# 22-0007-cv

## 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 Continuation of Caption See Inside Cover)*

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

# BRIEF FOR *AMICI CURIAE* THE LEGAL AID SOCIETY, LAWYERS FOR CHILDREN, AND THE CHILDREN'S LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

LISA FREEMAN
KATHRYN WOOD
Special Litigation and Law Reform Unit
Juvenile Rights Practice
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
(212) 577-3300
lafreeman@legal-aid.org
kwood@legal-aid.org

DAVID E. ROSS
DAVID J. ABRAMS
STEPHEN P. THOMASCH
YARDEN HODES
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
dross@kasowitz.com
dabrams@kasowitz.com
sthomasch@kasowitz.com
yhodes@kasowitz.com

*Attorneys for Amici Curiae The Legal Aid Society, Lawyers for Children, and The Children's Law Center*

*(For Continuation of Appearances See Inside Cover)*

ELISA W.; ALEXANDRIA R., by her Next Friend, Alison Max Rothschild; THIERRY E., by his Next Friend, Michael B. Mushlin; LUCAS T., XIMENA T., JOSE T.C. and VALENTINA T.C., by their next friend, Rachel Friedman; AYANNA J., by her next friend, Meyghan McCrea; OLIVIA and ANA-MARIA R., by their Next Friend, Dawn Cardi; XAVION M., by his Next Friend, Michael B. Mushlin; DAMEON C., by his Next Friend, Reverend Doctor Gwendolyn Hadley-Hall; TYRONE M., by his Next Friend, Bishop Lillian Robinson-Wiltshire; BRITTNEY W., by her Next Friend, Shamara Mills; MIKAYLA G., by her Next Friend, Michael B. Mushlin; MYLS J. and MALIK M., by their Next Friend, Elizabeth Hendrix; and EMMANUEL S. and MATTHEW V., by their Next Friend, Samuel D. Perry, Individually and on Behalf of a Class of All Others Similarly Situated,

*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.*

---

BETSY KRAMER, ESQ.
LAWYERS FOR CHILDREN
110 Lafayette Street, 8th floor
New York, New York 10013
(212) 966-6420
bkramer@lawyersforchildren.org

JANET NEUSTAETTER, ESQ.
THE CHILDREN'S LAW CENTER
44 Court St., 11th Floor
Brooklyn, New York 11201
(718) 522-3333
jneustaetter@clcny.org

*Attorneys for Amici Curiae The Legal Aid Society, Lawyers for Children, and The Children's Law Center*

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

The Legal Aid Society, Lawyers For Children, and The Children's Law Center respectfully submit this *amicus curiae* brief in support of Plaintiffs-Appellants ("Appellants") pursuant to Federal Rule of Appellate Procedure 29(a).[1]

## INTEREST OF THE AMICI CURIAE

*Amici curiae* are New York-based legal and advocacy organizations that represent and advocate for the rights of disenfranchised children in New York City. Each organization works to protect and defend vulnerable children through direct representation, impact litigation, policy advocacy, and education.

Founded in 1876, The Legal Aid Society ("LAS") is the oldest and largest private non-profit legal services agency in the nation. Since the inception of the New York Family Court sixty years ago, LAS has maintained a Juvenile Rights Practice to help ensure the health and welfare of New York City's children in courtrooms and communities. Today, the Juvenile Rights Practice defends the rights, needs, and interests of approximately ninety percent of all children who appear in Family Courts in New York City on child welfare, parental rights, persons in need of supervision, and related matters. To support this work, LAS lawyers, social workers, paralegals, and investigators are devoted to serving the unique needs

[1] Pursuant to Fed. R. App. P. 29(a), all parties consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

of children and youth removed from their homes and placed in the custody of the New York City Administration for Children's Services ("ACS"). Through this work, LAS has a unique perspective on the needs of New York City's children and the role of class action litigation in driving systemic change and policy reforms for children in foster care.

Since 1984, Lawyers For Children ("LFC") has provided free legal and social work services on behalf of children in more than 30,000 New York City Family Court proceedings involving abuse, neglect, voluntary foster care placement, termination of parental rights, adoption, guardianship, paternity, custody, and visitation. LFC's goal is to protect vigorously the right of the children they represent to a safe, secure, and supportive home environment.

The Children's Law Center ("CLC"), founded in 1997, provides representation to children through its Trial, Appellate, and Reflective Advocacy Practice. CLC is one of two organizations selected by the New York State Unified Court System to provide representation to children who are assigned counsel in custody and visitation proceedings in New York City Family Court. CLC also handles paternity, family offense, child support, guardianship and child protective matters, including those in which children are placed in foster care.

