23-7401-cv

United States Court of Appeals

for the

Second Circuit

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)

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

BRIEF FOR PLAINTIFFS-APPELLANTS

LISA FREEMAN
KATHRYN WOOD
KIMBERLY R. SCHERTZ
THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
199 Water Street
New York, New York 10038
(212) 577-3300

Attorneys for Plaintiffs-Appellants

CP COUNSEL PRESS (800) 4-APPEAL • (327061)

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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Each year, hundreds of children who have been removed from their parents by the New York City Administration for Children's Services ("ACS"), and who ACS is constitutionally required to care for and protect, are needlessly deprived safe, familiar, and stable homes with their relatives. Instead, Defendants' policies and practices arbitrarily deny certification of their relatives as foster parents. As a result, these children, who have just experienced the trauma of removal from their parents, are thrust into stranger foster care or institutional group care or are placed with relatives but denied critical supports and services for their basic care.

Defendants' policies and practices violate Plaintiff children's rights to family association, freedom from harm, to be in government care no longer than necessary, and to due process when they (1) *automatically* deny children kin foster and adoptive homes based on a list of nearly 300 convictions that require *lifetime* mandatory disqualification; (2) deny children kin foster and adoptive homes based on the mere fact that the relative or an adult household member has a criminal *charge* or conviction, or is the subject of an indicated report in the New York State Central Register of Child Abuse and Maltreatment ("SCR"), without an appropriate individualized assessment of whether the placement is safe; (3) fail to provide guidance and oversight to ensure that ACS staff are appropriately evaluating a child's relative for their foster placement; and (4) fail to provide the child with notice

and an opportunity to challenge the denial of foster care or adoptive placement with their relative.

Despite national and statutory recognition that children removed from their parents fare better when placed with relatives, Defendants fail to consider the relative's current ability to care for the child and instead base their disqualification decisions on often irrelevant aspects of the relative's past – even where a conviction or SCR history is decades old, the child has a loving, long term relationship with the relative, and the relative maintains a safe home. That Defendants' practices are arbitrary is demonstrated by the fact that they routinely permit children to reside with *disqualified* relatives yet deny the *child* the services and supports needed for their basic care.

Some children are placed in foster care with strangers ("Stranger Placed Plaintiffs") due to Defendants' disqualification of their relatives and suffer from disrupted family ties, which, in turn, worsens their behavioral and emotional well-being and are placed at greater risk of maltreatment, institutionalization, and instability. Other children are placed with the very relatives who have been denied certification ("Directly Placed Plaintiffs") and suffer from Defendants' failure to provide critical services and supports, which in turn denies them basic requirements for their health and safety, significantly strains their relationships with their kin,

fractures the stability of placement, and puts them at unreasonable risk of removal from the home.

Sheila Poole in her official capacity as (former) Commissioner of the New York State Office of Children and Family Services ("OCFS" or "State Defendants") is responsible for oversight and supervision of ACS but fails to provide adequate guidance to protect Plaintiffs from these harms.

These policies and practices violate Plaintiffs' substantive and procedural due process rights under the Fourteenth Amendment of the United States Constitution. Plaintiffs seek systemic declaratory and injunctive relief to remedy these violations.

On April 8, 2022, Defendants moved to dismiss the Complaint[1] pursuant to Federal Rules of Civil Procedure ("FRCP") §§12(b)(1), 12(b)(6), and 12(b)(7). (ECF No. 24). On September 12, 2023, the Honorable Judge DeArcy Hall issued a Memorandum and Order ("Order") dismissing all claims for lack of subject matter jurisdiction pursuant to FRCP § 12(b)(1). (A-267). The district court did not reach Defendants' 12(b)(6) or 12(b)(7) challenges and did not address Plaintiffs' procedural due process claim or specific claims against State Defendants.

In its Order, the district court repeatedly held Plaintiffs to heightened burdens which are inapplicable at this early juncture. It failed to take Plaintiffs' allegations

[1] The Complaint will be cited as ¶__.

as true, *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988),[2] instead requiring Plaintiffs to establish "beyond a preponderance of the evidence that subject-matter jurisdiction exists" and it explicitly refused to draw inferences in Plaintiffs' favor. A-276. It effectively held Plaintiffs to a proximate cause standard, A-281-284, when the traceability requirement is "relatively modest," *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)), and actions of third parties that predictably flow from defendants' actions do not defeat traceability. *Dep't. of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). The district court additionally rejected Plaintiffs' family association and freedom from harm claims for failure to allege sufficiently imminent risk of harm, even though Plaintiffs allege both concrete harms and sufficiently imminent risk of harm and even though there is a low threshold for alleging sufficient injury for standing. *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017); A-277-289. The district court also rejected these claims because it erroneously held that Directly Placed Plaintiffs are not in government custody.

Finally, while dismissing only on FRCP § 12(b)(1) grounds, the district court posits that Plaintiffs' claims should be dismissed on prudential standing grounds, even though Plaintiffs explicitly and sufficiently assert their own rights and injuries

[2] All internal case citations omitted unless otherwise stated.

throughout their Complaint. (A-13); A-290. The district court failed to address both Plaintiffs' claims against State Defendants for deficient oversight and Plaintiffs' procedural due process claims.

For the reasons set forth below, the district court's Order dismissing the Complaint in its entirety should be reversed.

JURISDICTIONAL STATEMENT

This action is brought pursuant to 42 U.S.C. § 1983 to redress violations of the Constitution of the United States. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). That court further had the authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, its inherent equitable powers, and FRCP § 57.

The district court entered judgment on September 14, 2023. (A-292). Plaintiffs filed a timely notice of appeal on October 16, 2023. (A-294). Because the judgment of the United States District Court was final, the Court of Appeals has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by failing to accept Plaintiffs' allegations as true and drawing reasonable inferences in their favor.

2. Whether the Court erred by failing to apply the low injury-in-fact threshold for standing purposes in its analysis of all Plaintiffs' claims.

3. Whether the district court erred in holding that Stranger Placed Plaintiffs lacked standing for their family association claim, ignoring the relatively

modest traceability standard and well-settled law that indirect but predictable actions that flow from Defendants' conduct satisfy traceability.

4. Whether the district court erred in its standing analysis by requiring physical removal of a child from their relative as an unsupported prerequisite to asserting Plaintiffs' constitutional right to family association.

5. Whether the district court erred by concluding that Directly Placed Plaintiffs, who are denied requirements for their basic care, fracturing their relationships and creating debilitating instability, did not allege imminent risk and lacked standing to assert their family association claim.

6. Whether the district court erred by concluding that Directly Placed Plaintiffs, removed by Defendants from their parents and under Defendants' care and supervision, lacked standing to assert their right to be free from emotional and psychological harm and their right to be in government care no longer than necessary.

7. Whether the district court erred by finding Stranger Placed Plaintiffs undisputed allegations of harm insufficient to adequately allege a violation of the right to be free from emotional and psychological harm and the right to be in government care no longer than necessary.

8. Whether the district court erred by not addressing Plaintiffs' procedural due process claims against all Defendants and Plaintiffs' oversight claims against Defendant OCFS.

9. Whether the district court erred in concluding that, despite Plaintiffs' myriad allegations of their own rights and injuries, Plaintiffs are asserting the rights and interests of a third party and have not established prudential standing.

STATEMENT OF THE CASE

Children in the New York City ("NYC") child welfare system are routinely denied foster homes with their relatives after being involuntarily removed from their parent or guardian. ¶¶ 1-21 (A-13-20). While under Defendants' care and supervision, these children are denied basic services and supports necessary for their safe and adequate care. ¶¶ 191-96 (A-65-67).

Despite the recognition that children removed from their parents do best when placed with relatives, ACS places children into stranger foster care or institutions, or does place them with relatives while denying them necessities for their basic care. ¶¶ 8, 15-17, 145-156 (A-15, 18-19, 52-55). Children in stranger foster care in NYC are at a high risk of maltreatment, suffer trauma from placement instability, have poorer school performance, are more likely to suffer from mental and physical illness, and succumb to homelessness, arrest, and chemical dependency, and are unnecessarily institutionalized. ¶¶ 146-47, 152-53, 214 (A-52, 53-54, 71). Children placed with relatives, but nonetheless denied services and supports, suffer from emotional and mental deterioration, risk medical and educational decline, experience instability and the debilitating fracturing of their family relationships. ¶¶ 161, 192-96 (A-56, 66-67).

The Named Plaintiffs

All Plaintiffs were involuntarily removed from their parents by ACS. Their subsequent experiences demonstrate the real harm that Defendants' unconstitutional child welfare policies and practices have on the lives of young children.

For example, 7-year-old J.R. was involuntarily removed from his father after his mother died, placed in a large institutional facility and then at least six different foster homes despite his grandparents offering to care for him. ¶¶ 83-85 (A-35). J.R. was shuffled around multiple schools during these critical years, contributing to

challenges achieving the goals set in his special education plan and losing meaningful contact with his siblings and community. ¶¶ 85, 90 (A-35, 36-37). J.R. also suffered from mental health issues and received inadequate mental health services. ¶ 91 (A-37). After several years in the child welfare system, J.R. is no closer to having a permanent home. ¶ 92 (A-37).

In another example, B.B. was involuntarily removed from his mother shortly after birth and taken into ACS custody. ¶ 22 (A-20). B.B. was then placed with his great-grandparents but denied services and support essential for his basic care. ¶¶ 22, 27, 30 (A-20, 21-22). B.B. has autism, is low functioning and non-verbal, and suffers from chronic lung disease and asthma. ¶¶ 24, 32 (A-21, 22-23). Defendants threatened to remove B.B. from his great-grandparents and place him into stranger foster care at least once, and they have denied him adequate care to support his many medical, developmental, and educational needs. ¶¶ 27, 30, 37 (A-21-24). Years after removing him from his mother, Defendants' actions have deprived B.B. of a stable permanent home. ¶ 36 (A-23).

