

# 23-7401-CV

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## United States Court of Appeals *for the* Second Circuit

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B. B., a minor, by his Next Friend Joy Rosenthal, on behalf of themselves and all other similarly situated youth, T. R., a minor, by his Next Friend Cynthia Godsoe, on behalf of themselves and all other similarly situated youth, M. P., a minor, by his Next Friend Adira Hulkower, on behalf of themselves and all other similarly situated youth, Z.W. and D.W., minors, by their Next Friend Jennifer Melnick, on behalf of themselves and all other similarly situated youth, C. W. C., a minor, by her Next Friend Joy Rosenthal, on behalf of themselves and all other similarly situated youth, J. R., a minor, by his Next Friend Anna Roberts, on behalf of themselves and all other similarly situated youth,

*(For Continuation of Caption See Inside Cover)*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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### REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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J.S. and S.S., minors, by their Next Friend Lisa Hoyes, on behalf of themselves and all other similarly situated youth, C. P., a minor, by his Next Friend Cynthia Godsoe, on behalf of themselves and all other similarly situated youth, C. C., a minor, by her Next Friend, Lisa Hoyes, on behalf of themselves and all other similarly situated youth, E.R., A.R. and M.R., minors, by their Next Friend Peggy Cooper Davis, on behalf of themselves and all other similarly situated youth,

*Plaintiffs-Appellants,*

– v. –

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

*Defendants-Appellees.*

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## PRELIMINARY STATEMENT

Plaintiffs, vulnerable children primarily from low-income families of color and thrust into New York City’s (“NYC”) child welfare system, seek to enforce their constitutional rights to family association, freedom from harm, and due process – not, as Defendants assert, to simply receive financial benefits. When Defendants involuntarily remove a child from their parent, they assume responsibility for the child’s care. The Constitution requires that the NYC Administration for Children’s Services (“ACS”) and the New York State Office of Children and Family Services (“OCFS”) provide safe and adequate care and placement, provide for children’s basic needs, and do not unreasonably interfere with their familial relationships. Yet, Defendants’ systemic practices routinely violate Plaintiffs’ rights, putting the putative class of children at an unacceptable risk of harm, and denying them *any* due process. Plaintiffs seek protection from this arbitrary government action and to enjoin those practices that violate the law.

Defendants attempt to deprive Plaintiff children the opportunity to pursue their claims, asserting they lack standing. First, City Defendants (“City”) and State Defendants (“State”) (collectively, “Defendants”) assert that their mandatory disqualification system is required by the federal government, although it is undisputed that federal laws only incentivize states to adopt conforming legislation.

Second, Defendants argue that Plaintiffs in stranger foster homes or institutional settings (“Stranger Placed Plaintiffs”) lack standing to assert their right to family association and to be free from harm because they merely complain of suboptimal care. This gross understatement is an attempt to obfuscate the heart of Plaintiffs’ claims – Defendants routinely deny Plaintiffs foster placement and visitation with family while placing them at serious risk of harm in placements unable to adequately provide for their basic needs.

Third, Defendants argue that the Court must ignore Defendants’ violations of law – and the harm those violations impose – because some Plaintiffs currently live with their relatives (“Directly Placed Plaintiffs”) and are therefore not in government custody. That position, too, is neither supported by caselaw nor by NYC’s child welfare scheme. Premised on a fundamental misunderstanding of Plaintiffs’ claims, Defendants also put forth an unsupported and cramped view of the injury Directly Placed Plaintiffs must allege to assert their right to family association.

Fourth, while acknowledging that the district court did not consider whether Plaintiffs’ claims should be dismissed under FRCP § 12(b)(6), Defendants now ask the Court to make such findings. While this Court’s practice dictates that it should decline to consider issues the district court did not reach, Plaintiffs nonetheless delineate detailed, factual allegations that are more than sufficient to make out a plausible entitlement to relief. Plaintiffs’ substantive due process claims must be

analyzed through the lens of professional judgement – the standard applicable for involuntarily committed adults, and even more appropriate for innocent children. The State asserts the “shock-the-conscience” standard must be applied, but admits this Court has utilized other standards to analyze these claims. Regardless, Plaintiffs have alleged sufficient facts to state claims under Defendants proposed standards.

Fifth, the State contends that although it has created and is responsible for the systems Plaintiffs challenge, it is not liable for the resulting harm. Plaintiffs’ well-pled allegations and applicable law sufficiently demonstrate their direct involvement and establish standing.

Finally, Defendants argue that recent state legislation moots Plaintiffs’ claims involving the Statewide Central Register (“SCR”), an argument the district court also did not consider. However, a case does not become moot simply because the underlying legislation is modified, especially where, as here, the amendments do not address the crux of Plaintiffs’ claims nor ameliorate their harm.

Defendants cannot escape responsibility for harm caused by systems they have created and control. For the following reasons, the district court’s Order dismissing Plaintiffs’ claims on standing grounds should be vacated.<sup>1</sup>

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<sup>1</sup> Contrary to the State’s assertion, Plaintiffs did not waive their argument regarding prudential standing below. State Br. 50. As reflected in the district court’s Order, and discussed in Plaintiffs’ opening brief, the prudential standing doctrine is inapplicable because Plaintiffs assert injury stemming from a violation

## ARGUMENT

### I. Plaintiffs’ Harm From Mandatory Disqualification Of Their Relatives Is Traceable to and Redressable by Defendants.

The City argues that Plaintiffs’ claims challenging its mandatory disqualification system, which automatically disqualifies relatives with any one of more than 300 criminal offenses from foster parent certification, are not traceable to Defendants because this system is required by federal law. City Br. 24-25. However, as Defendants admit, federal law does not mandate any behavior by the State, but rather conditions *federal funding* on compliance with the federal statute. City Br. 25; State Br. 9. This does not create inconsistent rules and, accordingly all caselaw Defendants cite is inapposite. New York has *chosen* to adopt Soc. Svcs. L. § 378-a, establishing its mandatory disqualification system; OCFS is responsible for implementing this law in an overbroad fashion; and the harm Plaintiffs allege is directly traceable to Defendants’ practices. ¶¶ 165-71 (A-58-60).

Nor is the City’s’ assertion about the redressability of Plaintiffs’ claims meritorious. City Br. 26-28. New York’s obligation to pay for foster care is not rooted in whether the federal government is providing financial support, but rather an independent state obligation.<sup>2</sup> N.Y. Soc. Svcs. L. § 398-a. Nor is the loss of

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of *their own* legal rights and interests, not that of their relatives. *See* Plaintiffs’ Opening Brief (“Opening Br.”) 57-58; Order at 23-24 (A-289-90).