* * *

Affirmative civil rights class action litigation is at the heart of *amici*'s law reform work on behalf of their clients. It is an essential tool for remedying systemic problems, enforcing the rights of similarly situated persons, and removing long-standing barriers to justice for children who lack the means and ability to challenge independently the obstacles they face.

Courts in this Circuit and across the country have routinely certified classes of children in child welfare systems. The District Court's denial of Appellants' renewed motion for class certification (the "Order") should be viewed as an aberration predicated on an overly narrow interpretation of operative class certification standards under binding Second Circuit and Supreme Court precedent. *See generally Elisa W. v. City of New York*, No. 1:15-cv-05273, ECF No. 542 (S.D.N.Y. Sept. 3, 2021). If affirmed by this Court, the Order would jeopardize the viability of children's rights class actions in the Second Circuit, thereby depriving New York's most vulnerable citizens of what is often their only avenue to vindicate their rights to basic liberties including freedom from harm while in government care. *Amici* ask this Court to reverse the Order and remand for reconsideration in accordance with controlling class certification precedent.

## ARGUMENT

### I. CLASS ACTIONS PLAY AN IMPORTANT ROLE IN CHILDREN'S RIGHTS LITIGATION

Across the nation, class actions have played a crucial role in the protection of civil rights. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).[2] As detailed *infra*, critically important civil rights class actions also have led to significant structural reforms protecting children's rights, particularly for those in foster care. It is therefore imperative that this Court ensure the continued viability of class actions to protect children in foster care.

#### A. Children In Foster Care Are Particularly Vulnerable And Face Significant Barriers To Addressing Serious Systemic Issues

At the outset, it is important to understand the composition of the putative class of children in foster care in New York City. Every year, ACS removes thousands of New York City children from their parents or guardians and takes them into government custody.[3] Nearly three-quarters of these children are under age

---

[2] *See also* Hon. Robert L. Carter, *The Federal Rules Of Civil Procedure As A Vindicator Of Civil Rights*, 137 U. PA. L. REV. 2179, 2184 (1989) (noting that there is a "special dependence of civil rights (and other public rights) litigation on the device of the class action").

[3] *See* New York State Office of Children & Family Services, *2020 Monitoring & Analysis Profiles With Selected Trend Data: 2016-2020, Child Protective Services, Foster Care, Adoption, New York City*, p. 7, available at

eleven.[4] A disproportionate number of these children are African American and Latinx.[5] And the majority come from families who are poor,[6] as families who are "below the poverty line are 22 times more likely to be involved in the child protection system than families with incomes slightly above it."[7] Unsurprisingly,

---

https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20City.pdf (last accessed April 25, 2022).

[4] *See* NYC Children Flash Report Monthly Indicator ("NYC Children Flash Report"), p. 16, available at https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2022/02.pdf (last accessed April 25, 2022).

[5] African American children enter the child welfare system in numbers far greater than their proportion of the general population. For example, while African American children represent almost 21.6% of New York City's youth, 50% of children removed from their parents' custody are African American. CCC Analysis of U.S. Census Bureau, American Community Survey 1-Year Estimates, Public Use Microdata Sample File (2005-2019), available at https://data.cccnewyork.org/data/table/98/child-population#11/18/40/a/a (last accessed April 25, 2022) (reflecting racial demographics of New York City's child population); 2021 Monitoring and Analysis Profiles With Selected Trend Data: 2017-2021, Child Protective Services, Foster Care, Adoption, New York City, New York State office of Children and Family Services, available at https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20City.pdf (last accessed April 25, 2022) (reflecting racial demographics of children in foster care).

[6] Kathryn Joyce, The Crime of Parenting While Poor, The New Republic, Feb. 25, 2019, https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform (last accessed April 25, 2022).

[7] Martin Guggenheim, Representing Parents In Child Welfare Cases: Advice and Guidance for Family Defenders, ed. Martin Guggenheim & Vivek S. Sankaran, 17 (2016).

many of these children have experienced trauma in their short lives,[8] including the trauma suffered when ACS removes them, for an indefinite length of time, from the only homes and communities they have known. Given this reality, New York City's foster children face virtually insurmountable barriers to seeking systemic reforms of the child welfare system in the absence of class actions.

### B. Class Actions Provide A Vital Tool Without Which New York City's Children Are Unable To Effect Systemic Change

Children in the child welfare system face several structural barriers to effecting systemic change through individual actions. Children are often unexpectedly thrust into government custody, away from their parents or other adults who typically would represent their interests. Moreover, because most children in the child welfare system are indigent, they lack the ability to fund litigation independently. They also face the threat of having their claims become moot, either due to receiving a permanent placement through adoption or a final discharge home,[9] or aging out of the foster care system during the course of the litigation.[10] In

---

[8] Caitlin Papovich, Trauma & Children in Foster Care: A Comprehensive Overview, July 10, 2019, https://www.csp.edu/publication/trauma-children-in-foster-care-a-comprehensive-overview/#:~:text=Youth%20in%20foster%20care%20have,et%20al.%2C%202012 (last accessed April 25, 2022).

