not subject to the fair hearing process for any class members institutionalized in a non-DC institution or at risk of institutionalization. Thus, because the State Defendants are not service agencies, Plaintiffs' challenges to their policies and practices cannot be brought against them in fair hearings.

Not only can Plaintiffs not bring their claims in fair hearings, they cannot recover the relief prayed for in this action in fair hearings. *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 690-92 involved a fair

hearing scheme not unlike the fair hearing procedure at issue here. *Compare* § 4700 *et seq*. *with* § 10950 *et seq*. In *Ramos*, a group of families sought declaratory and injunctive class relief and individual damages from the termination of their government benefits. *Id*. at 688. The trial court held that the plaintiffs had not exhausted their administrative remedies available in a fair hearing procedure. *Id*. at 690. The Court of Appeal reversed, in part, characterizing the suggested administrative remedy as "unavailable or inadequate" due to the individualized nature of the fair hearing procedures:

> The entire fair hearing scheme is premised on an individualized treatment of claims for aid. Each individual theoretically has different needs, and his claim for aid would be treated separately. In no section of this chapter . . . is there provision for class relief. It is the *individual* who must apply for a hearing, regarding *his* application for or receipt of aid. He must do so in person or through an *authorized* representative. It is clear that the hearing scheme established by the Legislature does not contemplate class actions. There was therefore no failure to exhaust an administrative *remedy* for class relief, for no such administrative remedy existed.

Id. at 690-91 (emphasis in original); *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 935-37 ("A hearing officer would violate both statutory and constitutional authority in opening his hearing room to a class action.")

The same reasoning applies here. The Lanterman Act fair hearing process outlined in § 4700 *et seq*. is premised similarly on individualized needs for individualized services. §§ 4710(a) & 4710.5(a).

The fair hearing process is based on "a person" who has been denied "services." *See* §§ 4701.5 (defining "applicant" as "a person") 4702 (defining "claimant" as "an applicant or recipient") 4703.5 (defining "recipient" as "a person") & 4703.7 (defining "services" as those set forth in a "recipient's individual program plan"). A fair hearing request form is a document filled out and submitted by a "claimant" who is dissatisfied with a service agency decision or action. *See* §§ 4702.6 & 4710.5.

Additionally, the fair hearing process is simply not designed to challenge Defendants' systemic policies or practices that violate the Lanterman Act and other state and federal laws, such as DDS's failure to monitor RC compliance with law, DDS's failure to assess gaps in service needs on a state-wide basis, or DDS's failure to monitor and set standards for the CPP. 4JA0936-1049. There is no provision for class relief and the fair hearing procedures could not possibly allow for the time and discovery inherent in a class action because they are structured to expedite only individual relief. *See* §§ 4710.5(a) (setting 30 days statute of limitations), 4712(a) (requiring hearing within 50 days of hearing request, extendable only 40 days for good cause), 4712(d) (requiring discovery exchange five days before hearing) & 4710.7 (allowing access only to records in claimant's file prior to filing a hearing request if an informal meeting is requested). Although there is a provision allowing consolidation of appeals, this is not akin to a class action or an avenue to seek systemic

relief — despite the consolidation each claimant retains his or her individual rights to present evidence, confront and cross-examine witnesses, appear with counsel, access records, and to have his or her own interpreter. §§ 4712.2 & 4701(f). As in *Ramos*, the fair hearing process is inadequate because it cannot provide the classwide systemic remedy Plaintiffs seek.

Even if the fair hearing process could provide a remedy, courts have rejected the alternative of individual suits as a realistic remedy for a class of persons with developmental disabilities: "This is precisely the type of group which class treatment was designed to protect." *Armstead v. Pingree* (M.D. Fla. 1986) 629 F.Supp. 273, 279 (pointing to "plaintiffs' confinement, their economic resources, and their mental handicaps" as reasons to conclude that individual actions would be unlikely).

The Superior Court abused its discretion as it had no basis to "presume" that a fair hearing process eliminates the need for class certification.

2. Class treatment is superior to thousands of individual actions or a writ of mandate case.

Class treatment is superior to multiple actions. Multiple proceedings provide no benefit and add excessive costs. Multiple actions to establish the existence and illegality of Defendants' policies and practices would burden the litigants and the courts with cumulative expenses,

discovery efforts, and evidence. *See Sav-On*, *supra*, 34 Cal.4th at p. 340; *see also Richmond*, *supra*, 29 Cal.3d at pp. 474-75 (recognizing that the judicial system substantially benefits by the efficient use of its resources); *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1087 (explaining multiple actions require presentation of duplicative expert testimony). As in *Reyes*, "this community of interest requirement is especially satisfied here, because the trial court would have to redetermine the legality of the [defendants' processes] in each case individually pursued." 196 Cal.App4th at p. 1279.