<sup>2</sup> Notably, the State does not join this argument.

federal funds a defense to a constitutional violation. *See, e.g., Thomas v. Schroer*, 127 F.Supp.3d 864, 875 (W.D. Tenn. 2015) (law may violate First Amendment despite resulting loss of federal funds). Moreover, if New York’s mandatory disqualification system was found unconstitutional, the federal government would be unable to lawfully condition funding on compliance with it. *S. Dakota v. Dole*, 483 U.S. 203, 210 (1987) (The Spending Clause “may not be used to induce the States to engage in activities that would themselves be unconstitutional.”)<sup>3</sup>

## **II. All Plaintiffs Have Standing to Assert Their Right to Family Association and Integrity.**

### ***Stranger Placed Plaintiffs***

Despite the low threshold for establishing traceable injury, *see* Opening Br. 25-26, Defendants attempt to shirk responsibility for the predictable consequences of their policies and practices. They claim that the acts of Stranger Placed Plaintiffs’ relatives defeat traceability and that Plaintiffs have not suffered sufficient injury because they have not been completely prevented from associating with family members. City Br. 48-49; State Br. 35-36. Importantly, the City cannot and does not refute the well-settled caselaw establishing that indirect but predictable actions that flow from Defendants’ challenged conduct, as the relatives’ actions do here, can

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<sup>3</sup> All internal quotations or case citations omitted unless otherwise stated.

support standing. Opening Br. 28-29; City Br. 48-49. Instead, Defendants continue to pretend that Plaintiffs' relatives acted in a vacuum.

M.P., J.R. and C.P. suffer significant harm as a result of Defendants' denial of loving, familiar kin foster homes, and their resulting placement in stranger care and substantial limitation on family contact. *See, e.g.*, ¶¶ 3 (A-13), 15 (A-18), 151 (A-53); ¶¶ 59 (A-29) (M.P.), 90 (A-36-37) (J.R.); 104 (A-41), 110 (A-42-43) (C.P.). The challenges faced by Plaintiffs' relatives, including their ability to house and care for the Plaintiffs, predictably flowed from Defendants' actions—removing the child from their parental home, identifying the child's relative, and denying the child the relative foster home and adequate services and supports for the child's basic care. The State's argument that Plaintiffs' relatives' actions broke the causal chain disregards this Court's holdings. *Elisa W. v. City of New York*, 82 F.4th 115, 128 n.7 (2d Cir. 2023) (plaintiffs satisfy traceability where “defendants' conduct is one cause of the substantial risk of harm to foster children”); *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2d Cir. 2013) (*superseded by statute on other grounds as stated in Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023)) (fairly traceable standard does not require injury to arise from last step of causal chain). Moreover, the City's assertion that the time between denial of kin foster care and placement in stranger care negates traceability to Defendants' actions, City Br. 49, ignores the dilemma these families

face - committed to care for their related, needy children, but unable to without services for the child's basic care.

Defendants also attempt to argue – without explicitly stating – that the right to family association is only implicated where the government seeks to remove a child from their family, and therefore C.P. has not alleged any injury. City Br. 50; State Br. 31, 38. This is false. *See infra 17-19*. Moreover, contrary to Defendants' suggestion, C.P. had an established relationship with his uncle. *See* ¶ 104 (A-41); Opening Br. 32-33. *Cf. Sykes v. New York State Office of Children and Family Servs*, No. 1:18-cv-8309-GHW, 2019 WL 4688608 (S.D.N.Y. Sept. 2019) (great uncle lacked existing relationship with grandnephew he met once for an hour). By denying kin placement, Defendants separated C.P. not only from his uncle but from his younger brother and other family members. *See* Opening Br. 32-33.

### ***Directly Placed Plaintiffs***

The State admits “government deprivation of meaningful contact with family members or significant[] interfere[nce] with a familial relationship other than removal from family” can implicate the right to familial association. State Br. 32; *see also* Opening Br. 34-36.<sup>4</sup> But the State argues that denying financial benefits to

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<sup>4</sup> Contrary to the district court and the City's assertion, Plaintiffs fully briefed this issue below. [E.D.N.Y. Dkt. No. 28] Plaintiffs' opening brief reiterates those arguments, including that complete denial of family contact is not required to implicate Plaintiffs' rights. Opening Br. 33-42.

Plaintiffs' caregivers does not raise any "plausible inference" of deprivation of this right, obfuscating the nature of Plaintiffs' claims. State Br. 32. Plaintiffs do not assert that Defendants' denial of money violates their rights. Rather, Plaintiff children claim that Defendants have infringed on their rights by undermining and interfering with Plaintiffs' relationships with their relatives and other family members, including by failing to provide necessary *services* for their basic care, which significantly strains Plaintiffs' relationships with their relatives, fractures the stability of placement, and puts them at unreasonable risk of removal and loss of meaningful contact and permanency with their family *and* siblings.

It is this type of systemic government action without reasonable justification that is at the heart of Plaintiffs' claims. *Kia P. v. McIntyre*, 235 F.3d 749, 758 (2d Cir. 2000) (the core of due process is protection against arbitrary government action). Children subject to the government's unjustified system have a right to be free from unreasonable risk of harm, including harm to their familial integrity. 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). And the experience of the Stranger Placed Plaintiffs demonstrates that these harms are not conjectural.

Although Defendants concede that a risk of injury can be sufficiently imminent where there is a credible threat of injury, they argue that Plaintiffs must show an “actual or imminent threat of removal.” State Br. 35. City Br. 38; *see also* Opening Br. 38. However, risk of removal is but one *effect* of Defendants’ interference in their familial relationship and not the sole injury alleged. Moreover, contrary to the City’s suggestion, Plaintiffs have also alleged denial of visitation with family as another example of injury. *See, e.g.*, ¶¶ 67 (A-31), 70 (A-32); 151(A-53).

Defendants do not deny that Plaintiffs have a right to be free from unreasonable risk of harm stemming from *systemic* failures. City Br 37-38. Because Plaintiffs cannot avoid continual exposure to these systemic failures, they suffer imminent risk of harm. When potential harm is a result of a systemic policy or practice, it is significantly more likely to occur again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (plaintiff may have standing if alleged harm was result of city policy or practice); *31 Foster Child. v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003) (“when the threatened acts that will cause injury are [] part of a policy, it is significantly more likely that the injury will occur again”). Plaintiff children’s harm is not theoretical – but has been concretely inflicted by the very system Defendants created and control.

