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**COURT OF APPEALS  
STATE OF NEW YORK**

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THE CITY OF NEW YORK, E.V., J.O., A.J., T.B., T.V., S.V., and K.D., by  
WILLIAM C. BELL, Commissioner of the New York City Administration for  
Children's Services,

Plaintiffs,

- against -

THOMAS A. MAUL, as Commissioner of the New York State Office of Mental  
Retardation and Developmental Disabilities,

Defendant.

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L.J., A.S., C.B., L.O., D.C., E.V., J.C., S.H., R.P., L.N., T.T. and others similarly  
situated,

Plaintiff-Intervenors and Plaintiffs-Respondents,

- against -

JOHN B. MATTINGLY, in his official capacity as COMMISSIONER, NEW YORK  
CITY, ADMINISTRATION FOR CHILDREN'S SERVICES,

Defendant-Appellant,

- and -

THOMAS A. MAUL, in his official capacity, as COMMISSIONER, NEW YORK  
STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL  
DISABILITIES,

Defendant.

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**BRIEF OF AMICI CURIAE  
ADVOCATES FOR CHILDREN OF NEW YORK, BAZELON CENTER  
FOR MENTAL HEALTH LAW, BRENNAN CENTER FOR  
JUSTICE AT NYU SCHOOL OF LAW, THE BRONX DEFENDERS,  
CHILDREN'S RIGHTS INC.,  
(*amici curiae list and appearances continued inside*)**

**CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, COURT  
APPOINTED SPECIAL ADVOCATES, INC., DISABILITY ADVOCATES,  
INC., EMPIRE JUSTICE CENTER, LEGAL SERVICES OF CENTRAL  
NEW YORK, MENTAL DISABILITY LAW CLINIC AT TOURO LAW  
CENTER, MFY LEGAL SERVICES, INC., NATIONAL DISABILITY  
RIGHTS NETWORK, NEW YORK CIVIL LIBERTIES UNION, NEW  
YORK LEGAL ASSISTANCE GROUP,  
AND URBAN JUSTICE CENTER**

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## **STATEMENT OF CORPORATE RELATIONSHIPS**

Advocates for Children of New York, Bazelon Center for Mental Health Law, The Bronx Defenders, Children's Rights Inc., Citizens' Committee for Children of New York, Court Appointed Special Advocates, Inc., Disability Advocates, Inc., Empire Justice Center, Legal Services of Central New York, Mental Disability Law Clinic at Touro Law Center, MFY Legal Services, Inc., National Disability Rights Network, New York Civil Liberties Union, New York Legal Assistance Group, and Urban Justice Center are non-profit organizations with no parent companies and no subsidiaries or affiliates.

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## **INTEREST OF AMICI CURIAE**

The Amici Curiae (“Amici”) are 16 national, state and local non-profit organizations that advocate for vulnerable children, adults and senior citizens, including people with mental and physical disabilities, individuals who have been abused or neglected, children in foster care, poor people, and immigrants. Many of these individuals rely on government compliance with federal and state laws mandating the provision of essential services and benefits. Some of the Amici have successfully prosecuted class actions that have achieved important reforms in cases like the one alleged here, where a persistent pattern of government failures to provide mandated services or benefits to vulnerable people is claimed to result from deficient government policies and practices. Amici, therefore, have a strong interest in assuring that the class action continues to be available in such cases in New York’s courts. To that end, Amici submit this Brief Amici Curiae in support of the certified class of children with developmental disabilities in this action, and urge affirmance. A list of the Amici is set forth in Addendum A.

## **SUMMARY OF ARGUMENT**

Amici submit this brief to show that the class action is an indispensable judicial device because it is the most effective, efficient and economic means of addressing government violations of law that result from the

kind of institutional and systemic deficiencies alleged in this case. It is essential that the class action be preserved for use in cases like this one.

