22-7

United States Court of Appeals
for the Second Circuit

AYANNA J., by her next friend, MEYGHAN MCCREA, DAMEON C., by his next friend, REVEREND DOCTOR GWENDOLYN HADLEY-HALL, OLIVIA R., by their next friend, DAWN CARDI, MATTHEW V., by their next friend, SAMUEL D. PERRY, Individually and on behalf of a class of all others similarly situated, MIKAYLA G., by her next friend, MICHAEL B. MUSHLIN, VALENTINA T.C., by their next friend, RACHEL FRIEDMAN, JOSE T.C., by their next friend, RACHEL FRIEDMAN, LUCAS T., by their next friend, RACHEL FRIEDMAN, MYLS J., by their next friend, ELIZABETH HENDRIX, XIMENA T., by their next friend, RACHEL FRIEDMAN, MALIK M., by their next friend, ELIZABETH HENDRIX, EMMANUEL S., by their next friend, SAMUEL D. PERRY, Individually and on behalf of a class and all others similarly situated, ALEXANDRIA R., by her next friend, ALISON MAX ROTHSCHILD, THIERRY E., by his next friend MICHAEL B. MUSHLIN, ELISA W., XAVION M., by his next friend, MICHAEL B. MUSHLIN, TYRONE M., by his next friend, BISHOP LILLIAN ROBINSON-WILTSHIRE, ANA-MARIA R., by their next friend, DAWN CARDI, BRITTNEY W., by her next friend, SHAMARA MILLS,

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, SHEILA J. POOLE, Commissioner of the New York State Office of Children and Family Services, in her official capacity,

Defendants-Appellees,

(*caption continues inside front cover*)

On Appeal from the United States District Court
for the Southern District of New York

CORRECTED PAGE PROOF BRIEF FOR APPELLEE SHEILA J. POOLE

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Dated: July 21, 2022

(*caption continues from front cover*)

STATE OF NEW YORK, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, DAVID HANSEL, Commissioner of the New York City Administration for Children's Services, in his official capacity, NEW YORK CITY ADMINISTRATION FOR CHILDRENS SERVICES,

Defendants,

THE LEGAL AID SOCIETY, LAWYERS FOR CHILDREN, INC., THE CHILDREN'S LAW CENTER OF NEW YORK, CENTER FOR FAMILY REPRESENTATION, ESQ., BRONX DEFENDERS, BROOKLYN DEFENDER SERVICE, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM,

Intervenors.

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PRELIMINARY STATEMENT

Plaintiffs—nineteen children who were previously (but are no longer) in foster care in New York City—sought to certify a class of all children who are or will be in the New York City foster care system to litigate constitutional and statutory challenges to the State and City's administration of foster care. Plaintiffs' claims against the sole remaining state defendant—Sheila J. Poole, Commissioner of the New York State Office of Children and Family Services (OCFS)—are based on unspecified deficiencies in OCFS's oversight of New York City's Administration for Children's Services (ACS) and various contract agencies.[1]

In September 2016, the United States District Court for the Southern District of New York (Swain, J.) denied plaintiffs' first motion for class certification for lack of evidence to support the requirements for certification. In September 2021, the district court (Wood, J.) denied plaintiffs' renewed motion, holding that, despite two and a half years of discovery, plaintiffs still had not met their burden to establish that there were common questions to which common answers could drive resolution of

[1] This brief is submitted solely on behalf of Commissioner Poole.

the litigation or that the claims of the named plaintiffs were typical of the claims of other class members. This Court should affirm.

Plaintiffs have failed to establish commonality because the outcome of any given child's case is driven by multiple independent actors who are not parties to this litigation. Plaintiffs insist that they do not challenge individual case outcomes but system-wide policies and practices that purportedly place all children in foster care at a risk of harm. However, plaintiffs fail to identify any policy or practice attributable to OCFS that is responsible for plaintiffs' allegedly common injuries. Plaintiffs complain obliquely that OCFS fails to exercise adequate oversight over ACS but fail to show any specific system-wide oversight lapses that have affected children in the foster care system as a class.

For similar reasons, plaintiffs have also failed to establish that the claims of the named plaintiffs are typical of the claims of all children in the New York City foster care system. Undisputed record evidence shows that children with long stays in foster care, such as the named plaintiffs, have significantly more complex cases than other children in the foster care system. Moreover, the named plaintiffs failed to demonstrate that

their injuries are traceable to class-wide policies rather than to individual circumstances.

Denial of class certification may also be affirmed on several independent grounds not reached by the district court. As defendants argued below, the named plaintiffs do not adequately represent the class because at least some of the relief named plaintiffs seek—namely, earlier and more frequent petitions to terminate parental rights—is squarely contrary to relief sought by prospective class members seeking family reunification. And class counsel's representation is inadequate because, among other things, counsel never met with any of the named plaintiffs prior to filing this lawsuit. Separately, plaintiffs have not established that an injunction requiring OCFS to exercise its oversight responsibility in plaintiffs' preferred manner is appropriate, as is required to certify a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Finally, the district court also properly declined to certify either of plaintiffs' two proposed subclasses. Plaintiffs forfeited any argument with respect to subclasses by failing to brief the issue below. Plaintiffs have also failed to show that either of the subclasses satisfies Rule 23's requirements or can properly be certified as against the state defendant.

ISSUES PRESENTED

1. Did the district court abuse its discretion in declining to certify a class of all children who are or will be in the custody of New York City's foster care system?

2. Did the district court abuse its discretion in declining to certify either of plaintiffs' proposed subclasses?

STATEMENT OF THE CASE

A. Factual Background

1. New York State's foster care system

New York State's foster care system is supervised statewide by OCFS and administered by fifty-eight local departments of social services: fifty-seven departments corresponding to the fifty-seven counties outside of New York City, and ACS, which is responsible for the five counties in New York City.[2] (ECF 498 at 1-2; *see also* ECF 379 at 4.)

OCFS exercises its supervisory responsibilities by, among other things: (i) publishing new and updated regulations and guidance docu-

[2] OCFS also oversees the Saint Regis Mohawk Tribe's local administration of its foster care system. (ECF 498 at 2.)

ments; (ii) upgrading, maintaining, and monitoring a centralized child welfare computer system and database; (iii) maintaining regular and constant communication with local departments; (iv) reviewing and approving local departments' individual policies, corrective actions, and program improvement plans; (v) exercising direct oversight of local departments' approved contractors; (vi) approving and supervising local departmental initiatives; and (vii) collaborating with the United States Department of Health and Human Services (HHS) to assess conformity with federal child welfare law. (*See* ECF 498 at 3-13.) OCFS's supervisory responsibilities are carried out by the agency's Division of Child Welfare and Community Services and its regional offices. (*Id.* at 1-3.)