[9] See NYC Children Flash Report, p. 19.

[10] *See* Report on Youth in Foster Care, New York City Administration for Children's Services, pp. 11-12, available at

addition, if successful, individual actions typically result only in individual relief, rather than systemic change.[11]

While the Family Court plays a critical role in matters involving child welfare, the Family Court system does not have the authority to address the need for systemic reforms in the child welfare system. Family Court is a court of limited jurisdiction with limited authority. *H.M. v. E.T.*, 14 N.Y.3d 521, 526 (N.Y. 2010) ("Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute."). New York courts regularly enforce these limitations on the Family Court's authority, even where the requested action concerns a child's welfare. *See, e.g.*, *Donald QQ v. Stephanie RR*, 198 A.D.3d 1155, 1156 (3d Dep't 2021) (holding that "Family Court lacks the authority" to "order a child protective agency . . . to commence a neglect proceeding against a parent"); *In re K.O.*, 49 Misc.3d 806 (N.Y. Fam. Ct. 2015) (Family Court lacked

---

https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/ReportOnYouthInFC2020.pdf (last accessed April 25, 2022).

[11] Where a plaintiff has proven only an individual claim, courts routinely find that the issuance of a broader injunction concerning similarly situated individuals is inappropriate. *See, e.g.*, *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefiting an entire class in an individual suit, such broad relief is rarely justified"). Thus, proceeding in an individual action only "could result in an order so narrow as to be meaningless" for those similarly injured by a constitutional violation. Maureen Carroll, *Class Action Myopia*, 65 DUKE L. J. 843, 859 (2016).

authority "to invade the discretionary authority of the state agency authorized to provide appropriate care for a child in its custody"); *City of New York v. Maul*, 59 A.D.3d 187, 190 (1st Dep't 2009) (holding that the limited jurisdiction of the Family Court prevents it from granting systemic relief on behalf of developmentally disabled children in foster care).

Thus, the constraints on the Family Court's authority have left it without the ability to order the type of relief that Appellants seek herein—systemic reform of a city and state agency. *See*, *e.g., Matter of Lorie C.*, 49 N.Y.2d 161, 166, 171-172 (N.Y. 1980) ("the court-ordered plan is beyond the authority of the Family Court because it establishes general overview of functions of the Department of Social Services"). Indeed, the Family Court lacks the authority to enter an order providing for "general overview" of an agency's functions, and it therefore cannot: (1) require ACS to ensure that caseworkers have caseloads that conform to accepted professional standards; (2) mandate that the City has enough foster homes for children in its custody (indeed, the Family Court cannot even mandate a particular placement for an *individual* child); (3) require the City to have a process for matching children with appropriate placement; (4) ensure appropriate training for all employees; (5) develop an appropriate array of services for children or parents to enable children to exit foster care to permanency; (6) ensure the City provides oversight over contracting agencies; or (7) ensure the State provides oversight over

the City. *See id.* Thus, litigants such as Appellants must seek systemic relief through another forum.

### C. Class Actions Have Been Instrumental In Reforming The New York City Foster Care System

Class actions are a primary method for achieving systemic, institutional reform, particularly in the children's rights field. Public interest organizations such as *amici* have brought class actions on behalf of thousands of children in New York City. *See, e.g.*, *C.W. et al. v. City of New York*, No. 1:13-cv-037376 (E.D.N.Y. 2013) (civil rights class action securing an appropriate number of shelter beds for youth, increasing access to mental health services for runaway and homeless youth, and establishing due process procedures for runaway and homeless youth facing involuntary discharge from shelter); *D.B. v. Richter*, No. 402759/2011 (N.Y. Sup. Ct. 2011) (civil rights class action ensuring that children in foster care do not age out to homelessness); *A.M. et al. v. Mattingly*, No. 1:10-cv-02181 (E.D.N.Y. 2010) (civil rights class action protecting children in acute care psychiatric hospitals by ensuring adequate discharge planning and prompt discharge to the least restrictive setting); *City of New York v. Maul*, 929 N.Y.3d 499 (N.Y. 2010) (civil rights class action vindicating rights of disabled children in foster care to least restrictive settings appropriate for their needs); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (civil rights class action holding that ACS violated substantive due process by prosecuting mothers who were domestic violence victims and unnecessarily

removing their children); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (civil rights class action on behalf of a class of children in foster care, leading to substantial reform in child welfare system).