This case is not about isolated, random individual failures to provide the services which the New York City Administration for Children's Services ("ACS") and the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") are obligated to provide. The thrust of the complaint is that, for decades, there has been a persistent, wide-spread pattern of such failures resulting from policies these agencies have adopted—or more accurately, failed to adopt. These include alleged failures to provide the training and guidelines needed to identify and properly and timely place eligible children with developmental disabilities, and a long-standing, unresolved inter-agency dispute about each agency's respective statutory responsibilities. These and other alleged systemic failures have harmed not just the individual named children who are serving as the class representatives in this case, but also have harmed, or threaten to harm, all children in the class who have developmental disabilities and are entitled to and dependent on these agencies' services.

These alleged institutional failures cannot be cured by individual actions because these failures go beyond the denial of services to any one individual child. An individual case-by-case approach, moreover, would force the courts to address the same violations of law over and over again, while generations

of current and future children with disabilities suffer the same injuries, which after-the-fact individual cases cannot fully repair. Individual actions would treat only the symptoms and ignore the causes. Only a class action, which can address the agencies' systemic failures and secure injunctive and declaratory relief to correct the causes of the agencies' persistent violations of law, can provide an effective remedy.

Moreover, because actions for class-wide injunctive and declaratory relief, like this one, are focused on government agency policies and practices affecting the entire class, rather than any particular individual, those policies and practices present common issues of law and fact which necessarily predominate over any individual's claim of actual entitlement to services. A class action is thus the most effective, efficient and economic means of remedying government violations based on the kind of deficiencies alleged in this case.

Finally, a class action is especially important to vindicate the rights of individuals likely to be unable to do so on their own. Many of the children in the class and their families may be indigent or unaware of their rights and therefore unlikely to initiate litigation or even to protest their mistreatment. Absent this class action, many of the children with developmental disabilities who comprise the class may simply suffer in silence.

For these reasons, courts have repeatedly recognized the need for, and propriety of, class actions in circumstances like those alleged in this case. Indeed, in the leading case involving similar allegations, *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994), the United States Court of Appeals for the Third Circuit found that the denial of class certification was as an abuse of discretion. Certainly, the certification of the class on the facts alleged here was well within the broad discretion afforded to the Supreme Court by Article 9 of the CPLR (“Article 9”).

The same need for an effective remedy for the kind of violations of law alleged in this case also shows why this case is justiciable. Absent the class-wide injunctive and declaratory relief sought to address the alleged systemic deficiencies, the alleged violations of law by ACS and OMRDD will continue. It is precisely the role of courts to adjudicate claims of violations or threatened violations of law by government agencies. If the facts alleged here can be proven, a refusal by the court to intervene would amount to an abdication of its role as a check on unlawful government action.

The need for an effective remedy for these violations also shows why this case cannot be mooted merely by the resolution of some of the named class representatives’ individual claims, or by the fact that some of these children have aged out of the child welfare system during the pendency of this litigation. Even if these children were no longer entitled to individual forward looking relief, the

alleged violations or threatened violations resulting from the alleged institutional deficiencies affecting other children who belong to the class would continue. Treating the case as moot would mean that these violations or threatened violations would evade review, and provide a means for these agencies to avoid accountability for the systemic policy failures that allegedly have plagued the system and harmed children with developmental disabilities for so many years. Indeed, one of the values of the class action device is that it effectively precludes the government from mooting specific individuals' claims as a means of avoiding its statutory responsibilities. Under these circumstances, this case is not moot.

## **ARGUMENT**

### **I.**

#### **THE CLASS ACTION IS AN INDISPENSABLE DEVICE FOR REMEDYING THE KIND OF SYSTEMIC GOVERNMENT DEFICIENCIES ALLEGED HERE**

This case usefully demonstrates why the class action is an indispensable device for addressing government violations of law which result from systemic deficiencies.

#### **A. Only A Class Action Can Provide Relief Adequate To Secure The Rights Of All Of The Children With Disabilities Being Denied The Services That ACS And OMRDD Are Obligated To Provide**

The class of children with developmental disabilities certified in this case seeks injunctive and declaratory relief to remedy an alleged widespread pattern of persistent violations by ACS and OMRDD of their statutory obligations

to provide services to children with developmental disabilities. These children, who are entitled by law to services from ACS and OMRDD because they are foster children with developmental disabilities, allege that these violations are caused by a number of systemic deficiencies including:

(i) an unresolved inter-agency dispute about each agency's respective responsibilities to implement its statutory duty to provide residential, planning and other support services;

(ii) ACS's failure to develop adequate policies or programs to identify children with developmental disabilities to be considered for referral to OMRDD for adult placement;

(iii) ACS's failure to adequately train staff to recognize developmental disabilities;

(iv) ACS's failure to develop written guidelines concerning referral for and placement with OMRDD;

(v) ACS's failure to train staff on preparing complete referral packages;

(vi) the absence of a formal process for resolving disputes and a failure to give the children's guardian or

family notice of their right to a hearing where services are denied; and

(vii) ACS's failure to investigate facilities in which children are placed.