As a condition of receiving federal reimbursement for certain foster-care-related payments, OCFS must ensure that local departments such as ACS comply with a plan that the State submits to the Secretary of HHS for approval. *See* 42 U.S.C. § 672; *see also New York ex rel. N.Y. State Off. of Child. & Fam. Servs. v. United States Dep't of Health & Hum. Servs.' Admin. for Child. & Fams.*, 556 F.3d 90, 92-93 (2d Cir. 2009). Among other things, federal law requires that a State have a written case plan for each

child and that a State review the status of each child in care at least every six months. *See* 42 U.S.C. § 675(1), (5).

2. The New York State Office of Children and Family Services' (OCFS) supervision of New York City's administration of foster care

As noted above, ACS administers the foster care system in New York City. (ECF 379 at 4; ECF 498 at 2.) Subject to certain exceptions not relevant here, children in foster care in New York City are placed in the custody of the Commissioner of ACS. (*See* ECF 379 at 4.) *See* Social Services Law (SSL) §§ 56, 61(1), 383(2). The placement of a child in ACS custody triggers a proceeding in New York State's Family Court to resolve issues pertaining to the care, custody, and permanency of the child. (*See* ECF 379 at 3.)

It is undisputed that there is "frequent interaction between OCFS and ACS at all levels." (*See* ECF 440 at 54; *see* ECF 442-7 at 17; ECF 442-18 at 7; ECF 442-21 at 11.) OCFS and ACS personnel regularly conduct in-person meetings and conference calls, and routinely communicate by email. (ECF 498 at 6; *see* ECF 440 at 54; ECF 442-7 at 17; ECF 442-18 at 7; ECF 442-21 at 11.) OCFS holds monthly meetings with representatives from ACS to evaluate and discuss developments in ACS's policies,

practices, and programs. At least every three months, OCFS reviews data generated by ACS, which includes, inter alia, data covering repeat maltreatment, entries into and exits from foster care, and length of time to permanency. (*See* ECF 442-7 at 17-18; ECF 498 at 6.) Finally, OCFS's New York City Regional Office supervises and provides support to ACS and its approved contractors. (*See* ECF 498 at 3.)

3. The New York City Administration for Children's Services' (ACS) delegation of case management activities to contract agencies pursuant to OCFS oversight

ACS delegates certain case management activities—including the placement of children into foster homes, casework contacts, and the provision of services to children and parents—to nonprofit organizations referred to as "contract agencies." (*See* ECF 498 at 2.) Such delegation occurs pursuant to the Improved Outcomes for Children program, which is authorized by state law and operates subject to OCFS approval and supervision. *See* SSL § 153-k(4). During the period relevant to this litigation, ACS contracted with twenty-six contract agencies. (*See* ECF 498 at 2; *see also* ECF 379 at 4; ECF 491 at 1-2; ECF 493 at 18, 27.)

OCFS exercises substantial oversight with respect to the Improved Outcomes for Children program. (ECF 498 at 5-8.) Among other things, OCFS requires ACS to periodically submit a comprehensive report regarding the program, which details (i) current preventive and foster care services, including but not limited to the reform initiatives and other programs ACS has developed and implemented; (ii) data collected by ACS and its alignment with the program's core indicators; (iii) proposed data targets and goals; (iv) strategies to meet the stated goals; and (v) fiscal reporting. (*Id.* at 5; *see, e.g.*, ECF 442-68.) Following submission of this report, OCFS and ACS engage in an iterative process, consisting of regular meetings, telephone calls, emails, and exchanges of drafts, during which the report is reviewed and revised by both OCFS and ACS until OCFS is satisfied with its terms and approves the report. The process requires review from other state agencies, including the New York State Division of Budget. (ECF 498 at 5-6; *see* ECF 442-7 at 6-7; ECF 442-21 at 10.) OCFS also reviews issues related to the Improved Outcomes for Children program at monthly meetings with representatives from ACS.

(*See* ECF 442-7 at 17; ECF 498 at 6.) OCFS re-reviewed and re-approved the program in May 2019 (ECF 498-2) and again in July 2021.[3]

OCFS supervises ACS's contract agencies directly through a process called "voluntary agency reviews" (VARs). VARs are comprehensive on-site and document-based reviews that require extensive resources from both OCFS and contract agency personnel. A VAR generally takes nine months to complete, not including any additional time that may be needed to implement corrective action. The on-site portion of the review consists of interviews with children in care, family, and agency staff; case record reviews of a representative sample of the agency's cases; observations of the agency's programming; and subsequent quality control by a regional office staff member. If a VAR identifies the need for any corrective action, OCFS will implement and oversee a detailed program improvement plan.[4] (*See* ECF 498 at 7-8; *see also* ECF 442-86.)

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[3] The state defendant has provided a copy of this approval letter to plaintiffs' counsel via email and will provide a copy to this Court upon request.

[4] The director of OCFS's New York City Regional Office estimated that "90 percent" of agencies receive a performance improvement plan after a VAR. (ECF 442-7 at 20.)

OCFS also conducts quarterly site visits of all contract agencies. During these on-site visits, OCFS staff follow up on issues identified in the most recent VAR, review the progress of any outstanding corrective action, interview both agency staff and foster children placed at the agency, perform additional reviews of safety issues and incident logs, review a representative sample of case files, and discuss new or amended policies. OCFS documents its findings in a quarterly site visit report. (*See* ECF 498 at 8.)

4. Recent developments in OCFS systems and policies

OCFS regularly updates its systems to increase the level of care to the children and families it serves. For example, in 2019, OCFS implemented a "placement module," which provides a searching and matching feature designed to assist caseworkers in finding appropriate foster care placements based on several key metrics, including a child's primary language, medical issues, and emotional needs. (*See* ECF 498 at 10; ECF 498-4.) OCFS also recently upgraded its statewide centralized database to allow users to upload digital photographs, documents, and vital records directly into the database, making this information more easily available to other individuals who may provide services for the child (such as another

caseworker, a supervisor, or a caseworker at a different contract agency). (*See* ECF 498 at 10; ECF 498-3.) Another new monitoring tool allows OCFS to use data collected from the central database to conduct spot checks on a random sample of foster and adoptive homes. (ECF 498 at 11.)

OCFS also regularly refines its policies in response to feedback and experiences. For example, OCFS's recent Kin-First Firewall policy requires each local department of social services, including ACS, to implement a higher, second-level review during the placement process to verify that all viable relatives and significant adults in a child's life have been exhaustively considered for a kinship placement before a non-kinship placement is made.[5] (ECF 498 at 4.) OCFS also routinely reminds local departments of social services and contract agencies about best practices in maintaining and documenting casework contacts on a timely basis. *See, e.g.*, OCFS, Informational Letter No. 20-OCFS-INF-11 (Nov. 20, 2020), https://tinyurl.com/4v9b53uu.

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[5] New York state and federal law both prioritize family reunification. *See* SSL §§ 131(3), 384-b(1)(a)(ii)-(iii); Family First Prevention Services Act of 2018, Pub. L. No. 115-123, tit. VII, 132 Stat. 64, 232-69 (codified at 42 U.S.C. § 671 et seq.).