The Child Welfare System

Children removed from their parents are under the care and custody of ACS and remain so until the child secures a permanent home. ¶¶ 6, 139 (A-15, 50). New York State OCFS oversees the local NYC child welfare agency, ACS, and must ensure that ACS complies with all state and federal laws. ¶ 134 (A-49).

ACS and OCFS are responsible for the safe and adequate care of children removed from their parents. ¶¶ 134-35 (A-49). The ultimate goal of the child welfare system is to either reunify the child with their parent or, if that is not possible, find a permanent home for the child through the Kinship Guardianship Assistance Program ("KinGAP")[3] or adoption. ¶ 6 (A-15). In the interim, ACS temporarily places children with foster parents or into group care settings. ¶¶ 3, 5 (A-14, 15). Placement with a relative is widely recognized by the federal government and Defendants to be best for children removed from their parent(s). Family First Prevention Services Act (FFPSA) of 2018, P.L. 115-123 Title VII; ¶ 157 (A-55); A-121, 136.

Harm to Plaintiff Children

As Defendants acknowledge, children placed in kin foster homes are better able to preserve community and family ties, have reduced trauma and higher rates of behavioral and emotional well-being, are more likely to achieve permanency through reunification, adoption, or guardianship, and are less likely to re-enter foster care. ¶ 8 (A-15).

In NYC, however, children are denied kin foster homes based solely on their relative's past conduct rather than their current ability to care for the child. ¶¶ 165-

[3] KinGAP, a legislatively authorized subsidized guardianship program that aims to facilitate the permanent placement of foster children with relatives, is available only to kin *foster* parents. N.Y Soc. Svcs. L. § 458-B.

79 (A-58-62). These denials have grim consequences. As Plaintiffs' experiences demonstrate, children who could have been placed with family are thrust into stranger foster or institutional group care or are deprived of necessary services and support. ¶ 3 (A-14). This practice leaves children unnecessarily vulnerable, magnifies the trauma of parental removal, and leads to the following harms:

- **Significant interference with their family relationships**: Defendants' practices deprive all Plaintiffs of placement in loving, familiar kin foster homes. *See, e.g.*, ¶ 3 (A-14). Some Plaintiffs are thrust into stranger foster care, losing or dramatically limiting contact with family. *Id.* ¶¶ 3, 15, 146, 151 (A-14, 18-19, 52, 53); *See, e.g.*, ¶ 59 (A-29) (M.P.), 90 (A-36-37) (J.R.). Others are directly placed with relatives, but deprived of needed services and supports leading to behavioral and other forms of decompensation, placing an undue strain on their relationship with their relative, and placing each at risk of removal. *Id.* ¶¶ 17, 191-96 (A-19, 65-67). *See, e.g.*, ¶¶ 30-32 (A-22-23) (B.B.), 46 (A-26) (T.R.), 100-101 (A-39-40) (J.S. and S.S.), 115-199 (A-44-68) (C.C.). Several Plaintiffs are disconnected or at risk of disconnection from their siblings as well. *See, e.g.*, ¶ 67 (A-31), 70 (A-32) (Z.W. and D.W.); 90 (A-36-37) (J.R.); 110 (A- 42-43) (C.P.); 151(A-53).

- **Placement in institutional settings:** Defendants and the federal government agree that institutional settings are harmful to children in the child welfare system *See, e.g.* FFPSA (requiring prioritization of kin and seeking reduction of children in institutional settings); ¶ 214 (A-71). However, Plaintiffs risk placement in these settings due to Defendants' practices. *See* ¶¶ 15 (A-18), 190 (A-65). For example, ACS placed M.P. in an institutional facility outside of NYC where he suffered mental decompensation, even though he had a relative willing to care for him. ¶¶ 52 (A-28), 58-59 (A-29). M.P. was disconnected from his community – a harm known to cause significant trauma to children in foster care. *Id.* M.P. also feared for his physical safety at the facility. *Id.* J.R., C.P. and T.R. - despite their young ages - were also each placed in large institutional facilities. ¶¶ 39, 83, 105 (A-24, 35, 41).

- **Placement instability:** All Stranger Placed Plaintiffs have experienced or face a heightened risk of experiencing multiple moves and placement instability, a known trauma to children. ¶ 152 (A-53). According to ACS data, children in stranger care experience approximately three times more placement moves than children in kin foster homes. *Id*. For example, J.R. experienced significant placement instability as he was shuffled between at least six different foster homes. ¶¶. 85, 92 (A-35, 37). *See also* ¶¶ 52 (A-28), 58-9 (A-29) (M.P.). All Plaintiffs, including Directly Placed Plaintiffs, suffer placement instability. *See, e.g.*, ¶¶ 27 (A-21) (B.B. threatened with removal); 119 (A-45) ("unstable unpredictable care plan will exacerbate [C.C.] symptoms and compromise her capacity to improve"); 110 (A-42-43) (C.P. regressed following placement instability).

- **Risk of abuse and neglect:** Children in foster care in New York are at higher risk of maltreatment than almost anywhere in the country – this includes Stranger Placed Plaintiffs, and Direct Placement Plaintiffs who face the risk of removal into stranger foster care. ¶ 147 (A-52); *See, e.g.*,¶¶ 52 (A-28) (M.P.), 27 (A-21) (B.B.), 101 (A-40) (J.S. and S.S.). New York ranks the third worst for rates of substantiated reports of child maltreatment in foster care. *Id.*

- **Deprived of a permanent home**: The child welfare system's ultimate goal for each child removed from their parent is to identify a safe and suitable permanent home. ¶ 6 (A-15). This is critical to children's long-term safety and well-being, and can prevent homelessness, sexual exploitation, and unemployment. ¶ 153 (A-54). Each Plaintiff is at an unreasonable risk of never having a permanent home. *Id.* The Stranger Placed Plaintiffs have all been bounced between different placements with no secured permanent placement, and all the Directly Placed Plaintiffs are in limbo as each is unable to achieve permanency through adoption or KinGAP. *See, e.g.*, ¶¶ 59 (A-29) (M.P.) 71 (A-32) (Z.W. and D.W.) 92 (A-37) (J.R.) 101 (A-40) (J.S. and S.S.) 119 (A-45) (C.C.).

- **Denial of basic medical and mental health services and supports:** Because Defendants denied their relatives foster home certification, Directly Placed Plaintiffs are denied critical services and supports necessary for their basic care, ¶¶ 191-96 (A-65-67), including automatic enrollment in Medicaid (Soc. Sec. Act. Title IV-E; N.Y. Soc.

Serv. Law § 366[1][c][4]); comprehensive medical services (18 N.Y.C.R.R. § 441.22); family planning, sex education, and reproductive health services (*Id.* § 441.22[l][1][2]); services for medically fragile children (*Id.* § 427.6); and for children with greater mental health and behavioral needs (*Id.* § 427.6; § 443.3; § 427.3[c][2][x]). All Directly Placed Plaintiffs have suffered trauma requiring supportive services and most have disabilities, mental health issues, and other special needs. *See, e.g.*, ¶¶ 24 (A-21), 32 (A-22-23) (B.B.); 101 (A-40) (J.S., S.S.); 115 (A-44), 118 (A-45) (C.C.); 46 (A-26) (T.R.); 53 (A-28), 58 (A-29) (M.P.); 68 (A-31) (Z.W. and D.W.); 91 (A-37) (J.R.).

- **Denial of needed educational and other services and supports:** Directly Placed Plaintiffs are denied needed educational, vocational and other services and supports, ¶¶ 191-96 (A-65-67), including transportation to and from their school of origin (18 N.Y.C.R.R. § 427.3[c][2][v][c]); daycare (*Id.* § 427.3[c][2][vi]); transportation costs for visits with family (*Id.* § 427.3[c][2][v]); books and SAT preparation classes (*Id.* § 427.3[c][2][ii]); clothing for proms, religious observances, and graduation (*Id.* § 427.3[c][2][i]); regular allowance (*Id.* § 441.12[a]); special furniture or equipment (*Id.* § 427.3[c][2][vii]; and nonmedical needs of a handicapped child (*Id.* § 427.3[c][2][xii]). Older Directly Placed Plaintiffs are also denied additional services including: vocational training and remedial education (*Id.* § 430.12[f][2][i][a]; *Id.* § 441.13); college room and board (N.Y. Soc. Svcs. L. § 398[10]); independent living skills classes and monthly stipend (18 N.Y.C.R.R. § 430.12[f][2][i][a]); and public housing priority and housing security before leaving foster care (*Id.* § 430.12[f][3][i][c]). All Directly Placed Plaintiffs are also denied maintenance payments to cover the cost of their basic needs, including food, clothing, transportation, and other necessities. (18 N.Y.C.R.R. §§ 427.3[a]; 427.16, 427.3[c][2][i],[v]); *See, e.g.*, ¶¶ 24 (A-21), 37 (A-23) (B.B.); 45-46 (A-26) (T.R.); 81 (A-34) (C.W.C.); 100-101 (A-39-40) (J.S. and S.S.); 117-118 (A-45) (C.C.); 127-29 (A-47-48) (R. Children).

Defendants' Policies and Practices Denying Children Kin Foster Homes

These harms are the direct result of Defendants' policies and practices arbitrarily denying Plaintiffs kin foster homes based on their relative's past, rather than their current ability to care for the child. ¶ 188 (A-64-65).