(Respondents' Brief at 1, 9, 11-15, 17-18).

Individuals are likely to be incapable of remedying such systemic deficiencies through individual actions. Individuals are unlikely to have the resources or incentive to secure relief that would extend beyond their own individual situations. And government agencies are likely to resolve individual claims, if and when brought, without reaching or remedying the underlying institutional deficiencies causing the widespread violations of law that harm or threaten to harm all of the class members.

More specifically, courts are often reluctant to entertain claims by individuals that go beyond their individual situations, to provide the kind of discovery needed to address systemic deficiencies, or to provide the systemic relief needed to cure those systemic deficiencies. If limited to hearing individual actions, courts would be required to deal with the consequences of the persistent violations alleged here over and over again, without addressing the underlying institutional causes for such violations.



The class action is also more efficient and economic. By focusing on the institutional deficiencies rather than individual claims, it addresses matters that commonly affect all class members in a single proceeding. It can reduce the number of individual cases filed with the courts by effecting reforms that may diminish future violations.

The class action can also provide relief which can be more effectively monitored by the courts and the members of the class.

In contrast to an individual action, a class action seeking class-wide injunctive and declaratory relief can provide an adequate remedy in circumstances such as those alleged here. By addressing the underlying causes of the government's violations, a court can provide relief that protects all class members against current and future violations, including those who are too poor or vulnerable to initiate individual actions, or who may be unaware of their rights to do so.

**B. The Class Action Is Recognized As An Indispensable And Superior Device For Remediating Systemic Deficiencies**

The superiority of class actions for addressing such systemic deficiencies – especially where the victims of such deficiencies are children, persons with mental or physical disabilities, or persons who are poor – is well recognized.

For example, in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), the Ninth Circuit, in affirming the district court's decision to grant system-wide injunctive relief to a class of prisoners and parolees with disabilities who had been injured by a systemic failure to accommodate their disabilities, explained in terms directly applicable here:

System-wide relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs), or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the class's injury.

*Id.* at 870. See also *People United For Children, Inc. v. City of New York*, 214 F.R.D. 252, 266 (S.D.N.Y. 2003) (holding that class certification "is appropriate where broad, class-wide injunctive and declaratory relief is necessary to redress group-wide injury") (internal quotation and citation omitted).<sup>1</sup>

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<sup>1</sup> This Brief Amici Curiae cites federal cases decided under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). Such cases are persuasive because Article 9 is modeled on, and largely adopts, the class action requirements of Rule 23. See, e.g., *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 93, 434 N.Y.S.2d 698, 705 (2d Dep't 1980); *Colt Indus. S'holder Litig. v. Colt Indus., Inc.*, 77 N.Y.2d 185, 194, 565 N.Y.S.2d 755, 760 (1991). Additionally, it is commonplace for New York courts to rely on federal precedent when interpreting and applying the requirements of Article 9. See, e.g., *Friar*, 78 A.D.2d at 93-94, 434 N.Y.S.2d at 705-06; *Stern v. Carter*, 82 A.D.2d 321, 325-26, 441 N.Y.S.2d 717, 722 (2d Dep't 1981); *Geiger v. Am. Tobacco Co.*, 181 Misc.2d 875, 878-79, 696 N.Y.S.2d 345, 348 (Sup. Ct. N.Y. Cty. 1999).

As described below, courts, scholars and advocates have identified numerous practical and procedural reasons why class actions are necessary and appropriate in situations such as those alleged here.

