

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-13666

JAKLIN SUZETH GOTAY & OTHERS

v.

KIMBERLY MALPASS & OTHERS

**BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL
SERVICES AND CHILDREN'S LAW CENTER OF MASSACHUSETTS
IN SUPPORT OF NEITHER PARTY**

Committee for Public Counsel Services

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. P. 17(c)(1), amici curiae Committee for Public Counsel Services and Children's Law Center of Massachusetts are each nonprofit corporations with no parent corporations, with no stock, and therefore no publicly held company owning 10% or more of their stock.

RULE 17(c)(5) DECLARATION

No party or party's counsel authored this brief in whole or in part; no party, party's counsel, or other person or entity other than amici contributed money intended to fund preparing or submitting this brief; and none of the amici or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENTS OF INTEREST

The **Committee for Public Counsel Services** ("CPCS") is a statutorily created statewide agency established by G. L. c. 211D, §§ 1 et seq., whose responsibility is "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the

Commonwealth. Those legal services include representing children and families in termination of parental rights proceedings, defendants in criminal cases, juveniles in delinquency and youthful offender proceedings, and individuals the Commonwealth seeks to deprive of their liberty (e.g., by commitment to a psychiatric facility), or to administer a highly restrictive or highly intrusive treatment modality (e.g., antipsychotic medications). This Court's decision in this case will affect the interests of CPCS's present and future clients. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated . . ."). Aside from the appointment of counsel for the indigent parties, CPCS has no financial interest in the case.

The **Children's Law Center of Massachusetts** ("CLCM"), founded in 1977, is a private, non-profit legal advocacy and resource center with a mission of promoting and securing equal justice and maximizing opportunity for low-income children and youth. CLCM elevates the voices of children and youth clients by providing them with high quality, holistic legal advocacy on matters that implicate their safety, liberty, education, and access to the courts and by offering technical assistance and training on youth-related systems and law to lay and professional communities

throughout the Commonwealth. CLCM has also filed amicus curiae briefs in matters that affect children's rights. CLCM has an interest in ensuring that the rights and interests of children in Massachusetts and throughout the nation are protected. This case presents questions of significance both to the children and to the attorneys who represent them. The amici hope that their views will add to the Court's consideration of the issues raised in this appeal.

SUMMARY OF ARGUMENT

It is settled that, when the State restrains a person's liberty, the State creates a special relationship with the person that obligates it to provide for their care and safety. The Commonwealth restrains a child's liberty when it takes custody of the child, limits her relationship with her parent, and assumes the right to make nearly every decision the child's parent previously had made for her. A child in the Commonwealth's custody must depend on the Commonwealth to protect her interest in being properly cared for and protected, and the Commonwealth must fulfil its obligation to do so. (pp. 12-15).

Massachusetts law recognizes that a child's parent must provide for the child's care and protection, and that the Commonwealth may separate

the family in order to provide the required care if necessary. And the law has been clear for thirty-five years that children have an absolute constitutional interest in freedom from harm. Further, the consensus of persuasive authority is that children in State foster care have a special relationship with the State that entitles them to the protections of the Due Process Clause. (pp. 16-18).

A child's substantive due process right to safety in the Commonwealth's custody should be interpreted broadly. It should be said to include the rights to: a safe living environment, services that accord with acceptable professional judgment and promote the child's wellbeing, services and other assistance that are targeted to remediate the need for State custody as quickly as possible, and the least restrictive substitute care placement. (pp. 19-20).

A decision confirming that children in the Commonwealth's custody have a clearly established due process right to safety in substitute care could work to protect those children from the wide array of the harms that endanger foster children in Massachusetts. Children are harmed by being separated from their parents, and that harm compounds throughout the separation. And studies show that, for cases where the decision to remove

a child or leave them in their home is a close one, children who are spared the vagaries of the foster care system have better life outcomes than those who are subjected to it. (pp. 21-23). Children also are harmed by maltreatment in their substitute care placements – which occurs at higher rates in Massachusetts than in most other states. (pp. 24-27). Placement instability in foster care also is worse in Massachusetts than in most places, and it visits longstanding harm upon the children who experience it. (pp. 27-28). So, too, does the Commonwealth’s failure to properly manage the mental health needs of the children in its custody, its failure to ensure that every child it takes from their family has a connection to a permanent family before they attain the age of eighteen, and its failure to protect LGBTQ+ youth from the specific harms that befall them in State custody. (pp. 28-32).

