22-0007-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ELISA W., ET AL., PLAINTIFFS-APPELLANTS,
v.
THE CITY OF NEW YORK, ET AL., DEFENDANTS-APPELLEES.

(For Full Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (CIV. NO. 15-5273)
(THE HONORABLE KIMBA M. WOOD)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS
(PAGE PROOF)

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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,

NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES; STATE OF NEW YORK; NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES; AND DAVID HANSEL, COMMISSIONER OF THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, IN HIS OFFICIAL CAPACITY,

DEFENDANTS.

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PRELIMINARY STATEMENT

Plaintiffs seek to enforce federal and state policy, not change it. Federal and state law require ACS and OCFS to ensure safe, stable and appropriate placements for foster children in ACS's legal custody. Both Congress and the New York State Legislature have enacted an array of statutory protections to enforce those rights. Defendants' systemic practices routinely violate those laws, putting all children in New York City's foster system at an unacceptable risk of harm. Plaintiffs seek to enjoin specific practices that violate the law.

Defendants argue that each class member must wait until he or she suffers a "tangible injury" before seeking such a remedy. That is not the law. As the Supreme Court has held, it would be "odd to deny an injunction to [someone] who plainly proved an unsafe, life-threatening condition ... on the ground that nothing yet had happened to them". *Helling v. McKinney*, 509 U.S. 25, 33 (1993). It is well settled that an as-yet unmaterialized risk can constitute a harm that is remediable with prospective injunctive relief.

Defendants further argue that the Court must ignore Defendants' violations of law—and the impermissible risk of harm those violations impose on all foster children—and focus only on the different ways in which that common risk may eventually manifest for each child. That position, too, is directly contrary

to Second Circuit precedent and would be fatal for a large swath of civil-rights class actions.

While acknowledging that "the district court did not reach the question" (City Br. 56; *see also* State Br. 38), Defendants now also ask this Court to make factual findings, as matters of first impression, that neither the Named Plaintiffs nor their counsel are adequate to represent the class. Not only is such a fact-based inquiry inappropriate on an undeveloped record, Defendants' argument is refuted by the limited record that does exist.

Finally, Defendants contend that this case fails to satisfy Rule 23(b)(2) because not "every class member suffered an injury", making any injunctive remedy overbroad. (City Br. 63; *see also* State Br. 40.) Again, Plaintiffs have shown that every class member has suffered—and continues to suffer—the same unacceptable risk of harm based on common violations of law; an injunction targeted to Defendants' systemic practices *would* benefit the entire class.

For the reasons set forth below, the district court's Order denying class certification should be vacated and remanded.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT PLAINTIFFS HAD NOT SATISFIED RULE 23(a) COMMONALITY.

Plaintiffs do *not* seek to remedy individual instances of inappropriate foster placements, maltreatment or delays in permanency. Rather, Plaintiffs allege that Defendants' unlawful practices subject *all* children in ACS custody to a substantial *risk* of such harms in violation of their substantive due process and statutory rights. These risks of harm are severe. Compared to national averages, children in New York City foster care remain in care twice as long, are reunited with parents more slowly and are maltreated at far higher rates. (Ex.108.7; Ex.110.)[1]

As detailed in Plaintiffs' opening brief (Opening Br. 32-44), the district court committed multiple legal errors in finding a lack of commonality, including (i) failing to apply *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), and other settled law recognizing "risk of harm" claims as appropriate for class treatment; (ii) misapplying *Wal-Mart Stores, Inc. v. Dukes*,

[1] The severe risk of harm continues. *See* https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20City.pdf (p. 10: over 50% of children remained in custody for more than 2 years as of December 31, 2021); https://cwoutcomes.acf.hhs.gov/cwodatasite/recurrence/index (maltreatment rate).

564 U.S. 338 (2011); and (iii) misconstruing Plaintiffs' claims as depending on individual outcomes.

Defendants' arguments fail. Courts in this Circuit, and around the nation, have recognized that a substantial risk of harm—separate from the varied adverse outcomes that may ultimately manifest from that risk—is a cognizable injury that can be adjudicated in a single stroke. This doctrine finds particular application in civil-rights cases, where centralized policies and practices give rise to classwide risks that, although manifesting in different negative outcomes for individual class members, are nevertheless remediable through injunctive relief benefiting the entire class. (*See infra* Section I.A.)

Defendants' merits-based arguments regarding supposed recent improvements to the foster care system do not alter the relevant inquiry on class certification. The record demonstrates a number of common practices affecting the entire Class and remediable by injunctive relief. (*See infra* Section I.B.)

A. The District Court Erred by Failing To Apply Settled Law Recognizing That a Common Risk of Harm Can Satisfy Rule 23(a)(2)'s Commonality Requirement.

Citing case law concerning Article III's injury-in-fact requirement, the City argues that "deprivation of substantive due process requires a showing of tangible injury, not a mere risk of harm" (City Br. 42) and that "a bare statutory violation is [not] actionable ... in the absence of a resulting injury" (*id.* at 46). In

"a suit for *injunctive relief*", however, standing is satisfied by a risk of harm that is "sufficiently imminent and substantial". *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). Nor does Defendants' contention that Plaintiffs have not satisfied the Article III "traceability" requirement hold water, as the case record amply demonstrates that Defendants' conduct is one cause of the substantial risk of harm to foster children.

This Article III inquiry is distinct from the type of harm needed to support a cause of action on Plaintiffs' constitutional and statutory claims. Courts both inside and outside of this Circuit have held that a *risk* of harm can constitute a substantive due process injury and, separately, can support a claim for injunctive relief for either constitutional or statutory claims.

Finally, Defendants' argument ignores binding and persuasive precedent certifying classes of foster children under a "risk of harm" theory.

1. The Proposed Class Has Standing To Seek Prospective Injunctive Relief.

In arguing that Plaintiffs' substantive due process claims require a "tangible injury, not a mere risk of harm" (City Br. 42), the City relies on cases—*Doe v. Cuomo*, 755 F.3d 105, 114 (2d Cir. 2014), and *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir. 1998)—that it did not cite below and are not found in the District Court Opinion. Similarly, in contending that a "bare statutory violation" is inactionable absent "a resulting injury" (City Br. 46), the City relies on *Thole v.*

U.S. Bank N.A., 140 S. Ct. 1615, 1620 (2020), also cited on appeal for the first time. *Doe*, *Thomas* and *Thole* were all Article III standing cases, although the City never uses this terminology in its brief.