**1. Absent A Class Action, Many People Will Have No Remedy For Government Violations Of Their Rights**

First, a representative proceeding such as a class action “guarantees a hearing for individuals ... who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf.” *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). It is important, therefore, to ensure that individuals who are poor and otherwise vulnerable—such as the children here, whose parents cannot provide care for them—have access to the courts through the class action device.

Second, systemic agency failures are unlikely to be remedied through political or legislative means because the individuals harmed by an agency’s failures often have little, if any, political power. For example, children in foster care “do not vote ... [and] lack the developmental ability to organize. Their voices ... cannot be heard. Whatever happens to them, therefore, happens outside the zone of public scrutiny.” Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L.L. REV. 199, 214 (1988). See also Scott J. Preston, “Can You Hear Me? ”: *The United States Court of Appeals for the Third Circuit Addresses the*

*Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653, 1706 (1996) (noting that “[f]oster children, commonly representing disadvantaged and minority groups, lack the necessary influence to compel a legislative or executive branch to take action”).

Accordingly, for many persons, the class action is the only vehicle by which they can realistically secure protection against the failure of government agencies to fulfill their legal obligations.<sup>2</sup>

## **2. Class Actions Are Necessary To Address Systemic Deficiencies For Procedural Reasons**

In addition to the practical realities that necessitate a class action in circumstances such as those alleged here, a class action for declaratory and injunctive relief is often procedurally necessary where the problems to be remedied are systemic agency failures. System-wide relief cannot be obtained through individual actions for several reasons.

First, individual actions “tend to focus attention, myopically, on individual culpability for past actions instead of on detection and correction of

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<sup>2</sup> Many commentators have discussed the importance of the class action for persons who are poor or otherwise vulnerable. *See, e.g.*, Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 68-72 (2007); Daniel Tenny, *There is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1034-35 (2005); Joshua D. Blank and Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. STATE L. REV. 1, 10-14 (2005); Marie A. Failinger and Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L. J. 1, 8-9 (1984).

institutional deficiencies.” Mushlin, *Unsafe Havens*, 23 HARV. C.R.-C.L. L. REV. 199, 250. *See also* Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J. L. REFORM 199, 212 (2007) (explaining that the “elements of systemic relief fall beyond the narrow and individualized parameters of judicial relief” available on an individual basis in family court).

Second, unlike discovery in a class action, discovery in an individual action is limited to information that is relevant to a plaintiff’s individual claims. An individual plaintiff “may be able to obtain discovery of a defendant’s practices and procedures with respect to himself, but not with respect to other persons’ cases, as he would be able to do in a class action.” Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges when Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URBAN L. J., 873, 884 (2002). Individual plaintiffs, therefore, often would be prevented from obtaining the evidence needed to establish the existence of a system-wide agency failure, even if they were inclined to do so.

Third, in many instances courts have declined to grant class-wide relief if no class has been certified. *See, e.g., Seittelman v. Sabol*, 158 Misc.2d 498, 512, 601 N.Y.S.2d 391, 400 (Sup. Ct. N.Y. Cty. 1993), *aff’d as modified*, 217 A.D.2d 523, 630 N.Y.S.2d 296 (1st Dep’t 1995) (holding that “unless this court grants class certification, its directives concerning entitlement ... will only apply to

the individual named plaintiffs”); *Zepeda v. United States Immigration and Naturalization Serv.*, 753 F.2d 719, 728 n.1 (9th Cir. 1985); *Bowers v. National Collegiate Athletic Ass’n*, 118 F.Supp.2d 494, 503 (D.N.J. 2000).

Additional procedural considerations make clear that a class action is far superior to a multitude of individual actions where systemic agency failures have caused class-wide injury.

As we noted, an individual case-by-case approach forces courts to address the same injury repeatedly without ever addressing the defective policies that are the root cause of the problem. Such an approach would be “an obvious waste of judicial resources.” *Friar*, 78 A.D.2d at 98-99, 434 N.Y.S.2d at 708. *See also Brown v. Wing*, 170 Misc.2d 554, 561, 649 N.Y.S.2d 988, 992 (Sup. Ct. Monroe Cty. 1996), *aff’d*, 241 A.D.2d 956, 663 N.Y.S.2d 1025 (4th Dep’t 1997) (it would be “an affront to basic principles of judicial economy” to deny class certification and thereby invite a multitude of parallel proceedings); *Abel & Udell, If You Gag the Lawyers*, 29 FORDHAM URBAN L. J. at 884 (where a court cannot “learn the complete facts about the defendant’s relevant practices and procedures,” as would occur in a class action, “similarly situated individuals will have to return to court repeatedly with the same problem, thus increasing the burden on the courts”).

