COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT—DIVISION FOUR

CAPITOL PEOPLE FIRST, et al., Plaintiffs/Petitioners, vs. DEPARTMENT OF DEVELOPMENTAL SERVICES, et al., Respondents/Defendants, vs. CALIFORNIA ASSOCIATION OF STATE HOSPITAL/PARENT COUNCILS FOR THE RETARDED, et al., Intervenors	A113168 Trial Court Case No. 2002-038715

Appeal from an Order of the Superior Court, County of Alameda
Hon. Ronald Sabraw, Judge

BRIEF OF AMICI CURIAE WASHINGTON PROTECTION AND ADVOCACY SYSTEM, NATIONAL DISABILITY RIGHTS NETWORK, MENTAL HEALTH ADVOCACY PROJECT AND PUBLIC INTEREST LAW FIRM OF THE LAW FOUNDATION OF SILICON VALLEY, AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND IN SUPPORT OF PLAINTIFFS' APPEAL OF DENIAL OF CLASS CERTIFICATION

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INTRODUCTION

Amici Curiae submit this brief to put the trial court's denial of class certification in this matter in a broader context. Class litigation to enforce the rights of people with disabilities is ubiquitous and practicable; further, if the class action vehicle is unavailable to institutionalized persons with disabilities, their ability to enforce their civil rights will be at serious risk.

Amici[1] will present information demonstrating that: 1) courts routinely certify classes in these types of systemic reform cases brought on behalf of individuals with developmental disabilities; 2) no significant conflicts exist between the class representatives and the putative class members that would defeat class certification; and 3) if a class is not certified, there will be significant consequences for individuals with developmental disabilities in the state of California.

[1] Amici Curiae are five disability advocacy and civil rights organizations, all of which are profoundly interested in the issue of the availability of class relief for people with developmental disabilities, as set forth in detail in the accompanying *Application of Washington Protection and Advocacy System, National Disability Rights Network, Mental Health Advocacy Project and Public Interest Law Firm of the Law Foundation of Silicon Valley, and Disability Rights Education and Defense Fund for Leave to File Amicus Curiae Brief in Support of Plaintiffs and Appellants.*

I. RELEVANT FACTS

In order to avoid unnecessary duplication and in the interest of judicial economy, amici adopt the summary of significant facts set forth in plaintiffs' opening brief.

II. ARGUMENT

A. Courts Routinely Certify Classes in System Reform Cases Involving the Deinstitutionalization of Individuals with Developmental Disabilities and Their Integration into the Community.

1. The National Trend to Deinstitutionalize People with Developmental Disabilities is Supported by the Passage of the Americans with Disabilities Act and by Significant Case Law Recognizing the Virtues of Community Integration.

Over the last several decades, there has been a national trend to deinstitutionalize individuals with developmental disabilities and integrate them into the community. (See R.W. Prouty & K.C. Lakin, eds., *Residential Services for Persons with Developmental Disabilities: Status and Trends Through 1998,* University of Minnesota, Research and Training Center on Community Living Institute on Community Integration (1999); see also K.C. Lakin, R.W. Prouty, B. Polister & L. Anderson, eds., *Over Three Quarters of All Residential Services Recipients in Community Settings as of June 1999,* 38 Mental Retardation 378 (2000).)

Congress acknowledged the need to end the pervasive segregation of and discrimination against individuals with disabilities when it enacted the Americans with Disabilities Act (ADA) of 1990. (42 U.S.C. § 1101 et seq.). In doing so, Congress determined that:

> [T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

(Sen.Rep. No. 110-116, 1st Sess., p. 20 (1989); H.R.Rep. No. 101-485(II), 2d Sess., p. 50 (1990) [emphasis added].)