First, under New York Social Services Law 378-a(2)(e)(1) and OCFS and ACS policies and practices, Defendants deprive children of kin foster placement if the relative has a mandatory disqualifying conviction. ¶¶ 165-71 (A-58-60). OCFS has designated nearly 300 felonies mandating lifetime disqualification, including certain "attempted" felonies. *Id.* As a result, children are denied kin foster homes even when a conviction is decades old, even where the child has a loving, long term relationship with the relative, and even where the relative has been fully rehabilitated and maintains a safe home ("Mandatory Disqualification Subclass"). ¶¶ 11 (A-16), 75 (A-232). Approximately 40 other felonies similarly require a five-year mandatory disqualification, including certain drug offenses. ¶ 167 (A-58).

Second, under New York Social Services Law 378-1(2)(e)(3), and OCFS and ACS policies and practices, a child can be denied kin foster placement if the relative – or any adult in their household – has been convicted of *or even charged* with any crime at any point in the past ("Discretionary Criminal History Subclass"). ¶¶ 172-75 (A-60-61), 232 (A-75-76).

Third, under OCFS and ACS policy and practice, children are denied kin foster homes if their relative – or any adult in their household – was ever the subject of an SCR "indicated report." ¶¶ 176-86 (A-61-64). The SCR is an OCFS registry of persons who have been investigated by ACS or other local child welfare agency for child maltreatment. *Id.* An indicated report does not mandate any further action so a case may never be filed in Family Court and, indeed, the person may never hear from OCFS or ACS again. ¶¶ 13 (A-17-18), 177 (A-61-62). With this limited information, ACS routinely denies children kin foster homes ("SCR Disqualification Subclass"). ¶ 232 (A-75).

Both OCFS and ACS provide inadequate guidance and oversight to ensure ACS decision makers are fully evaluating relatives with either discretionary disqualifying charges or convictions or SCR history. ¶¶ 12-13 (A1-7-18), 174 (A-60-61), 179-82 (A-62-63), 197-206 (A-67-69).

Although Defendants are regularly required to provide notice to children in their care, neither the child nor their attorney is provided with notice or an opportunity to challenge Defendants' denials of foster home certification of their relatives. *See, e.g.* N.Y.F.C.A § 1089(b) (children placed out of home entitled to fourteen days' notice and a permanency hearing report before each permanency hearing); 18 N.Y.C.R.R. § 443.5 (foster children entitled to ten days' notice of removal, independent review hearing, and fair hearing to challenge such removal).

The fact that Defendants' policies and practices do not reflect actual determinations about the safety of the relative's home or the child's best interest is made apparent by ACS's practice of permitting children to be placed *with the disqualified relative* but denying the child any services and supports for their basic care. ¶ 16 (A-19). This practice, colloquially called a "direct placement," causes irreparable harm to the child, including denial of their basic medical, mental health, behavioral, educational and development needs, placement instability, and significant interference with their family relationships. ¶¶191-96 (A-65-67).

Plaintiffs' Claims

The Plaintiffs brought this civil rights action on behalf of themselves and a putative class of all children in New York City who have been, or will be, removed from their parents by ACS pursuant to Article 10 of the Family Court Act, and who have been denied, or are at risk of being denied, a foster or adoptive placement with relatives based on the kin's or adult household member's criminal history or SCR record (the "putative class"). ¶ 18 (A-19). The Complaint asserts that Defendants have deprived Plaintiff children, and the putative class and sub-classes they represent, of their rights under the Fourteenth Amendment to the U.S. Constitution. ¶¶ 187-231 (A-64-75).

First, all Plaintiffs and the putative class assert their substantive due process rights under the Fourteenth Amendment against all Defendants. ¶¶ 249-53 (A-80-

81). Defendants' systemwide policies and practices, including their lack of oversight, deprive Plaintiff children of their fundamental right to family association, their right to be free from unnecessary and unreasonable intrusions into their mental and emotional stability and well-being, and their right to be under governmental care or supervision no longer than necessary. *Id.*

Second, Plaintiffs B.B., J.R., and the R. Children assert these same substantive due process rights against all Defendants on behalf of themselves and the Mandatory Disqualification Subclass. ¶¶ 254-58 (A-81).

Third, Plaintiffs B.B., J.R., and the R. Children assert their right to procedural due process under the Fourteenth Amendment against all Defendants on behalf of themselves and the Mandatory Disqualification Subclass. ¶¶ 259-61 (A-82).

Fourth, Plaintiffs Z.W. and D.W., C.P., C.C., and J.S. and S.S. assert their right to procedural due process under the Fourteenth Amendment against all Defendants on behalf of themselves and the Discretionary Criminal History Subclass. ¶¶ 262-64 (A-82-83).

Fifth, Plaintiffs T.R., M.P., C.W.C., C.C., J.S. and S.S., and R. Children assert their right to procedural due process under the Fourteenth Amendment against all Defendants on behalf of themselves and the SCR Disqualification Subclass. ¶¶ 265-67 (A-83).

Plaintiffs seek declaratory and injunctive relief on behalf of the putative class to remedy these systemic deficiencies in NYC's child welfare system, including, *inter alia:*

- Requiring Defendants to establish and implement practices to ensure the putative class are provided with a meaningful and individualized evaluation of whether placement in a foster or adoptive home with kin is safe and to certify and place the putative class with kin foster parents when it is safe, regardless of the criminal history or SCR record of the kin or adult household member;
- Requiring Defendants to establish and implement guidance and oversight over the foster and adoptive approval process to ensure its staff and agents are appropriately evaluating and fully considering a child's kin even when that kin or adult household member has a criminal or SCR record; and
- Requiring Defendants to establish and implement practices to ensure the Plaintiff Class receive notice and a meaningful opportunity to challenge any determination denying their foster or adoptive placement based on the criminal history or SCR record of the kin or adult household member. A-83-85.

The Memorandum and Order on Defendants' Motion to Dismiss

On April 8, 2022, Defendants filed a Motion to Dismiss all of Plaintiffs' claims. (ECF No. 24). The Honorable Judge DeArcy Hall granted Defendants' motion on September 12, 2023, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and dismissed the Complaint in its entirety. (A-267, 292). The district court did not consider the Defendants' remaining arguments under 12(b)(6) or 12(b)(7), nor did it analyze Plaintiffs' standing to assert their procedural due process claims or directly address the State Defendants' violations of Plaintiffs' rights.

Right to Family Association

The district court agreed that the right to family association is "paramount" and extends beyond the relationship between parent and child, A-277-78, but concluded that Directly Placed Plaintiffs lacked standing, A-279, because this right is "implicated only where the government seeks to remove a child from their familial association and deprive the parents of their interest in the care, custody and management of the child." A-278. The district court recognized that risk of harm can be sufficient for standing purposes, but found the Directly Placed Plaintiffs lacked standing because none "is laboring under an actual or imminent threat of removal." A-280-81. The district court concluded that Stranger Placed Plaintiffs failed to allege an injury that is fairly traceable to Defendants. A-284.

Right to Freedom from Harm and To Be Under Governmental Care or Supervision No Longer than Necessary

The district court concluded that Directly Placed Plaintiffs lack standing to assert their right to be free from harm and their right to be under government care no longer than necessary because "none ... are in government custody." A-285. The district court concluded that Stranger Placed Plaintiffs are arguing that "the Government has not provided a least restrictive, optimal placement, which does not constitute an injury to their right to be free from harm," A-287, and that "placement in foster care in [no] way hinders the purpose of their custody." A-289.

SUMMARY OF THE ARGUMENT

The district court's dismissal of all Plaintiffs' claims for lack of standing involved multiple errors.

The district court failed to take Plaintiffs' allegations as true and make all reasonable inferences in their favor, as it must at this juncture. *Natural Res. Defense Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006); A-276. Instead, the district court required Plaintiffs to establish "beyond a preponderance of the evidence that subject-matter jurisdiction exists" and explicitly refused to draw inferences in Plaintiffs' favor. A-276.

Moreover, the district court erroneously held that Plaintiffs failed to adequately allege injury, even though the injury-in-fact requirement is "a low threshold" that "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy," *John*, 858 F.3d at 736, and "[a]t the pleading stage, general allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); A-276.

Family Association

The district court dismissed Stranger Placed Plaintiffs' family association claims, finding their injury was not fairly traceable to Defendants' actions because

their placements into foster care were due to a "voluntary" decision by their relatives to either cease or decline to have the child reside in their home. A-281-84. The district court gave great weight to Defendants' extrinsic evidence to assert the "voluntary" nature of the relatives' decisions, although this evidence does not contradict Plaintiffs' allegations. A-281. However, the traceability requirements for standing are "relatively modest," *Rothstein*, 708 F.3d at, 91-92, and the law is clear that indirect but predictable actions that flow from defendants' conduct, as the relatives' actions do here, do not defeat traceability. *Dep't. of Commerce*, 139 S. Ct. at 2566. Nor need Plaintiffs allege that the Defendants' actions were the sole cause of the substantial risk of harm, but rather one factor. *Elisa W. v. City of New York*, 82 F.4th 115, 128 (2d Cir. 2023).

The district court dismissed Directly Placed Plaintiffs' family association claims on two erroneous grounds. First, it misconstrued the parameters of the right to family association. This right does not require removal from a parent; rather, it is implicated when the government denies children meaningful contact with family members or significantly interferes with a familial relationship, even if that interference falls short of complete deprivation. *See*, *Patel v. Searles*, 305 F.3d 130, 135-37 (2d Cir. 2002). Second, the district court ignored Directly Placed Plaintiffs' plainly alleged significant concrete harm and dismissed Plaintiffs' risk of sufficiently imminent harm. A-277-81. The Complaint cites harm to their familial

relationships arising from Defendants' arbitrary denials of foster care certification, including strain on the relationships, fracturing the stability of placement and putting them at unreasonable risk of removal, and the denial of meaningful contact and permanency with their family and siblings.