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Further, while an individual action may “compensate for an individual injury which has already occurred,” a class action for declaratory and injunctive relief “seeks to prevent harm from occurring in the first instance.” Mushlin, *Unsafe Havens*, 23 HARV. C.R.-C.L. L. REV. at 250.

Finally, even if a court in an individual action “rules that a defendant has acted unlawfully with respect to one plaintiff, the defendant may not cease its unlawful behavior with respect to similarly situated individuals”. Abel & Udell, *If You Gag the Lawyers*, 29 FORDHAM URBAN L. J., at 883. See also Tenny, *There is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies*, 103 MICH. L. REV. at 1034-35 (“an agency ... might not apply a non-class judgment to other similarly situated people”). Accordingly, an individual action may create precedent, but it typically would not provide any non-party with enforceable relief. In contrast, a class action provides all class members with relief that may be enforced through a contempt proceeding, thereby forestalling any need for subsequent, individual litigations. See *Nehmer v. United States Veterans’ Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987). See also Lowry & Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J. L. REFORM at 211 (noting that a class action “provides a platform for enforceable reform that lives beyond election cycles and enables a long term strategy for systemic improvement that looks beyond a particular administration or leadership”).

3. **Class Actions Have Proved An Effective Means For Rectifying Systemic Deficiencies That Cause Persistent Government Violations Of Law**

Class actions against government agencies have yielded critically important results. *See, e.g.,* Lowry & Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J. L. REFORM at 210 (“[C]lass actions have a proven track record of producing measurable positive results in reforming large child welfare systems, on which so many fragile lives are dependent.”); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 456-57 (2007) (“[T]he effectiveness of structural litigation in reforming institutions cannot be disputed. Structural litigation campaigns have desegregated schools, reformed prisons, attacked deplorable health care conditions in institutions, challenged police abuse, and targeted discrimination in large private employers.”).

The experiences of the Amici organizations reinforce the conclusion that the class action serves as an essential tool to secure relief when government agencies defy the law. For example, in *Brad H. v. City of New York*, 185 Misc.2d 420, 712 N.Y.S.2d 336 (Sup. Ct. N.Y. Cty. 2000), *aff’d*, 276 A.D.2d 440, 716 N.Y.S.2d 852 (1st Dep’t 2000), a case brought by Amicus Urban Justice Center, the court certified a class of current and future prisoners, and later approved a settlement between the plaintiffs and the City that benefited both the class members and the broader community by promoting released prisoners’ access to



mental health treatment. The settlement required the City to provide “mentally ill inmates access to treatment they need to maintain psychiatric stability after their release.” Susan Saulny, *City Agrees to Help Care for Mentally Ill Inmates After Release*, N.Y. TIMES, Jan. 9, 2003, available at <http://www.nytimes.com/2003/01/09/nyregion/city-agrees-to-help-care-for-mentally-ill-inmates-after-release.html>.

Similarly, *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) and *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003), class actions brought by Amicus Children’s Rights, Inc. to redress continuing illegalities in two child welfare systems, both produced settlements that corrected the pattern of agency disregard for the law, to the enduring benefit of the children served by these systems. The settlement reached after class certification in *Marisol A.* resulted in lower caseloads for social workers, additional funding for new foster care placements and an improved data management system. See *Marisol A. v. Giuliani Fact Sheet*, available at [http://www.childrensrights.org/wp-content/uploads/2008/06/ny\\_marisol\\_fact\\_sheet.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/ny_marisol_fact_sheet.pdf). A consent decree in *Kenny A.* required the government defendants to revise their practices concerning the provision of health care, investigation of maltreatment allegations, court reviews, caseload limits, training, and licensing of foster homes. *Kenny A. v. Perdue (Child*