The City's injury-in-fact argument gets standing law wrong. The Supreme Court has recognized that "a material risk of future harm can satisfy the concrete-harm requirement" in a suit for injunctive relief "so long as the risk of harm is sufficiently imminent and substantial". *TransUnion*, 141 S. Ct. at 2210. Here, class members face precisely such an imminent threat of substantial harm—one that, if realized, would expose them to unsafe environments, neglect and perpetually unstable living situations, and would delay or deny them the right to a permanent family. This is proved by the classwide statistics cited above and the harrowing experiences of the Named Plaintiff Children, as documented in the Long Report. (Ex.1; *see also* Opening Br. 13, 18-19, 22.)

Defendants also argue for the first time that Plaintiffs have not shown their injury is sufficiently "traceable" to Defendants' conduct. (State Br. 37; *see* City Br. 43, 45-46.) Defendants are wrong. "The traceability requirement for Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (internal quotation omitted). This poses a "lesser burden" than proximate cause; "an intervening cause of the plaintiff's injury ... is

not necessarily a basis for finding that the injury is not 'fairly traceable' to the acts of the defendant". *Id.* at 92. Here, Defendants' systemic violations of federal and state law are the driving force behind the substantial risk of harm experienced by each class member. For example, ACS's practice of placing children without considering their individual needs creates the risk that *any* given child taken into ACS custody may end up in an unsuitable living arrangement. OCFS acknowledged that ACS's placement practices "too often lead[] to mismatches between child need and the capabilities of the placement resource". (Ex.93.'094.) Not only is Plaintiffs' risk-of-harm injury fairly traceable to Defendants' conduct, it directly results from it.

2. This Court Has Recognized That a Risk of Harm Can Support a Claim for Injunctive Relief on Constitutional and Statutory Claims.

Regarding the elements of Plaintiffs' causes of action, the City contends that (i) a substantive due process claim based on a risk of harm requires that the risk actually "materialize" in order to "hold the defendants liable" (City Br. 43); and (ii) statutory claims "require proof of harm" separate from a risk of harm (*id.* at 46). Both contentions fail.

First, a request for injunctive relief against constitutional violations "may be based on a defendant's conduct in exposing [a person] to an unreasonable risk of future harm" ***even if*** "actual physical injury" does not result. *Smith v.*

Carpenter, 316 F.3d 178, 188 (2d Cir. 2003). Indeed, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition ... on the ground that nothing yet had happened to them." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).[2] This is particularly relevant where, as here, the state exercises custody over a person, because "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being". *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). And this Court has specifically applied this analysis to children in foster care. *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981).

Courts have routinely recognized that substantive due process claims for injunctive relief may lie under a risk-of-harm theory even absent materialized harms. *See, e.g.*, *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 968-69 (9th Cir. 2019); *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 264-65, 267-68, 271 (5th Cir. 2018); *Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 834-35 (1st Cir. 2015); *D.G. ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1196 (10th Cir. 2010).

[2] The City argues that "even if a risk of harm were sufficient" to state a due process claim under some circumstances, the risk Plaintiffs face in this case is insufficient. (City Br. 43-46.) That is a merits question inappropriate for class certification. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). The relevant point is that this inquiry can be resolved on a classwide basis.

Second, Plaintiffs may properly seek injunctive relief for Defendants' practices that chronically violate children's statutory rights and pose a substantial and imminent risk to the physical, mental and emotional health of every child in their custody. A plaintiff may seek injunctive relief "to prevent future wrong, although no right has yet been violated". *Swift & Co. v. United States*, 276 U.S. 311, 315 (1928); *Kostok v. Thomas*, 105 F.3d 65, 69 (2d Cir. 1997) (a "federal court may grant prospective injunctive relief ... to stop or prevent acts that are illegal under federal law").

The City's assertion that Defendants have previously complied with the relevant statutes "for at least some class members" (City Br. 47) does not render the Class uncertifiable. This lawsuit does not seek to remedy past harms. "Injunctive ... relief is useless to a person who has already been injured." *Butz v. Economou*, 438 U.S. 478, 504 (1978). If the child remains in Defendants' custody, he or she remains subject to the risks posed by their ongoing unlawful practices.

3. The District Court Failed To Apply *Marisol* in Analyzing Plaintiffs' "Risk of Harm" Claims.

This Court has previously applied the "risk of harm" framework to Rule 23 and upheld the certification of a class of foster children that likewise sought "declaratory and injunctive relief ... to redress injuries caused by the alleged systemic failures of the City's child welfare system". *Marisol*, 126 F.3d at 375. The district court in *Marisol* properly recognized that regardless of whether the

"plaintiffs all suffer the same actual injury", they "can establish commonality by 'demonstrating that all class members are *subject* to the same harm'". 929 F. Supp. 662, 691 (S.D.N.Y. 1996) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)). This Court affirmed, even though "no single plaintiff (named or otherwise) is affected by each and every legal violation alleged in the complaint" and "no single specific legal claim identified by the plaintiffs affects every member of the class". 126 F.3d at 377. This Court recognized that a classwide risk of harm can support a finding of commonality even where not every member of the class suffered the same (or indeed any) materialized harm.

Marisol remains good law. Defendants wrongly contend that *Marisol* does not apply because (i) it involved an appeal from a grant of class certification, where the abuse-of-discretion standard tilted in the plaintiffs' favor (City Br. 49; State Br. 30); and (ii) *Wal-Mart* precludes class certification where plaintiffs allege "merely that they have all suffered a violation of the same provision of law" (City Br. 25 (quoting *Wal-Mart*, 564 U.S. at 350); State Br. 24 (same)). Neither reason succeeds.

First, the posture of the *Marisol* appeal was immaterial to this Court's acceptance of the *legal theory* in that case, as this Court reviews legal rulings *de novo*. *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004). The City's suggestion that "[t]he deference working in the plaintiffs' favor was crucial to the Court's

analysis" (City Br. 49) ignores this entirely. The district court's *legal* ruling that commonality may be established by demonstrating all class members are "subject to the same harm" was affirmed after *de novo* review by this Court, which specifically observed that "the only other circuit court which has considered this very question has held that it was an abuse of discretion *not* to certify a class nearly identical to the one considered here". *Marisol*, 126 F.3d at 377 (referencing *Baby Neal*, 43 F.3d at 64-65).