B. Procedural History

1. The complaint and plaintiffs' first class certification motion

In July 2015, next friends of ten children who entered the foster care system in New York City between 2002 and 2013 filed this putative class action, seeking declaratory and injunctive relief to remedy alleged deficiencies in New York City's foster care system. (ECF 1.) The complaint was subsequently amended to name nine other plaintiff children. (ECF 91.) The remaining defendants in this action are the City of New York and Commissioner Poole. (*See* ECF 278; ECF 343.)

The first two claims in the amended complaint allege substantive due process violations by the state and city defendants on a theory of deliberate indifference under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). (*See* ECF 91 at 115-116; *see also* Br. for Pls.-Appellants (Br.) at 33-34, 39.) The third claim asserts various statutory violations by the state and city defendants under the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act

of 1997.[6] (*See* ECF 91 at 63, 117-119.) The fourth and fifth claims consist of state statutory and contract claims brought only against the city defendants. (ECF 91 at 119-122.)

In December 2015, plaintiffs moved to certify a class of "children who are now or will be in the foster care custody of the Commissioner of" ACS. (Mem. of Law in Supp. of Am. Mot. for Class Certification at 1 (Certification Mem.), ECF No. 88.) The city defendants and several intervenor nonprofit organizations opposed class certification, including on the ground that the amended complaint "seriously misrepresented" the realities of New York City's foster care system.[7] (*See* Objs. of The Legal Aid Soc'y et al. to Proposed Settlement at 3 (Objs. of The Legal Aid Soc'y

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[6] The district court dismissed plaintiffs' theories against the state defendant described in paragraphs (a), (c), (d), (e), (f), and (j) of the third claim. (*See* ECF 397 at 5.)

[7] The intervenors were The Bronx Defenders, Brooklyn Defender Services, Center for Family Representation, Inc., Neighborhood Defender Service of Harlem, Lawyers for Children, Inc., The Children's Law Center, and The Legal Aid Society. (Mem. of Law in Supp. of Brooklyn Def. Servs. et al.'s Mot. to Intervene, ECF No. 182; Objs. of The Legal Aid Soc'y et al. to Proposed Settlement, ECF No. 187.) The state defendants did not oppose plaintiffs' first motion for class certification because the parties had reached a preliminary settlement agreement that was later rejected by the district court. (*See* ECF 259.)

et al.), ECF No. 187; *see also* City Defs.' Mem. of Law in Opp'n to Mot. for Class Certification, ECF No. 205.)

The district court (Swain, J.) denied certification, holding that "the very breadth of the common questions framed by Plaintiffs . . . undermines Plaintiffs' ability to demonstrate that certification of a broad unitary class of children who are or will be in foster care is appropriate." (ECF 282 at 3-4.) The district court also questioned the veracity of many of plaintiffs' allegations and observed the dearth of any allegations concerning most of the twenty-six contract agencies used by ACS. (*Id.* at 2-3.) The district court stated that plaintiffs could renew their motion for class certification only if they provided "an evidentiary record that demonstrates satisfaction of the requirements of Rules 23(a) and 23(b)(2) as to both the broad class and appropriate subclasses." (*Id.* at 4.)

2. Plaintiffs' second class certification motion and the decision below

After two and a half years of discovery, plaintiffs renewed their motion for certification of an identical class—"children who are now or will be in the foster care custody of the Commissioner of ACS." (*See* ECF

440 at 14.) The motion also proposed two subclasses,[8] although plaintiffs' opening brief made no attempt to argue that these subclasses satisfied the requirements of Rule 23(a) or (b)(2). (*See id.* at 1-70.) The city and state defendants opposed the motion (ECF 493; ECF 497), and four of the nonprofit organizations that had intervened in opposition to plaintiffs' first motion for class certification filed an amicus brief opposing the second motion (Br. of Amici Curiae Brooklyn Def. Servs. et al. in Opp'n to Renewed Mot. for Class Certification (Brooklyn Def. Servs. et al. Amici Br.), ECF No. 531).[9]

The district court (Wood, J.) denied plaintiffs' motion, holding that plaintiffs had "not met their burden to demonstrate that there are questions of law or fact common to the class, nor ha[d] they made an

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[8] The proposed subclasses are: (i) "all children who have been in ACS custody for more than two years and whose cases require 'special scrutiny' pursuant to ACS policy" ("Special Scrutiny subclass"); and (ii) "all children for whom Contract Agencies failed to assess and document compelling reasons every three months to justify the decision not to file a termination of parental rights . . . petition after the children had been in care for 15 of the prior 22 months" ("Compelling Reasons subclass"). (ECF 440 at 14-15.)

[9] These amici were Brooklyn Defender Services, The Bronx Defenders, Center for Family Representation, Inc., and Neighborhood Defender Service of Harlem. (Brooklyn Def. Servs. et al. Amici Br., ECF No. 531.)

adequate showing that the claims of the named Plaintiffs are typical of the claims of the class." (Special Appendix (SPA.) 16.) *First*, as to the state defendant, plaintiffs had identified only one common question of fact (i.e., "whether OCFS effectively exercises adequate oversight over ACS and the Contract Agencies") and one common question of law (i.e., "whether such a failure by OCFS results in children being at risk of being deprived of their constitutional or statutory rights"). (SPA. 17.) The court concluded that these extremely general questions were analogous to the questions that were rejected as inadequate to support commonality by the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). (*See* SPA. 17-18). In addition, the court observed that there were "myriad reasons," many beyond OCFS's control, that affected the injuries purportedly suffered by plaintiffs, such that the class members' claims could not "be resolved in one stroke." (SPA. 18.)

Second, the court found that plaintiffs' "allegations do not flow from unitary, non-discretionary policies that violate the rights of all class members." (SPA. 18.) Rather, the injuries described stemmed from case-specific departures, including some made by actors "not within the control of ACS, OCFS, or any Contract Agency." (SPA. 18-19.) Relatedly, the

court concluded that "the role played in each child's case by the New York State Family Court system is a critical factor that creates 'dissimilarities within the proposed class' that 'impede the generation of common answers.'" (SPA. 19 (quoting *Wal-Mart*, 564 U.S. at 350).)

The district court also held that plaintiffs had not established typicality. The court explained that "the very nature of which children remain in the foster care system for extended lengths of time does not yield ready comparison between the named Plaintiffs and other individuals" because the named plaintiffs necessarily possessed significantly more complicated cases than those of children with shorter stays. (SPA. 22.) Further, the named plaintiffs' claims could not "be said to arise from the same course of events as those of other children" in the class because, even assuming the failures attributed to the state and city defendants in the complaint, it was not possible to determine whether those failures had caused plaintiffs' alleged injuries without evaluating multiple other potentially injurious factors. (SPA. 22-23 (quotation and alteration marks omitted).)

Because the district court found that plaintiffs failed to establish commonality and typicality, it did not reach the question of whether plain-

tiffs established adequacy of representation or the separate requirement of Rule 23(b)(2). The court also did not separately analyze plaintiffs' proposed subclasses, as plaintiffs' briefs did not contain arguments about the application of Rule 23 to the subclasses.