Absent access to class action litigation, New York's children might still be exposed to the risk of inadequate shelter, being discharged from foster care without a home, languishing in overly restrictive facilities, or being unnecessarily removed from a parent when domestic violence is involved. Federal class action litigation has been a critically important tool for the advancement of children's rights, as it has facilitated systemic change unavailable through individual litigation or through the Family Court's limited jurisdiction and purview.

## II. THE ORDER IS CONTRARY TO ESTABLISHED CASE LAW AND, IF ADOPTED BY THIS COURT, WOULD HAVE A SEVERELY NEGATIVE IMPACT ON CHILDREN'S RIGHTS CLASS ACTIONS

The Order's interpretation of Rule 23's commonality and typicality requirements is contrary to established Second Circuit case law and is unsupported by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) ("*Wal-Mart*"). Moreover, the Order's narrow and misguided interpretation is particularly troubling given the adverse impact it would have on one of the most vulnerable groups in our society—children in foster care. Accordingly, the Order should be reversed and remanded so the District Court may reconsider Appellants' renewed motion for class certification applying the proper standard, as detailed

below and in accordance with this Court's prior decisions in *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), and *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. Jan. 25, 2022).

### A. The Standard Applied By The Order Is Contrary To Binding Precedent In This Circuit

The District Court erred in its application of the commonality and typicality requirements of Rule 23 when considering Appellants' renewed motion for class certification, and in doing so, contravened established Second Circuit law.

#### *1. The District Court Applied An Erroneous Commonality Standard*

In assessing commonality, the Court erred by ignoring the many common questions that flow from Appellees' practices that allegedly expose all children in foster care to a substantial risk of harm. In doing so, the Court rejected a finding of commonality for three reasons. *First*, the District Court found an absence of commonality because "there are myriad reasons" why Appellants' alleged injuries "may occur," and thus the questions were allegedly incapable of generating "common answers that would drive the resolution of the case." (Order, at 17-18.) *Second*, the District Court held that Appellants' allegations relied on "departures from ACS policy" that purportedly failed to demonstrate a common practice causing the alleged harm to all class members. (*Id.* at 18-19.) *Third*, the District Court found that the structure and role of the New York State Family Court and New York's

foster care system creates dissimilarities that "'impede the generation of common answers.'" (*Id.* at 19 (quoting *Wal-Mart*, 564 U.S. at 350).) The District Court misinterpreted the factual landscape as well as current law in finding that each of these concerns defeats commonality.

*a. Appellants' Injuries Need Not Be Identical Because Risk Of Harm Is Sufficient To Establish Commonality*

The Order's first basis for finding the absence of commonality— that "the questions presented by Plaintiffs are too broad and generalized" because "there are myriad reasons" why Appellants' injuries "may occur"—relied on an erroneous interpretation of *Wal-Mart* and ignored extensive precedent, both pre- and post-*Wal-Mart*, regarding differing injury and risk of harm.

The District Court wrongly interpreted *Wal-Mart* to require that the harm that flows to each putative class member from the alleged violation must be identical. Specifically, it held that under *Wal-Mart*, all plaintiffs must "have 'suffered the same injury,' but that '[t]his does not mean merely that they have all suffered a violation of the same provision of law.'" (Order at 17 (citing *Wal-Mart*, 564 U.S. at 350) (emphasis added).) The District Court then analogized to *Wal-Mart* to support its denial of commonality: "In *Wal-Mart*, the mere claim that employees of the same company had suffered an injury to Title VII did not mean that all of those claims could be 'productively litigated at once.' So too here." (Order at 18 (emphasis added.)) Based on that analogy, the District Court found that no commonality exists

because there are "myriad reasons" why Appellants' injuries "may occur." (*Id.*) That logic fails, however, for two reasons.

*First*, in *Wal-Mart*, there was no common policy at issue. 564 U.S. at 344 ("These plaintiffs . . . do not allege that Wal-Mart has any express policy against the advancement of women."). By contrast, Appellants here allege that certain ACS and OCFS policies have caused them injuries.

*Second*, where, as here, common policies or practices harm all members of a putative class (or subject them to an unreasonable risk of harm), the violation is susceptible to being remedied "in one stroke," which is all that *Wal-Mart* requires. 564 U.S. at 350.[12] Whether the actual harm suffered differs by individual class member is of no import if the common policies or practices subject class members to a common unreasonable risk of harm.

This Court's recent decision in *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022), rejected an argument similar to that adopted by the Order. In *Barrows*, the Centers for Medicare & Medicaid Services ("CMS") appealed a decision certifying a class of Medicare Part A beneficiaries who have or will receive a notice from CMS reclassifying their hospital admission from inpatient to outpatient services.

[12] *Wal-Mart* involved a suit for class-wide individual damages. *Walmart*, 564 U.S. at 345. As a result, relief would have required an independent process involving evidentiary hearings. Where, as here, only injunctive relief is sought, it is apparent that a "common answer" exists.