Finally, the City contends that Plaintiffs' claim fails because Defendants did not intentionally aim to disrupt families. Neither of the cases Defendants cite support their argument. First, *Gorman v. Rensselaer Cnty.* does not even involve governmental policies and procedures that directly impact the very survival of family units. 910 F.3d 40, 48 (2d Cir. 2018). *Patel v. Searles* is similarly inapposite. 305 F.3d 130 (2d Cir. 2002). Indeed, in *Patel* this Court specifically stated it had "never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate association." *Id.* at 137.

Even if intentional interference were required, Plaintiffs' allegations easily suffice. When Defendants remove Plaintiffs from their parent, they are responsible for the child's care and safety. Opening Br. 8-9. By placing children with relatives but denying them services needed for their care, the harm to children is not incidental. Rather, Defendants are aware their policies and practices place children in unstable environments, predictably harming them. *See, e.g.*, ¶¶158 (A-55), 190-94 (A-65-66), 198-200 (A-67-68). Yet, children are continuously subjected to these same practices.

### **III. Plaintiffs Have Standing to Assert Their Right to be Free From Harm.**

As the district court held, and Defendants acknowledge, Plaintiffs have a constitutional right to be free from psychological and emotional harm and to services and supports reasonably necessary to protect them from that harm. (A-284-85); City Br. 51-53; State Br. 40-46; Opening Br. 10-12, 43-46. Nonetheless, Defendants

argue that the relief Stranger Placed Plaintiffs seek would not remedy the harms alleged and that Directly Placed Plaintiffs are not entitled to such protections. City Br. 53; State Br. 40-46. Both arguments again misconstrue Plaintiffs' claims and directly contradict how NYC's child welfare system functions.

### ***Stranger Placed Plaintiffs***

The City acknowledges Plaintiffs are entitled to protection from “placement in the care of foster parents and institutional facilities that are unable to adequately care for them.” City Br. 52-53. Moreover, they concede that “the harms plaintiffs recount to the non-kinship placed plaintiffs might, in theory, state a direct claim for inadequate conditions on behalf of those children.”<sup>5</sup> City Br. 53. Yet, Defendants incorrectly contend Plaintiffs are instead claiming a right “to a particular placement” and/or a right for their relatives to be “reimbursed for their potential care.” *Id.* at 53-54; State Br. 44-45. Plaintiff children are challenging the inadequate *conditions* in which they are placed. Those conditions are the direct result of Defendants' actions as government agencies charged with the care and supervision of children they remove from their parent, which includes assessing safe and adequate placements for children in its custody. *See* Opening Br. 9-15, 43-46 (citing harms). Plaintiffs

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<sup>5</sup> Whether M.P. currently desires to remain in foster care is of no consequence to his ability to bring his claim. *Cf. Comer v. Cisneros*, 37 F.3d 775, 791 (2d Cir. 1994) (plaintiff's current desire is irrelevant as standing is based on facts as they exist at time of complaint); *see also, infra* 36-37.

seek to enforce their right to protection from harms, including a right to government action that prevents children in government care from deteriorating physically and psychologically, meaningful assessment of placements, provision of services for their care, and assurance of their safety. *Id.* These actions intended to prevent harm – not a specific placement nor financial “reimbursement” to a non-party – are the core of Plaintiffs’ claims.

***Directly Placed Plaintiffs***

Defendants further argue that Directly Placed Plaintiffs are not in Defendants’ custody and therefore are not entitled to protection from harm. City Br. 40-46; State Br. 40-46. However, all children in the putative class are entitled to the full protections of the Fourteenth Amendment – all have been involuntarily removed from their parent, placed in the child welfare system and are subject to ACS supervision. Opening Br. 46-53. Defendants attempt to escape responsibility, arguing the New York Court of Appeals has held that Directly Placed Plaintiffs are not under Defendants’ care and that the Family Court is ultimately responsible for these children’s care. Both arguments misstate the caselaw and deflect this Court’s attention from Defendants’ pivotal role in the care and supervision of all children it removes from their parent.

The City admits a “special relationship” exists where a plaintiff is “involuntarily [placed] into state custody” – which is precisely Plaintiffs’ situation.<sup>6</sup> City Br. 41. Yet to support its argument that Directly Placed Plaintiffs are not in Defendants’ custody, Defendants cite *Matter of Dale P.* 84 N.Y.2d 72 (1994), which involved a child who was *voluntarily* relinquished by his parent into the voluntary custody of a non-relative. *Id.* at 75. The child was eventually directly placed by “the Family Court and the [ACS] Commissioner.” *Id.* at 77. Even so, the court held that government’s “first obligation is to help the family with services to prevent its breakup.” *Id.* at 79-80. Moreover, the court held that there is no valid “reason to distinguish a foster child who is not placed by or with a social services agency from one directly placed by the court in a home not certified under applicable state and federal law.”<sup>7</sup> *Id.* at 81. The court concluded that ACS *was* statutorily authorized to bring a termination proceeding on behalf of Dale P. as part of its continuing duties of care to the child even though he was not in a foster home. *Id.* at 82. The court’s reasoning affirmatively supports Plaintiffs’ claims that children in direct placement

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<sup>6</sup> Despite the City’s assertion, Plaintiffs presented numerous arguments below about Defendants’ failure to provide for Plaintiffs’ basic needs placing them in danger. [E.D.N.Y. Dkt No.28]; *see e.g.*, ¶¶ 17 (A-19), 192-96 (A-66-67).

<sup>7</sup> FCA § 1055 (at issue in *Dale P.*) and § 1017, governing direct placement, require specific, ongoing care and supervision by ACS. Neither provision discusses transfer of custody nor mitigates ACS responsibility over children in these placements.

are under the care and supervision of Defendants such that they are entitled to protection from harm.

The City also argues that because the Family Court “order[s] [direct] placements,” this negates Defendants’ duty of care to Plaintiffs. City Br. 44. However, all placements stemming from involuntary removals must ultimately be ordered by the Family Court, defeating their argument. *See e.g.*, FCA §§ 1021, 1022, 1024, 1017, 1027, 1055. Indeed, the Family Court orders foster home placements, yet the City does not argue that fact diminishes its duty of care to children in foster homes. Moreover, Defendants’ “ongoing obligations” are not, as it argues, merely “part of Family Court proceedings,” City Br. 44, but statutory and flow to children it involuntarily removes from their homes.<sup>8</sup>

Finally, despite the City’s assertion, a directly placed child is not similar to a child “outside of the ACS system [who] had been living with a relative because of

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<sup>8</sup> Similarly, the State’s argument that the government has no duty to prevent harm to Directly Placed Plaintiffs rests solely on two inapposite out of circuit cases. In *Burton v. Richmond*, the “family made their own custodial determinations and then went to the court ... to get them legally sanctioned.” 370 F.3d 723, 727 (8th Cir. 2004), State Br. 43. The children were not involuntarily removed from their parent by the government, as here. In *Weller v. Dep’t of Soc. Servs. for Baltimore*, the state removed the child from the father after an allegation of abuse but then transferred custody to non-respondent *mother*, with rights separate and apart from any child welfare proceeding. 901 F.2d 387, 392 (4th Cir. 1990); State Br. 43.

the death or disappearance of the parent or at the parent’s request.” City Br. 42.<sup>9</sup> Children in such situations are diverted from the child welfare system altogether. They are not involuntarily removed by a government actor, subject to a Family Court proceeding, or within the framework of the child welfare system.