This Court granted plaintiffs' petition for interlocutory appeal of the certification order pursuant to Rule 23(f). *See* Order, *Ayanna J. ex rel. McCrea v. City of New York*, No. 21-2262 (2d Cir. Jan. 4, 2022), ECF No. 37.

SUMMARY OF ARGUMENT

The district court correctly concluded that plaintiffs failed to satisfy Rule 23(a)(2)'s commonality requirement. The deficiency was especially pronounced with respect to plaintiffs' claims against the state defendant, as to whom plaintiffs identified only one "common" question of fact and one "common" question of law—neither of which was likely to produce a common answer that could resolve the litigation on a class-wide basis.

Likewise, the district court correctly concluded that plaintiffs failed to satisfy Rule 23(a)(3)'s typicality requirement because the named plaintiffs had spent extended time in the foster care system, making them unrepresentative of the broad class of all children who are now or will be in the foster care custody of ACS. In addition, the named plaintiffs

failed to establish that their injuries flowed from the state defendant's (undefined) oversight policies.

This Court may also affirm on several alternative grounds that the district court did not reach. As defendants argued below, plaintiffs and their counsel do not adequately represent the class. There is no evidence that class counsel met with the named plaintiffs prior to filing this lawsuit or that the named plaintiffs seek relief consistent with the interests of all class members. Separately, plaintiffs have not established that injunctive relief against Commissioner Poole is appropriate, as required by Rule 23(b)(2).

Finally, the district court properly declined to certify plaintiffs' proposed subclasses. Plaintiffs plainly forfeited this issue by setting forth no argument or evidence below that the proposed subclasses satisfy Rule 23's requirements. In any event, the subclasses could not be certified with respect to the state defendant because the subclasses' claims arise out of violations of municipal policy rather than federal statutes. The subclasses also suffer from many of the same defects as the general class, including lack of commonality and adequacy.

STANDARD OF REVIEW

"Federal Rule of Civil Procedure 23(a) permits a case to be litigated as a class action only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015). A class action seeking injunctive relief may be maintained only if "in addition to the threshold requirements of numerosity, commonality, typicality, and adequacy of representation, the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 18 (2d Cir. 2003) (quotation marks omitted).

This Court reviews "both the lower court's ultimate determination on certification, as well as . . . its rulings [whether] the individual Rule 23 requirements have been met," for abuse of discretion. *Loftin v. Bande (In re Flag Telecom Holdings, Ltd. Sec. Litig.)*, 574 F.3d 29, 34 (2d Cir.

2009). An abuse of discretion occurs if a district court commits legal error, finds clearly erroneous facts, or otherwise renders a determination that "cannot be located within the range of permissible decisions." *Fields v. Kijakazi*, 24 F.4th 845, 852 (2d Cir. 2022) (quotation marks omitted).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DECLINED TO CERTIFY THE PROPOSED GENERAL CLASS

The district court correctly held that plaintiffs had not met their burden to identify common questions or to demonstrate that the named plaintiffs' claims were typical of the class. This Court may affirm on either ground, or because plaintiffs separately failed to show adequacy of representation or to satisfy the independent requirement of Rule 23(b)(2).

A. The District Court Correctly Concluded That Plaintiffs Failed to Establish Commonality.

1. Plaintiffs failed to identify common questions of law or fact sufficient to certify a class against the state defendant.

A plaintiff seeking class certification "must affirmatively demonstrate," *Wal-Mart*, 564 U.S. at 350, that there are "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2). Because any "competently crafted class complaint literally raises common questions," the Supreme Court has explained that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50 (quotation marks omitted). This injury may not be merely that the class members "have all suffered a violation of the same provision of law." *Id.* at 350. Rather, the plaintiff "must be prepared to prove" that his or her claim "depend[s] upon a common contention" and that this common contention "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, the district court correctly concluded that plaintiffs failed to identify a common question or law or fact supporting class certification. Plaintiffs proposed a single, exceedingly broad common question of fact as to the state defendant: "whether OCFS[] . . . effectively exercise[s]

adequate and meaningful oversight over ACS and the Contract Agencies." (*See* ECF 440 at 64.) This circular question fails to satisfy Rule 23(a)(2) because its resolution does not "produce a common answer to the crucial question" of why any particular child in care—let alone all children in care—was denied (or risked being denied) safety, permanency, or well-being. *See Wal-Mart*, 564 U.S. at 352. Framing the factual question as whether the oversight was "effective[]," "adequate," or "meaningful" (ECF 440 at 64) erroneously presupposes the very "glue" that the question is intended to supply: that the state defendant is the "'moving force' behind the alleged injury," *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008) (quoting *Board of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)).

The district court also correctly held that plaintiffs' sole common question of law as to the state defendant was improper. Plaintiffs identified the common question as

> whether OCFS's failure to effectively exercise adequate and meaningful oversight . . . means that children in the Class have been and are at continuing risk of being deprived of: (1) their substantive due process rights conferred upon them by the Fourteenth Amendment to the United States Constitution; (2) a written case plan in violation of [the Adoption and Safe Families Act of 1997 (ASFA)]; and (3) an appropriate case review system in violation of ASFA.

(ECF 440 at 64.) As a threshold matter, this question is indistinguishable from the questions that were rejected as insufficient in plaintiffs' first motion for class certification. (*Compare* Certification Mem. at 18-19, ECF No. 88, *with* ECF 440 at 63-64.) And as another court of appeals has aptly explained, such a question "completely misunderstands Rule 23(a)(2)" because it does nothing more than restate "the bottom-line liability question in any individual plaintiff's" case. *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 497 (7th Cir. 2012).

More importantly, this question runs directly afoul of *Wal-Mart*'s rule that a class may not be certified if the common question amounts to nothing more than whether plaintiffs "have all suffered a violation of the same provision of law." *See Wal-Mart*, 564 U.S. at 350. As the Supreme Court explained, "the mere claim by employees of the same company that they have suffered a [common] injury . . . gives no cause to believe that all their claims can productively be litigated at once." *Id.* Here, too, the bare claim that all children within the same foster care system have purportedly suffered a constitutional or statutory injury gives no reason to believe that their claims are capable of collective resolution.

On appeal, plaintiffs' only rejoinder is to assert that OCFS's purportedly inadequate oversight of ACS places all children in care at a "risk of harm." *See* Br. at 34; *see also* Br. of *Amici Curiae* Professors David Marcus & Tobias Barrington Wolff (Professors Amici Br.) at 3-4, 8, 25; Br. for *Amici Curiae* The Legal Aid Soc'y et al. (The Legal Aid Soc'y et al. Amici Br.) at 12-18. Plaintiffs' framing of their claims does not salvage their class certification motion. When plaintiffs seek to glue together disparate injuries by identifying a uniform policy or practice of the defendant, they bear the burden of offering "significant proof" not only that such a general policy exists but also that it gives rise to the same kinds of claims for all class members. *See Wal-Mart*, 564 U.S. at 353 (quotation and alteration marks omitted); *see also* Professors Amici Br. at 12 n.4. Under these circumstances, "proof of commonality necessarily overlaps with respondents' merits contention" that the defendant engages in an injurious pattern or practice. *Wal-Mart*, 564 U.S. at 352; *see also id.* at 351 (observing that a district court's "rigorous analysis" of the Rule 23 factors "will entail some overlap with the merits of the plaintiff's underlying claim" (quotation marks omitted)); Br. at 35 (A "finding of commonality is necessarily intertwined with the nature of the underlying claims.").