Moreover, contrary to the City's suggestion (City Br. 48), the class in *Marisol* was *substantially broader* than that proposed here. Whereas the Class here includes only "children who are now or will be in the foster care custody of" ACS (Am.Compl.¶191), the *Marisol* class further extended to "children who, while not in the custody of ACS, are or will be at risk of neglect or abuse". 126 F.3d at 375.

Second, contrary to Defendants' contentions (City Br. 48; State Br. 30-31), *Wal-Mart* neither overruled *Marisol* nor precludes class certification in this case. *Wal-Mart* was a "pattern or practice" discrimination case, 564 U.S. at 352, concerning "literally millions of employment decisions" that had to be considered separately *unless* there was "some glue holding the alleged reasons for all those decisions together", *id.* Because there was no direct evidence, the plaintiffs attempted "to make that showing by means of statistical and anecdotal evidence",

which the Court rejected. *Id.* at 355-56. As discussed at length in Plaintiffs' opening brief (Opening Br. 35-41), this case's commonality analysis is fundamentally different and is not controlled by the holding in *Wal-Mart*.

4. Courts in Other Circuits Have Found Commonality on Similar Facts.

Since *Wal-Mart*, two other circuit courts have upheld class certification on the same risk of harm theory that Plaintiffs advance here. *See B.K.*, 922 F.3d at 968-69 (Ninth Circuit); *M.D.*, 907 F.3d at 271 (Fifth Circuit);[3] *see also D.G.*, 594 F.3d at 1196 (Tenth Circuit, pre-*Wal-Mart*); *Baby Neal*, 43 F.3d at 60-61, 65 (Third Circuit, same).

The cases the City cites to suggest that other courts "have rejected" proposed common questions based on systemic unlawful practices (City Br. 20) are inapposite. *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 30 (1st Cir. 2019), was a case that alleged a pattern of harm "without identifying a particular driver—'a ***uniform policy or practice*** that affects all class

[3] Defendants contend that the state in *M.D.* waived its Rule 23 arguments on appeal. (City Br. 39 n.9; State Br. 33.) However, the Fifth Circuit only deemed waived *some* of the state's "rule 23-specific arguments" and proceeded to analyze "its general claim that plaintiffs have failed to demonstrate class-wide harm". 907 F.3d at 270-71. It concluded that the state's policies subjected the plaintiffs to "a substantial risk of serious harm on a class-wide basis", *id.* at 271, and *decertified* one of the subclasses on commonality grounds, *id.*—demonstrating that it analyzed commonality.

members'—of that alleged harm". *Id.* (emphases added). The present case, however, does not depend on a pattern of harm to show commonality; it focuses on central, unlawful practices (*i.e.*, "drivers") of the sort not identified in *Parent/Professional*. Similarly, in *DL v. Dist. of Columbia*, 713 F.3d 120, 127-28 (D.C. Cir. 2013), there was "no single or uniform policy or practice that bridge[d] all" of the plaintiffs' claims. By contrast, here, the record shows that ACS engages in systemic practices that uniformly subject all class members to a common risk of serious harm.

The overly broad common question posed in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 497 (7th Cir. 2012), was whether "[a]ll potential class members have suffered as a result of MPS' failure to ensure their Child Find rights under IDEA and Wisconsin law". The legal injury was not defined at all—the plaintiffs presented a "superficial common question[]" that failed to ask whether "the class members 'have suffered the same injury'". *Id.* (quoting *Wal-Mart*, 564 U.S. at 350). Here, all class members suffer the same risk of harm from common systemic practices. And the flaw in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 842, 844-45 (5th Cir. 2012), was the district court's lack of a "rigorous analysis" in analyzing the common questions; the case was therefore remanded, without prejudice, for further analysis. *Id.* at 844 ("On remand, the district court's conclusion may ultimately be a sound application of *Wal-Mart* ...."). As explained

in footnote 3, the class was later re-certified and affirmed on appeal in *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237.

B. The District Court Erred by Ignoring Defendants' Common Practices That Affect All Class Members.

Plaintiffs submitted ample evidence of five common practices subjecting the Class to a substantial risk of harm and violation of statutory rights. These practices are the "glue" holding the class together because "either each of the policies and practices is unlawful as to every [class member] or it is not". *B.K.*, 922 F.3d at 969 (quoting *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)). Moreover, Plaintiffs have proposed specific, classwide declaratory and injunctive relief for each common practice alleged. Defendants' arguments as to these practices do not defeat commonality.[4]

Placements. ACS's practice of making foster-care placements without considering children's individual needs violates the Constitution and federal and state law. (Opening Br. 27.)[5] Plaintiffs introduced extensive evidence regarding this common practice, including Defendants' internal documents and

[4] As Plaintiffs previously explained (Opening Br. 43-44), Plaintiffs challenge common practices, not individual "departures from ACS policy". (City Br. 36.)

[5] City Defendant argues that the district court dismissed Plaintiffs' federal statutory claims under 42 U.S.C. § 671(a)(10). (City Br. 47 n.14.) But Plaintiffs also challenged ACS's placement practices as unconstitutional and contrary to other federal and state laws. (Am.Compl.¶66; 42 U.S.C. § 675(5)(A); 18 N.Y.C.C.R.R. § 430.11.)

testimony from Contract Agency representatives. (Opening Br. 11-13, 44-47.) City Defendant argues that no common question exists regarding placements because "ACS now has a highly effective matching system in place". (City Br. 31-32.) Whether this new system—as to which Defendants have provided no discovery (Rep.Ex.10; Rep.Ex.11)—is in fact "highly effective" is a merits question that can be determined, following discovery, at trial. *See Amgen*, 568 U.S. at 466. For commonality purposes, what matters is that this is a statewide system applicable to the Class as a whole (SPA6); whether it meets constitutional and statutory standards is capable of determination in a single stroke.

In an effort to disprove common injury, City Defendant cites a Named Plaintiff who was purportedly placed with an appropriate foster home. (City Br. 32-33.) But the record demonstrates that each of the 19 Named Plaintiff Children was placed in a home without a matching process that took into account their individual needs, subjecting them all to an unacceptable *risk* of harm. (Opening Br. 11-13, 44-47.) The record also demonstrates that many of the Named Plaintiffs *did* suffer actual harm as a result.[6] That one Named Plaintiff was placed in an adequate foster home as a result of "a fortunate accident" (Ex.1.B'9) does not

[6] For example, despite documented special needs, Brittney was placed with a family that was not trained to care for children with disabilities (Ex.1.'5); and the T.C. siblings and Thierry were placed in homes that did not speak their own language (Ex.1.'6-7).

defeat commonality. City Defendant's logic demonstrates the same legal error that pervaded the Opinion below: the common question is not whether every class member suffered a bad placement; it is whether ACS's placement *practices*—which apply to the Class as a whole—subject the entire Class to a substantial risk of harm.

