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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Rochelle Walking Eagle, Madonna Pappan, and Lisa Young, the individual named plaintiffs in this putative class action, each saw their two children removed from their homes by the Defendants or their agents based on allegations of abuse or neglect. In each case, Defendants conducted a temporary custody ("48-hour") hearing that, Plaintiffs allege in their complaint, failed to provide these parents with the procedural rights guaranteed to them by the Fourteenth Amendment's due process clause and the Indian Child Welfare Act (ICWA). After these hearings, Walking Eagle, Pappan, and Young suffered through months of separation from their children before they were returned home. These separations were deeply traumatic for both the mothers and their children.

Together with the Oglala and Rosebud Sioux Tribes, the three individual named plaintiffs brought this lawsuit for declaratory and injunctive relief in order to protect themselves and other Indian families from experiencing these grievous harms in the future. Accordingly, the three named plaintiffs wish to represent a class consisting of "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota and who, like the plaintiffs, are parents or custodians of Indian children." *See* Class Action Complaint for Declaratory and Injunctive Relief (Dkt. 1) at ¶ 7. They therefore submit the attached Motion for Class Certification.

In order to proceed as a class, Plaintiffs must meet the Rule 23(a) prerequisites and, in addition, must demonstrate that their case falls into one of the three subcategories of Rule 23(b). *See Christina A. ex rel. Jennifer A. v. Bloomberg,* 197 F.R.D. 664, 667 (D.S.D. 2000) (certifying a (b)(2) class of juvenile detainees at the training school in Plankinton). Subsection (a) of Rule 23 requires that (1) the class be "so numerous that

joinder of all members is impracticable;" (2) there be "questions of law or fact common to the class;" (3) the claims or defenses of the representative parties be "typical of the claims or defenses of the class;" and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Subsection (b)(2) of Rule 23, the category relevant here, provides that class certification is proper where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

As demonstrated below, this case satisfies all the prerequisites of Rule 23(a), (b)(2). Class certification is just as appropriate in this civil rights case as it was in *Christina A.*, 197 F.R.D. at 671. The Court should therefore certify the class, allowing the three individual named plaintiffs to represent all members of federally recognized tribes raising Indian children in Pennington County.

ARGUMENT

The proposed class meets the requirements of Rule 23(a) and those of Rule 23(b)(2), rendering class certification appropriate.

1. Rule 23(a)(1): Numerosity

Plaintiffs must show that the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). When determining whether the numerosity requirement has been met, "[i]n addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559–60 (8th Cir.

1982). The Eighth Circuit has developed "[n]o rigid rule of thumb" as to how large the class must be in order to satisfy the numerosity requirement. *Gries v. Standard Ready Mix Concrete, L.L.C.*, 252 F.R.D. 479, 484 (N.D. Iowa 2008) (citation omitted). Generally speaking, a class containing more than forty members is sufficiently numerous. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of forty members"); *Richter v. Bowen*, 669 F. Supp. 275, 281 (N.D. Iowa 1987). In some situations, certification has been granted with fewer members. *See Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 255 (S.D. Iowa 2001) (certifying (b)(2) class with only seventeen members).

As of 2010, when the most recent complete census was conducted, there were 576 households in Pennington County in which members of the Oglala Sioux Tribe were raising children under the age of 18, 195 such households containing members of the Rosebud Sioux Tribe, and 57 Standing Rock Sioux households. *See* Profile of General Population and Housing Characteristics: 2010, 2010 Census American Indian and Alaska Native Summary File (Oglala Sioux Tribe; Rosebud Sioux Tribe; Standing Rock Sioux Tribe), attached as Exhibits 1-3. Thus, the class would contain more than 800 adults using the very conservative assumption that none of these households contains more than one parent or custodian. This figure also excludes numerous parents living in Pennington County who are members of other federally recognized tribes. It is therefore clear that the size of the class far surpasses the threshold requirement for numerosity based on the sheer number of current class members who reside in Pennington County. *See Christina A.*, 197 F.R.D. at 667 (certifying a (b)(2) class of 89 juveniles).