Here, plaintiffs' constitutional and statutory claims against the state defendant require proof of class-wide injuries caused by specific system-wide policies or practices. As the Supreme Court has explained, *Monell* liability requires that the identified government policy "be closely related to the ultimate injury." *See City of Canton v. Harris*, 489 U.S. 378, 391 (1989). And although "in virtually every instance where a person has had his or her [federal] rights violated . . . , a [42 U.S.C.] § 1983 plaintiff will be able to point to something the [government] could have done to prevent the unfortunate incident," that without more is insufficient. *Id.* at 392 (quotation marks omitted).

Plaintiffs impermissibly frame their common contention against the state defendant as a policy of "inadequate" or "meaningless" oversight. But this "common" question constitutes a mere tautology that seeks to hold the state defendant liable under a theory of vicarious liability. Such a theory "will not attach under § 1983." *Id.* at 385. Further, as the district court correctly recognized, even if plaintiffs had alleged some concrete link between "inadequate" OCFS oversight and the class's injuries, actually establishing the element of causation with respect to the state defendant would be "'impede[d]'" by the individualized and independent

factors driving outcomes in underlying cases, including actions by contract agency employees, children, parents, at least two sets of attorneys, and Family Court judges.[10] (*See* SPA. 18-19 (quoting *Wal-Mart*, 564 U.S. at 350).)

Contrary to plaintiffs' assertion that they have proffered "significant" and "voluminous" evidence establishing the existence of a systemic OCFS policy that exposes all children in foster care to a risk of harm (*see* Br. at 41, 43-44), the proof presented by the plaintiffs below consisted of only a handful of isolated statements—many from non-OCFS personnel—that fell far short of constituting proof of a "particular and readily identifiable" policy that has class-wide effects, *Parsons v. Ryan*, 754 F.3d 657, 683 (9th Cir. 2014); *see Barrows v. Becerra*, 24 F.4th 116, 131-33 (2d Cir. 2022) (agency's policy of not permitting Medicare beneficiaries to challenge hospitals' outpatient designations); *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1035, 1038-40, 1038 n.5 (8th Cir. 2018) (prison officials'

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[10] Indeed, plaintiffs and amici do not dispute that permanency outcomes in each case are affected by policy departures by individual caseworkers or by decisions from individual judges in the New York State Family Court system. (*See* Br. at 34; Objs. of The Legal Aid Soc'y et al. at 5, ECF No. 187 ("delays in the system are often caused by factors that are out of ACS' control").)

medical treatment policies related to hepatitis diagnosis and treatment); *see also Ross v. Gossett*, 33 F.4th 433, 438 (7th Cir. 2022) ("The appellants concede that the shakedowns were conducted according to a uniform plan . . . .").

For example, plaintiffs placed substantial emphasis on a statement by the former Commissioner of ACS that the Improved Outcomes for Children program is "broken." (*See* ECF 442-88 at 2; *see also* Br. at 1.) Such a general critique does not establish a uniform policy of indifference at OCFS, much less a policy not to exercise oversight with respect to specific functions carried out by ACS or contract agencies. Nor does this statement link any specific OCFS policy to a particular harm or risk of harm to class members. *See Reynolds v. Giuliani*, 506 F.3d 183, 186, 195 (2d Cir. 2007). Plaintiffs also cited to a statement by a contract agency's corporate designee that OCFS conducts in-depth reviews of only a limited number of case files during VARs. (*See* ECF 442-13 at 6; Br. at 23-24.) But plaintiffs failed to explain how conducting oversight through reviews of a representative sample of case files (i) violates the Constitution or federal law or (ii) demonstrates inadequate supervision as a factual matter. Likewise, plaintiffs cited an OCFS deputy commissioner's statement for

the proposition that OCFS always approves ACS's policies. Br. at 24. But that deputy commissioner actually testified that OCFS personnel "have asked for some pretty substantial revisions" during the iterative approval process. (ECF 442-22 at 42.)

Plaintiffs are therefore wrong to argue the district court committed error by failing to catalog and address their evidence that OCFS had a uniform policy of "knowingly tolerat[ing]" ACS's deficiencies. *See* Br. at 51. The district court was well aware of the evidence plaintiffs had offered to establish commonality. (*See, e.g.*, ECF 440 at 52-55, 57, 59-64; ECF 533 at 15-16, 18-19.) The court correctly rejected this evidence in concluding that plaintiffs' allegations "do not flow from unitary, non-discretionary policies that violate the rights of all class members or cause them all injury." (SPA. 18.)

2. The district court properly distinguished *Marisol A.* and out-of-circuit cases.

Plaintiffs and amici erroneously contend that the district court "ignore[d]" cases recognizing that "common practices giving rise to a substantial *risk of harm* can be appropriate for class treatment." *See* Br. at 34; *see also* Professors Amici Br. at 11-14; The Legal Aid Soc'y et al.

Amici Br. at 3. The district court did not ignore these cases, but rather properly addressed and distinguished them. (*See* SPA. 23 n.10.)

First, the district court correctly determined that this Court's decision in *Marisol A. ex rel. Forbes v. Giuliani* does not require the certification of plaintiffs' broadly defined class. *See* 126 F.3d 372 (2d Cir. 1997). *Marisol A.*, a pre–*Wal-Mart* case, involved a pretrial certification order that, by this Court's characterization, "stretche[d] the notions of commonality and typicality" and operated "near the boundary of the class action device." *See id.* at 377. This Court's deference to the district court's discretionary grant of class certification at the pretrial stage in *Marisol A.* did not limit the district court's discretion to deny certification here, where plaintiffs failed to develop more specific common questions after years of discovery. *See National Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 256 & n.86 (2d Cir. 2018) ("Whether a district court 'abused its discretion' is a case-specific and often fact-intensive inquiry," which permits different "discretionary call[s]" in "similar situation[s].")

Moreover, this Court concluded even in *Marisol A.* that the question certified by the district court—whether "defendants ha[d] injured all class members by failing to meet their federal and state law obligations"—was

far too broad to be administrable. *See* 126 F.3d at 377 (quotation marks omitted). It thus remanded the case with instructions to divide the class into subclasses. *Id.* at 377, 380. Since that decision, *Wal-Mart* has made clear that class actions may not proceed at all when the "glue" uniting class members' individual injuries amounts to such an abstract, high-level question. *See* 564 U.S. at 350. Accordingly, the district court in this case was likely correct to note that "it is highly doubtful that the class certified in *Marisol A.* would be certified today." [11] (SPA. 23 n.10 (quotation and alteration marks omitted).)