As a remedy, Plaintiffs request an injunction requiring ACS to develop and implement a process for matching children with Contract Agencies that takes into account the child's needs and to regularly and independently verify the Contract Agencies' compliance with that process. (Am.Compl.¶¶121, 123.)

Training. Plaintiffs presented evidence that ACS delegates case planning authority to caseworkers without any minimum training standards. (Opening Br. 27.) City Defendant argues this is not a common question because (i) caseworkers must have academic qualifications or prior experience; (ii) "ACS offers numerous *opportunities* for training in their work [and] required trainings on reporting requirements for children who may be maltreated"; and (iii) any given child may not have been affected by a lack of mandated training, as some caseworkers may have taken supplemental training. (City Br. 33 (emphasis added).) Each of these arguments fails.

First, whether, in the absence of formal training requirements, Defendants can satisfy the class members' constitutional and statutory rights by

setting minimal academic requirements and providing for optional training is a question that is capable of determination in a single stroke. These arguments do not destroy commonality. Moreover, they are meritless. Baseline academic qualifications and optional training do nothing to ensure that caseworkers are *in fact* adequately trained to provide adequate services to foster children. (Opening Br. 13-14, 47-48; Ex.14.'32:9-24.)

Second, City Defendant contends that it is enough to mandate annual training regarding reporting abuse or maltreatment. (City Br. 33.) This merits argument again does nothing to defeat commonality. Moreover, mandatory training on a single topic (reporting abuse) does nothing to address the other systemic harms (such as failure to achieve permanency) to which the children in foster care are exposed.

Third, Plaintiffs do not seek to remedy any particular instance of inadequate case worker training. Whether ACS delegates care and case planning responsibilities without imposing meaningful training requirements for caseworkers has nothing to do with the circumstances of any individual caseworker or child. Whether this practice gives rise to a constitutional claim is a question capable of classwide resolution.

As a remedy, Plaintiffs request an injunction prohibiting ACS from placing children in Contract Agencies that do not ensure all caseworkers receive training approved by OCFS and ACS. (Am.Compl.¶121.)

Case Plans. ACS's practice of providing inadequate and untimely case plans violates the Constitution and federal and state law. (Opening Br. 27.)[7] Plaintiffs introduced extensive evidence regarding this common practice. (*See, e.g.*, Ex.115.1'12.)[8] City Defendant advances three arguments (City Br. 34-35)—none of which defeats commonality.

First, City Defendant argues that Plaintiffs "do not show that all of the agencies failed to provide timely case planning in each foster child's case". (*Id.* at 35.) This reasoning again reflects the legal error underlying the opinion below. Plaintiffs do not seek to remedy individual instances of an inadequate or untimely case plan, but rather to remedy ACS's systemic practice of accepting case plans

[7] Although the district court held there is no private right to "implementation" of a case plan (City Br. 47 n.14), it denied the City's Motion to Dismiss Plaintiffs' claims regarding the preparation and substance of case plans. (Dkt.282.)

[8] Plaintiffs also set forth evidence of actual harms. Seven years after Elisa's parent voluntarily surrendered parental rights, for example, Elisa's caseworker documented a concurrent plan of "return to parent". (Ex.1.10.) Similarly, after almost two years, Mikayla's caseworker submitted a permanency report with the "concurrent plan": "[n]o relatives have come forward to plan for [Mikayla]". (*Id*.8.)

that violate statutory standards. Whether such a systemic practice exists is capable of single-stroke, classwide determination. *See B.K.*, 922 F.3d at 968-69.

Second, the City argues that there is "no legal obligation to timely enter case entries". (City Br. 34.) Even setting aside that this ignores Plaintiffs' claims that ACS has a practice of providing *inadequate* case plans by failing to engage in concurrent planning and provide reunification services (Opening Br. 15-19), the City is wrong. Federal law prescribes "extensive specific content requirements for case plans". (Dkt.278.12); *see* 42 U.S.C. § 675(1).[9] Failure to timely update case plans is inconsistent with these requirements. Whether failure to timely enter case entries gives rise to a claim is itself capable of classwide resolution, as is whether ACS has a systemic practice of failing to comply with such a requirement.[10]

Third, the City argues, and the district court found, that time spent on documentation would detract from other caseworker priorities. (City Br. 64; SPA18.) But that is a premature merits question wholly untethered from the

[9] Timely case plans are also required under state law, 18 N.Y.C.R.R. § 430.12(a), and ACS's contracts with the Contract Agencies. (Ex.31.'83.)

[10] For children who have been in care for 15 of the prior 22 months, federal and state law also require the periodic documentation of compelling reasons to justify the decision not to file a termination of parental rights. 42 U.S.C. §§ 671(a)(16), 675(5)(B), (E); N.Y. Soc. Servs. L. § 384-b.

commonality analysis. *See Amgen*, 568 U.S. at 466. The district court also erred by placing its own policy preferences over federal and state law prescribing documentation requirements.

As a remedy, Plaintiffs request an injunction prohibiting ACS from placing children with a Contract Agency unless at least 90% of the case plans for children placed with the agency meet statutory requirements. (Am.Compl.¶121.)

Permanency. ACS's practice of deficient permanency planning conflicts with the Constitution and federal and state law. (Opening Br. 27.) Plaintiffs' opening brief summarized voluminous evidence that ACS has a systemic practice of accepting permanency planning that violates federal standards. (Opening Br. 19-22, 49-51.)

City Defendant argues there is no common question regarding permanency because (i) Plaintiffs do not allege that "the permanency planning for all children is deficient or that every child is harmed by an alleged policy of accepting deficient permanency planning" and (ii) Plaintiffs' evidence supposedly does not reflect "current practice". (City Br. 36.) The City's first argument is the same, now-familiar mischaracterization of Plaintiffs' claims. Plaintiffs do not challenge the injury that any individual child suffered due to a delay in permanency. They allege—and provided evidence that—Defendants' systemwide

permanency practices expose all children in foster care to a substantial risk of harm. (Opening Br. 19-22, 49-51.)