Further, "the fluid nature of the population" of Pennington County residents makes joinder impractical. *See Christina A.*, 197 F.R.D. at 667; *see also Atkins v. Toan*, 595 F. Supp. 104, 105 (W.D. Mo. 1984) ("Joinder is also impractical because class membership is fluid."). Because Indian parents will be moving into and out of Pennington County throughout the course of this litigation, it would be virtually impossible to join them individually. Class treatment is therefore efficient and appropriate.

2. Rule 23(a)(2): Commonality

Plaintiffs must also establish that there are "questions of law *or* fact common to the class." Fed R. Civ. P. 23(a)(2) (emphasis added). Indeed, there only needs to be one question of law or fact common to the class if it is a core question. "'The commonality requirement is met if plaintiffs' grievances share a common question of law or fact.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010), quoting *Marisol A. v. Giuliana*, 126 F.3d 372, 376 (2d Cir. 1997). *See also J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (holding that subsection (a)(2) requires "only a single issue common to the class."); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.")

The commonality requirement is satisfied "'where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.'" *Paxton*, 688 F.2d at 561 (internal citation omitted). Such a common question of law is presented when the class claims turn on whether policies and procedures "amount to or result in constitutional deprivations of

Plaintiffs' rights." *Christina A.*, 197 F.R.D. at 667. Thus, the commonality requirement is met where "[a]ll members of the class seek a declaration that an illegal policy and practice exists and an injunction should be issued prohibiting such practice." *Lambertz-Brinkman v. Reisch*, 2008 WL 4774895 (D.S.D. Oct. 31, 2008) (citing *DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171, 1174 (8th Cir. 1995)).

Here, the resolution of Plaintiffs' claims turns entirely on common questions of law and fact. Plaintiffs allege that Defendants policies, practices, and customs are unconstitutional and violative of ICWA. What, precisely, these policies, practices, and customs consist of is the overarching, common factual question in this case; whether those policies, practices and customs indeed violate Plaintiffs' procedural rights under the Fourteenth Amendment and ICWA is the overarching, common legal question.[1] Indeed, because Plaintiffs seek no relief tailored to the individual circumstances of class members, all relevant questions of law and fact are common to the class.

3. Rule 23(a)(3): Typicality

Rule 23(a) also requires that the claims or defenses of the representative parties be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The burden of showing typicality is not an onerous one." *Paxton*, *688* F.2d at 562. *See Christina A.*, at 668 (citing *Paxton* on this point). The typicality requirement is "satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or

[1] Of course, in addition to this overarching question of law are other, narrower questions of law common to the class. For instance, the Plaintiffs contend that they have a right at the 48-hour hearing to examine both the petition for temporary custody order and the ICWA affidavit, as well as a right to cross-examine the author of that affidavit. Each of those contentions presents a separate question of law. However, what is important here is that these questions are common to the class, and the Court's ruling will apply equally to each member of the class.

are based on the same legal or remedial theory." *Paxton,* at 561-62 (citation and internal marks omitted); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) ("Typicality under Rule 23(a)(3) means that there are other members of the class who have the same or similar grievances as the plaintiff.") (citation and internal marks omitted). In a case seeking only class-wide injunctive and declaratory relief, typicality is presumed. *See Lambertz-Brinkman*, 2008 WL 4774895, at *2 ("Typicality exists if the proposed class members have the same or similar grievances in that they have been or will be subjected to the same allegedly unlawful treatment as the named plaintiffs.") (citing *Paxton*, 688 F.2d at 562). Further, a finding of commonality generally compels a finding of typicality. See *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 674 (S.D. Iowa 2009) (citing *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 333 n. 13 (N.D.Ill. 1995)).