Second, the district court properly rebuffed plaintiffs' reliance on out-of-circuit cases involving challenges to aspects of the foster care

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[11] Several other cases cited by plaintiffs similarly predate *Wal-Mart* and involve comparably broad questions. In *Baby Neal ex rel. Kanter v. Casey*, for example, commonality was based on the question of whether the class was "subject to the risk that they will suffer from the same deprivations resulting from the [defendant]'s alleged violations" of federal law. 43 F.3d 48, 60 (3d Cir. 1994). And in *DG ex rel. Stricklin v. Devaughn*, commonality was based on the question of whether the defendant's "policies or practices violate class members' right to be reasonably free from harm and imminent risk of harm while in state custody." 594 F.3d 1188, 1193 (10th Cir. 2010) (quotation marks omitted). As the Seventh Circuit has subsequently explained, "tolerance of a wildly indefinite class definition under Rule 23 is no longer the norm." *Jamie S.*, 668 F.3d at 496.

system. (*See* SPA. 23 n.10.) As the court explained, "cross-jurisdictional comparisons to other foster care systems" are of "limited" persuasive value, in light of distinctive features of New York's system, including the "complex interplay" among OCFS, ACS, and the contract agencies and the central role of New York State's Family Court system.[12] (SPA. 23 n.10.) For example, *B.K. ex rel. Tinsley v. Snyder* did not involve a theory of inadequate oversight on the part of a supervising state agency; rather, the state defendants there were directly responsible for "delivering health care and other services to the thousands of children in the Arizona foster care system." 922 F.3d 957, 962-63 (9th Cir. 2019). Similarly, unlike the process of securing permanency for foster children in New York City, delivering routine medical treatment to children in Arizona's foster care system does not appear to require the approval of an Arizona state court

[12] Indeed, in a brief submitted to the district court opposing plaintiffs' first motion for class certification, amici The Legal Aid Society, Lawyers for Children, and The Children's Law Center stated that, "even in cases where ACS is in compliance with statutory and regulatory mandates, the children may remain in foster care longer than in other jurisdictions because cases in New York City Family Courts are adversarial." (Objs. of The Legal Aid Soc'y et al. at 5, ECF No. 187.)

judge or of another state actor with concomitant authority and discretion. *See id*.

Plaintiffs' remaining cases are at best unhelpful to their arguments. In *Connor B. ex rel. Vigurs v. Patrick*, for example, the First Circuit ultimately found that plaintiffs had not proven that the Massachusetts Department of Children and Families "engaged in particular practices which have already caused direct harm to the entire class or even a majority of the class." 774 F.3d 45, 55 (1st Cir. 2014). Indeed, the opinion included a lengthy discussion of why "class-wide challenges to a state agency's entire set of practices for care of foster children are difficult to bring successfully." *Id.* at 55-57. And in *M.D. ex rel. Stukenberg v. Abbott*, the Fifth Circuit deemed Texas's arguments against class certification "waived for failure to adequately brief them." 907 F.3d 237, 270 (5th Cir. 2018).[13] Similarly, in *B.K.*, the state defendants "did not seriously dispute the adequacy" of the plaintiffs' evidence of common practices on appeal.

[13] Notably, on a prior appeal, the Fifth Circuit had found that the class in *M.D.* did not satisfy commonality, citing *Wal-Mart* and identifying defects similar to those presented by plaintiffs' motion here. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 842 (5th Cir. 2012).

922 F.3d at 969. These cases bring nothing to bear on the disputed questions of commonality presented here.

B. The District Court Correctly Concluded That Plaintiffs Failed to Establish Typicality.

"Typicality requires that the claims of the class representatives be typical of those of the class." *Barrows*, 24 F.4th at 131 (quotation marks omitted). This requirement "is satisfied when each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (quotation marks omitted). Put differently, "[t]ypicality requires that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (quotation and alteration marks omitted).

Here, the district court correctly concluded that the named plaintiffs had not established that their claims were typical of the class. (*See* SPA. 23.) Specifically, all of the named plaintiffs had spent extended time in the foster care system, making them unrepresentative of all children

who are now or will be in the foster care custody of ACS.[14] (*See* SPA. 22.) As defendants established, children with lengthy stays in foster care have cases that are especially "multifaceted and significantly complex," making their injuries traceable to child- and family-specific circumstances, including—as was the case for multiple named plaintiffs—delays in parents' receiving mental health or drug treatment services from third-party providers. (*See* SPA. 22-23 (quotation marks omitted).)

On appeal, plaintiffs misplace their reliance (Br. at 54-55) on cases holding that typicality is not defeated where there are "minor variations in the fact patterns underlying individual claims," *see Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993). Setting aside that the differences between the named plaintiffs and the class constitute more than "minor variations"—for example, none of the named plaintiffs was ever in congregate care, even though approximately fourteen percent of children in ACS custody were in congregate care at the time plaintiffs sought certification (*see* ECF 498 at 3)—that contention is beside the point. It is

[14] For example, fifteen percent of children entering care between 2001 and 2018 left foster care within thirty days of placement, and twenty-five percent left foster care within ninety days. (ECF 495 at 4.)

well established that, to satisfy typicality, the named plaintiffs' injuries must "follow[] from the course of conduct at the center of the class claims" and "result [from] a course of conduct that is not unique to any of them." *Parsons*, 754 F.3d at 685. As the district court determined, that requirement was not satisfied here "because it is not possible to determine what caused a permanency delay, a specific placement, an untimely or poorly conceived case plan, or an instance of maltreatment, without evaluating all of the other contributing factors and influences."[15] (SPA. 22-23.)

Plaintiffs are wrong that "[t]racing the causes of outcomes for individual foster children" is "irrelevant" to the typicality analysis. *See* Br. at 57. Under that principle, any child in the New York City foster care system could serve as the named plaintiff in any class action challenging any policy of ACS, of OCFS, or even of HHS, which also exercises an oversight role and thus, by plaintiffs' logic, puts all children in foster care nationwide at risk of harm. Such a rule is inconsistent with the purpose of the typicality requirement, which is to ensure that "the named

[15] Contrary to plaintiffs' contentions, the district court specifically analyzed typicality with respect to injuries other than delayed permanency. (*See* SPA. 22-23.)

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." *See General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Absent any injuries caused by a defendant, the named plaintiff is in no position to litigate against that particular defendant. *See St. Stephen's Sch. v. PricewaterhouseCoopers Accts. N.V.*, 570 F. App'x 37, 39 (2d Cir. 2014) (summary order) (movants must satisfy the "Rule 23 requirements as they pertain to the claims asserted against each defendant").