Nor do Plaintiffs' claims require Plaintiffs to prove—at the class certification stage or at trial—that Defendants' common practices are the *sole* cause of permanency delays. That the Family Court may also contribute to delays in permanency (City Br. 17, 36) does not obviate Defendants' responsibilities to ensure their permanency-planning practices are consistent with the constitutional and statutory rights of the Class.[11] Instead, it suffices to show that Defendants' "deliberate indifference was a substantial factor leading to the denial of [Plaintiffs'] right to be protected from harm while in foster care". *S.W. ex rel. Marquis-Abrams v. City of New York*, 46 F. Supp. 3d 176, 200 (E.D.N.Y. 2014) (internal quotation omitted). That question is capable of classwide resolution.

City Defendant's suggestion that Plaintiffs' evidence is insufficient or outdated also fails. (City Br. 35-36.) The City does not identify—and did not produce—any evidence regarding changes in permanency practices to rebut Plaintiffs' evidence. And the question of whether any new practices cure the

[11] Indeed, as Amici explain, the Family Court "plays a narrow role in individual children's care while they are in ACS custody." (Legal Aid Br. 21.) For example, case planning, including permanency hearing reports, are the legal responsibility of Defendants, not the Family Court to which reports are submitted. N.Y. Fam. Ct. Act § 1089(a)(3)(b).

violations Plaintiffs allege may be resolved in one stroke for the entire class at trial, following merits discovery. *See M.G. v. New York City Dep't of Educ*., 162 F. Supp. 3d 216, 232 (S.D.N.Y. 2016).

As a remedy, Plaintiffs request an injunction requiring ACS, among other things, to require Contract Agencies to demonstrate compliance with the range of permanency planning options mandated by federal law, including concurrent planning and providing resources for reunification or adoption, depending on a child's permanency goal. (Am.Compl.¶122.)

OCFS's Failure to Oversee ACS. OCFS's failure meaningfully to oversee ACS violates the Constitution and federal and state law. (Opening Br. 27.) State Defendant argues that there is no common question regarding OCFS's inadequate oversight because (i) Plaintiffs supposedly fail to show their "disparate injuries" were caused by "specific system-wide policies or practices", and (ii) the common question of OCFS's oversight purportedly "seeks to hold the state defendant liable under a theory of vicarious liability". (State Br. 25-27.) Both arguments are wrong.

Plaintiffs do not challenge OCFS's oversight of ACS's handling of any individual child's case or seek to hold State Defendant vicariously liable for ACS's actions. Rather, Plaintiffs allege that OCFS's *own* systemic practices of tolerating ACS's systemwide dysfunctions and repeatedly reauthorizing the broken

Improved Outcomes for Children ("IOC") program violate the Class's constitutional and statutory rights. Plaintiffs therefore challenge specific, concrete actions by OCFS that contribute causally to the classwide harms Plaintiffs allege. Indeed, the State reapproved IOC on July 2021 (and granted ACS a waiver from OCFS requirements), further perpetuating the system Plaintiffs allege is unlawful. (State Br. 9 n.3.) Whether OCFS's actions rise to constitutional and statutory violations is a common question capable of classwide resolution.

As a remedy, Plaintiffs request an injunction requiring OCFS to conduct annual case record reviews of a statistically significant sample of children in ACS custody to measure the degree to which children are receiving timely permanence or being mistreated in care. (Am.Compl.¶¶123-124.)

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT PLAINTIFFS HAD NOT SATISFIED RULE 23(a) TYPICALITY.

Named Plaintiff Children satisfy the typicality requirement of Rule 23(a)(3) because their claims arise from the same course of conduct as the Class's claims and "each class member makes similar legal arguments to prove the defendants' liability" as the Named Plaintiffs. *Marisol*, 126 F.3d at 376. Like commonality, typicality does not require that the facts underlying each class representative's claims be identical to those of their class. *See Toney-Dick v. Doar*, No. 12 CIV. 9162, 2013 WL 5295221, at *7 (S.D.N.Y. Sept. 16, 2013) (citations omitted). Where, as here, a class representative is subject to policies and

practices that apply equally to every class member, typicality is met. *See, e.g.*, *B.K.*, 922 F.3d at 969-70. Defendants' arguments to the contrary misinterpret settled law.

A. The District Court Erred by Misapplying Settled Law on Typicality.

Defendants argue that Named Plaintiffs' claims do not "arise[] from the same course of events ... because the relevant course of conduct is entirely different in each case". (City Br. 54-55.) This argument has the same essential flaw as Defendants' arguments concerning commonality—it focuses on individualized outcomes while ignoring the common *risk* of harm to which Named Plaintiffs and all class members are exposed by Defendants' challenged policies.

Contrary to City Defendants' assertion (*id.*), Plaintiffs rely on multiple cases where courts have found typicality on a risk-of-harm basis—even where each member of the class did not suffer actual harm. (*See* Opening Br. 54-59 (citing *B.K.*, 922 F.3d at 970; *D.G.*, 594 F.3d at 1199; *M.B. ex rel. Eggemeyer v. Corsi*, 327 F.R.D. 271, 281 (W.D. Mo. 2018); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 46 (S.D. Tex. 2013); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 296-97 (D. Mass. 2011).)

City Defendant attempts to distinguish some of Plaintiffs' authority as "cases where a plaintiff may have suffered a different injury because of the application of the same policy, but where the policy was the clear source of the

plaintiff's injury, and it applied the same way to all plaintiffs". (City Br. 55 (citing *Parsons*, 754 F.3d at 686; *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601 (S.D.N.Y. 2018); *Brown v. Giuliani*, 158 F.R.D. 251, 268 (E.D.N.Y. 1994)).) That is wrong. The focus of the analysis in all three of those injunctive relief cases was not any individualized *past* injury, but rather the classwide risk of *future* harm. *See Parsons*, 754 F.3d at 686 ("[E]ach of the named plaintiffs is similarly positioned to all other ADC inmates with respect to a substantial risk of serious harm resulting from exposure to the defendants' policies and practices .... It does not matter that the named plaintiffs may have in the past suffered varying injuries ...."); *L.V.M. v. Lloyd*, 318 F. Supp. 3d at 615-16 (holding typicality satisfied where Defendants' conduct continued to cause "systemic delay"); *Brown v. Giuliani*, 158 F.R.D. at 265 ("The facts ... demonstrate a continuing threat of irreparable injury in the future to plaintiffs and their class unless preliminary injunctive relief is forthcoming.").