Right To Be Free From Harm

The district court dismissed Stranger Placed Plaintiffs' claims of a violation of their right to be free from unnecessary and unreasonable intrusions into their mental and psychological well-being because their alleged injury was less severe than that alleged in another case which did not purport to establish a minimum injury. A-284-89; *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 622, 670-71 (S.D.N.Y 1996), *aff'd sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). The district court misconstrued Plaintiffs' allegations to be seeking an "optimal" placement, rather than freedom from unnecessary and unreasonable mental and psychological harm and completely ignored these children's undisputed allegations of harm.

Regarding these same claims on behalf of Directly Placed Plaintiffs, the district court summarily concluded that Plaintiffs failed to "direct the district court to any allegations" that contradict Defendants' argument that the Directly Placed Plaintiffs lacked standing because they are not in government custody. A-285. In fact, Plaintiffs allege that all children in the putative class were under ACS care and

custody, ¶¶ 249-58 (A-80-81), entitling them to the full protections of the Fourteenth Amendment under both the "special relationship" and "state-created danger" exceptions. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 198-202 (1989); *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012).

Right To Be In Government Care No Longer Than Necessary

The district court misconstrued Plaintiffs' claims regarding the well-established right to services and supports that enable children to remain under ACS care and supervision no longer than necessary. *See Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); *Marisol A*, 929 F. Supp. at 676. Again mischaracterizing Plaintiffs' claims as seeking "an optimal level of care," A-288, the district court ignored Plaintiffs' clear allegations that Defendants' policies and practices unnecessarily prolonged Stranger Placed Plaintiffs' time in foster care, denying them pathways to permanency or reunification. The district court reiterated its summary conclusion about the custody status of Directly Placed Plaintiffs in dismissing this claim as well. A-285.

The district court wholly failed to address Plaintiffs' viable procedural due process claims and ignored the State Defendant's specific violation of Plaintiffs' rights through their lack of oversight and supervision.

Finally, the district court concluded that Plaintiffs "have not established that they qualify for the exception to the prudential standing rule," A-290, although

Plaintiffs make clear they are not asserting the rights or injuries of others. Nonetheless, Plaintiffs' allegations do not violate the now disfavored doctrine. *Lexmark Intern. Inc., v. Static Control Components, Inc.*, 572 U.S. 118, 125-126 (2014).

While acknowledging that Defendants' policies and practices make "children worse off," the district court nonetheless minimized Plaintiff children's significant allegations of harm in order to justify closing the courthouse door at this early stage. A-291. The district court concluded that Plaintiff children are not entitled to challenge the arbitrary systems that have profound consequences on their lives and demand basic care and protection from the very actors who removed them from their homes. These conclusions are contrary to a 12(b)(1) analysis and the substantive law governing the underlying claims. Plaintiff children, and all vulnerable children in the putative class, are entitled to challenge Defendants' harmful disqualification systems that: deny them individualized consideration of safe, familiar and loving relative homes; withhold needed services and supports; intrude upon their relationships; and deprive them of pathways to exit the child welfare system as quickly as possible.

Given the Order's many errors of law, this Court should review the legal claims *de novo*, vacate the Order, and find Plaintiffs have established standing.

ARGUMENT

A district court's Rule 12(b)(1) determination is subject to review of its "factual findings for clear error and [its] legal conclusions *de novo*." *Natural Res. Defense Council*, 461 F.3d at 171. To establish standing, a plaintiff must plead an injury-in-fact that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560-61.

I. The District Court Failed to Accept Plaintiffs' Allegations as True and Draw all Reasonable Inferences in Their Favor.

The district court was required to "accept as true all material allegations of the complaint and … construe the complaint in favor of the complaining party." *Pennell*, 485 U.S. at 7. However, the district court required Plaintiffs to establish "beyond a preponderance of the evidence that subject-matter jurisdiction exists" and explicitly refused to draw inferences in Plaintiffs' favor. A-276.

While courts may impose a heightened burden upon plaintiffs to establish standing where defendants mount a factual challenge, *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016), Defendants' evidence did not contradict Plaintiffs' allegations and the district court should not have altered the burden. Even if Defendants presented a fact-based challenge, "plaintiffs are entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing." *Id. See also Capogrosso v. Gelbstein*, 18-CV-2710(MKB)(LB),

2019 WL 4686448, at *6 (E.D.N.Y. Sept. 25, 2019) ("While the statements proffered by the State defendants may be used to support an alternate theory of [causation]. . . , they do not directly contradict Plaintiff's plausible allegations that he was injured by . . . [d]efendants"). The district court's application of this erroneous standard pervades its decision, particularly in its analysis of traceability for Plaintiffs' family association claims.

II. The Injury Requirement for Article III Standing is a Low Threshold which Plaintiff Children Have Met.

To establish Article III standing at the pleading stage, a plaintiff must assert an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent. *Lujan*, 504 U.S. at 560-61. Moreover, "general factual allegations of injury . . . may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id*. at 561. Courts across the country have found standing in similar class actions brought by children alleging that a child welfare system's policies and practices plausibly caused, and placed them at future risk of, imminent, particularized harm. *See, e.g., 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003); *Connor B. v. Patrick*, 771 F. Supp. 2d 142, 151-53 (D. Mass. 2011); *Carson P. v. Heineman*, 240 F.R.D. 456, 512-513 (D. Neb. 2007); *Clark K. v. Guinn*, Civ. No. 2:06-cv-1068 (RCJ) (RJJ), 2007 WL 1435428, at *5 (D. Nev. May 14, 2007); *Dwayne B. v. Granholm*, Civ. No. 06-13548, 2007 WL 1140920, at *3-4 (E.D. Mich. Apr. 17, 2007). Likewise, Plaintiff

Children have each sufficiently pled facts demonstrating actual, particular injury as a result of Defendants' policies and practices.

The injury-in-fact requirement is "a low threshold" that "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *John*, 858 F.3d at 736. As this Court held, to survive a motion to dismiss under FRCP 12(b)(1) "a plaintiff must clearly allege facts sufficient to constitute an injury in fact, but those allegations need not be capable of sustaining a valid cause of action." *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567, 574 (2d Cir. 2018); *see also Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013) (for purposes of standing a court should avoid "conflat[ing] the requirement for an injury-in-fact with the ... validity of [the plaintiff's] claim."); *Dean v. Blumenthal*, 577 F.3d 60, 64 n.4 (2d Cir. 2009) (plaintiff has standing based on concrete and actual harm from loss of campaign contributions even though there is no constitutional right to receive those contributions). Despite this low threshold, the district court repeatedly held Plaintiffs to an improperly high standard for alleging injury.

III. The District Court Erred by Concluding that Plaintiffs Lack Standing to Assert Their Right to Family Association and Integrity.

Although the district court recognized the importance of the right to the preservation of family integrity, A-277, it erroneously found the Stranger Placed Plaintiffs lack standing due to inadequate traceability of their injury, A-284, and the Directly Placed Plaintiffs lack standing due to inadequate injury. A-280-81.

The right to family association and integrity encompasses reciprocal rights, including the right of the child to "not be . . . dislocated from the emotional attachments" of familial relationships, *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000), and the right to be free from government attempts to undermine or interfere with family relationships, *Patel*, 305 F.3d at 135. The constitutional protections of the family extend beyond the traditional nuclear unit and arise from the "emotional attachments" within a family, not just biology. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (right to relationship with relative); *Rivera v. Marcus*, 696 F.2d 1016, 1023-26 (2d Cir. 1982) (child has liberty interest in living with relative foster parent).

A. Stranger Placed Plaintiffs Have Standing To Assert Their Family Association Claim

The district court erroneously concluded that Stranger Placed Plaintiffs, M.P., J.R., and C.P., lack standing to assert a violation of their rights to family association, A-281-84, failing to take the allegations in the light most favorable to plaintiffs, misconstruing Defendants' immaterial extrinsic evidence, and failing to apply the correct legal standard for traceability.

The "requirement that a complaint allege an injury that is fairly traceable to defendants' conduct … for purposes of constitutional standing is a lesser burden than the requirement that it show proximate cause." *Rothstein*, 708 F.3d at 91-92. Indeed,

"at [the pleading] stage of the litigation, the plaintiffs' burden ... of alleging that their injury is 'fairly traceable' to the challenged act is relatively modest." *Id*.; *Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, 22-1741-CV, 2023 WL 8494453, at *6 n.15 (2d Cir., Dec. 8, 2023) ("causal-connection … does not create an onerous standard.")

The district court erroneously determined that the relatives' decisions to either discontinue (M.P. and J.R.) or never (C.P.) house and care for their relative child constitute "'independent action[s] of some third party not before the court."" A-282 (citing, *Lujan*, 504 U.S. at 560-61). However, the record nowhere indicates that C.P.'s uncle declined to care for him. *See* ¶¶ 103-110 (A-40-43); CA-62. And the decisions of M.P. and J.R.'s relatives were the predictable consequence of Defendants' denials of foster home certification and accompanying basic services and supports for the children's care. The law is well-settled that indirect but predictable actions that flow from defendants' challenged conduct, as the relatives' actions do here, can support standing. *Dep't of Commerce*, 139 S. Ct. at 2566 ("[r]espondents' theory of standing … relies instead on the predictable effect of Government action on the decisions of third parties."); *Ateres Bais Yaakov Academy of Rockland*, 2023 WL 8494453, at *6 (defendants' steps to frustrate plaintiffs' planned property acquisition predictably prevented plaintiffs from securing needed regulatory approvals leading to termination of contract); *Chevron Corp. v. Donziger*,

833 F.3d 74, 121 (2d Cir. 2016) ("defendant's conduct that injures a plaintiff but does so only after intervening conduct by another person, may suffice for Article III standing"); *Bell v. Univ. of Hartford*, 577 F. Supp. 3d 6, 24 (D. Conn. 2021) (need for approval process by a third party for injury to occur does not defeat traceability).