Children of color disproportionately suffer the harms of the Commonwealth’s custody and substitute care. Recent data shows that they are more likely than white children to be taken into custody and to suffer harm once there. Children of color also are more likely to be subjected to placement instability and less likely to enjoy the benefits of being placed with kin. (pp. 33-37).

ARGUMENT

I. A child in the legal custody of the Department of Children and Families has a clearly established substantive due process right to reasonable care and safety in substitute care placements¹ due to a special relationship between the child and the Commonwealth.

A. When the Commonwealth removes a child from her parents and places her in substitute care, the Commonwealth's restraint on the child's personal liberty creates a special relationship that triggers the protections of the Due Process Clause.

A State creates a special relationship with a person when it restrains their "freedom to act on [their] own behalf – through institutionalization, incarceration, or a similar restraint on their personal liberty[.]" DeShaney v. Winnebago Cty Dep't of Soc. Servs., 489 U.S. 189, 200 (1989). The State's affirmative act of so restraining the person's freedom triggers a "corresponding duty to assume some responsibility for [their] safety and

¹ The amici submit this brief to address the second of the three questions this Court put to potential amici, to wit, "[w]hether a child placed by the Commonwealth in a foster home has a clearly established due process right to a safe living environment due to a special relationship between the Commonwealth and the foster child." Because DCF may place a child in its custody in a foster home, a group care facility, or an institution (G. L. c. 119, § 32; 110 C.M.R. § 7.101(2)) and the answer to the Court's question is not dependent on the type of placement DCF chooses for a child, the amici generally use the term "substitute care" in place of "foster home."

general well-being” under the Due Process Clause of the Fourteenth Amendment. Id. See U.S. Const. Amend. 14.

The United States Supreme Court suggested in DeShaney that the placement of a child in State foster care may be “sufficiently analogous to incarceration or institutionalization” to create the special relationship that “give[s] rise to” the State’s “affirmative duty” to protect the child. Id. at 201, n.9. The First Circuit Court of Appeals also has assumed, but has not decided, that children in foster care have a substantive due process right to safety in State custody and a special relationship with the State “because [the State] affirmatively took responsibility for protecting [them] from harm while they remained in foster care.” Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45, 53 (1st Cir. 2014), citing J.R. v. Gloria, 593 F.3d 73, 80 (1st Cir. 2010).

When the Commonwealth, acting through its Department of Children and Families (“DCF”), encounters parents who require assistance to provide adequate care to their child, DCF must make reasonable efforts to “prevent or eliminate the need” to remove the child and place her in

foster care. G. L. c. 119, § 29C;² see G. L. c. 119, § 1 (Commonwealth’s policy “to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children . . . and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.”). DCF thus may remove a child to its custody and place her in foster care only as a “last resort.” Care and Protection of Walt, 478 Mass. 212, 219 (2017).

These limitations on the Commonwealth’s ability to separate children from their parents are required because the parent-child relationship implicates constitutional rights “of the highest order.” Care and Protection of Zita, 455 Mass. 272, 284 (2009). Children have a “vital interest” in maintaining their relationship with their fit parent. Santosky v. Kramer, 455 U.S. 745, 760 (1982). Children also have an absolute constitutional interest

² Absent certain enumerated exceptions, “[i]f a court of competent jurisdiction commits, grants custody or transfers responsibility for a child to the department or its agent, the court . . . shall determine whether the department or its agent, as appropriate, has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home.” G. L. c. 119, § 29C.

in freedom from abuse and neglect. Care and Protection of Robert, 408 Mass. 52, 62 (1990). See G. L. c. 119, § 1 (recognizing right of every child to custodial care that ensures their “sound health and normal . . . development.”).