The City also erroneously relies on *Matter of Hasani B.* 195 A.D.2d 404 (1st Dep’t 1993); City Br. 42. The *Hasani B.* children were in legal guardianship with a non-relative who wished to voluntarily place the children with the child welfare agency in an effort to be certified as a foster parent. The court held that the family court did not have authority to order the agency to accept the voluntary placement and certify the guardian as foster parent, because the family court could not circumvent the statutory voluntary placement process and because a person could not simultaneously be legal guardian and foster parent. Consequently, the facts of this case are significantly distinct from those of all Plaintiffs involuntarily removed from their parent and placed into the child welfare system.

Regarding Plaintiffs’ remaining substantive due process claim, Defendants assert, without support, that before Plaintiffs can assert their right to be in care no

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<sup>9</sup> Defendants selectively chose quotes from *Hasani B.* where the court is differentiating another case – *Matter of Gravina*, 89 A.D.2d 534 (N.Y. App. Div. 1982) – quoting language about the “death or disappearance of the parent.” City Br. 42. Neither the quote nor the citation to *Hasani B.* support Defendant’s argument. Moreover, because the children in *Matter of Gravina* were never removed from their parent, they were not part of the child welfare system.

longer than necessary, Plaintiffs' relatives need first apply to be an adoptive parent or for Kinship Guardianship Assistance Program ("KinGAP"). City Br. 46, 54; State Br. 48. However, once a person is denied as a foster parent for the reasons at issue here, they are statutorily *ineligible* for both adoption and KinGAP. Opening Br. 54. And there is no requirement for "a futile gesture as a prerequisite for adjudication in federal court." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir.1999); *see also Nenninger v. Village of Port Jefferson*, 509 Fed. App'x. 36, 39 (2d Cir. 2013) (claim is ripe notwithstanding the submission of an application that would inevitably be denied); *Cruz v. Zucker*, 116 F. Supp. 3d 334, 349 (S.D.N.Y. 2015) (plaintiffs need not apply for cosmetic surgery that will not be approved under the rules).<sup>10</sup>

#### **IV. Plaintiff Children State Viable Substantive Due Process Claims.**

Because the district court did not reach Defendants' arguments for dismissal under Federal Rule 12(b)(6), this Court should reject the State's invitation to address these questions in the first instance. *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000) (per curiam) (Court's "settled practice" to decline to reach issues not considered by district court). Nonetheless, Plaintiffs' detailed factual allegations are more than sufficient to establish a plausible entitlement to relief.

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<sup>10</sup> This argument supports Plaintiffs' standing for their additional claims regarding adoption.

To survive a Rule 12(b)(6) motion, Plaintiffs must “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible if it pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*; *see also Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020) (this standard “does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conduct”). In assessing a FRCP § 12(b)(6) motion, the court must “construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff.” *Iqbal*, 556 U.S. at 678; *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016).

**A. Plaintiff Children Adequately Plead a Violation Of Their Right to Family Association and Integrity.**

It is undisputed that the Constitution protects the right to family integrity and association. Yet, the district court erroneously concluded, and Defendants assert, that “the right to family association is implicated *only* where the government seeks to remove a child from their familial association and deprive the parent of their interest in the care, custody and management of the child.” A-278 (emphasis added); State Br. 52. This assertion is not supported by any controlling authority, Opening Br. 34-36, nor have Defendants asserted any. Moreover, there is no merit to Defendants’

continued assertions that the “gravamen of plaintiffs’ claims ... is that their relatives were disqualified from receiving financial benefits.” State Br. 30-31.

Defendants’ assertion that Plaintiffs’ interest in family association is only implicated where a child is “inappropriately removed or dislocated from family,” contradicts established caselaw and presents a self-serving cramped view of children’s rights. The right to family association is implicated when the government denies meaningful contact with family members or significantly interferes with the familial relationship – even if that interference falls short of complete deprivation. Opening Br. 34-37. All Plaintiffs have sufficiently alleged that Defendants have infringed their rights by undermining and interfering with their familial relationships, including by: (1) denying placement with their relative and being thrust into stranger foster care or institutional group care, *see, e.g.*, ¶¶ 58 (A-29), 88 (A-36), 92 (A-37) (M.P. and J.R. are cut off from the relatives who sought to be their foster parent); (2) failing to provide services and supports, which significantly strains Plaintiffs’ relationships with their relatives, fractures the stability of placement and puts them at unreasonable risk of removal, *see, e.g.*, ¶¶ 31-37 (A-22-24) (B.B., who has significant needs, is not provided with critical support needed to engage with his family, which results in emotional and financial strain on the family and poses significant threat of removal), ¶ 101 (A-40) (without a foster care case planner, medical services, and other resources, J.S. is unable to fully communicate and

appropriately interact with his grandmother and faces risk of removal); and (3) denying meaningful contact with siblings, *see, e.g.*, ¶ 67 (A-31) (without their uncle’s foster parent certification, Z.W. and D.W. cannot live with their two other siblings), ¶ 90 (A-36-37) (J.R. cannot visit with siblings due to placement in stranger foster care far from his home community), ¶¶ 103 (A-40-41), 110 (A-42-43) (rather than being placed in kin foster home with one sibling and near two others, C.P. was placed in stranger foster care away from all three siblings). These systemic failures violate children’s right to be free from unreasonable risk of harm due to systemic failures in the child welfare system. *See supra* 9; *M.D. v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013).

**B. Plaintiff Children Adequately Plead a Violation Of Their Right to be Free From Harm.**

Plaintiffs have a clearly established right to be free from unnecessary and unreasonable intrusions into their mental and psychological well-being, to appropriate conditions and duration of foster care, and to services and supports reasonably necessary to protect them from that harm. *See supra* 10-11. Indeed, the “Constitution requires the responsible state officials to take steps to *prevent* children in state [care] from deteriorating physically or psychologically.” *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)) (emphasis added). Plaintiffs seek to enforce their right to minimally adequate care,

treatment, and services to prevent an unreasonable risk of harm, not to obtain an optimal level of care or treatment, as Defendants contend.