The district court additionally denied standing for these three Plaintiffs because the causal nexus depends upon the "voluntary" acts of the child's relative. A-281-283. However, the Supreme Court has found a predictable harm sufficiently traceable even where it depends upon third parties' actions that can be described as unlawful, *Dep't of Commerce*, 139 S. Ct. at 2566, coerced by defendants, *Bennett v. Spear*, 520 U.S. 154, 169 (1997), or "in some sense … willingly incurred." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 296-97 (2022) (plaintiff's choice of method of repaying campaign loans in order to violate regulation is fairly traceable to defendant's actions).

Notably, Plaintiffs need not allege that the placement of these three children into stranger foster care resulted solely from Defendants' unlawful policies and procedures, but rather need only allege that Defendants' actions were a contributing cause. Indeed, in addressing claims on behalf of children in foster care, this Court recently found plaintiffs met the requisite traceability threshold because "plaintiffs sufficiently allege that *defendants' conduct is one cause* of the substantial risk of harm to foster children." *Elisa W.*, 82 F.4th at 128 n.7 (emphasis added). As the

Complaint makes clear, the Defendant's denial of foster home certification and accompanying services and supports for Plaintiff children's care is a significant cause of the harm M.P., J.R., and C.P. have suffered. The relatives' decisions that they were unable to house and care for the Plaintiffs predictably flowed from Defendants' actions, coming *after* the Defendants had removed the child from their parental home, *after* the child's relative had been identified by Defendants, and *after* Defendants had denied the child the relative foster home and the concomitant services and supports for their basic care. Defendants' extrinsic evidence with regard to these three Plaintiffs does not defeat the traceability of Plaintiffs' injuries. Indeed, it explicitly supports it.

i. The Placements of M.P. and J.R. in Stranger Foster Care and Attendant Harm are Fairly Traceable to Defendants' Actions

M.P.is a youth with significant mental health issues. ¶ 53 (A-28); *see also* CA-169 (bipolar disorder, anxiety and schizophrenia); CA-231 (IEP for Emotional Disturbance). His relative, Ms. M., with whom he had lived previously, worked hard to connect him with mental health services. ¶ 53 (A-28). Following Defendants' denial of the kin foster home for M.P. and the services and supports to address M.P.'s needs, Ms. M. found his behavior difficult to manage and ACS removed him from

her home.[4] ¶¶ 53-58 (A-28-29); CA-239-40; *See supra* pp. 10-13 (describing attendant harm).

Defendants do not dispute these allegations and their own records confirm them. Nonetheless, the district court erroneously characterizes Ms. M. as making a "voluntary" decision to relinquish care of M.P. such that it defeats traceability. However, Ms. M.'s difficulty managing M.P.'s behavior is a direct and predictable consequence of Defendants' denial of kin foster home certification for M.P. and services and supports for M.P.'s basic needs. Indeed, Defendants' decision deprived M.P. of exactly the kind of services he required and that children in foster care with similar serious mental health diagnoses are provided: enrollment in Medicaid, mental health supports, a caretaker trained as a therapeutic foster parent and specific services, such as respite services, to help the caretaker cope with and manage M.P.'s challenging behaviors. 18 N.Y.C.R.R. § 427.6; § 443.3; § 427.3(c)(2)(x); *see also*, ¶ 161 (A-56).

J.R. is a child with significant mental health needs. ¶ 91 (A-37) (multiple diagnoses, including PTSD, Disruptive Mood Dysregulation Disorder, and Major Depression Disorder); *see also* CA-58 (PTSD, Major Depression Disorder and ADHD). J.R. was removed from his father approximately 10 months after the death

[4] Defendants' records indicate that the foster care agency planned to remove M.P. from his relative's home "due to her not meeting his needs." CA-258, 260.

of his mother. ¶ 84 (A-35). After multiple placements in stranger foster care, he was placed in his paternal grandmother Ms. V's home. ¶¶ 83-89 (A-35-36). However, ACS denied J.R. a kin foster home and services and supports for his care based on an almost 30-year-old mandatory disqualifying conviction of Ms. V's husband. ¶¶ 86, 88. The record is undisputed that following ACS' decision, without the services and supports necessary for J.R.'s basic needs including his mental and behavioral health needs, Ms. V. reported she could not provide for him and ACS removed him from her home. ¶ 88 (A-36); CA-17, 18, 29, 37; *See supra* pp. 10-13 (describing attendant harm).

ii. C.P.'s Placement in Stranger Foster Care and Attendant Harm is Directly Traceable to Defendants' Actions

C.P.'s uncle, Mr. P., came forward offering to care for him and took multiple steps in preparation of caring for him, including trying to obtain an apartment to accommodate them both. ¶¶ 103 (A-40), 105 (A-41). After Defendants refused to certify him due to a prior misdemeanor conviction for driving while intoxicated, Mr. P. offered to agree to abide by court order that he would not drive with C.P. ¶¶ 103-110 (A-40-43). However, Defendants still refused to certify Mr. P.'s home for C.P.'s care and instead placed C.P. into stranger foster care. *Id.* Nothing in the Complaint or the record indicates that Mr. P. refused to care for C.P. after being denied certification. ¶¶ 103-110 (A-40-43); CA-62. In stranger foster care, C.P. was separated from his younger brother and other family members, had difficulty

sleeping, and regressed significantly, including needing diapers, although he had long been potty trained. ¶¶ 103-111 (A-40-43) (C.P.); *See supra* pp. 10-13 (describing attendant harm). Nonetheless, the district court found "no allegations that permit the Court to infer that C.P.'s placement in stranger foster care versus (presumably) with his uncle can be attributed to conduct by Defendants." A-284.

The district court mischaracterized the behavior of M.P. and J.R.'s relatives as unrelated "independent actions" A-281-82. However, they were completely predictable consequences that are fairly traceable to Defendants' policies and procedures. As this Court noted, "it is wrong to equate injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Rothstein*, 708 F.3d at 91-92 (emphasis omitted). Nor was there a basis for the district court to find C.P.'s uncle's behavior defeated traceability. Plaintiffs have more than met the "modest" burden at this stage of litigation. *Id.*

B. Directly Placed Plaintiffs Have Standing to Assert Their Family Association Claims

The district court erroneously found that the eleven Directly Placed Plaintiffs[5] do not have standing to assert their family association claims because each child resides with their relative and because the children's risk of injury was not

[5] The District Court also concludes that C.P., a Stranger Placed Plaintiff, does not have standing because he was never "removed at the direction of ACS" from his relative. A-284. As such, the arguments set out *infra* § III.B(i), apply with equal force to C.P.'s standing to bring this claim.

sufficiently imminent. In doing so, the court created an unsupported prerequisite for asserting a family association claim and ignored Plaintiffs' well-pled allegations of concrete and actual harm and risk of imminent harm due to Defendants' policies and practices.

i. The Directly Placed Plaintiff Children Have Standing to Challenge Defendants' Infringement on Their Right to Family Association and Integrity

The district court asserts that "the liberty interest in 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, *citing Kia P.*, 235 F.3d at 759. This assertion is not supported by *Kia P.* nor by any other controlling authority.

The right to family association is implicated when the government denies children meaningful contact with family members or significantly interferes with a familial relationship, even if that interference falls short of complete deprivation. *See Patel*, 305 F.3d at 135-37 (rejecting as "draconian and formalistic" defendants' argument that complete or permanent deprivation of family association is necessary to implicate right); *Marisol A.*, 929 F. Supp. 662 (S.D.N.Y. 1996) (plaintiffs stated substantive due process claim arising from defendants' alleged failure to provide reasonable services and placements to protect right of association with family members); *Kenny A. v. Perdue*, 218 F.R.D. 277, 296 (N.D. Ga. 2003) (plaintiff

children's allegation that defendant state actors "have systematically denied them meaningful visitation with their parents and siblings" stated viable claim); *Eric L. v. Bird*, 848 F. Supp. 303, 306 (D.N.H. 1994) (plaintiff children's allegations that defendants failed "to maintain the integrity of plaintiffs' families where possible, to [timely and appropriately] place them in secure, permanent homes . . . [, and to] provide services necessary to protect children in the class from harm" adequately pled violation of right to family integrity); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) (plaintiff children's allegations that "defendants' practices of placing siblings in separate placements and then failing to provide visits among siblings" sufficiently pled violation of right to family association).

As this Court recognized in *Kia P.*, "since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary [government] action." 235 F.3d at 758; *see also Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999) ("substantive due-process rights guard against the government's 'exercise of power without any reasonable justification in the service of a legitimate governmental objective'"). It is just such an exercise of power without reasonable justification that is at issue here.

In *Kia P.* this Court granted the government summary judgment because parents' custodial rights were outweighed by competing governmental concerns about the safety of the child. *Kia P.*, 235 F.3d at 758. No such competing concerns

exist here. Rather, Defendants concede no safety concerns regarding the direct placement of the children with their relatives, but nonetheless, through their policies and practices, deny children the services and supports necessary for their care, significantly straining their relationships with their kin. ¶¶ 27 (A-21), 31 (A-22) (B.B.); 43-44 (A-25-26) (T.R.); 66 (A-31) (Z.W. & D.W.); 76 (A-33) (C.W.C.); 99 (A-39) (J.S. & S.S.); 117 (A-45) (C.C.); 126-127(A-47-48) (E.R., A.R., & M.R.). This arbitrary action unduly interferes with the Plaintiffs' rights to family association.