*Alexander v. Azar*, 2020 WL 1430089, at *5 (D. Conn. Mar. 24, 2020). The plaintiffs alleged that CMS violated their due process rights by reclassifying them without providing an administrative review process for the reclassification decision. *Barrows*, 24 F.4th at 122. CMS challenged the Court's finding that the class satisfied Rule 23's commonality and typicality requirements. *Id.* at 130-132.

CMS argued that the plaintiffs had not met Rule 23's commonality requirements because the class members allegedly suffered different injuries as a result of the reclassification and that there were "no questions of law or fact common to the class." *Barrows*, F.4th at 131. This Court rejected that argument. *First*, this Court found that the injury need not be identical for it to be common as "the injury arising from the absence of an appeals process may manifest itself differently depending on a beneficiary's medical situation." *Id.* Instead, it was sufficient that the class members had all suffered the injury in that they were denied Medicare Part A coverage based on the reclassification, regardless of how that denial impacted them individually. *Id.* *Second*, this Court found that common questions existed because the plaintiffs' proposed questions "focus on the centralized actions" of CMS. *Id.* In doing so, it recognized that "where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Id.*

*Barrows* is not alone in finding that, even post-*Wal-Mart*, Rule 23 does not require that putative class members all suffer the same specific injury as a result of the wrongful conduct at issue. *See, e.g.*, *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030 (8th Cir. 2018) (certifying class because the question asked by each class member is susceptible to common resolution, despite the fact that class member's physical symptoms may vary); *Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017) (affirming class certification even where no two class members had "the exact same risk" of health issues as the relevant policy was alleged to pose an unconstitutional risk of serious harm to all class members); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (finding that common questions of law or fact existed, despite the fact that "the risk might ultimately result in different future harm for different inmates"); *M.D. v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013) ("[T]he issue here is not what percentage of children have actually suffered abuse while in state custody, but whether and to what extent foster children are at *imminent risk of serious harm*") (citations omitted) (emphasis in original).

Indeed, the recognition that injuries need not be identical is particularly important where, as here, the allegations are that the policies and practices expose the putative class to an unreasonable *risk of harm*. Certainly, where a risk of harm is unreasonable, it is accepted that some class members may suffer actual injury while others face only an unreasonable risk of injury. As in *Barrows*, courts have

continued post *Wal-Mart* to find commonality where the defendants' policies and practices uniformly subject members of the putative class to a substantial *risk of harm*. *See, e.g.*, *K.A. v. City of New York*, 413 F. Supp. 3d 282, 302 (S.D.N.Y. 2019) (finding Rule 23 commonality based on "substantial and unreasonable risk" of sexual abuse and harm); *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y. 2017) (claim by juveniles in county jail for class-wide injunctive relief based on "common course of conduct" giving rise to "substantial risk of serious harm"); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957 (9th Cir. 2019) (affirming class certification in action alleging that state child welfare agencies' widespread systemic failures exposed children in custody of Arizona foster care system to physical and emotional harm and unreasonable risk of harm); *Connor B. ex rel. Virgurs v. Patrick*, 272 F.R.D. 288, 293-95 (D. Mass. 2011) ("[T]he unreasonable *risk* of harm created by these alleged systemic failures within DCF and applicable to the entire Plaintiff class is sufficient to satisfy the requirement of commonality."); *D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635 (N.D. Okla. 2011) (certifying class of children in foster care subject to imminent risk of harm while in state custody).

The District Court's failure to consider whether Appellees' common practices put Appellants at a substantial risk of harm is apparent from the Court's failure to explain why Appellants' claim of an inadequate training and monitoring regimen for

case workers fails to meet the threshold for commonality. *See, e.g., M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 279-80 (W.D. Mo. 2018); *Wal-Mart*, 131 S. Ct. at 359 ("[F]or the purposes of Rule 23(a)(2) [e]ven a single [common] question will do."). Other jurisdictions have certified similar classes with similar contentions. *See, e.g.*, *D.G.*, 278 F.R.D. at 639-42, 645.

Indeed, in finding a lack of commonality, the District Court appears to have focused on Appellants' claims relating to delays in achieving permanency even though Appellants challenge several of Appellees' policies and practices.[13] *See, e.g., Elisa W.* ECF 440 at 13, 20, 23. Specifically, the Order asserts that multiple factors can contribute to delays in achieving permanency and that this fact defeats commonality for all of Appellants' allegations. *Id.*, ECF 542 at 18. However, the District Court should have considered each of Appellants' allegations of constitutional and statutory violations independently to determine if they meet the Rule 23 commonality requirements. *Wal-Mart*, 131 S. Ct. at 359.