B. The District Court Erred by Finding That the Named Plaintiff Children Are Not Typical of the Class.

The record establishes that Named Plaintiffs satisfy the typicality requirement under settled law, and Defendants' arguments to the contrary fail.

First, contrary to Defendants' assertion (City Br. 55), the risk of harm to all Named Plaintiffs flows from ACS's and OCFS's violations. During their time in foster care, Defendants' policies put all Named Plaintiff Children at risk of

being assigned to a caseworker who ACS did not ensure received adequate and appropriate training; placed in foster homes without any consideration of their background, risk factors and characteristics; provided with inadequate case plans; and subjected to permanency delay.

Second, Defendants assert that Plaintiffs "have no account of the practices at over half of the [Contract] Agencies." (City Br. 55.) As detailed in Plaintiffs' opening brief, there was no finding—or even any evidence suggesting—that the 11 agencies responsible for the Named Plaintiffs were outliers in their practices. (Opening Br. 59.) Defendants provide no response to these points. Moreover, which Contract Agency had custody over which Named Plaintiff does not matter, because each class member's claims stem from the risk of harm created by Defendants' systemic practices, independent of any Contract Agency action.

Third, Defendants argue that it is impossible to trace what practice caused a permanency delay, deficient case plan or improper placement for each child (City Br. 54, State Br. 36), and therefore, Named Plaintiffs' "claims are not merely minor factual variations or differences in harms arising from the same course of conduct".[12] But, as noted repeatedly, Plaintiffs' claims seek to remedy

[12] State Defendant wrongly states that none of the Named Plaintiffs was placed in congregate care. (State Br. 35.) Named Plaintiff Child Elisa W. was in a congregate care facility from the ages of 19 to 20. (Rep.Ex.9.'783-84.).

systemic failures that subject all foster children in the Class to a substantial risk of harm, not individualized determinations.

Accordingly, Named Plaintiffs satisfy Rule 23(a)'s typicality requirement.[13]

III. THE DISTRICT COURT'S FAILURE TO CONSIDER THE PROPOSED SUBCLASSES IS REVERSIBLE ERROR.

Defendants argue the district court did not err by failing to consider the subclasses for three reasons, all of which are unavailing.

First, contrary to Defendants' argument (St. Br. 42-44; City Br. 68), Plaintiffs have not forfeited this argument.

Plaintiffs' class certification motion argued expressly that the "subclasses as defined meet the requirements of Rules 23(a) and 23(b)(2)" and presented record evidence in support. (Mot.48.) To demonstrate numerosity, Plaintiffs proffered evidence estimating the Compelling Reasons Subclass to consist of over 3,700 children (*see id.*35-36 (citing Ex.108)) and the Special Scrutiny Subclass to consist of approximately 5,000 children (*see id.*36-37 n.19 (citing Ex.117)). Plaintiffs also set forth evidence of the common questions of fact that apply to each Subclass (Mot.51-52), identified which Named Plaintiffs are

[13] As discussed in Plaintiffs' opening brief, State Defendant's argument that Named Plaintiffs are atypical because they were in care longer than some class members (State Br. 34-35) misapplies the law on typicality. (Opening Br. 54-55.)

representatives of the two Subclasses (*id*.6-7), explained how those Named Plaintiffs would adequately represent their respective subclasses (*id*.56-57 n.30), described how their claims are typical of the respective subclasses (*id*.54-55 n.29) and explained that the subclasses satisfy Rule 23(b)(2) because the relief requested involves uniform remedies enjoining government actions and institutional policies (*id*.57).

Second, City Defendant suggests that the district court was free to ignore Plaintiffs' proposed subclasses. (City Br. 65-66.) Contrary to the City's argument, *Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993), is on point. There, this Court reversed a denial of class certification where the district court did not consider whether subclasses were appropriate and remanded for "further consideration of whether the class, or a subclass" could be certified. *Id.* at 937, 939. While a district court may not be obliged to consider subclasses *sua sponte*, the court must consider subclasses proposed by the parties. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) (affirming court of appeals remand to district court "for consideration of subclasses").

Third, City Defendant incorrectly argues that "the district court's commonality reasoning is equally applicable to the subclasses" and that "[n]othing about the subclasses is distinct except for the particular policies they seek to challenge". (City Br. 66.) The subclasses present distinct common questions of

fact: (i) for the Special Scrutiny Subclass, whether ACS fails to ensure that children in foster care for more than two years receive special scrutiny as required by ACS's contracts with the Contract Agencies (of which subclass members are third-party beneficiaries)[14] and (ii) for the Compelling Reasons Subclass, whether ACS fails to ensure adequate and timely documentation of compelling reasons not to file a termination of parental rights ("TPR") petition, as required by federal law. (*See* Mot.51-52; Dkt.278.15-17; 42 U.S.C. §§ 671(a)(16), 675(5)(B), (E).)[15] Plaintiffs presented evidence regarding both questions. (Opening Br. 19, 21-22.) The legality of these practices is capable of single-stroke resolution because "either each of the policies and practices is unlawful" as to every child in the respective subclasses "or it is not". *Parsons*, 754 F.3d at 678.

Moreover, the district court's commonality and typicality analysis—while incorrect as to the Class as a whole—is particularly inapplicable to the

[14] Defendants argue the special scrutiny requirement is "merely an aspirational agency goal". (City Br. 67.) That is wrong (Ex.31.'484-85) and, in any event, presents a common question capable of classwide resolution.

[15] Defendants argue the Compelling Reasons Subclass is not certifiable because establishing a violation supposedly "requires consideration of whether the facts of a specific case will present a compelling reason not to file a petition". (City Br. 67.) But Plaintiffs do not challenge the failure to document compelling reasons for any particular child; they allege a systemic practice of not filing TPR petitions within statutorily mandated timelines (Opening Br. 21-22), a question that may be answered for the entire Subclass.

proposed subclasses. The district court found a lack of typicality, for example, because "the very nature of which children remain the foster care system for extended length of time does not yield ready comparison between the named Plaintiffs and other individuals". (SPA22.) Certification of the Special Scrutiny Subclass would have resolved this concern by limiting the class to children who spent extended time in foster care.