The claims of Walking Eagle, Pappan, and Young are not merely typical of, but are identical to, those of each class member: all allege that Defendants engage in systemic policies, practices, and customs that deprive them of their constitutional and statutory rights to timely and adequate hearings, preceded by adequate notice, when the state removes their children from their homes. That each member of the class may have "personally experienced a different combination of these conditions, policies and practices does not defeat the typicality of the claims because everyone in the class is subject to them." *Christina A.*, 197 F.R.D. at 668.

4. Rule 23(a)(4): Fairness and Adequacy of Representation

Rule 23(a)'s final requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement

"'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a)," as all of these requirements turn on whether "'maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).

"The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63. Where, as here and in *Christina A.*, each of the plaintiffs is seeking the same remedy and no member of the class is presenting an individual claim, there is no "real possibility of conflicts between the named Plaintiffs and the other members of the class." *See Christina A.*, at 670. Moreover, all three of the individual named plaintiffs have suffered from Defendants' unconstitutional policies and had their children removed from their homes, and these injuries constitute a driving force that motivates them to vigorously prosecute this case.

Plaintiffs' attorneys at the American Civil Liberties Union (ACLU) and the Hanna Law Offices are well qualified to litigate this case and have adequate resources to devote to it. Lead attorney Stephen Pevar, Senior Staff Counsel with the ACLU, has litigated some 100 class action civil rights cases since his admission to the South Dakota Bar in 1971. Mr. Pevar is the author of *The Rights of Indians and Tribes* (Oxford Univ. Press 2012), and currently teaches American Indian Law as an adjunct professor at the University of Connecticut School of Law. Dana Hanna, a former attorney general of the

Rosebud Sioux Tribe, has represented tribal interests in state and federal court litigation for some fifteen years. Robert Doody, Executive Director of the ACLU of South Dakota, has been litigating civil rights cases for seven years. Rachel Goodman, Staff Attorney with the ACLU's Racial Justice Program in the ACLU national office in New York City, will provide additional litigation support. Collectively, class counsel are competent to handle this litigation. Moreover, this action is not collusive. These attorneys know of no antagonism between the interests of the individual named plaintiffs and the members of the class.

5. The requirements of subsection (b)(2) are met.

Plaintiffs seek to certify the class pursuant to Rule 23(b)(2), which allows for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The instant case is a prototype (b)(2) action First, as a matter of factual evidence, the Defendants either have, or have not, pursued the policies, practices, and customs cited in Plaintiffs' complaint. If they have acted in that manner, then each member of the putative class will be entitled to the same final injunctive or corresponding declaratory relief.[2]

[2] The Supreme Court's decision in *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), confirms the propriety of class action litigation in cases such as the one at Bar, although it cautions against the use of class actions in certain omnibus (b)(3) damages cases. Class certification under (b)(2) is appropriate "when a single injunction or declaratory judgment would provide relief to each member of the class," as is the case here. *Id.* at 2557. Thus, "even after *Wal–Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs." *Floyd v. City of New York*, 283 F.R.D. 153, 173 (S.D.N.Y. 2012).

Courts must read Rule 23(b)(2) liberally in the context of civil rights suits. *Christina A.*, 197 F.R.D. at 671. "If Rule 23(b)(2) plainly applies and there is no prejudice to the Defendants, the class should be certified so that any injunctive relief awarded to the plaintiff is made 'explicit and unmistakable.'" *Id.* at 672 (quoting *Rodriguez v. Percell*, 391 F.Supp. 38, 41 n. 2 (S.D.N.Y. 1975)). Here, Rule 23(b)(2) applies on its face. Indeed, Defendants stand to gain as much from class certification as do the Plaintiffs: classwide resolution will allow the Defendants to avoid a multiplicity of lawsuits raising identical claims. Thus, this case satisfies the prerequisites of (b)(2).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion to certify the class pursuant to Rule 23(a), (b)(2) be granted.

Respectfully submitted this 22nd day of April, 2013.

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