Furthermore, with regard to the allegation of delays in achieving permanency, the fact that factors other than Appellees' policies and practices contribute to delay should not defeat commonality. The operative questions should be whether

[13] *Amici* do not assert that the speed in achieving what is considered a permanent outcome for children in the child welfare system is necessarily an accurate measure of the ability of the system to safely and adequately care for children in its purview.

Appellees' policies and practices give rise to an unreasonable risk of harm and whether, under *Wal-Mart*, a common remedy exists. Rule 23 does not require that a common remedy would prevent all harm, but rather that it addresses the harm that has been identified as flowing from the common policies and practices.

Appellants do not claim that all class members will be injured in exactly the same way by Appellees' alleged systemic deficiencies, only that Appellees' patterns or practices put the putative class members—children in foster care in New York City—at an unreasonable risk of harm, and that there are common remedies to address those patterns or practices. As such, the alleged injury or risk of harm to Appellants is sufficient to "generate common answers apt to drive the resolution of the litigation" and sustain a finding of commonality. The District Court erred in finding otherwise.

*b. Departures From Policy Can Constitute A Common Practice Sufficient For Commonality*

The Order's second basis for declining to find commonality—that Appellants' "allegations do not flow from unitary, non-discretionary policies that violate the rights of all class members or cause them all injury," but instead rely on "departures from ACS policy"—is also contrary to established case law. (Order, at 18-19.) The Order construed Appellants' allegations as concerning "*departures* from ACS policy" without considering Appellants' argument that those departures were the result of unified patterns and practices, such as overworking case workers. (*Id.*

(emphasis in original).) Nothing in *Wal-Mart* requires such a narrow interpretation of Appellants' allegations. Instead, "[p]ost-*Wal-Mart*, establishing commonality entails two things: that there exists a common policy or practice, possibly an implicit one, that is the alleged source of the harm to class members, and that there are common questions of law or fact that will be dispositive of the class members' claims." *Perry*, 294 F.R.D. at 29.

Although it pre-dates *Wal-Mart*, this Court's holding in *Marisol* reflects the proper analysis of these issues in the present context. In *Marisol*, this Court considered an appeal of an order certifying a class of foster children, defined as "[a]ll children who are or will be in the custody of [ACS], and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS." 126 F.3d at 375. The Defendants argued that certification was inappropriate because neither commonality nor typicality were demonstrated by the class as "each named plaintiff challenges a different aspect of the child welfare system," including "inadequate training and supervision of foster parents, the failure to properly investigate reports of suspected neglect and abuse, unconscionable delay in removing children from abusive homes, and the inability to secure appropriate placements for adoption." *Id.* at 376. This Court rejected that contention, finding that certification was proper even if "the creation of subclasses

will be necessary" because, among other reasons, "plaintiffs allege that their injuries derive from a unitary course of conduct by a single system." *Id.* at 377.

Since this Court decided *Marisol*, it has been the cornerstone for children's rights class action analyses in the Second Circuit. Nonetheless, the Order held in cursory fashion that *Marisol* is likely no longer good law because it "predate[s] the Supreme Court's seminal decision in *Wal-Mart*." (Order, at 23 n.10.) In support of this point, the Order relied only on Judge McMahon's dictum in *Taylor v. Zucker*, 2015 WL 4560739 (S.D.N.Y. July 27, 2015), that "it is highly doubtful that the [*Marisol*] class would be certified today." (Order, at 23 n.10.)

However, nothing in *Wal-Mart* negates the holding in *Marisol* that a course of conduct creating a classwide risk of harm can support a finding of commonality. Indeed, since *Wal-Mart*, numerous decisions by this Court, including the recent *Barrows* decision, have continued to rely on *Marisol* as valid precedent on the standards for class certification. *See, e.g.*, *Barrows*, 24 F.4th at 132 n.67; *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 85 (2d Cir. 2015); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011). As such, given the analogous context here, the District Court should have followed *Marisol* when deciding Plaintiffs' renewed motion for class certification.

*c. Neither New York's Family Court Structure Nor Its Child Welfare System Is An Impediment To A Finding Of Commonality*

The Order's final basis for declining to find commonality relies upon what it characterizes as New York's unique child welfare and Family Court systems. The Order found "the role played in each child's case by the New York State Family Court system is a critical factor that 'creates dissimilarities within the proposed class' that 'impede the generation of common answers.'" (Order at 19 (quoting *Wal-Mart*, 564 U.S. at 350).) The Order further contended that the New York City foster care system is unique, and thus cannot be subject to cross-jurisdictional comparison. (Order, at 23 n.10.) Both of these arguments are contradicted by established law and unsupported by an analysis of child welfare systems nationwide. Specifically, this Court found sufficient commonality to support certification of a class of foster children in *Marisol*, which involved consideration of the same interplay between ACS and the Family Court as well as the child welfare system. *Marisol*, 126 F.3d at 376-77.