Nor does there exist legal precedent mandating that a child must have already been removed from family, or even be in the custody of family, in order to trigger their right to family association. For example, in *Moore*, the Supreme Court found that the plaintiff grandmother was entitled to bring a family association claim when a housing ordinance prohibited her from allowing her minor grandchild to reside with her. 431 U.S. 494. No removal from the grandmother had taken place as of the time of filing. *Id.* at 498-500. *See also Patel*, 305 F.3d at 135-36 (alleged defamatory misinformation campaign by police states family association claim even though adult plaintiff did not live with father or siblings); *Finch v. City of New York*, 591 F. Supp. 2d 349 (S.D.N.Y. 2008) (finding liberty interest between child and prospective kin foster parent although child did not live with relative); *Drollinger v. Milligan*, 552 F.2d 1220, 1225-7 (7th Cir. 1977) (grandfather had right of family association

although granddaughter was not in his custody). Directly Placed Plaintiffs therefore have standing to assert an infringement of their right to family association.

ii. Directly Placed Plaintiffs Have Alleged Actual Injury and Risk of Injury Sufficient for Standing Purposes

Although the district court correctly recognized that risk of harm may constitute sufficient injury for standing purposes, A-279, it erroneously found that Directly Placed Plaintiffs failed to adequately allege injury for purposes of their family association claim. A-280-81. However, as the Complaint alleges, and as must be taken as true at this juncture, Defendants have infringed Plaintiffs' rights by undermining and interfering with the relationship between Plaintiffs and their relatives, including 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 and loss of meaningful contact and permanency with their family and siblings.

It is well established that children in the child welfare system have the right to be free from unreasonable *risk* of harm due to systemic failures, and that such risk satisfies the *Lujan* requirement of a concrete injury. *DG v. Devaughn*, 594 F.3d 1188, 1196-98 (10th Cir. 2010) (constitutional injury to children can include the risk of harm due to alleged systemic failures of child welfare agency); *see also M.D. v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013) ("[Plaintiff children] have a right to be free of the unreasonable risk of harm, and if they suffer that risk now, they have suffered

a legal injury."); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 890-93 (10th Cir. 1992) (violation of a foster child's substantive due process right arises when the child is harmed or placed at "risk of harm"). As such, Plaintiffs are "entitled to safeguards that *prevent* them from deteriorating either physically or psychologically." *M.D.*, 294 F.R.D. at 34 (emphasis added).

Moreover, the risk of injury is sufficiently imminent where there is a credible threat of injury, even if a plaintiff has not been subjected to the actual injury before suing. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("remedy for unsafe conditions need not await a tragic event," a person in custody could successfully complain of "demonstrably unsafe drinking water without waiting for an attack of dysentery"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("one does not have to await the consummation of threatened injury to obtain preventive relief"); *Davis v. Shah*, 821 F.3d 231, 262-64 (2d Cir. 2016) (plaintiffs adequately allege an injury-in-fact not based on actual or imminent institutionalization but rather public entity's failure to provide necessary services which puts plaintiffs at substantial risk of requiring institutionalized care). Further, a plaintiff need not demonstrate that the injury will occur within days or even weeks to establish imminence for standing purposes. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995) (likely injury at unknown future date sufficient to establish standing).

Finally, the risk of removal from their relatives is sufficient injury where, as here, the threatened acts are authorized or part of a policy or practice and, therefore, significantly more likely to occur again. *Lyons*, 461 U.S. at 106 (plaintiff may have had standing if he had alleged "that the City ordered or authorized police officers to [perform illegal chokeholds]"); *31 Foster Child.*, 329 F.3d at 1266 ("when the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again"). Children removed from their parents by ACS cannot avoid being exposed to Defendants' challenged conduct and therefore suffer an actual risk of future harm from these ongoing policies and practices. As such, the duration of Plaintiffs' unstable placement with their relatives has no bearing on their risk of exposure to Defendants' harmful conduct.

Here, Plaintiffs have clearly alleged that through direct placement, ACS denies children the services and supports necessary for their care, significantly straining the children's relationships with their relatives and fracturing the stability of their placement. The risk of removal is but one effect of that interference in their familial relationship. It is not, as the district court concluded, the only injury alleged by the Directly Placed Plaintiffs. Plaintiff Children also allege deterioration resulting from lack of services and supports, which, in turn, causes further injury to their familial relationships and emotional and mental well-being.

The Complaint is replete with examples of the Plaintiffs suffering both actual and imminent risk of harm. For example, due to Defendants' failure to provide support for B.B.'s significant behavioral, mental health, and educational needs, it is increasingly difficult for his great-grandmother to meet B.B.'s needs and has placed a significant strain on their relationship and created debilitating instability. ¶¶ 22-37 (A-20-23). Moreover, ACS has threatened to remove B.B. from the home, interfering with their familial relationship and concretely demonstrating the vulnerability of B.B.'s placement. *Id.* J.S. and S.S. also rightfully worry about being removed from their grandmother, as ACS has also denied them the requirements for their basic care, including clothing. ¶¶ 100-101 (A-39-40). As a result, J.S.'s development and behavior has worsened putting constant strain on his relationship with his grandmother. *Id.* A court-ordered evaluation of Plaintiff C.C. found that, "[a]n unstable unpredictable care plan will exacerbate her symptoms and compromise her capacity to improve." ¶ 119 (A-45-46). Yet, Defendants placed her in exactly that position, compromising her familial relationships and putting her under constant threat of disruption in her placement with her relatives. ¶¶ 112-119 (A-44-46). Other Directly Placed Plaintiffs allege similar harms and risk of harm. *See* ¶ 67 (A-31) (without their uncle's foster parent certification, Z.W. and D.W. cannot live with their two other siblings); ¶¶ 128-131 (A-48) (E.R., A.R., and M.R.'s grandmother struggles to feed and house them, even facing the threat of eviction);

¶¶ 45-46 (A-26) (T.R.'s family relationship and stability is strained due to lack of supports and services needed for his basic care); ¶ 81 (A-34) (C.W.C. same); ¶ 117 (A-45) (C.C. same). All are also denied viable supported permanency options, namely KinGAP and adoption, placing them in a constant state of limbo. ¶¶ 155,195 (A-54, 66).

Moreover, courts have held that children in the child welfare system have standing to challenge its systemic deficiencies because they cannot avoid exposure to defendants' ongoing challenged conduct, and therefore demonstrate a substantial likelihood that the alleged injury will occur for the purpose of supporting Article III standing. S*ee Carson P.*, 240 F.R.D. at 512-513 (that the safety, health, and well-being needs of plaintiff children under state care were being met when lawsuit was filed did not "eliminate their future risk of ongoing problems within the [] child welfare system"); *Clark K.*, 2007 WL 1435428, at * 4 (substantial likelihood that the alleged future injury will occur as plaintiff children in child welfare system cannot "avoid exposure to Defendants' challenged conduct"); *Dwayne B.*, 2007 WL 1140920, at *4 (child welfare system's systemic failings "threaten imminent, continuing harms to Plaintiff's constitution [sic] and federal statutory rights [that] can be remedied by the injunctive relief they seek…"). As such, Defendants must "take reasonable preventative measures in advance of the harm occurring." *Cash v. Cnty. of Erie*, 654 F.3d 324, 335 (2d Cir. 2011). Plaintiffs are entangled in the child

welfare system and will continue to be until they are returned to their parents, adopted, or reach the age of majority. They cannot avoid exposure to Defendants' challenged conduct. The alleged pattern and practice in this case presents a substantial likelihood that the alleged risk of injury will occur.

IV. The District Court Erred by Concluding that Plaintiffs Lack Standing to Assert Their Right to Be Free From Unnecessary and Unreasonable Intrusions Into Their Mental and Psychological Well-Being.

Despite the district court's finding that Plaintiffs have a right to be free from unnecessary and unreasonable intrusions into their mental and psychological well-being, and to appropriate conditions and duration of foster care, it concludes that all Plaintiff Children – regardless of their placement status – lack standing to assert such rights. A-284-289. The district court reasoned that Stranger Placed Plaintiffs had not suffered sufficient harm, largely because their harm was not equivalent to harm alleged by plaintiffs in a different class action lawsuit challenging the child welfare system in New York City over 20 years ago. A-286-288. Moreover, the district court assumed, without analysis, that the Directly Placed Plaintiffs are not in Defendants' custody and therefore cannot assert their rights. A-285. Both these conclusions misconstrue Plaintiffs' claims and ignore caselaw establishing the minimal requirements for alleging injury for these substantive due process rights.

A. Plaintiffs in Stranger Foster Care Have Standing to Assert Their Right to Be Free From Harm.

As the district court acknowledges, 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. *See also Marisol A.*, 929 F. Supp. at 675 (children in child welfare system have a right be free from "unreasonable and unnecessary intrusions into their emotional well-being"). In addition, as the district court recognized, Plaintiffs have a right to be free from unreasonable *risk* of harm. A-279. Nonetheless, the district court misconstrued the claims of Stranger Placed Plaintiffs and found they failed to allege sufficient injury to assert these rights. A-288.