Likewise, courts have also recognized that institutionalization has resulted in discrimination and segregation that "rivaled, and indeed paralleled, the worst excesses of Jim Crow." (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 462 (Marshall, J., concurring in part & dissenting in part); see also *id.* at 454 (Stevens, J., concurring) [individuals with mental retardation subjected to "history of unfair and often grotesque mistreatment"].) Following the passage of the ADA, courts held that the ADA obliges states to affirmatively take steps to end segregation of and discrimination against individuals with disabilities—including those with developmental disabilities—who have been institutionalized. (See

Olmstead v. L.C. (1999) 527 U.S. 581, 605-606,[2] see also *Helen L. v. Didario* (3rd Cir. 1995) 46 F.3d 325.[3]) The *Olmstead* court noted that in enacting the ADA, Congress intended to remedy the historical isolation and segregation of individuals with disabilities and discrimination against individuals with disabilities "'in such critical areas as . . . institutionalization'" finding that the discrimination manifested itself in "'outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation.'" (*Olmstead v. L.C.*, *supra*, 527 U.S. at pp. 588-89 [citing 42 U.S.C. §§ 12101(a)(2), (3), (5)].) The Court recognized the discriminatory impact of the fact that:

> In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without

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[2] In *Olmstead*, plaintiffs were two persons with developmental disabilities and mental illnesses. Both had a history of treatment in institutions. Both remained institutionalized even after their treating professionals found them ready for community placement. They sued, alleging that the state's failure to place them in a community-based program, once their treating professionals determined such a placement was appropriate, violated Title II of the ADA. (*Id.* at p. 1.)

[3] In *Helen L.*, plaintiffs challenged the Pennsylvania Department of Public Welfare's policy of providing services to persons with disabilities in segregated institutional settings instead of integrated community-based settings. (*Id.* at pp. 335-339.) The Third Circuit held that the ADA and its attendant regulations defined unnecessary segregation in institutions as a form of illegal discrimination against people with disabilities. (*Id.* at p. 333.)

> mental disabilities can receive medical services they need without similar sacrifice.

(*Id.* at p. 601.)

2. Federal Cases Granting Class Certification Are Relevant in California, and Numerous Federal Courts Have Granted Class Certification in Cases Similar to This One.

Thus, it is clear that Congress and the courts have recognized that the unnecessary institutionalization of people with developmental disabilities is a manifest violation of their fundamental rights. However, the Superior Court's decision in this case deprived these people of a vital weapon in fighting these violations—the class action vehicle.

Cases involving deinstitutionalization of individuals with developmental disabilities, such as this one, are exceptionally well-suited for class treatment because the claims can be proven by showing systemic violations, such as the failure to adopt or follow policies and practices and apply them uniformly to the class members. People with disabilities, especially those who are isolated in institutions, almost always lack the resources to remedy violations of their individual rights based on systemic policies, practices and service gaps, leaving class litigation brought on behalf of themselves and others in similar circumstances as the only route to needed reform. In fact, class actions have become the quintessential means for enforcing the rights of institutionalized persons, to address not

only unlawful conditions of confinement but also policies and practices that result in widespread unnecessary institutionalization.

Plaintiffs here seek systemic relief to remedy defendants' unlawful policies and practices that result in unnecessary institutionalization and in defendants' failure to integrate plaintiffs and putative class members into the community in violation of their constitutional and statutory rights. (See 4JA1036-1042 [Fifth Amended Complaint, "Relief Requested," pp. 95-101, ¶¶ 1-16]; see also 4JA1060, 1061-1071 [Plaintiffs' Mem. Ps & As in Supp. Mot. for Class Cert., pp. 2, 3-13].) Specifically, plaintiffs seek declaratory, mandamus and injunctive relief compelling defendants to develop, adopt and implement policies and practices that will successfully integrate plaintiffs and the putative class members into the community and to take steps to provide the necessary services and supports to those individuals who are at risk of institutionalization. (See 4JA0983-0985 [Fifth Amended Complaint, ¶¶ 171, 173].)

Plaintiffs' Opening Brief addresses in detail the reversible errors the Superior Court committed when it ignored and misapplied California case law in denying class certification. Amici agree with plaintiffs' state-law

[4] In some instances it appears defendants have appropriate policies but do not consistently implement them.

analysis and therefore will not rehash it here. However, the Superior Court also misapplied *federal* case law in relying on the Tenth Circuit Court of Appeals' ruling in *J.B. v. Valdez* (10th Cir. 1999) 186 F.3d 1280. In *Katie A., et al. v. Diana Bonta, et al.* (C.D.Cal. June 18, 2003, No. CV-02-5662), the District Court for the Central District of California certified a class of foster children seeking mental health services in California. In certifying the class, the court correctly declined to follow *Valdez*, finding that that case was inconsistent with other Ninth, Third and Second Circuit rulings in which classes had been certified, and also applied reasoning that conflicted with "strong public policy arguments favoring availability of class action remedies to those subjected to 'system-wide practice[s] or polic[ies].'" (*Id*. at p. 16 [citing *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d. 849, 868; *Walters v. Reno* (9th Cir. 1998) 145 F.3d 1032, 1047].)