But beyond the exponential costs inherent in a multitude of duplicative proceedings, considerations of equity favor certification. The right to file a class action originated in equity, with the objective of redressing small wrongs that might otherwise go unredressed. *See Rose*, *supra*, 126 Cal.App.3d at p. 934. The gaps and deficiencies in Defendants' policies and practices are systemic causes of unnecessary institutionalization for thousands of people for years or decades. This action seeks to ensure California's promise (codified in §§ 4501 & 4502) to persons with developmental disabilities of an entitlement to an opportunity to live integrated in the community by being served in the least restrictive setting. *See Sav-On*, *supra*, 34 Cal.4th at pp. 340-41 (citing strong public policy in favor of class certification in general and a public policy in favor of affording employee protections).

The nature of this class in particular requires a systemic approach where individualized violations are difficult to articulate and prove, and the individuals whose rights are violated are people with cognitive or other severe disabilities, most without the resources to undertake the complex and daunting task of suing the myriad state and private entities responsible for violating their rights. *Reyes*, *supra*, 196 Cal.App.3d at p. 1270, n.6 (regarding appropriateness of class action for government benefits litigation) & pp. 1279-80 (certifying class of disabled and indigent plaintiffs for several reasons including their inability to obtain private counsel, judicial economy, finality of judgment binding all parties to a decree, and enforceability through contempt or supplemental decree); *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810 ("Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.").

No individual plaintiff could or should be the test case for this type of action with its four-year history, numerous dispositive motions, countless discovery and ex-parte motions, writs and this appeal. *Rose*, *supra*, 126 Cal.App.3d at pp. 934-35 ("We see no basis in law or equity for making a sacrificial lamb of [plaintiff] or any other individual class member").

Even if a test case presented itself and succeeded, absent plaintiffs could not enforce the judgment or decree. *See Miller v. Woods* (1983) 148 Cal.App.3d 862, 872 ("Class members are not parties to an individual decree. They cannot enforce such decision by contempt or supplemental decree."). Presumably for this reason, among others, California courts certify class actions even where plaintiffs seek a writ of mandate, thus proving that a writ of mandate standing alone is not a sufficient substitute for a class action. *Reyes*, *supra*, 196 Cal.App.3d at pp. 1279-80 (affirming certification of plaintiffs' class despite plaintiffs' request for peremptory writ of mandate in addition to complaint); *Gonzales*, *supra*, 116 Cal.App.3d at pp. 981, 986 (same).

As stated in *Rose*: "We cannot permit such an inequity [as the denial of a motion for class certification] when the very purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights." 126 Cal.App.3d at p. 935.

3. The Superior Court lacked support for its holding that Plaintiffs failed to demonstrate superiority.

The Superior Court cited *Linder*, *supra*, 23 Cal.4th at p. 446, for the proposition that trial courts are obligated to consider the role of class actions in deterring and redressing wrongdoing. 14 JA3607 & 3617-18. The reason *Linder* imposed that obligation was to ensure that a wrongdoer

is not allowed to continue wrongdoing "simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *Linder, supra*, 23 Cal.4th at p. 446. That rationale should have led the Superior Court to certify the class here because the claims in this case involve conduct that harms large numbers of people in systemic ways that are beyond the means of any individual plaintiff to prosecute through years of factual and expert discovery, much less trial.

The Superior Court also implied that class certification might be improper because of the possibility that the Defendants were subjected to external oversight, relying on *Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 660. 14JA3607 & 3617-18. As an initial matter, any reliance on *Caro* would be misplaced because neither *Caro* nor any other case suggests that executive branch oversight of an agency could preclude a class action where the agency violates the law. Moreover, in *Caro*, the court held that previous judicial decisions against the defendant minimized the availability of monetary damages and mooted plaintiffs' requested injunctive relief. *Id.* Here, the opposite is true. One reason this action became necessary is that Defendants failed to voluntarily continue to follow the law and began to backslide after the consent decree in the *Coffelt* case expired. 12JA3093-94.

Finally, *Basurco v. 21st Century Ins. Co.* (2003) 108

Cal.App.4th 110, 120-22, cited by the Superior Court (14JA3607 & 3617), is likewise inapposite. The *Basurco* court affirmed the denial of class certification for a class of homeowners seeking monetary damages, in part, because of the trial court's innovative methods of dealing with hundreds of similar cases that *had already been* filed, including its issuance of a global order that established attorney committees and filing procedures. *Id.* at 121-22. Here, Plaintiffs seek no individual or monetary relief and there is no alternative process or forum capable of granting the mandamus, injunctive and declaratory relief sought to the entire class.

In short, no authority supports the Superior Court's holding that Plaintiffs failed to establish the superiority of this class action over any alternative.

VI. CONCLUSION

The Superior Court's denial of Plaintiffs' motion for class certification is marked by erroneous legal assumptions that caused the use of improper criteria. The Order should be reversed and the Superior Court should be directed to enter a new order granting Plaintiffs' motion for class certification.

DATED: August 8, 2006

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WORD COUNT CERTIFICATION

I hereby certify that according to the computer program used to prepare the foregoing brief, it consists of 13,901 words, including footnotes.

DATED: August 8, 2006 BINGHAM McCUTCHEN LLP

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PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Mateo, California at 1900 University Avenue, East Palo Alto, California 94303-2223. I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery by FedEx, and correspondence is deposited with FedEx that same day in the ordinary course of business.

Today I served the attached:

APPELLANTS' OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 8, 2006.

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