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*, 457 U.S. 307) (emphasis added); *See also Connor B.*, 771 F. Supp. 2d at 161 (*Youngberg's* guarantee of reasonable care encompasses emotional safety and wellbeing); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.C. 1991) (children in child welfare system have a right to safe living conditions and services to prevent psychological, emotional and physical harm); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (same). This includes protection from placement in the care of foster parents and institutional facilities that are unable to adequately care for them and pose a risk

to their safety and care. *Henry A.*, 678 F.3d at 1002. Plaintiffs do not, as the district court concludes, seek an optimal level of treatment. Rather, Plaintiffs seek to enforce their clearly established right to "minimally adequate" care, treatment, and services to prevent an unreasonable risk of harm such as psychological and emotional deterioration. *Youngberg*, 457 U.S. at 321; *Hernandez v. Texas Dep't of Protective and Regul. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004).

Plaintiffs in stranger foster care each allege abundant specific facts demonstrating how Defendants' policies and practices fail to protect them from harm and put them at an unreasonable risk of harm. For example, even though M.P. had a relative willing to care for him, ACS placed M.P. in an institutional facility outside of NYC where he suffered from mental decompensation. ¶¶ 50-60 (A-27-29). M.P. was disconnected from his community – a known harm that causes significant trauma to children in foster care. *Id.* M.P. feared for his physical safety at the facility – a type of facility recognized by the federal government and the state to be harmful to children. *Id.; see supra* p. 10. ACS further failed to provide any services to support M.P.'s continued behavioral and psychological challenges. *Id.* As a direct result of Defendants' policies and practices, M.P. suffered emotional and psychological harm and is at risk of further deterioration from his continued institutionalization.

Similarly, after Defendants refused to certify J.R.'s relative's home, J.R. experienced significant placement instability after being shuffled between at least

six different foster homes during his time in care – another harm known to cause significant trauma to children in foster care. ¶¶ 83-93 (A-35-37). ACS's failure to find an appropriate home for J.R. resulted in interruptions in J.R.'s schooling and delays in his special education services. *Id.* Throughout his time in foster care, J.R. has been disconnected from meaningful contact with his siblings – a harm known to cause significant trauma to children in foster care. *Id.* J.R. developed serious mental health issues, was diagnosed with at least eight different disorders, and has received inconsistent and inadequate mental health care. *Id.* As a direct result of Defendants' policies and practices, J.R. suffered emotional and psychological harm and is at risk of further deterioration while in Defendants' care.

Likewise, C.P., a six-year-old child, was placed in a large institutional facility in downtown Manhattan. ¶¶ 103-11 (A-40-43). Even though he had a relative willing to care for him, C.P. has been separated from most of his siblings and from his extended family during his time in Defendants' custody – a harm known to cause significant trauma to children in foster care. *Id.* C.P. has regressed significantly as a symptom of these traumas, including incontinence, difficulty sleeping, and fearfulness. *Id.* ACS further failed to provide any services to support C.P.'s continued behavioral and psychological challenges. *Id.* As a direct result of Defendants' policies and practices, C.P. suffered emotional and psychological harm and is at risk of further deterioration while in Defendants' care.

These are concrete and particular injuries suffered by the Plaintiffs concerning "the conditions of foster care, not just the fact that one is in foster care." A-287. In callous disregard of these significant harms, the district court concluded that they are not sufficient for standing purposes because they are different from those of plaintiffs in *Marisol A*, 929 F. Supp. at 670-71, who "suffered severe abuse and neglect." A-287. The extreme physical harms suffered by the plaintiffs in *Marisol* is but one example of how children are harmed in New York City foster care – it is not the constitutional floor for standing purposes. Accordingly, the harm suffered by Plaintiffs is more than sufficient to meet the low threshold for adequately alleging injury for standing purposes. *See supra* pp. 10-13.

B. Directly Placed Plaintiffs Have Standing to Assert Their Right to Be Free From Unnecessary and Unreasonable Intrusions Into Their Mental and Psychological Well-Being.

The district court again applied erroneous standards, *supra* §§ I, II, by summarily concluding that Plaintiffs failed to "direct the Court to any allegations" that contradict Defendants' argument that the Directly Placed Plaintiffs lack standing because they are not in government custody. A-285. To the contrary, Plaintiffs clearly allege that all children in the putative class are under ACS care and custody entitling them to the full protections of the Fourteenth Amendment, which require, as the district court notes, Defendants to "provide services and care" to protect

children's right "to be free from psychological, emotional and developmental harm." A-284 (citing *Marisol A.*, 929 F. Supp. at 674 (S.D.N.Y 1996)).

While the Fourteenth Amendment's Due Process clause generally does not grant an affirmative right to government aid, there are two exceptions, both of which apply here. First, the "special relationship" exception stems from a relationship existing between the plaintiff and the state such that the state assumes some responsibility for the plaintiff's safety and well-being. *DeShaney*, 489 U.S. at 198-202. Second, the "state-created danger exception" exists when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger. *See Henry A.*, 678 F.3d at 998 (finding both special relationship and state-created danger exception apply to due process claims of children in child welfare system). The district court's opinion is devoid of any analysis of the custody status of Plaintiffs other than to summarily conclude that Directly Placed Plaintiffs are not in custody and therefore do not have standing to assert a violation of their due process rights.

First, the district court's conclusion ignores settled law recognizing that individuals placed involuntarily into state custody enter a "special relationship" with the state and are thus entitled to "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Youngberg*, 457 U.S. at 324. It is the state's affirmative act of restraining

the individual's freedom to act on his own behalf which is the deprivation of liberty triggering the protections of the Due Process Clause. *DeShaney,* 489 U.S. at 200. Indeed, the "salient feature that creates duties on the part of the State is that it by affirmative act, renders the individual substantially dependent upon the state ... to meet [his or her] basic needs." *M.D.*, 294 F.R.D. at 33 (quoting *Nicini v. Morra,* 212 F.3d 798, 808 (3d Cir. 2000)).

Courts across the country have found, with apparent unanimity, that such a special relationship exists *when the state removes a child from their parent(s)* and takes them into their care. *See., e.g., Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981); *M.D. v. Abbott*, 907 F.3d 237, 249-70 (5th Cir. 2018); *Connor B.*, 771 F. Supp. 2d at 160; *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 291-292 (8th Cir. 1993); *Yvonne L*, 959 F.2d at 892-94; *K.H.*, 914 F.2d at 851; *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987). When children are in "custody or *under the care of the government,* their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the Constitution." *Doe I,* 649 F.2d at 141 (emphasis added); *see also Nicini,* 212 F.3d at 808-09 (finding special relationship and that child was under the care of social services agency where he was "substantially dependent" on agency although child lived with individual not certified as foster parent); *Bryan C. v. Lambrew*, 340

F.R.D. 501, 516 (D. Me. 2021) (child's *entry* into foster care creates a special relationship). The act of removing the child from the parent -- restraining the child's liberty and making them dependent on the government -- triggers the special relationship and the attendant affirmative duties.

In making its summary conclusions, the district court ignored the clearly alleged and undisputed nuances and complexities of NYC's child welfare system. ACS *involuntarily removed* every Plaintiff from their parent or guardian and took over their care and well-being. ACS placed each Directly Placed Plaintiff in the home of their relative and then denied each the services and supports necessary for their basic care. ACS supervises each Directly Placed Plaintiff's placement. ACS is statutorily obligated to visit each home or facility to ensure the child's health, investigate any issue arising in the care of the child, develop a plan assessing the child's safety and permanency, exercise reasonable efforts to ensure progress toward the child's permanency goal, and report on this progress and the child's well-being to the Family Court on a regular basis. *See, e.g.*, N.Y.F.C.A § 1089; 18 N.Y.C.R.R. § 428. ACS is also obligated to seek removal of the child any time it suspects the placement is contrary to the child's well-being. The fact that the Family Court orders remands to direct placements – as it does with foster home placement – does not diminish ACS's responsibility for the care and supervision of the child. ACS has

rendered each child substantially dependent on the government and is ultimately responsible for their basic care, safety, and placement.

That the Directly Placed plaintiffs are currently residing with their relatives does not diminish the special relationship that has been created with Defendants. Once a child has been removed from their parent(s), the state "owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Henry A.*, 678 F.3d at 1000. Indeed, when the state has taken the child away from her parents and into its custody, it could no more place a foster child in a situation lacking adequate care than it could a prisoner. *K.H.*, 914 F.2d at 848–49. The government cannot "avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons." *T.M. v. Carson*, 93 F. Supp. 2d 1179, 1186 (D. Wyo. 2000) (quoting *K.H.*, 914 F.2d at 851). Once removed, Defendants owe each Directly Placed Plaintiff safe and adequate placement and care– whether that is in stranger care or with a relative.

Second, Plaintiffs have standing to sue for violation of their Due Process rights under the state-created danger exception. This exception applies, where, as here, a "state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061

(9th Cir. 2006) (quoting *DeShaney*, 489 U.S. at 197). Where Defendants know of the danger that Plaintiffs face in homes in which the government places them, the state-created danger exception applies. *See Henry A.*, 678 F.3d at 1003 (state-created danger theory applies when state removed children from their homes and placed them in care of foster parents, including in care of relatives and out-of-state facilities and homes, who were unable to adequately care for them); *Tamas v. Dep't of Social & Health Servs.*, 630 F.3d 833, 842-44 (9th Cir. 2010) (state-created danger exception applies even where child has been adopted since child was previously in Defendants' care prior to adoption and was placed in worse situation by various defendants' actions and inactions); *K.S.S. v. Montgomery Cnty. Bd. of Comm'rs*, 871 F. Supp. 2d 389, 399 (E.D. Pa. 2012) (child sufficiently pled substantive due process claim on state-created danger theory against county child welfare agency when agency had placed child with abusive foster father). Here, Defendants have removed Plaintiffs from their parent(s), assumed responsibility for their care and placed them in unstable, unsupported homes unable to adequately care for their basic needs. As such, Defendants have exposed Plaintiff Children to a danger which each would not have otherwise faced if provided the same supports and services afforded to children in foster care.