Although federal cases are not controlling, California courts have held that the existence of federal court cases certifying classes in similar contexts is indicative that class certification is appropriate. (See *Mendoza v. Tulare* (1980) 128 Cal.App.3d 403, 419-20 [class of prisoners seeking prison reforms certified; court found commonality requirement satisfied in spite of the differences among class members' legal status].) The circumstances of the named and putative class members in the *Capitol*

People First case are analogous and in some cases identical to those in the cases identified and discussed below, so these cases are highly relevant.

For example, courts in the Ninth Circuit have routinely certified classes in cases similar to the one before the Court. In *Armstrong*, the Ninth Circuit upheld the class certification of prisoners with disabilities who alleged that defendants had discriminated against them in parole and parole revocation hearings based upon their disabilities. (*Armstrong v. Davis*, *supra*, at p. 868.) The court held that although the prisoners had different disabilities and accommodation needs, those differences did not defeat class certification because the defendants' policies and their implementation were at issue and the defendants' conduct was common to the class. (*Ibid*.) Furthermore, in *Townsend v. Quasim* (9th Cir. 2003) 328 F.3d 511, 515, the court certified a class of Medicaid recipients with disabilities seeking an injunction preventing the state from requiring them to move from nursing home facilities as a condition of receiving Medicaid services.

Emily Q., et al., v. S. Kimberly Belshe, et al. (C.D.Cal. May 5, 1999, Case No. CV-98-4181) is an additional disability rights case in which a federal court in California certified a class, rejecting challenges to the issue of commonality by the defendants. In *Emily Q*, the court certified a class composed of all current and future children under the age of 21 who were Medicaid beneficiaries placed in locked mental health treatment facilities or

being considered for placement in such facilities or had undergone at least one emergency psychiatric hospitalization related to their current disability within the preceding 24 months. (*Id.* at p. 1.)

Numerous other courts throughout the country have also certified classes similar to the one proposed in this case. For example, in *Ligas v. Maram* (N.D. Ill.) 2006 WL 644474, the court recently certified a class of individuals with developmental disabilities who challenged the state of Illinois' failure to provide them with the option to receive long-term care services in the most integrated setting. (*Id.* at *1.) Defendants argued that plaintiffs failed to meet class commonality requirements because not all of the class members would be entitled to the proposed relief and because of their factual differences. (*Id.* at *2.) In certifying the class, the court held that "the proposed class is challenging the defendants' failure to enact policies regarding community placement, and in assessing this standardized conduct, common questions of law and fact predominate." (*Id*. at *3.)

In two similar cases in Washington, *Allen, et al. v. Western State Hospital, et al.* (W.D.Wash. May 17, 1999, Case No. 99-5018) and *Marr, et al. v. Eastern State Hospital, et al.* (E.D.Wash. April 29, 2002, Case No. 02-0067), the United States District Courts for the Western and Eastern Districts of Washington certified classes in cases involving claims brought by individuals with developmental disabilities with mental health treatment

needs. In both *Allen* and *Marr*, the class members brought claims against the state of Washington for inadequate conditions of care at the state hospital, failure to provide them with integrated community living arrangements, and failure to provide them with adequate and appropriate community-based habilitative and mental health services. (*Allen* at pp. 3-11, *Marr* at pp. 3-12.) Both courts specifically found that in spite of the differences in the treatment needs and other individual variations among the class members, the commonality requirements had been met because the defendants' conduct had been common to the plaintiffs and the plaintiff class. (*Allen* at pp. 5, 6, 9-11, *Marr* at pp.3, 7-9.)

a. Appellate Courts Certifying Classes in Disability Rights Cases

The following is a list and summary of disability rights actions in which classes have been certified. Most of these cases are community integration cases precisely analogous to the Capitol People First case.[5]

Frederick L. v. Dept. of Public Welfare (3d Cir. 2005) 422 F.3d 151, 153 (court certified class of individuals with mental illnesses seeking discharge from psychiatric institution and integration into community-based mental health programs);

[5] The listed cases are examples of cases brought on behalf of individuals with disabilities in institutions or in the community in which a class has been certified. Some of the decisions cited grant class certification; others do not address class certification, but reflect the court's earlier determination and definition of a class.