IV. THE ALTERNATIVE GROUNDS RAISED BY DEFENDANTS FAIL.

The district court did not reach the question of adequacy or Rule 23(b)(2)'s requirements, and this Court should reject Defendants' invitation (City Br. 56-65; State Br. 38-42) to address these questions in the first instance. This Court's "settled practice" is to decline to reach issues that were not considered by the district court. *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000) (per curiam). That practice is particularly prudent for class certification, which presents a "mixed question of fact and law". *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 40 (2d Cir. 2006). This Court should decline to consider in the first instance the question of whether Plaintiffs meet the Rule 23 requirements beyond commonality and typicality.

In any event, for the reasons below, the proposed Class meets the remaining requirements of Rule 23.

A. The Named Plaintiffs Adequately Represent the Class and Subclasses.

Under Rule 23(a)(4), class representatives must "fairly and adequately protect the interests of the class". "[N]ot every potential conflict will preclude a finding of adequacy"; a conflict "must be fundamental, and speculative conflicts should be disregarded at the class certification stage". *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 141 (S.D.N.Y. 2006) (citation omitted). Moreover, to warrant denial of class certification, even a conflict alleged to be fundamental must be "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation". *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 n.33 (S.D.N.Y. 2005) (citation omitted).

Defendants and Parent Advocates Amici argue that Named Plaintiffs do not adequately represent the class and subclasses. (State Br. 38-40; City Br. 56-58; Parent Advocates Br. 15-19) Their arguments fail.

First, Defendants argue that Named Plaintiffs are inadequate representatives because "[a]ll children who are or ever will be in foster care are going to have any number of differing interests". (City Br. 57.) However, all class members have the same interest in enjoining Defendants from violating their legal rights to constitutionally adequate safety and care; their right not to be held in governmental custody longer than needed to achieve the custody's purpose; and their right to a foster care system that maintains, for each child, a statutorily

adequate written case plan and case review system. As Amici note, Defendants' unsupported speculation that some absent class members might prefer to have these rights violated "would jeopardize the viability of children's rights class actions in the Second Circuit". (Legal Aid Br. 3.)

Second, Defendants argue that certain Named Plaintiffs may be inadequate representatives because the record does not indicate that they "support legal relief that would favor or even require earlier termination of parental rights". (State Br. 38-39; *see also* City Br. 57-58.) That argument is a red herring. Defendants (and Parent Advocates Amici) misconstrue Plaintiffs' case as a quest for early termination of parental rights and more adoptions. That is simply not so. Under the Adoption and Safe Families Act ("ASFA") and state law, TPRs must be filed only absent the documentation of compelling reasons (or a statutory exemption) for each child who has been in foster care for 15 of the last 22 months.[16] Plaintiffs' proposed injunction would require the filing of TPRs ***only*** in circumstances where Congress and the New York State Legislature have determined that TPRs must be filed. For children for whom compelling reasons

[16] 42 U.S.C. §§ 671(a)(16), 675(5)(B), 675(5)(E); N.Y. Soc. Servs. L. § 384-b. New York State law is consistent with federal law but goes further in providing a non-exhaustive list of "compelling reason[s]" justifying the non-filing of a TPR petition. *See* N.Y. Soc. Servs. L. § 384-b(3)(l)(i)(B).

exist not to file a TPR, such information should be documented, and a TPR need not be filed.

Accordingly, there are no "conflicts" precluding Named Plaintiffs from representing the Class or Subclasses.[17]

B. Class Counsel Adequately Represents the Class and Subclasses.

Rule 23(g)(1)(A) enumerates four factors the district court should consider when determining whether proposed class counsel is adequate, namely: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class".

Plaintiffs' counsel are experienced class action and child welfare litigators, with decades of combined experience, who have capably and aggressively represented the interests of the Named Plaintiff Children and the

[17] For similar reasons, City Defendant's claim of a conflict within the Compelling Reasons Subclass based on Named Plaintiff Children who ultimately reunited with birth parents (City Br. 57) is baseless. Those children had the same interest as other Subclass members in enforcement of their statutory rights—in their case, compliance with the requirement to *document* the compelling reason *not* to terminate parental rights and the right to necessary services to support their reunification.

proposed class for nearly six years. (Dkt.441.2-3; Dkt.442.) City Defendant and Parent Advocates Amici do not dispute counsel's experience or capability. Rather, they challenge the adequacy of Plaintiffs' counsel on three grounds. Each is meritless.

First, City Defendant and Amici assert that Plaintiffs' counsel's "positions are hostile to the interests of at least some of the named plaintiff children", that they wish to "advance[e] their own policy preferences" and that their "end goal in this litigation is to supplant New York's policy favoring family reunification with their own uncompromising preference for speedy exits through TPR and adoption". (City Br. 57, 59; Parent Advocates Br. 4-8, 15-19.) These unfounded attacks on Plaintiffs' counsel's motivations ignore the actual nature of the claims in this case. Nothing in this litigation seeks to alter the permanency goal (or any other custodial decision) for any child in the foster-care system. Instead, as noted above, the Amended Complaint alleges violations of the Named Plaintiff Children's substantive due process and statutory rights. (*See, e.g.*, Am.Compl.¶¶ 344, 348, 351.) These are legally enforceable rights that have been recognized by numerous courts across the country, including this one. (*See* Opening Br. 24-26.) Plaintiffs seek only to enforce their constitutional and statutory rights, not to change the law or supplant state policy favoring family

reunification. For these reasons, the District Court rejected this purported "conflict". (Dkt.416.39-40; Dkt.418.)[18]

Amici falsely assert that this litigation represents "another vehicle for Ms. Lowry to pursue her own pro-adoption agenda, to the detriment of families across New York City". (Parent Advocates Br. 19.) Ms. Lowry has served as class counsel in numerous class actions across the country on behalf of children in foster care, and courts have lauded Ms. Lowry's "extensive experience ... in complex and class action litigation" and unquestioned "competence and zeal". *M.D.*, 294 F.R.D. at 46. In fact, Ms. Lowry's past settlements include provisions aimed at improving services and support not only for children but also for family reunification efforts.[19]

Second, Defendants argue that Plaintiffs' counsel are inadequate because they "never actually met with the named plaintiffs in this litigation prior to filing this lawsuit". (State Br. 38; City Br. 60-61.) As the District Court

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[18] To the extent Amici assert that these relevant provisions of ASFA (and New York State law) are unconstitutional (Parent Advocates Br. 6-8), that is wrong, irrelevant to the question of class certification and beyond the scope of the issues raised by the parties. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) (declining to consider issue raised by amici).