*First*, as discussed *supra,* the Family Court is a court of limited jurisdiction that plays a narrow role in individual children's care while they are in ACS custody. Appellants do not seek to remedy individual issues litigated in Family Court, but rather to address systemic deficiencies in the child welfare system. Moreover, the Order places undue weight on the Family Court's role in delay to permanency and

ignores Appellants' other claims on which Family Court proceedings have absolutely no bearing.

As noted above, Family Court proceedings certainly can contribute to a delay in the time to disposition or "permanency." *See, e.g., The Impact of COVID-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants*, New York City Bar Association and The Fund for Modern Courts, p. 7 (January 2022) (noting that because of a lack of judicial resources, it might take several years to complete a proceeding to terminate parental rights and allow a child to be adopted.); The Long Road Home: The Study of Children Stranded in Foster Care, Children's Rights, pp. 171-195 (Nov. 2009) (noting various factors within the family court system that lead to delays in permanency). Those delays, however, do not affect whether ACS's policies or practices cause harm or an unreasonable risk of harm, as alleged by Appellants. For example, *amici* regularly have cases adjourned in Family Court due to delayed reports from overworked caseworkers or ACS's failure to provide timely services to families. That the Family Court may also cause delay does not negate the existence of common questions concerning whether ACS's practices cause common harm (or risk of harm) to the putative class members.

Moreover, in finding that the Family Court creates dissimilarities within the proposed class, the Order failed to consider Appellants' claims unrelated to

permanency or time to disposition. Most of Appellants' allegations involve aspects of the child welfare system that are never before the Family Court. For example, Appellants allege constitutional violations resulting from inadequate caseworker training and unmanageable caseloads as well as failure to keep children safe while in government care. The Family Court has no role in deciding the particular type or frequency of training ACS staff should receive nor does it ensure that Appellees have a system in place to ensure children's safety. As discussed *supra* at section I.B., because state law greatly circumscribes the role of the Family Court, it has no authority to correct these alleged systemic problems.

*Second*, the Order also suggests that commonality cannot be established due to the purportedly unique size and complexity of the New York foster care system. New York's foster care system, however, is not unique. Many other jurisdictions have adopted similar child welfare models with both state and local oversight and/or contracted service providers for foster care, and have had similar classes certified. Indeed, as of 2018, eight other states administered their child welfare services on a county-by-county level, like New York, and two states used a hybrid state-county system,[14] while eleven other states and the District of Columbia engaged in the

[14] *See State vs. County Administration of Child Welfare Services* (2018), Department of Health and Human Services, Children's Bureau, available at https://www.childwelfare.gov/pubPDFs/services.pdf (last accessed April 25, 2022) (reflecting that California, Colorado, Minnesota, North Carolina, North Dakota,

privatization of case management services.[15] Courts in those states have nevertheless found it appropriate, post *Wal-Mart*, to certify classes of foster children despite those system-wide complexities. *See, e.g.*, *B.K.*, 922 F.3d 957 (affirming certification of class of Arizona children in foster care).

Nonetheless, the District Court concluded that because the New York State child welfare system involves a complex interplay of state, city, and private actors, children in the New York foster care system are left defenseless—unable to hold any single party to account because too many parties play a role in creating the circumstances in which they find themselves. This reasoning defies logic and reality. It is both possible and necessary to hold any party responsible for creating an unreasonable risk of harm posed to a child's life. The fact that ACS has chosen to contract with 29 foster care agencies to care for children in its custody does not and cannot immunize ACS from liability for harm flowing from its policies and practices. Appellants claim that ACS and OCFS provide deficient oversight.

---

Ohio, Pennsylvania, and Virginia also use county-level systems and that Nevada and Wisconsin use hybrid state-county systems).

[15] *See Privatization in Child Welfare*, National Conference of State Legislatures (Feb. 2018), available at https://leg.mt.gov/content/Committees/Interim/2017-2018/Children-Family/Meetings/Mar-2018/march2018-ncsl-cps-privatization-report.pdf (last accessed April 25, 2022) (reflecting that Arizona, Colorado, District of Columbia, Florida, Illinois, Kansas, Michigan, Missouri, Ohio, South Dakota, Tennessee, and Wisconsin also engaged in privatization).

Policies and practices with respect to oversight are by definition common to all putative class members. Thus, ACS's decision to contract out its services should mean that oversight by both ACS and OCFS is even more essential and any failure of oversight that much more egregious.

Were this Court to endorse or adopt the District Court's ruling on this point, it would effectively insulate from review cases challenging state and city executive action and procedures when an agency chooses to contract out its services. Accordingly, this Court should reverse the Order and remand for reconsideration based on the commonality standards outlined by this Court in *Barrows* and *Marisol*.