Armstrong v. Davis, *supra*, 275 F.3d at p. 868 (court certified class of prisoners with disabilities. See discussion above);

Thomas S. v. Flaherty (W.D.N.C. 1988) 699 F.Supp. 1178, aff'd (4th Cir. 1990) 902 F.2d 250, 251 (court certified class of adults with developmental disabilities inappropriately kept in public psychiatric institutions);

Halderman v. Pennhurst State School and Hosp. (E.D.Pa. 1978) 446 F.Supp. 1295, 1298, aff'd in part and rev'd in part (3d Cir. 1979) 612 F.2d 84, 88; rev'd and remanded (1981) 451 U.S. 1, 7, aff'd on remand (3d Cir. 1982) 673 F.2d 647, rev'd and remanded (1984) 465 U.S. 89; consent decree entered (E.D.Pa. 1985) 610 F.Supp. 1221 (court certified class of residents or former residents of state institutions seeking creation of community living arrangements, institutional improvement, and damages);

Society for Good Will to Retarded Children v. Cuomo (E.D.N.Y. 1983) 572 F.Supp. 1300, vacated and remanded (2d Cir. 1984) 737 F.2d 1239, 1243, on remand (E.D.N.Y. 1990) 745 F.Supp. 879 (court certified class of more than 1500 individuals in residence or on the rolls of a state institution for people with developmental disabilities. Class members sought improved institutional care, expansion of community resources and support services, and transfer of most clients to small community residences);

Kentucky Assn. of Retarded Citizens v. Conn. (W.D.Ky. 1980) 510 F.Supp. 1233, 1236, aff'd (6th Cir. 1982) 674 F.2d 582 (court certified class of all persons who reside or may reside in an institution for individuals with developmental disabilities. Class sought to enjoin defendants from new construction and purchase of new institutional facilities);

Michigan Assn. of Retarded Citizens v. Smith (E.D. Mich. 1979) 475 F.Supp. 990, 991, aff'd (6th Cir. 1981) 657 F.2d 102 (court certified class of residents of a state institution for people with developmental disabilities as of the date of the complaint, and all who would reside there in the future. Class members sought provision of habilitative services in appropriate, less restrictive residential alternatives, the prevention of new admissions and improvement of conditions at the state institution);

ABC of North Dakota v. Olson (D.C. N.D. 1982) 561 F.Supp. 473, 475, aff'd (8th Cir. 1983) 713 F.2d 1384, 1387 (court certified class of persons with developmental disabilities who are or may become residents of state institutions who seek community placement and institutional improvement);

Assn. for Retarded Citizens of North Dakota v. Olson (8th Cir. 1983) 713 F.2d 1384, 1387 (court certified class of individuals with developmental disabilities challenging the conditions of their confinement and the state's failure to provide them with alternative community living arrangements);

Coley v. Clinton (8th Cir. 1980) 635 F.2d 1364 (Court of Appeal reversed district court's denial of class certification where plaintiffs challenged inadequate conditions of care at state psychiatric facility and unlawful civil commitment procedures) (Decision certifying class);

b. District Courts Certifying Classes in Disability Rights Cases

Ligas v. Maram, supra (court certified class of individuals with developmental disabilities who challenged the state's failure to provide services in the most integrated setting. See discussion above);

Marr, et al. v. Eastern State Hospital, et al., supra (court certified class of individuals with developmental disabilities and mental health needs challenging, *inter alia*, failure to provide them with integrated community living arrangements. See discussion above);

M.A.C. v. Betit (D.Utah 2003) 284 F.Supp.2d 1298, 1303-04 (court certified class of individuals with developmental disabilities challenging the state of Utah's waiting list for services) (Decision granting class certification);