In applying the state-created danger principle, this Court has "sought to tread a fine line between conduct that is passive and that which is affirmative." *Pena v.*

DePrisco, 432 F.3d 98, 109 (2d Cir. 2005) (state-created danger existed where police officers affirmatively condoned fellow officer's drunk driving); *see also Matican v. City of New York*, 524 F.3d 151, 157-58 (2d Cir. 2008) (allegation that police planned sting in manner that would lead to exposure of informant is "sufficiently affirmative to qualify as state-created danger"). The state or its agents must "in some way ha[ve] assist[ed] in creating or increasing the danger to the victim." *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (state-created danger where police officers told assailants they would not interfere with an attack). In some cases, "*repeated inaction by government officials* over a sustained period of time, without explicit advance approval or encouragement of the misbehavior in question, might effectively constitute an implicit prior assurance rising to the level of an affirmative act." *Pena*, 432 F.3d at 110 (emphasis added).

Defendants have placed Plaintiffs, each of whom are known to have significant special needs, into homes which Defendants have affirmatively denied needed supports and services. Defendants have placed Plaintiffs into homes where there is not only a known risk of harm due to instability, but where, through Defendants' affirmative refusal and inaction, there is inadequate care for the child's basic needs. In other words, Defendants have increased the danger to Plaintiffs when they refuse to provide adequate food, clothing, medical and mental healthcare, and educational support for Directly Placed Plaintiffs. As a result, the state created

danger exception, in addition to the special relationship exception, applies to Directly Placed Plaintiffs and provides standing to assert their substantive due process rights.

V. The District Court Fundamentally Misinterpreted Plaintiff Children's Claims Regarding the Conditions and Duration of Foster Care.

The district court again applied erroneous standards, *supra* §§ I, II, in misconstruing Plaintiffs' claims regarding the well-established right to services and supports that enable children to remain under ACS care and supervision no longer than necessary. *See Youngberg*, 457 U.S. at 324; *Marisol A*, 929 F. Supp. at 676 ("[t]he right to be free from harm encompasses the right alleged by plaintiffs to appropriate conditions and duration of foster care"); *Connor B.*, 771 F. Supp. 2d at 161 (accepting plaintiffs' allegations as true, district court found it easily conceivable that Defendants violated plaintiffs' right not to be maintained in custody longer than necessary to accomplish the purposes of taking child into custody). Plaintiffs have standing to assert these rights as they are each in Defendants' care. *See supra* at § IV.B. Plaintiffs do not seek, what the district court characterized as, "an optimal level of care," A-288, but rather assert that Defendants' policies and practices deny pathways to permanency or reunification and unnecessarily prolong their time in care.

It is the goal of the child welfare system "to further the best interest of children by helping to create nurturing family environments without infringing on parental

rights." *Doe v. New York City Dep't of Soc. Servs.*, 670 F. Supp. 1145, 1174 (S.D.N.Y.1987) (citing N.Y. Soc. Serv. L. § 384–b(1)(a)(iii) and (iv)). As OCFS acknowledges, the ultimate goal of the foster care system, is either to reunify children with their parents or, if that is impossible, to find a permanent home for the child through adoption or guardianship. ¶ 6 (A-15). Plaintiffs' claim that they have been subjected to inappropriate conditions and duration of foster care is directly in line with this purpose. In a supported kin *foster* placement, Plaintiffs would have a greater chance of achieving permanency and leaving ACS care. Kin foster parents often facilitate reunification by maintaining close connection with the child's biological parent or guardian. ¶ 8 (A-15). When Plaintiffs are denied a kin foster home, they also lose access to two primary permanency options: KinGAP and adoption by that relative. KinGAP, a legislatively authorized, subsidized guardianship program that aims to facilitate the permanent placement of foster children with relatives, is available only to kin foster parents. N.Y Soc. Svcs. L. § 458-B; ¶ 155 (A-54). Defendants' denial of kin foster homes also forecloses adoption with that relative because the same barriers exist for certification as an adoptive parent as they do for foster parents. ¶ 195 (A-66). As such, Plaintiffs have clearly demonstrated direct harms from Defendants' policies and practices when their time in care is unnecessarily prolonged and Defendants deny them pathways to permanency and reunification - the ultimate goal of the child welfare system.

VI. The District Court Erred by Ignoring Plaintiffs' Procedural Due Process Claims Against All Defendants and Oversight Claims Against OCFS

The district court's failure to address Plaintiffs' well-pled procedural due process claims, as well as Plaintiffs' claims of deficient oversight by OCFS, constituted error.

To establish a due process claim, a party must "demonstrate that: (a) there has been a deprivation of liberty or property in the constitutional sense; and (b) the procedures used by the state to effect this deprivation were constitutionally inadequate." *Rivera*, 696 F.2d at 1022. Plaintiffs have sufficiently alleged that Defendants' practices deprive them of a liberty interest with respect to each of their substantive due process claims and that Defendants fail to provide any process for Plaintiffs to challenge Defendants' certification decision denying them a kin foster home. ¶¶ 14 (A-18), 20 (A-20), 220 (A-72), 222 (A-73). Plaintiffs further allege that they must receive timely notice and opportunity to challenge the denial of kin foster placements given the significant risk of irreparable harm at issue. Plaintiffs have therefore adequately pled their procedural due process claims. *See Marisol A.*, 929 F. Supp. at 680 ("New York's Child Protective Services laws … give plaintiffs an entitlement to protective services of which they may not be deprived without due process of law."); *Rivera*, 696 F.2d at 1018 (plaintiff had liberty interest in preserving familial relationship with siblings and was therefore entitled to

procedural due process before denial as kin foster parent). Yet, the district court never addresses Plaintiffs' procedural due process claims.

In addition, Plaintiffs clearly allege that OCFS violated their constitutional rights by failing to provide adequate guidance and oversight of ACS's evaluation process of potential relative foster parents, including the consideration of the criminal and SCR history of relatives and their household members. *See, e.g.*, ¶¶ 12 (A-17), 14 (A-18), 182 (A-63), 197 (A-67), 207 (A-69). These allegations meet the requirements for establishing standing, adequately alleging harm to Plaintiffs that is fairly traceable to OCFS and redressable. *Lujan*, 504 U.S. at 560-61. To the extent that the district court implicitly relied on its dismissal of Plaintiffs' substantive due process claims to justify dismissing Plaintiffs' claims against OCFS, it was in error. *See supra* §§ III-V. Similar allegations of deficient local oversight by the state mental health agency have been deemed sufficient to establish a traceable injury. *M.G. v. New York State of Mental Health*, No. 19-CV-639 (CS), 2021 WL 5299244, at *6 (S.D.N.Y. Nov. 15, 2021).

Plaintiffs sufficiently allege procedural due process claims and a distinct violation of their rights as to failure in oversight by State Defendants. This Court should reverse the Order and find standing for all of Plaintiffs' claims.

VII. The Prudential Standing Doctrine Does Not Justify Dismissal

While the district court did not purport to be dismissing based on prudential standing, it did state "Plaintiffs have not established that there is prudential standing in this case." A-290. This determination failed to recognize that the prudential standing doctrine's applicability was curtailed in the unanimous Supreme Court decision in *Lexmark Intern. Inc.*, 572 U.S. at 125-126. Furthermore, the Supreme Court reaffirmed the longstanding principle that once subject matter jurisdiction has been established, courts then have "a virtually unflagging" obligation to hear and decide cases within its jurisdiction. *Id.* at 126.

Even if the prudential standing doctrine were still applicable, the district court erred in finding Plaintiffs "arguably assert[] the legal rights and interest on behalf of the Kin Caregivers." A-290. As set forth *supra*, Plaintiffs assert injury stemming from a violation *their own* legal rights and interests, particularly since they do not seek certification of their kin, but rather a meaningful, individualized determination and opportunity to challenge any denial. Foster care maintenance payments (FCMPs) and foster care services are entitlements that belong to the Plaintiffs because the purpose of these payments and services is for the children's needs rather than to compensate foster parents for caring for them. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, codified as amended at 42 U.S.C. § 675(4)(A) (2018)); N.Y. Soc. Serv. L. § 398-a; *see also, Miller v. Youakim*, 440 U.S.

125, 138-145 (1979) (purpose of FCMPs is to meet children's needs; noting Congress increased FCMPs above those made via welfare in recognition that children required "additional resources – both monetary and service related – to provide a proper remedial environment" to address the trauma they have endured). Notably, the FMCPs and services follow the child who is in foster care – not the foster parent. A foster parent ceases to receive payments for any period a foster child is not in their care. *See e.g.*, 18 N.Y.C.R.R. §§ 427.2, 427.6; Soc. Svs. Law § 398-a. Children are also specifically entitled to have relatives explored as foster parents pursuant to the Family First Prevention Services Act and New York Family Court Act §1017. Therefore, Plaintiffs' claims do not warrant dismissal under the prudential standing doctrine.

CONCLUSION

Given the Order's many errors of law, this Court should review the legal claims *de novo*, vacate the Order and find Plaintiffs have established standing.

Dated: January 29, 2024

Respectfully submitted,

By: */s/ Lisa Freeman*

THE LEGAL AID SOCIETY
Lisa Freeman
Kathryn Wood
Kimberly R. Schertz
199 Water Street
New York, NY 10038
Phone: (212) 577-3300
lafreeman@legal-aid.org
kwood@legal-aid.org
kschertz@legal-aid.org

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Local Rule 32.1(a)(4) (A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 13,920 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

Dated: January 29, 2024

Respectfully submitted,

/s/ Lisa Freeman