These substantive due process interests are recognized by law and uncontested by Defendants. In the foster care context, this Court has acknowledged that children have “a liberty interest to be free from harm, and correspondingly, that the State has a duty to protect such children from harm.” *Southerland v. Guiliani*, 4 F. App’x 33, 37 (2d Cir. 2001); *see also Doe v. New York City Dep’t of Soc. Servs.*, (“*Doe I*”), 649 F.2d 134, 141 (2d Cir. 1981). This constitutional liberty interest includes freedom from psychological and emotional harm while in state custody, and services and supports reasonably necessary to protect them from that harm. *Marisol A. v. Giuliani*, 929 F. Supp. 662, 675-77 (S.D.N.Y. 1996) (children in child welfare have a right be free from “unreasonable and unnecessary intrusions into their emotional well-being”); Opening Br. 43-44.

Plaintiffs allege abundant specific facts demonstrating that Defendants unnecessarily and unreasonably deny children kin foster homes and, in doing so, fail to protect them from harm or put them at an unreasonable risk of harm. *See, e.g.*, Opening Br. 9-12. When Defendants deny Plaintiffs kin foster homes, children are placed, or face the unreasonable risk of placement, in stranger foster care, including institutional group care. Placement of a child into stranger foster care or institutional group care can have myriad negative consequences for the child, including

maltreatment, bouncing between placements, and never finding a permanent home. *See Id.*; 44-46. Directly placed children also suffer because they are deprived of necessary services that support their emotional and mental well-being. *See Opening Br.* 10-12, 39-42.

These are facially plausible allegations of Defendants’ policies and practices infringing on Plaintiffs’ constitutional right to be free from unnecessary and unreasonable intrusions on their mental and emotional well-being. Each concerns the actual *conditions* of foster care – not “just the fact that one is in foster care” – and reflect the lived experience of children at the mercy of Defendants’ systemic failures.

**C. Defendants Deprive Plaintiff Children Of Their Right to be Under Government Care or Supervision No Longer Than Is Necessary.**

In an apparent attempt to obfuscate, Defendants again mischaracterizes Plaintiffs’ claims. Plaintiffs do not assert an “affirmative right to a preferred caregiver,” but rather, seek to enforce their right to be under ACS’s care and supervision no longer necessary. *See Youngberg*, 457 U.S. at 324; *Marisol A*, 929 F. Supp. at 676; *Connor B. v. Patrick*, 771 F. Supp. 2d 142, 161 (D. Mass 2011). Defendants’ policies and practices unnecessarily and unreasonably deny them this right, including foreclosing the two main paths to exit the child welfare system – reunification with their parent or permanency with other family. Defendants’ denial of kin foster homes forecloses adoption with that relative, as adoptive parents face

the same barriers for certification as foster parents. Opening Br. 54. When they are denied a kin foster home, Plaintiffs also lose access to the KinGAP, a legislatively authorized, subsidized guardianship program that aims to facilitate the permanent placement of foster children with relatives. N.Y Soc. Svcs. L. § 458-B; ¶ 155 (A-54). Additionally, relative foster parents often facilitate reunification by maintaining close connection with the child’s biological parent. ¶ 8 (A-15). The result of these foreclosed paths is that Plaintiffs languish in Defendants’ care longer than necessary.

**D. Defendants’ Policies and Practices Violate Applicable Legal Standards.**

Plaintiffs sufficiently plead a violation of their fundamental substantive due process rights because Defendants’ actions violate all potentially applicable standards. Defendants assert that “conscience-shocking misconduct” is required to state a plausible substantive due process claim in the child welfare context. State Br. 54; City Br. 40. Not only is there no support for this bold assertion, but the State admits that a different standard – deliberate indifference – is the longstanding threshold for such claims. State Br. 54, 57 n.12; City Br. 51. Both standards must be rejected as federal caselaw consistently holds that the “professional judgment” standard applies to substantive due process claims for equitable relief in the child welfare context. Regardless, Plaintiffs easily satisfy each standard.

Comparing landmark Supreme Court cases, *Estelle v. Gamble*, 429 U.S. 97 (1977), and *Youngberg*, reveals why the professional judgment standard is

appropriate in the child welfare context. In *Estelle*, where the government interest in punishing felons was balanced against the rights of the incarcerated to be free from cruelty, the Court enunciated a “deliberate indifference” standard for prisoners’ substantive due process claims. In contrast, *Youngberg* examined the right of the disabled in a mental institution and observed that persons entering state care outside the criminal justice system must receive “more considerate treatment and conditions of confinement than criminals.” 457 U.S. at 321-23. Outside the criminal justice system, “liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” *Id.* at 323.

This Court has adopted the *Youngberg* professional judgment standard in the context of involuntary commitment. *See, e.g., Woe v. Cuomo*, 729 F.2d 96, 105 (2d Cir. 1984); *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984). Although this Court has not specifically applied the *Youngberg* standard to claims for equitable relief in the child welfare context, *see Doe v. New York City Dep’t of Soc. Servs.*, (“*Doe II*”), 709 F.2d 782, 790 (2d Cir. 1983), its rationale is readily applied here.<sup>11</sup> Like the developmentally disabled, Plaintiffs are

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<sup>11</sup> In *Doe I*, 649 F.2d at 141–42, pre-*Youngberg*, this Court applied the deliberate indifference standard to children in foster care. However, the *Doe I* plaintiff

innocent dependents in government care through no fault of their own. Therefore, application of the deliberate indifference standard arising under the Eighth Amendment would unjustly dilute the affirmative constitutional duties owed to children under ACS care and supervision where the purpose of that supervision is purely care and protection. For this reason, at least one court in this circuit has concluded that the professional judgment standard is appropriate for children in the child welfare context. *Alford v. City of New York*, 413 F. Supp. 3d 99, 115 (E.D.N.Y. 2018) (children under ACS care have “substantive due process right to protection from harm” that is violated when there is a substantial departure from “accepted professional judgement, practice, or standards”). So have many other federal courts.<sup>12</sup>

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sought monetary damages from a foster care agency, not injunctive relief for systemic failures. Professional judgment is the more appropriate standard for claims of injunctive relief, which is “prospective in nature and serves to force appropriate conduct without exacting a financial penalty.” *Kenny A. v. Perdue*, No. 1:02-cv-1686-MHS, 2004 WL 5503780, at \*4 (N.D. Ga. 2004); *LaShawn A.*, 762 F. Supp. at 996 n.29. This Court considered but did not decide whether the *Youngberg* professional judgment standard was appropriate the second time *Doe* was before the court. *Doe II*, 709 F.2d at 790.