Katie A., et al. v. Diana Bonta, et al., supra (court certified a class of foster children seeking mental health services in California. See discussion above);

Alexander ex rel. Barr v. Novello (E.D.N.Y. 2002) 210 F.R.D. 27, 38 (court certified class of children with psychiatric disabilities not provided with placements in residential treatment facilities with reasonable

promptness, in violation of Medicaid law) **(**Decision granting class certification);

Boulet v. Celluci (D.Mass. 2000) 107 F.Supp.2d 61, 80-81 (court certified class of individuals with developmental disabilities who challenged state's failure to provide them with Medicaid services with reasonable promptness) (Decision certifying class);

Allen, et al. v. Western State Hospital, et al., *supra* (court certified class of individuals with developmental disabilities and mental health needs challenging, *inter alia*, failure to provide them with integrated community living arrangements. See discussion above);

Emily Q., et al. v. S. Kimberly Belshe, et al., *supra* (court certified class of institutionalized and at-risk children with mental disabilities. See discussion above);

Rolland v. Cellucci (W.D.Mass. 1999) 52 F.Supp.2d 231, 233 (court certified class of all adults with developmental disabilities in Massachusetts residing in nursing facilities, or who are or should be screened for admission to nursing facilities pursuant to federal law);

Connecticut Traumatic Brain Injury Assn. v. Hogan (D.Conn. 1995) 161 F.R.D. 8 (court certified class of all persons with traumatic brain injuries and mental retardation who reside or may reside in the future in state institutions and who seek prevention of placement and retention of non-dangerous persons with mental retardation or traumatic brain injuries in state institutions) (Decision certifying class);

United States v. Pennsylvania (E.D.Pa. 1994) 160 F.R.D. 46, 48 (court certified class of residents and those at risk of placement at a state institution for people with developmental disabilities seeking community placement, quality assurance, and institutional improvement);

Consumer Advisory Bd. v. Glover (D.Me. 1993) 151 F.R.D. 490, 491 (court certified class of residents, outpatients, and guardians of a state-run institution for people with developmental disabilities, seeking placement in the lease restrictive setting and the physical safety of residents);

Martin v. Voinovich (S.D.Ohio 1993) 840 F.Supp. 1175, 1180 (court certified class of more than 9,000 persons in Ohio with developmental

disabilities who are or will be in need of community housing and services that are normalized, home-like and integrated);

Homeward Bound, Inc. v. Hissom Mem. Ctr. (N.D.Ok. 1987) 1987 WL 27104 *3 (court certified class of residents and former residents of a state institution for people with developmental disabilities who sought institutional improvement and placement in integrated community setting);

Medley v. Ginsberg (D.W.V. 1980) 492 F.Supp. 1294, 1297 (court certified class of all persons with developmental disabilities under 23 years old who are or will be institutionalized because of defendants' failure to provide community homes or who are unable to live in their homes due to lack of resources);

Vecchione, et al. v. Wohlgemuth (E.D.Pa. 1978) 80 F.R.D. 32 (court certified class of individuals with mental illness and individuals with developmental disabilities seeking remediation of their conditions of care at state-operated psychiatric facilities).

In the cases discussed above, although the individual circumstances and treatment needs of class members differed, the courts consistently found that the defendants' *conduct* was common to the named plaintiffs and class members and thus found that the commonality requirements for class certification were satisfied and certified the classes. The Court here should find that plaintiffs have met the commonality requirements of Code of Civil Procedure, section 382, reverse the trial court's order, and issue an order directing the trial court to certify the class in this case.

C. The Presence of Dissenting Class Members or Intervenors Has Not Been a Barrier to Class Certification in Similar Class Actions Around the Country.

In addition to erroneously ruling that class treatment was not proper

due to lack of commonality, the Superior Court also erred when it allowed that the objections of a group of people constituting less than 1 percent of the putative class to defeat class certification.