[19] *See, e.g.*, Rep.Ex.2.4, 10 (finding that Ms. Lowry's class action "resulted in transformational reforms", "durably improv[ing] the ways the Department serves children and families and achieves outcomes", including transforming placement patterns to aid family reunification).

recognized, "[p]rior to the commencement of this action, counsel for the Named Plaintiff Children met with the Named Plaintiff Children's biological parents, foster parents or other adult family members".[20] (Dkt.416.41, Dkt.418.) Appropriately, rather than meeting directly with these highly vulnerable young children, a majority of whom were under the age of 10 when the Complaint was filed (*see generally* Ex.1), Plaintiffs' counsel and the children's next friends reviewed the voluminous case files produced in discovery (including by engaging a team of nine social work experts to review them page by page). And Plaintiffs' counsel has been in regular contact with Named Plaintiff Elisa W., who is now over 18 years old. (Dkt.371.)

Although City Defendant acknowledges that the pertinent standard differs, it argues counsel in Family Court would "have had to meet a much higher standard for engaging with the subject child and advancing the child's articulated position". (City Br. 60.) But Plaintiffs' counsel seek not to challenge the individual decisions in the Family Court cases of any Named Plaintiff Child or class member, but rather, as counsel for the class, "to compel compliance with pre-existing constitutional and statutory requirements" (Dkt.416.40) in fulfilment of their "primary responsibility ... to represent the best interests of the class". *Jin v.*

[20] Plaintiffs' counsel also reached out to the Family Court lawyers for each Named Plaintiff Child. (Dkt.370¶5.)

Shanghai Original, Inc., 990 F.3d 251, 263 (2d Cir. 2021) (quoting Fed. R. Civ. P. 23(g) Advisory Committee's Note to the 2003 amendment).

Third, City Defendant's assertion that "[m]any of the named plaintiffs' next-friend representatives have had no contact with the child whose 'best interests' they purport to represent" (City Br. 59) is misleading. A number of the next friends have personal relationships with the foster children they represent. (Am.Compl.¶¶10, 21, 64; Dkt.416.25; Dkt.466.) Moreover, as the District Court held, the law permits next friends with "little or no contact or history with the [foster] children each sought to represent". (Dkt.416.37-38 (citing *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 91-92 (1st Cir. 2010).)

Thus, Plaintiffs' counsel is qualified to represent the Class and Subclasses pursuant to Rule 23(g).

C. The Proposed Class and Subclasses Meet the Requirements of Rule 23(b)(2).

"Class certification is appropriate [under Rule 23(b)(2)] where the defendant has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate." *Marisol*, 126 F.3d at 378. "[C]ivil rights cases alleging class-wide" conduct, as Plaintiffs allege here, "are prime examples of what Rule 23(b)(2) was intended to cover". *Toney-Dick*, 2013 WL 5295221, at *10 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)); *Marisol*, 126 F.3d at 378 ("[c]ivil rights cases seeking broad declaratory

or injunctive relief for a large and amorphous class ... fall squarely into the category of 23(b)(2) actions" (citation and quotation marks omitted)).

The record shows that Defendants have unlawful common practices affecting all children in the New York City foster-care system and, to remedy such practices, Plaintiffs have requested specific, system-wide injunctive relief that would apply to the Class (and subclasses) as a whole. (*See supra* Section I.B.) These are narrowly tailored remedies to prohibit concrete practices that deprive class members of their legal rights.

Defendants argue that a Rule 23(b)(2) class nevertheless may not be certified where "the class seeks relief that may not benefit some members—or, worse still, may benefit some members at the expense of others by diverting resources to problems that do not trouble some class members". (City Br. 62-63.) That argument is wrong as a matter of fact and law.

First, the requested relief would equally benefit all class members by reducing their risk of harm, whether or not the risk of harm created by Defendants' practices materializes for every individual class member. Moreover, all class members need not have suffered a tangible *past* injury in order for a class to be certified under Rule 23(b)(2) for *prospective* injunctive relief. 7AA C. Wright & A. Miller, Federal Practice & Procedure § 1775 (3d ed. 2008). Instead, it is

necessary only that the relief sought be applicable to the entire class. *See Parsons*, 754 F.3d at 688.

As the Supreme Court explained in *Wal-Mart*, certification under Rule 23(b)(2) is appropriate where "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (citation omitted). Here, Plaintiffs seek *only* injunctive relief. None of the requested remedies necessitate any child-by-child administration and consequently they "must perforce affect the entire class at once". *Id*. at 361-62. Plaintiffs' requested training-related injunction, for instance, would apply to all members of the Class, who are each assigned to a Contract Agency and exposed to a heightened risk of harm by Defendants' practice of not requiring caseworker training. For that reason, the requested relief is appropriate and Plaintiffs satisfy the requirements of Rule 23(b)(2).

Second, State Defendant is wrong to suggest that the Class cannot be certified because the requested injunctive relief cannot be applied to the State. The sole case the State cites for this proposition is inapposite. (State Br. 40-41 (citing *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007).) That case, which was decided after a bench trial and says nothing about class certification, holds only that the State cannot be found liable under § 1983 under a theory of respondeat superior. 506 F.3d at 191. Plaintiffs are not pursuing a respondeat superior theory. Instead,

Plaintiffs allege that OCFS's own common practices and deliberate indifference contribute causally to the risk of harm that class members face while in foster care.

CONCLUSION

For the foregoing reasons, and those stated in Named Plaintiffs' opening brief, the district court's Order denying class certification should be vacated and the Court should remand this case with directions to reconsider the motion for class certification.

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Perry, individually and on behalf of a class of all others similarly situated.

COUNT LIMITATIONS

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Reply Brief of Plaintiffs-Appellants (Page Proof) is prepared in a proportionally spaced typeface (14-point Times New Roman) and contains 8,979 words, as calculated by the Microsoft Word 365 word-processing program and excluding parts of the Brief exempted by Rule 32(a)(7)(B)(iii). Accordingly, it complies with Rule 32(a)(5)(A) and with the Court's Order, dated August 8, 2022, granting Plaintiffs-Appellants leave to file an oversized reply brief of up to 9,000 words.

August 9, 2022

/s/ Antony L. Ryan
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