<sup>12</sup> See, e.g., *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (“[t]he compelling appeal of the argument for the professional judgment standard is that foster children . . . are ‘entitled to more considerate treatment and conditions’ than criminals”); *Winston v. Children & Youth Servs. of Del. Cty.*, 948 F.2d 1380 (3d Cir. 1991); *K.H.*, 914 F.2d 846; *Kenny A.*, 2004 WL 5503780, at \*3; *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 953-54 (M.D. Tenn. 2000); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000); *T.M. v. Carson*, 93 F. Supp. 2d 1179, 1187 (D. Wyo. 2000); *Wendy*

State Defendants cite only *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999) to support their assertion that “shocks the conscience” is the appropriate standard in the child welfare context. State Br. 51. The *Tenenbaum* plaintiffs sought monetary damages from a foster care agency, not, as here, injunctive relief for systemic failures. Moreover, in its singular mention of the “shock-the-conscience” standard, *Tenenbaum* references procedural protections under due process, making it unclear which of the plaintiff’s claims the court is addressing. *Id.* The other cases Defendants put forth are inapposite as neither involves individuals in government care, let alone child welfare. State Br. 54 (citing *Lombardi v. Whitman* 485 F.3d 73, 81 (2d Cir. 2007) (9/11 search and rescue workers) and *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (builder’s zoning law claims)).

Regardless, the Supreme Court has made clear that the professional judgment standard could meet the “shock-the-conscience” test in *custodial* situations where forethought about an individual’s welfare “is not only feasible but obligatory under [the government] regime.” *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998). Thus, in the custodial context, once a court determines that either deliberate indifference or professional judgment is the proper standard, proof satisfying that standard necessarily shocks the conscience, establishing a substantive due process

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*H. v. City of Phila.*, 849 F. Supp. 367, 372 (E.D. Pa. 1994); *LaShawn A.*, at 996; *B.H.*, 715 F. Supp. at 1394.

violation. *See Bolmer v. Oliveira*, 594 F.3d 134, 142 (2d Cir. 2010) (district court did not err in applying test examining whether civil commitment criteria are “substantially below the standards generally accepted in the medical community,” because under *Lewis* this test “itself measures what is conscience shocking in this context”).

Although the “professional judgment” standard applies here, Plaintiffs’ allegations satisfy Defendants’ proposed standards. Plaintiffs plausibly allege that Defendants’ policies and practices not only inflict a serious risk of substantial harm, but also that Defendants are aware or should have known of facts demonstrating such risk.<sup>13</sup> Yet, Defendants practices remain unchanged. These actions are inconsistent with the exercise of reasonable professional judgment and demonstrate deliberate indifference to the serious risk of harm to Plaintiffs. Under either culpability standard, Plaintiffs’ detailed allegations more than satisfy the modest requirement at the pleadings stage, demonstrating a plausible entitlement to relief.

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<sup>13</sup> Considering the Supreme Court’s decision in *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), this Court held that deliberate indifference claims under the Due Process Clause on behalf of detainees no longer need establish Defendant’s subjective actual knowledge, but that Defendant objectively *should have known* that the condition posed an excessive risk to health or safety. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). The same standard for deliberate indifference should apply here.

**V. Plaintiff Children State a Viable Procedural Due Process Claim.**

Defendants do not deny that they fail to provide Plaintiffs *any* notice or opportunity to challenge the evaluation and denial of certification of their kin foster home.<sup>14</sup> Instead, Defendants argue that Plaintiffs' procedural due process claims are defective because Defendants have not deprived Plaintiffs of a constitutionally protected interest. State Br. 57. However, Plaintiffs have sufficiently alleged a liberty interest in (1) their right to family association and integrity, (2) their right to be free from harm, and (3) their right not to be maintained in government custody longer than is necessary. *See supra* 17-22. Therefore, Plaintiffs are entitled to due process protections.

The key "inquiry in any procedural due process analysis is whether a plaintiff was afforded notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Alford*, 413 F. Supp. 3d at 103. A three-part balancing test applies to determine what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, whether plaintiffs' interests are affected by the official action. *Id.* Here, Plaintiffs' interests affected by Defendants' policies and practices are compelling and consequential. *See supra* 17-22. Second, whether there is a risk of erroneous deprivation, and the probable value, if any, of additional procedural safeguards.

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<sup>14</sup> The district court did not reach Defendants' Rule 12(b)(6) arguments for dismissal of Plaintiffs' procedural due process claims.

*Mathews*, 424 U.S. at 335. Here, current procedures deny Plaintiffs *any* notice or process,<sup>15</sup> ¶¶ 212 (A-70), 220 (A-72), 226 (A-74), posing a serious risk of erroneous deprivation of Plaintiffs’ liberty interests, and indicating the likely value of safeguards. Third, the court considers the burden on the government of additional procedures. *Id.* Since Defendants profess the importance of placing removed children with relatives, ¶ 6 (A-15), the government’s interest would be *furthered* by providing procedural protections. *See Ellender v. Schweiker*, 575 F. Supp. 590, 601-02 (S.D.N.Y. 1983) (additional notice “benefits the Government as the representatives of the ‘public interest.’”); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 255 (E.D.N.Y. 2002) (the government’s “actions are motivated by bureaucratic pusillanimity and ignorance that harm rather than help the interests of the child.”) Notice to Plaintiffs and a chance to submit evidence of the suitability and safety of placement with their relative may easily be put in place.

The State argues that their deficient procedures for Plaintiffs’ relatives<sup>16</sup> somehow fulfill their obligation to provide process to Plaintiff children, whose rights

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<sup>15</sup> Moreover, due to the inherent unreliability of indicated SCR reports in particular, any system relying upon them faces a “high risk of erroneous deprivation.” *Finch v. City of New York*, 591 F. Supp. 2d 349, 363 (S.D.N.Y. 2008); *see infra* 35-37.

<sup>16</sup> Notably, the procedures Defendants provide kin are limited and inadequate. Where notice is required, it is rarely provided. Relatives cannot challenge the denial of foster parent certification based on mandatory disqualifying crime (unless it involves spousal abuse). While relatives may challenge the validity of the underlying SCR report or accuracy of their criminal record, they cannot

have been violated. State Br. 58-59. This assertion is particularly ironic as, unlike Plaintiff children, their relatives are not entitled to any legal representation.