The Superior Court permitted intervention in this case for the limited purpose of "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 developmental centers are not adversely affected by any judgment in this action." (2JA0545-0548 [January 28, 2003 Order].) Nothing in the relief proposed by plaintiffs herein will adversely affect those interests. Plaintiffs seek to enjoin defendants from further perpetuating their discriminatory and unlawful conduct that results in the unnecessary institutionalization of plaintiffs and members of the putative class. Specifically, plaintiffs seek an order from the Court requiring defendants to properly implement California's Lanterman Developmental Disabilities Services Act ("Lanterman Act") and other state and federal laws by providing the required assessments and individual planning and then developing adequate community services and supports to meet the identified needs. (See 4JA1036-1042 [Fifth Amended Complaint "Relief Requested," ¶¶ 1-16].)

Just as significant as the relief that plaintiffs seek is the relief that they do *not* seek: plaintiffs do not seek alteration of the legal requirements

and individual rights under the Lanterman Act or other state and federal laws to an individual planning process and services and related individual administrative or court review of disagreements regarding these matters, or alteration of the legal requirements and individual rights to services under the Lanterman Act or other state or federal laws.

The trial court committed reversible error by holding that because the intervenors, who oppose community placement, represent some of the putative class members, the named plaintiffs could not adequately represent their interests. (14JA3617 [Order Denying Class Certification].) Amici agree with plaintiffs' analysis in their opening brief, including the existence of controlling California precedent in the form of *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 479, prohibiting denial of class certification on the basis applied by the Superior Court.

In addition, over the course of decades, federal courts have granted class certification in a wide variety of disability rights and community integration cases despite opposition by some individuals. In numerous systemic reform cases brought on behalf of individuals with developmental disabilities, courts have certified classes, finding the named plaintiffs were adequate representatives even where disagreements as to prospective relief existed. (See e.g., *Vecchione*, *supra*, 80 F.R.D at p. 57, cited approvingly by *Carolyn C.* (D.Neb. 1996) 174 F.R.D. 452, 466 [holding that court may not

refuse to certify a class simply because it believes that "members of the class may [at some point] prefer to leave [a] violation of their rights unremedied" (citations omitted)].)

In *Vecchione*, a class was certified of individuals with mental illnesses and individuals with developmental disabilities. (*Id.* at p. 50.) When the court was asked to approve the settlement, a group representing class members with developmental disabilities objected to the settlement on the grounds that it was of benefit to class members with mental illness but stigmatized and harmed the class members with developmental disabilities and moved to alter or amend the class. (*Id*. at pp. 40-41.) The court rejected the objections and denied the motion to alter or modify the class to remove the individuals with developmental disabilities from the class, holding that to do so would be "drastic and untoward." (*Id.* at p. 49.) Specifically, the court found that removing them from the class would cause those class members to continue to suffer the unconstitutional practices of the defendants. (*Id*. at p. 57.)

The fact that the intervenors do not object to defendants' unconstitutional and unlawful practices and believe that placement in the institution is the best service available does not result in a conflict between the named plaintiffs and those represented by the intervenors that prevents class certification. (See *Messier v. Southbury Training School* (D.Conn.

1998) 183 F.R.D. 350, 356; *Wyatt By and Through Rawlins v. Poundstone* (M.D.Ala. 1995) 169 F.R.D. 155; see also *Caroline C., By and Through Carter v. Johnson* (D.Neb. 1996) 174 F.R.D 452, 466.) Class certification is particularly beneficial to the class—including future class members—where, as here, an action seeks to end discriminatory and unlawful practices by defendants. (See *Messier*, *supra*, 183 F.R.D. at p. 356; *Caroline C.*, *supra*, 174 F.R.D. at 466.)

Similar issues have been addressed in other institutional class litigation around the nation involving people with disabilities in which some individuals opposed class certification. Courts have not denied class certification in the vast majority of such cases. "[T]he question should not be whether there is a 100% concurrence of interests within the class, but rather whether the class as a whole and as to some primary issues being litigated is being adequately represented." (*Wyatt, supra,* 169 F.R.D. at p. 161 [court refused to decertify class challenging discriminatory and unconstitutional practices by the state in failing to place individuals with developmental disabilities in the community where some class members opposed community placement]; see also *Messier*, *supra*, 183 F.R.D. at p. 355 [court refused to allow some class members to opt out of class in case brought on behalf of individuals with developmental disabilities where 85% of the class opposed community placement].) As plaintiffs demonstrate in

their opening brief, regardless of how one calculates the percentage of the overall putative class that defendant intervernors comprise in the instant case, it is small—significantly less than in *Messier*.