When DCF takes a child from her parent’s custody and places her in foster care, the Commonwealth deprives the child of her rights, *inter alia*, to a relationship with her parent; to have her parent make decisions to protect her safety and further her best interests; and to make decisions she is able to make for herself. As the child’s custodian, DCF decides where the child will live, with whom she will have contact and the conditions of that contact, where she will go to school, what medical care she will receive and from whom. G. L. c. 119, § 21.³ The child is almost entirely at the mercy of DCF to meet her needs and ensure her welfare. See *id.* See also Care and Protection of Isaac, 419 Mass. 602, 610-611 (1995) (deferential standard of judicial review of DCF’s exercise of authority under § 21).

³ While foster parents or staff at institutional placements provide day-to-day care for a child in DCF’s custody, DCF is “ultimately responsible for the child who has been placed in their care.” Kerins v. Lima, 425 Mass. 108, 112 (1997).

When DCF assumes custody of a child and places her in a DCF substitute care placement, the Commonwealth creates a special relationship between DCF and the child that triggers the protections of the Due Process clause.

B. This Court long has recognized that children have an absolute constitutional interest in freedom from harm, and persuasive authority shows that the due process right to safety in substitute care is clearly established.

More than half a century ago, this Court described a parent's right to raise their child as a right "in the nature of a trust reposed in" the parent that "is subject to [the parent's] correlative duty to care for and protect the child." Richards v. Forrest, 278 Mass. 547, 553 (1959). The Court also explained that the Commonwealth may step in to provide the care and protection that is every child's birthright if the parent fails to "discharge th[at] obligation[]." Id. Several years later, this Court declared both that children have an absolute interest in freedom from harm in all situations and that the Commonwealth has a protected interest in providing "adequate care and protection" for a child whose parent does not. Care and Protection of Robert, 408 Mass. at 62, 66.

When DCF removes custody of a child from her parent, then, DCF assumes the duty to meet the child's constitutional right to care and protection. See id. See also G. L. c. 119, § § 1, 21 (recognizing children's rights to safe substitute care from the Commonwealth and defining DCF's custodial authority). DCF's obligation to protect the constitutional rights of the children it takes into custody and places in substitute care is well established in Massachusetts law.

The United States Supreme Court has not yet held that a State creates a special relationship that triggers the protections of the Due Process Clause when it takes custody of a child and places her in foster care. That Court has been clear, though, that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself," the State becomes responsible for meeting the individual's due process right to safety. DeShaney, 489 U.S. at 200, citing Estelle v. Gamble, 429 U.S. 97, 103-104 (1976), and Youngberg v. Romeo, 457 U.S. 307, 315-316 (1982). There can be no question, as discussed above, that DCF affirmatively acts to restrain a child's freedom and leaves her without a parent to care for and protect her when DCF takes custody of the child and places her in substitute care.

In any case, in the absence of direct controlling authority, a right may be shown to be clearly established through a “consensus of cases of persuasive authority.” Wilson v. Layne, 526 U.S. 603, 604 (1999). The ten federal circuits that have addressed the issue since 1981 have held that the “special relationship” that triggers substantive due process protections applies to children in foster care placements. See, e.g., Matican v. City of New York, 524 F.3d 151, 156 (2d Cir. 2008), citing Doe v. N.Y.C. Dep’t of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981); Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000); Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs., 597 F.3d 163, 175 (4th Cir. 2010); Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 856 (5th Cir. 2012) (en banc); Lintz v. Skipski, 25 F.3d 304, 305 (6th Cir. 1994); Reed v. Palmer, 906 F.3d 540, 552 (7th Cir. 2018); Norfleet ex rel. Norfleet v. Ark. Dep’t of Hum. Servs., 989 F.2d 289, 293 (8th Cir. 1993); Henry A. v. Willden, 678 F.3d 991, 1000 (9th Cir. 2012); Schwartz v. Booker, 702 F.3d 573, 580 (10th Cir. 2012); Ray v. Foltz, 370 F.3d 1079, 1082 (11th Cir. 2004). See also Bryan C. v. Lambrew, 340 F.R.D. 501, 516 (D. Me. 2021) (child’s entry into foster care creates special relationship, “triggering at least some constitutional duty by the State to care for the children in its custody”).