The State's argument that providing process to Plaintiffs would jeopardize its federal funding, State Br. 59-60, is misguided. *See supra* 4-5. Providing process for Plaintiff children who have been denied foster care placement with a relative based on the relatives' SCR or discretionary criminal history would have *no* effect on federal funding. Nor would providing process for Plaintiffs denied based on their relative's mandatory criminal conviction jeopardize funding if that process provided an avenue for Plaintiffs to redress the harms flowing from the disqualification.

A balancing of the *Mathews* factors demonstrates that the benefits of additional procedures outweigh any governmental burden, particularly since children already have the right to counsel in Family Court Act Article 10 proceedings, Def. Br. 31 n.13, and these procedures would apply only to children who are denied *kin* foster placements.<sup>17</sup> *See Nicholson*, 203 F. Supp. 2d at 255 (finding a right to

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challenge the denial of foster parent certification based on those discretionary disqualifications. ¶ 20 (A-20).

<sup>17</sup> The State's reliance on *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 817 (1977) to argue that providing Plaintiffs with due process would add "fiscal and administrative burdens" is misplaced. State Br. 60. *Smith* involved *stranger* foster parents seeking *additional* due process during the removal of children. The interests of Plaintiffs here is more compelling as Plaintiffs seek to maintain ties with their families, an interest the State shares. Moreover, unlike *Smith*, Plaintiffs here have *no* process, the risk of erroneous deprivation is high,

counsel for indigent parents, “[a] generalized treatment of the narrow class of mothers in this case is both possible and desirable.”).

## **VI. Plaintiffs State a Viable Claim Against State Defendants.**

The State asserts that Plaintiffs fail to adequately allege that the OCFS Commissioner’s individual actions played a role in the constitutional violations, fail to make out that OCFS’s conduct was “purposeful,” and fail to show a causal relationship between any oversight failing and the foster care determinations Plaintiffs challenge. State Br. 26-30. These assertions lack merit.

A plaintiff must “plead and [ultimately] prove ‘that each Government-official defendant, through the official's own individual actions, has violated the Constitution.’ .... The factors necessary to establish a [§ 1983] violation will vary ....” because the elements of different constitutional violations vary.” *Tangreti v Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) (quoting *Iqbal*, 556 U.S. at 676). The State incorrectly relies upon *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007) to assert any oversight failing must be purposeful. State Br. at 29. *Reynolds* was decided before “supervisory liability” was rejected in *Iqbal* and *Tangreti*. Moreover, the deliberate indifference standard for due process claims no longer requires subjective knowledge. *See Darnell*, 849 F.3d at 35. Plaintiffs maintain the applicable

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and the process would add little burden as it would only apply to children denied *kin* placements, who already have counsel in Article 10 proceedings.

standard here is professional judgment but meet their burden under each proposed standard. *See supra* 22-26.

Plaintiffs’ specific plausible allegations regarding the OCFS Commissioner are sufficient to establish standing and to state a claim, and are often supported by Defendants’ own evidentiary submissions. As the chief policymaker for OCFS, the Commissioner is responsible for the administration, regulation, and supervision of New York’s child welfare system and responsible for providing training regarding the care of children removed from their parents. ¶ 134 (A-49); *see also* ¶ 4 (A-94) (“OCFS ... has regulatory authority over the standards for the certification or approval of foster homes. *See* N.Y. Soc. Svcs. L. §§ 378; 18 N.Y.C.R.R. § 443; ¶ 9 (A-96) (... OCFS has specific authority ... to condition its approval of ACS’s managed care system for the delivery of foster care services on the implementation of additional criteria and standards.”)

The OCFS Commissioner’s responsibility for the promulgation and implementation of OCFS’s deficient policy is sufficient to establish her personal involvement and purposeful action. *Dodds v. Richardson*,<sup>18</sup> 614 F.3d 1185, 1199 (10th Cir. 2010) (defendant-supervisor liable “who creates, promulgates, implements, or in some other way possesses responsibility for the continued

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<sup>18</sup> This Court positively cited *Dodds* in *Tangreti*, 983 F.3d at 618, which the State cites. State Br. 27.

operation of a policy” the enforcement of which causes deprivation of Constitutional rights); *Stone #1 v. Annucci*, 20-CV-1326 (RA), 2021 WL 4463033, at \*9 (S.D.N.Y. Sept. 28, 2021) (policymaker personal involvement could include creation or continuance of policy under which unconstitutional practices occurred); *Meli v. City of Burlington, Vermont*, 585 F. Supp. 3d 615, 638-39 (D. Vt. 2022), *appeal dismissed*, 22-423, 2023 WL 5572582 (2d Cir. July 27, 2023); *Myers on Behalf of Estate of Myers v Davenport*, 1:21-CV-0922(LEK/CFH), 2022 WL 3017367, at \*6 (N.D.N.Y. July 29, 2022); *Bellamy v. Mount Vernon Hosp.*, No. 07-CV-1801(SAS), 2009 WL 1835939, at \*6 (S.D.N.Y. June 26, 2009).

### ***OCFS Fails to Provide Appropriate Guidance and Monitor Compliance***

Plaintiffs clearly allege the State is responsible for standards for approval of foster homes, and therefore knows this process requires ACS to make difficult decisions requiring appropriate guidance to avoid violating constitutional rights. Plaintiffs specifically allege that OCFS inflicts injury by failing to provide appropriate guidance for ACS’s exercise of discretion, ¶¶ 12 (A-17), 14 (A-18), 174 (A-60-61), 181-82 (A-63), 197-98 (A-67), 201-03 (A-68), 205-06 (A-69), 221 (A-72-73), 229 (A-75); and by failing to monitor ACS to ensure it follows that guidance and properly exercises its discretion. *Id.*<sup>19</sup> OCFS operates the SCR itself and is thus

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<sup>19</sup> Defendants incorrectly assert *M.G.* is not germane to traceability, claiming the state did not oversee but rather administered the system at issue. State Br. at 29-

aware of the grossly low standard used until recently to indicate reports, and the host of other serious deficiencies. *See infra* 35-37; A-13, ¶¶ 13 (A-17-18), 177-79 (A-61-62); ¶ 4 (A-94). OCFS also is aware that its deficient guidance has permitted ACS to rely on reports indicated based on this grossly low standard to disqualify relatives, as well as upon reports that never even result in a petition filed in Family Court, causing harm to children. ¶ 179 (A-62), 223 (A-73). OCFS is further aware that ACS routinely fails to take the additional steps required to evaluate any prior SCR history, including requesting the underlying investigation records from OCFS in order to have “complete and accurate information” to make an informed decision regarding certification of the home. ¶ 179 (A-62); ¶ 74 (A-114). Finally, OCFS is aware that its limited guidance for evaluating a foster parent’s criminal history only relates to safety assessments used in deciding whether to remove a child from a home (not whether to certify the applicant) and omits any reference to whether the applicant is a relative of the child. (A-166); (A-203).<sup>20</sup>

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30 n.5; *M.G. v New York State Office of Mental Health*, 572 F. Supp. 3d 1, 12 (S.D.N.Y. 2021) (“... Defendants administer the mental health system in New York State and are responsible for ... planning with local governments regarding community-based care, and determining funding and conducting oversight for the same.”)