The presence of this handful of objectors should not be allowed to nullify the rights of all Californians with developmental disabilities. Absent class certification, individuals with developmental disabilities in California are likely to continue to suffer irreparable harm as a result of the state's and the regional centers' continuing and widespread failure to provide services and supports to plaintiffs and the putative class members in the most integrated settings.

D. If a Class Is Not Certified, the Putative Current and Future Class Members Are Unlikely to Pursue Their Claims and Will Consequently Be Subjected to Needless Ongoing Segregation.

The Superior Court compounded its errors regarding commonality and adequacy by erroneously ruling that a class action was not a superior means of redress here. This conflicts with a long line of precedent holding that when courts examine the ability of class members to maintain separate actions, they are to examine factors including, but not limited to, "geographical diversity of class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought." (See *National Association of Radiation Survivors v. Walters*

(N.D.Cal. 1986) 111 F.R.D. 595, 599 [class certification appropriate where claimants with disabilities and their widows may be unable to bring individual suits due to lack of financial resources].) In *Armstead v. Pingree* (M.D. Fla. 1986) 629 F.Supp. 272, 279, the court specifically pointed out that institutionalized individuals with developmental disabilities are particularly suited for class certification, saying:

> The Court has also considered the ability of the individual plaintiffs to bring his or her own separate action if the amended class certification were denied. Considering plaintiffs' confinement, their economic resources, and their mental handicaps, it is highly unlikely that separate actions would follow if class treatment were denied. This is *precisely* the type of group which class treatment was designed to protect.

(*Id.* at p. 279 [emphasis added].)

As in *Armstead*, here the named plaintiffs seek to represent individuals with developmental disabilities who are institutionalized. As a result of their confinement, and their limited economic resources, they would find it extremely difficult to bring separate actions.

Moreover, individuals such as the plaintiffs and the putative class members are unlikely to be able to find counsel to represent them individually given the dearth of private counsel who are experienced and willing to litigate these cases. (See Michael L. Perlin, *Fatal Assumptions: A Critical Analysis of the Role of Counsel in Mental Disability Cases*, 16 Law

& Hum. Behav. 39, 42, 49 (1992).) No Sixth Amendment right to counsel exists in these types of cases. (See *Fatal Assumptions, supra,* 16 Law & Hum. Behav. at pp. 47-49.) Thus, in order to obtain counsel, a person is likely to have to pay for counsel, an impossible proposition for much of the putative class, given their limited resources.

This case presents issues of significant importance for the rights of individuals with disabilities, particularly individuals with developmental disabilities who are institutionalized or are at risk of institutionalization. If a class is not certified in this case, each and every individual of the approximately 7,775 class members who are institutionalized would need to come before the court and present the same facts pertaining to the defendants' conduct, provided each individual had the resources and ability to bring an individual case, which is highly unlikely. Thus, absent class certification, the unnamed current and future class members are at serious risk of being unable to have their day in court, continuing to be denied access to services to which they are entitled and to be subjected to discrimination as a result of needless segregation. Class certification here is necessary to "prevent a failure of justice." (*Mendoza, supra,* 128 Cal.App.3d at p. 416 [citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458].)

IV. Conclusion

Contrary to the trial court's decision in this case, classes have been certified in the overwhelming majority of similar cases where individuals with developmental disabilities have brought actions to vindicate their rights to live and receive services in the most integrated setting. And courts have also consistently held that intervenors' objection to the proposed remedy poses no obstacle to certification. Consistent with these cases, this Court should reverse the trial court's denial of class certification and direct the trial court to enter a new order granting Plaintiffs' Motion for Class Certification.

DATED this 7th day of November 2006.

Respectfully submitted,

LAW FOUNDATION OF SILICON VALLEY
PUBLIC INTEREST LAW FIRM

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By James F. Zahradka II

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1))

The text, including footnotes, of Amici Curiaes' Brief consists of 5,390 words as counted by the word-processing program used to generate the document.

Dated: November 7, 2006

Respectfully submitted,

LAW FOUNDATION OF SILICON VALLEY
PUBLIC INTEREST LAW FIRM

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By James F. Zahradka II