Accordingly, it is clearly established that children in State custody enjoy a substantive due process right to safety in their State-arranged placements.

C. The right of a child in the Commonwealth's custody to be free from harm in substitute care should be broadly interpreted to include, *inter alia*, appropriate conditions and duration of substitute care.

If this Court clarifies that foster children in State custody have a constitutional right to be free from harm, the Court also should address the breadth of that protection. For instance, the right to be free from harm necessarily encompasses the right to the essentials of adequate care, including sufficient food, shelter, clothing, and medical attention.

Youngberg, 457 U.S. at 324. See also Deshaney, 489 U.S. at 200 (where State restrains an individual's liberty, it must "provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety").

Additionally, the State must provide reasonably safe conditions of confinement for individuals in its custody. Youngberg, 457 U.S. at 315–316.

In addition to providing basic necessities, "the State is under a duty to provide [the involuntarily committed] with . . . conditions of reasonable care and safety[.]" Id. at 324.

When the First Circuit assumed that a special relationship exists between the Commonwealth and foster children, it also assumed that

the special relationship of foster care entails a duty on the state to provide for six particular rights: (1) to a safe living environment, (2) to services necessary for the children's physical and psychological well-being, (3) to treatment and care consistent with the purpose of their entry into the foster care system, (4) to custody only for such time as is necessary, (5) to receipt of care and treatment through the exercise of accepted professional judgment, and (6) to the least restrictive placement.

Connor B. ex rel. Vigurs, 774 F.3d at 53 (“defendants do not challenge the district court’s holding, so we will also assume *arguendo* that these six areas constitute an appropriate framework for analysis”). The Youngberg decision “contemplates the first three putative rights as protected by the Constitution and that, by logical extension . . . the last three items manifest the right to ‘reasonable care and safety,’ and thus are protections to which the Plaintiffs are equally entitled.” Connor B. ex rel. Vigurs v. Patrick, 985 F. Supp. 2d 129, 159 (D. Mass. 2013), aff’d, 774 F.3d 45 (1st Cir. 2014).

Given the myriad harms that can befall children in DCF custody, some of which amici survey in Part II *supra*, this Court should broadly interpret the substantive due process right to be free from harm.

II. Confirming a child’s clearly established constitutional right to reasonable care and safety in out-of-home placements may protect the Commonwealth’s foster children from a wide array of harms.

- A. A significant number of children suffer harm in DCF custody and out-of-home placements.

Children in DCF custody experience numerous, compounding harms including the initial trauma of being separated from their parents and families, abuse and neglect while in care, and the lack of appropriate medical care, education, supervision, and support. These detrimental impacts have been the subject of numerous reports by various state, federal, and nonprofit organizations dating back decades. For a comprehensive timeline and links to reports generated over the past ten years, see Friends of Children, *Failing Our Kids: Measures of the Broken Child Welfare System in Massachusetts* (2021).⁴

Harm of Removal

A child is harmed whenever DCF separates her from her family, whether or not the separation is justified. See generally Trivedi, *The Harm of Child Removal*, 43 NYU Rev. L. & Soc. Change 523 (2019). And the harm is

⁴ Available online at <https://friendsofchildreninc.org/failing-our-kids/>.

continuing. The President of the American Academy of Pediatrics explained in 2018 that “[s]eparating children from their parents can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her shortand long-term health. This type of prolonged exposure to serious stress – known as toxic stress – can carry lifelong consequences for children.” *Id.* at 526. See Care and Protection of Rashida, 488 Mass. 217, 228, n.16 (2021), quoting from L. Edwards, *Reasonable Efforts: A Judicial Perspective* 98 (2014) (“Children . . . are in trauma as the result of social services and court intervention. The longer the process takes, the more extensive the trauma[.]”).