Plaintiffs' argument would also run afoul of the jurisdictional requirement that a named plaintiff's claims be traceable to the defendant's conduct under article III. *See, e.g.*, *Barrows*, 24 F.4th at 128. "A federal rule cannot alter a constitutional requirement." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012). And as this Court has recognized, "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Id.* (quotation marks omitted). It is thus patently insufficient for a named plaintiff to demonstrate only that he or she has been "exposed" to an unlawful or injurious practice. *See* Br. at 31.

C. The District Court's Denial of Class Certification May Also Be Affirmed on Alternative Grounds.

The state defendant raised numerous arguments in opposition to plaintiffs' class certification motion below, including that plaintiffs and their counsel do not adequately represent the proposed class, *see* Fed. R. Civ. P. 23(a)(4), and that plaintiffs have not established that OCFS 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," *see id.* 23(b)(2). (*See* ECF 497 at 33-39.) The district court did not reach these grounds, in light of its rulings on commonality and typicality. (SPA. 16.) Either ground provides an independent alternative basis to affirm the denial of class certification here. *See Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006) (this Court is "free to affirm a decision on any grounds supported in the record, even if it is not one on which the trial court relied").

First, plaintiffs and their counsel will not "fairly and adequately protect the interests" of all children who are or will be in the New York City foster care system, *see* Fed. R. Civ. P. 23(a)(4), because, among other things, class counsel never actually met with the named plaintiffs in this litigation prior to filing this lawsuit (*see* ECF 533 at 8). Rule 23(a)'s

adequacy requirement is not satisfied where the class representatives "have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys"—which is precisely the case here. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (quotation marks omitted). Further, as amici The Legal Aid Society, Lawyers for Children, and The Children's Law Center aptly stated in an earlier filing, "Plaintiffs' counsel lacks experience or ongoing contact with the New York City foster care system." (Objs. of The Legal Aid Soc'y et al. at 17, ECF No. 187.)

Adequacy separately requires that the class members "not have interests that are antagonistic to one another," and nothing in the record indicates that the named plaintiffs—many of whom were eventually reunited with their birth parents—in fact support legal relief that would favor or even require earlier termination of parental rights, to say nothing of the wishes of absent class members. *See Securities & Exch. Comm'n v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 291 (2d Cir. 1992) (quotation marks omitted). The named plaintiffs' stated interest, as represented by their counsel, thus

impermissibly "tugs against the interest of" other class members. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

Second, an injunction against the state defendant would be inappropriate, and plaintiff therefore cannot satisfy the independent requirements of Rule 23(b)(2). Specifically, the injunction plaintiffs apparently contemplate would require the State to exercise its discretionary authority to supervise ACS and the contract agencies in an unspecified manner that plaintiffs deem to be more "effective[]," "adequate," and "meaningful." (*See* ECF 440 at 64.) This vague, subjective relief fails to satisfy the well-established requirement that an institutional reform injunction be narrowly tailored to remedy a specific deprivation. *See Reynolds*, 506 F.3d at 198 (observing that a "claim that the state should have supervised more or differently" improperly "second guess[es] the state's managerial decisions and priorities" and is inappropriate subject matter for an injunction).

Moreover, this Court has expressly held that no injunction lies against a supervising state agency for the failure to oversee its supervisee where the undisputed evidence shows that the agency did not "stand idly by" or "encourage" the supervisee's noncompliance. *Id.* at 196, 198. Like plaintiffs here, the named plaintiffs in *Reynolds* pleaded a supervisory

liability claim against two state agencies for failing to adequately oversee New York City's administration of a federal program. *Id.* at 188. This Court vacated the district court's injunction because it was "undisputed" that the relevant state agencies "took numerous steps toward improving the City's administration of its benefits programs." *Id.* at 188, 198; *see also Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (holding that state officials "may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted").

As described (see *supra* at 6-10), OCFS's oversight and supervision of both ACS and the contract agencies is extensive and thorough. The fact that plaintiffs have identified purported shortcomings in ACS's administration of the foster care system that have yet to be fully ameliorated is insufficient to warrant an injunction against the state defendant because "the extent of state defendants' ultimate success in averting injury cannot be the legal measure of its effort to do so, as such a standard is tantamount to vicarious liability." *See Reynolds*, 506 F.3d at 196.

POINT II

THE DISTRICT COURT PROPERLY DECLINED TO CERTIFY PLAINTIFFS' PROPOSED SUBCLASSES

A. Plaintiffs Forfeited Any Arguments Regarding Certification of Their Proposed Subclasses.

Contrary to plaintiffs' contention, the district court did not err in failing to separately address certification with respect to plaintiffs' proposed subclasses.[16] *See* Br. at 61-63. Notwithstanding the district court's clear directive to define appropriate subclasses in its order denying plaintiffs' first class certification motion (*see* ECF 282 at 4), plaintiffs entirely failed to brief the issue as part of their renewed motion, instead addressing the certification arguments exclusively to the general class (*see* ECF 440 at 58-59 (assessing numerosity of the general class only),

[16] To the extent plaintiffs argue that the district court was required to assess the proposed subclasses sua sponte, it is well established that a "court is not obligated to implement Rule 23(c)[5] on its own initiative" and that "the district court's refusal to shoulder what, in the final analysis, is plaintiff's burden" is not an abuse of discretion. *See Lundquist v. Security Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14-15 (2d Cir. 1993); *see also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) ("[I]t is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court.").

59-64 (assessing commonality as to the general class only), 64-66 (assessing typicality of the named plaintiffs representing the general class only)). Notably, plaintiffs did not even seek to amend their pleadings to allege the existence of—or any claims on behalf of—the two subclasses. (*See* ECF 91.) That failure was critical, because a moving party shoulders the burden to prove that the requirements of Rule 23 are met with respect to any proposed subclass, as well as with respect to the general class. *See Lundquist*, 993 F.2d at 14-15; *see also* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1790 (3d ed. Suppl. Serv. July 2022 update) (Westlaw).

Although the state defendant (*see* ECF 497 at 39) and amici below (*see* Brooklyn Def. Servs. et al. Amici Br. at 14, ECF No. 531) both discussed plaintiffs' failure to address the Rule 23 factors with respect to the subclasses in their opposition papers—and although plaintiffs were subsequently granted both an extension of time and leave to file additional pages (*see* ECF 500; ECF 501)—plaintiffs' reply brief still failed to raise these arguments in anything more than a cursory fashion. Instead, plaintiffs' reply merely (i) inserted the phrase "and subclasses" into the headings of their brief (*compare* ECF 440 at 2, *with* ECF 533 at 2);

(ii) argued that the statement of facts in their moving brief satisfied their burden of persuasion; and (iii) explained that their principal brief had cited to exhibits containing proof of the subclasses' numerosity—although the principal brief had not, in fact, cited to the operative pages in those exhibits (ECF 533 at 12, 14). It is well established that courts are not required to "hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001). And it is also true that "issues raised for the first time in a reply brief are generally deemed waived." *See Tardif v. City of New York*, 991 F.3d 394, 404 n.7 (2d Cir. 2021) (quotation and alteration marks omitted). Plaintiffs thus squarely forfeited any argument that their proposed subclasses merited additional consideration, and fairness dictates that plaintiffs should not receive a third bite at the apple.