<sup>20</sup> Notably, Meyer declines to attach the actual policy to which Exhibit H is an attachment.

### ***OCFS Established and Maintains the Mandatory Disqualification System***

Having created its list of nearly 300 mandatory disqualifying crimes based on an overbroad definition of crimes within the governing statute's categories, OCFS is necessarily aware that thousands of potential kin are forever disqualified, depriving children of relative foster homes. ¶¶ 166-171 (A-58-60), 208-216 (A-69-71). The State asserts that Plaintiffs do not allege that OCFS engaged in any “egregious conduct in failing to oversee” its mandatory disqualification system. State Br. 55. This mischaracterizes Plaintiffs’ claims – it is Defendants’ system itself that egregiously violates Plaintiffs’ constitutional rights. ¶¶ 208-16 (A-69-71).

### ***OCFS Provides Plaintiffs No Due Process***

OCFS deprives Plaintiff children of notice or the opportunity to challenge the evaluation and denial of certification of their kin foster home and are necessarily aware of this deprivation. *See supra* 27-30.

Plaintiffs clearly allege that OCFS is aware of the harm arising from its deficient policies and guidance. OCFS acknowledges the importance of locating and placing children in foster care with kin, requiring ACS to submit a policy prioritizing placement with kin to OCFS for review. ¶¶ 157-158 (A-57), (A-138). OCFS is also aware of the harm from mandatory disqualifications, stating: “[w]ithout the ability to conduct an individualized assessment in these situations, children who could live in viable kinship care placements may be forced into other foster care and group

home arrangements that may be less stable and more traumatic than placing them with relatives.” ¶ 214 (A-71).

Plaintiffs sufficiently alleged that OCFS is on notice that its oversight is deficient. A 2016 federal audit found OCFS does “not monitor these processes [background checks for foster parents] to ensure compliance.” ¶ 198 (A-67). A 2019 NYC Comptroller report concluded that “ACS management has failed to develop, implement and employ procedures and measures to effectively monitor and oversee its contracted foster agencies with regard to the foster care certification process.” ¶ 200 (A-68). In addition, OCFS does not track or collect data in a way that enables it to assess compliance with the certification and background check process and correct problematic practices. ¶¶ 169 (A-59), 206 (A-69). Finally, despite this notice of pervasive deficiencies in its certification processes, there is no indication that OCFS conducts any review of denied foster parent applications. ¶ 198 (A-67). Plaintiffs have thus powerfully established standing and adequately plead claims against OCFS.

## **VII. Plaintiffs Have Standing Despite SCR Legislative Reform.**

The City erroneously asserts that the claims of Plaintiffs whose relatives were disqualified based on their SCR history are moot due to legislation enacted after filing of this lawsuit amending N.Y. Soc. Svcs. L. § 424-a. Importantly, a case does not become moot simply because the underlying legislation is modified, especially

when, as here, the modified version continues to cause harm. *See Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993). Indeed, the legislative change falls far short of the relief sought here. ¶¶ 71-73 (A-32-33). ACS will still consider all indicated records of abuse, regardless of the age of those records, as well as those of neglect within the past eight years. N.Y. Soc. Svcs. L § 424-a(e)(i)(B)(II); *see also*, (A-229). Moreover, although Defendants assert that records of neglect more than eight years old are being designated as not reasonably related “on a rolling basis,” City Br. 29, they provide no assurance when this process will be completed nor that it will be done *prior* to consideration of any relative as foster parent. Many of the legislation’s changes are not retroactive, leaving the circumstances of Plaintiffs and putative class members with previously denied relatives unchanged. Accordingly, once any SCR record has been seen, the bell cannot be un-rung and it is unlikely Defendants will ensure that ACS will not be influenced by these records in their certification determinations. Finally, the legislative change will not address the other injunctive relief Plaintiffs seek. (A-83-85).

Even if any of Plaintiffs’ claims were found moot, Plaintiffs should be allowed to proceed under the “capable of repetition” exception to the mootness doctrine, *Kingdomware Tech., Inc. v. U.S.*, 579 U.S. 162, 170 (2016). Where the putative class is transitory, this exception is appropriate. *Amador v. Andrews*, 655 F.3d 89, 101 (2d

Cir. 2011) (“capable of repetition, yet evading review exception applicable where mootness resulted from a factor closely related to the essence of the claim”). The Plaintiff Class is transitory in nature – their family court proceedings and attendant placements could range from months to the vast majority of their childhoods. Further, there is no limit to the number of placement disruptions and subsequent exploration of kin caregivers they may experience during their time away from their parents. *See e.g.* App. Br. At 9-12. Under the “capable of repetition” doctrine, Plaintiffs’ claims in a class action relate back to the filing of the complaint, at which time all Plaintiffs had standing. *Robidoux v. Celani*, 987 F.2d 931, 938 (2d Cir. 1993); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992).<sup>21</sup>

Furthermore, the district court declined to consider Defendants’ mootness arguments and this Court should decline to address them in the first instance. *See supra* 16.

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<sup>21</sup> Defendants argue incorrectly that the claims of D.W. and Z.W. who now reside in a kin foster home are moot. State Br. n.7. Both Plaintiffs’ claims should be found to relate back to the filing of the complaint. *See supra* 36-37. Furthermore, voluntary cessation of allegedly illegal conduct does not make the claims moot. *U.S. v. W.T. Grant Co.*, 354 U.S. 629, 633 (1953).

## CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' opening brief, this Court should vacate the district court's Order and find Plaintiffs have established standing.

Dated: June 3, 2024

Respectfully submitted,

By:       /s/ Lisa Freeman      

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## **CERTIFICATE OF COMPLIANCE**

This brief is submitted on behalf of Plaintiffs-Appellants. It is subject to the enlarged word count (9,000 words) authorized by this Court's Order dated June 23, 2024 (Dkt. No. 54). This brief complies with the word count limitations of Fed. R. App. P. 32(a)(7)(B)(ii), as modified, because it contains no more than 8,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in a proportionally spaced 14-point Times New Roman typeface font using Microsoft Word.

Dated: June 3, 2024

Respectfully submitted,

/s/Lisa Freeman