At the same time, studies consistently demonstrate that children in marginal cases⁵ fared better on nearly every measure when they remained living with their parents as opposed to being placed in substitute care by child protective services.⁶ See, e.g., Doyle, Jr., *Causal Effects of Foster Care:*

⁵ A marginal case is one in which child protective services “investigators may disagree about the placement recommendation.” Doyle, Jr., Causal Effects of Foster Care: An Instrumental-Variables Approach, 35 *Child. & Youth Servs. Rev.* 1143 (2013). Put differently, a marginal case involves a close call.

⁶ Most care and protection cases relate to allegations of neglect, not abuse. In Fiscal Year 2023, more than 90.5% of the children for whom DCF

An Instrumental-Variables Approach, 35 Child. & Youth Servs. Rev. 1143 (2013) (finding that foster care causes higher rates of juvenile delinquency among marginal cases); Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 (4) J. of Pol. Econ. 746 (2008) (finding that children on the margin of placement were two to three times more likely to enter the criminal justice system as adults when removed from their caretakers); Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 (5) Am. Econ. Rev. 1583 (2007) (finding that children in marginal out-of-home placement cases fare better when they remain at home, especially older children). See also Gerber, et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child. & Youth Servs. Rev. 42 (2019) (finding that high quality parental representation resulted in children spending less time in foster care with no impact on maltreatment rates).

supported allegations of maltreatment were allegedly neglected. DCF Annual Report, Fiscal Year 2023, 34. By contrast, DCF supported allegations of physical abuse for 8.1% of reported children and of sexual abuse for 3.3% of the children brought to its attention. Id.

Harm of Maltreatment in Foster Care

Massachusetts is a particularly dangerous place to be a child in foster care. See Connor B., 985 F. Supp. 2nd at 139-156, 160 (finding that DCF failed to comport with national standards of care, state and federal requirements, and internal policies, regarding minimizing maltreatment in out-of-home placements). In Fiscal Year 2023, DCF reported that 22,873 children were the subjects of substantiated reports of maltreatment. DCF Annual Report (2023) (hereinafter, “FY2023 DCF Annual Report”), xi.⁷ That number represented 1.68% of the 1.36 million children residing in Massachusetts that year. Id. at 29. DCF also reported that it substantiated reports of maltreatment by a foster parent or congregate care employee for 214 children in its custody that fiscal year. Id. at 36. That number represents 1.72% of the 12,476 children in its custody, which is slightly higher than the rate of maltreatment in the overall population. In Fiscal Year 2022, Massachusetts ranked fourth in the nation for the percentage of children who were the subject of a substantiated, indicated, or “alternative response” maltreatment report while in foster care. U.S. Dep’t of Health &

⁷ Available online at <https://www.mass.gov/doc/fy2023-dcf-annual-report/download>.

Human Servs., The Administration for Child. & Families, Child Welfare Outcomes Report Data: Outcomes 1 and 2: Safety – FY 2022 (2024).⁸ The Office of the Child Advocate (OCA), an independent executive branch agency, is charged with reviewing all reports alleging that children were abused or neglected in out-of-home settings, including non-DCF-related entities, such as childcare settings and in Department of Youth Services congregate care placements. OCA Annual Report (2023), 31.⁹ In Fiscal Year 2023, the OCA received more reports of abuse or neglect in out-of-home settings than ever before. Id. The total represented a 41% increase from Fiscal Year 2022 and an 80% increase from Fiscal Year 2021. Id.

Supported reports of maltreatment in congregate care placements increased by 47% from Fiscal Year 2022 to Fiscal Year 2023. Id. at 32. The OCA observed that “[y]ear-over-year, congregate care yields the most supported reports of abuse and/or neglect in out-of-home settings.” Id. The maltreatment has included physical and sexual abuse of children by

⁸ Available online at <https://cwoutcomes.acf.hhs.gov/cwodatasite/recurrence/index/>.

⁹ Available online at <https://www.mass.gov/doc/oaca-annual-report-fiscal-year-2023/download>.

staff, as well as staff providing illicit substances to children and failing to supervise them properly. *Id.* at 70.¹⁰ In FY 2023, DCF placed over 1,000 of the children in its custody in congregate care. FY2023 DCF Annual Report, 13.