B. Certification of Plaintiffs' Proposed Subclasses Would Be Improper in Any Event.

If this Court determines that plaintiffs did not forfeit their arguments related to subclasses, it should remand to the district court for consideration of those arguments in the first instance. Alternatively, the Court may determine that certification of the subclasses is inappropriate

for the reasons briefed by the state defendant in the district court and set forth below.

Plaintiffs' first proposed subclass is "all children who have been in ACS custody for more than two years and whose cases require 'special scrutiny' pursuant to ACS policy." (ECF 440 at 14.) The Special Scrutiny subclass asserts only the fourth and fifth claims in the amended complaint (*see* ECF 533 at 11; Br. at 63), neither of which seeks relief against Commissioner Poole (ECF 91 at 119-122). The subclass therefore cannot be certified with respect to claims against the state defendant.[17]

Plaintiffs' second proposed subclass is "all children for whom Contract Agencies failed to assess and document compelling reasons every three months to justify the decision not to file a termination of parental rights . . . petition after the children had been in care for 15 of the prior 22 months." (ECF 440 at 14-15.) The Compelling Reasons subclass arises from a federal requirement that a State review the status of each child

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[17] The Special Scrutiny subclass independently fails as against the state defendant because the subclass's claims arise exclusively from purported violations of ACS guidance documents. (*See* Br. at 16; ECF 442-31 at 63.) The subclass thus alleges no injuries traceable to OCFS's violation of a federal statute redressable through an injunction against OCFS. See *infra* at 49-50.

in care at least every six months and file a petition to terminate parental rights once a child has been in care for fifteen of the previous twenty-two months—sometimes referred to as the "15/22 Rule." *See* 42 U.S.C. § 675(5)(B), (E); *see also* SSL § 384-b(3)(*l*); 18 N.Y.C.R.R. § 431.9(e)(2). The 15/22 Rule does not apply where: (i) the child is being cared for by a relative; (ii) the State documents "a compelling reason" that filing such a petition would not be in the child's best interest; or (iii) the State has failed to provide services to the child's family that are necessary for the child's safe return.[18] 42 U.S.C. § 675(5)(E); 45 C.F.R. § 1356.21(*i*)(2); *see also* SSL § 384-b(3)(*l*); 18 N.Y.C.R.R. § 431.9(e)(2). A 2013 guidance document from ACS provides that the review and documentation of "compelling reasons" should occur every three months rather than at the six-month intervals set by federal law. (*See* ECF 442-29 at 18.)

The Compelling Reasons subclass likewise does not warrant certification. As a preliminary matter, plaintiffs' own evidence establishes that

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[18] Under federal and state laws and regulations, a "compelling reason" includes, but is expressly not limited to, circumstances in which (i) adoption is not the appropriate permanency goal for the child, (ii) there are insufficient grounds to terminate parental rights; or (iii) the child is fourteen years old or older and will not consent to adoption. *See* SSL § 384-b(3)(*l*)(ii); 18 N.Y.C.R.R. § 431.9(e)(2)(ii); 45 C.F.R. § 1356.21(i)(2)(ii).

the named plaintiffs purporting to represent the Compelling Reasons subclass lack standing to assert these claims. *Mahon*, 683 F.3d at 64 ("'[N]amed plaintiffs who represent a class must allege and show that they personally have been injured.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996))). Compelling reasons were documented for each subclass representative on multiple occasions, defeating any showing of an injury-in-fact.[19] (*See* ECF 440-1.) To the extent the claimed injury is simply that compelling reasons were not documented *on time* (*see* ECF 533 at 14 n.16), it is still the case that no subclass representative was injured because in very few instances did the intervals between documented compelling reasons exceed six months, the limit set by federal law (*see* ECF 440-1). *See also* 42 U.S.C. § 675(5)(B). And even in the few instances where the intervals exceeded six months, the reasons for not documenting a compelling reason are nevertheless evident from the face of the case notes. For example, at least two of the subclass representatives (Emmanuel S. and

[19] For example, compelling reasons for named plaintiff Brittney W. were documented on at least fourteen occasions; the mean interval between compelling reasons documented was eighty-six days; the median interval was ninety-one days; and the longest interval was 136 days. The figures are similar for the other named plaintiffs. (*See* ECF 440-1.)

Matthew V.) had been placed into kinship care and were thus statutorily exempt from the 15/22 Rule. (*See* ECF 440-1 at 5.) *See also* 42 U.S.C. § 675(5)(E)(i); 45 C.F.R. § 1356.21(i)(2)(i).

Plaintiffs also fail to establish that this subclass satisfies the Rule 23(a) criteria because they do not show (i) that children for whom compelling reasons were not documented every three months (much less every six months) exist in sufficient numbers to warrant a class action; (ii) that there is any uniform policy or practice of OCFS that would supply the requisite common question of fact or law necessary to litigate this claim on a class-wide basis; (iii) that the claims of the eleven subclass representatives—some of whom are statutorily exempt from the 15/22 Rule—arise from the same course of events as other subclass members; or (iv) that the eleven subclass representatives could speak on behalf of children whose permanency goals are family reunification, rather than termination of parental rights and adoption. *See* Fed. R. Civ. P. 23(a). Nor do plaintiffs show that this subclass is defined by reference to administrable

criteria and thus ascertainable.[20] *See Universities Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A. Petrobras (In re Petrobras Sec.)*, 862 F.3d 250, 260 (2d Cir. 2017).

Finally, the Compelling Reasons subclass as defined cannot be certified with respect to the state defendant. As noted (see *supra* at 46), the requirement that compelling reasons be documented every three months arises from ACS guidance and not from a federal statute. A municipal guidance document provides no basis to hold a state official liable in a § 1983 claim expressly premised on a statutory violation arising under federal law. (*See* ECF 91 at 117-119.) *See Pollnow v. Glennon*, 757 F.2d 496, 501 (2d Cir. 1985) ("Clearly, a violation of state law is not cognizable under § 1983."). For similar reasons, plaintiffs cannot show that any injuries suffered by the Compelling Reasons subclass are traceable to an

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[20] The "compelling reasons" listed in federal and state laws and regulations are expressly nonexclusive. See *supra* at 46 n.18. Indeed, plaintiffs themselves were unable to identify subclass members by reference to objective criteria and instead instructed their expert to include "every instance in the case record that could be construed as" a compelling reason. (*See* ECF 440 at 45.) Plaintiffs thus fail to explain how it would be "administratively feasible for the court to determine whether a particular individual is a member" of this subclass. *See Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (quotation marks omitted).

OCFS policy or redressable by an injunction against the state defendant. It is well settled that "a plaintiff's injury resulting from the conduct of one defendant" has no "bearing on [his or] her Article III standing to sue other defendants." *Mahon*, 683 F.3d at 65.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying class certification.

Dated: New York, New York
July 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,214 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*