***2. The District Court Applied An Erroneous Typicality Standard***

In assessing typicality, the District Court erred in finding that "the highly individualized nature of any child's case is . . . particularly salient to the typicality requirement, highlighting the inability of the named Plaintiffs to be typical representatives of all children in foster care now or in the future." (Order, at 22.) The District Court based that ruling on two findings: (i) "the very nature of which children remain in the foster care system for extended lengths of time does not yield ready comparison between the named Plaintiffs and other individuals;" and (ii) "the named Plaintiffs' claims cannot be said to 'arise[] from the same course of events'" as the other putative class members because "it is not possible to determine what caused a permanency delay, a specific placement, an untimely or poorly-conceived

case plan, or an instance of maltreatment, without evaluating all of the other contributing facts and influences." (*Id.* at 22-23.) Each holding failed to apply the proper typicality standard under Rule 23.

*First*, the District Court erred in finding that the nature of the foster care system, including the fact that New York's policy preferences cause more complicated cases to be delayed longer than others, precluded a finding of typicality. (Order, at 22.) As this Court recently recognized in *Barrows*, typicality "is satisfied when each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Barrows*, 24 F.4th at 131. In *Barrows*, CMS argued that the claims asserted by the named plaintiffs—who were previously hospitalized individuals—were not typical of the putative class members "*who are going to be hospitalized*" because those individuals would "have a stronger interest in the expedited appeals process for currently-hospitalized individuals." *Id.* at 132 (emphasis in original). This Court rejected that argument, however, finding that CMS's "failure to provide an appeals process leads to the claims" of both the past and future hospital patients within the proposed class. *Id.* In doing so, this Court recognized that even though the effect may be different on certain members of the putative class, typicality is satisfied where the claim arises from the same cause. *Id.*

In contrast, the District Court here found that Appellants could not demonstrate typicality because the reasons children remain in the foster system for extended lengths varies. (Order, at 22.) That ruling follows the flawed logic of CMS rejected by this Court in *Barrows*, because it erroneously focuses on the outcomes for particular individuals. The District Court should have determined whether the allegedly improper conduct by ACS (*i.e.*, its pattern of failing to provide adequate oversight) gave rise to the claims of all members of the putative class in a way that made the named plaintiffs' claims typical of the unnamed class members—regardless of whether individual outcomes may vary. (*Id.*)

*Second*, the District Court erred in finding that Appellants could not demonstrate that their claims "arise from the same course of events" as the other putative class members because of the myriad reasons that could cause a permanency delay. (Order, at 22-23.) In reaching this holding, the District Court failed to provide adequate weight to this Court's ruling in *Marisol*, which affirmed a finding of typicality arising from a similar course of conduct. *See* 126 F.3d at 376-77. While the District Court distinguished *Marisol* because it was decided before *Wal-Mart*, this Court recently relied on *Marisol* in *Barrows* for the proposition that a "unitary course of conduct by a single system" (*e.g.*, ACS) could support typicality. *Barrows*, 24 F.4th at 132 n.67. The District Court thus erred by failing to consider under

*Marisol* whether Appellants' allegations arise from a unitary course of conduct by ACS.

Thus, this Court should reverse the Order and remand for reconsideration based on the typicality standard outlined by this Court in *Barrows* and *Marisol*.

## CONCLUSION

Based on the foregoing, *amici* respectfully request that the Court reverse the Order and remand for reconsideration applying the proper class commonality and typicality standards previously set forth by this Court in *Barrows* and *Marisol*.

Dated: New York, New York
April 26, 2022

Respectfully submitted,

By: */s/ David E. Ross*

David E. Ross
David J. Abrams
Stephen P. Thomasch
Yarden Hodes
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
Tel.: (212) 506-1700
dross@kasowitz.com
dabrams@kasowitz.com
sthomasch@kasowitz.com
yhodes@kasowitz.com

Lisa Freeman
Kathryn Wood
Special Litigation and Law Reform Unit
Juvenile Rights Practice
THE LEGAL AID SOCIETY

199 Water Street
New York, New York 10038
Tel.: (212) 577-3300
lafreeman@legal-aid.org
kwood@legal-aid.org

Betsy Kramer, Esq.
LAWYERS FOR CHILDREN
110 Lafayette Street, 8th Floor
New York, New York 10013
Tel.: (212) 966-6420, ext. 631
BKramer@lawyersforchildren.org

Janet Neustaetter, Esq.
THE CHILDREN'S LAW CENTER
44 Court Street, 11th Floor
Brooklyn, New York 11201
Tel.: (718) 522-3333, ext. 136
JNeustaetter@clcny.org

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit and Rule 32(e) of the Federal Rules of Appellate Procedure and because it contains 6,532 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

*/s/ David E. Ross*
David E. Ross