In DCF foster homes, supported reports of abuse included both physical and sexual abuse, and supported neglect reports included intimate partner violence, mental health challenges of a caregiver, inadequate supervision by a foster parent, and inadequate provision of food. OCA Annual Report, Fiscal Year 2023, 69-71.

Anecdotally, but saliently, the Honorable Peter J. Rubin of the Massachusetts Appeals Court recently noted during oral argument that, in a relatively short period of time, the court had handled two cases in which children had suffered abuse in DCF foster care. Justice Rubin noted his concern that DCF did not immediately remove one of the children from the

¹⁰ Earlier this year, the U.S. Senate Committee on Finance undertook an investigation into abusive conditions in taxpayer-funded congregate care facilities. See generally U.S. Senate, Senate Committee on Finance, *Warehouses of Neglect: How Taxpayers are Funding Systemic Abuse in Youth Residential Treatment Facilities* (2024), available online at https://www.finance.senate.gov/imo/media/doc/rtf_report_warehouses_of_neglect.pdf. The report includes reports of negligent supervision in a group home in Massachusetts. *Id.*

foster home when it learned of the abuse and emphasized that “it’s a care *and protection* proceeding. If the Commonwealth can’t protect these children, I’m not sure what the constitutional basis is for taking them away from parents, fit or unfit.”¹¹

Harm of Placement Instability

Children are harmed when DCF moves them from one out-of-home placement to another, even when they are not abused or neglected by their caregivers in those DCF placements. Such placement instability “disrupt[s] a child’s emotional, social, and academic well-being,” and “tends to increase” the length of time a child spends in impermanent out-of-home care. FY2023 DCF Annual Report, 18. Yet DCF shuttled children in its custody among substitute care placements much more frequently than the national average during Fiscal Year 2023. Id. In that year, DCF moved children who entered its custody at a rate of 7.17 times per 1000 days in placement, which reflected an increase over each of the preceding three

¹¹ See Impounded Case, No. 2024-P-0137, Oral Arg. at 2:54:05-2:55:30, Massachusetts Appeals Court Oral Arguments (Nov. 5, 2024), available at <https://www.youtube.com/watch?v=mqlieTgttyo>.

Fiscal Years. Id. In contrast, the national average for Fiscal Year 2023 was 4.48 moves per 1,000 days of placement. Id.

Harm of Poorly Managed Mental Health Conditions and Medical Care

Just this month, the State Auditor released a report criticizing DCF for failing to properly manage the care of children in its custody with mental health conditions. Mass. Office of the State Auditor, *Official Audit Report, Dep't of Children and Families, July 1, 2019 through December 31, 2023* (2024).¹²

The audit investigated children receiving psychotropic medication between 2019 and 2023. Among its findings are that children received antipsychotic medication without a valid court order; children on psychotropic medication were not provided recommended psychosocial services; and DCF consistently failed to maintain health information in its electronic case file for children receiving psychotropic medication. See generally id.

¹² Available online at <https://www.mass.gov/doc/audit-report-department-of-children-and-families/download>.

DCF policy requires that each child entering foster care receive an initial screening and a comprehensive medical evaluation. Yet in Fiscal Year 2023 almost 20% of children entering care received no screening and only 46% were completed in a timely manner. FY2023 DCF Annual Report, 42. Given that these children generally are in DCF's custody due to allegations of neglect or abuse, DCF's failure to promptly have children seen by a medical provider is particularly troubling.

Harm of Poor Education Outcomes

Children in foster care also experience poor education outcomes. A 2019 report by the Supreme Judicial Court's Court Improvement Program revealed that children in foster care were more likely to have lower proficiency levels and to repeat grades. See Mass. Court Improvement Program, *Stable Placement, Stable School: Improving Education Outcomes of Children in Foster Care in Massachusetts* (2019) (hereinafter "Stable Placement, Stable School").¹³ They also were more than three times more likely to be disciplined, including through the use of out-of-school

¹³ Available online at <https://www.mass.gov/doc/stable-placement-stable-school-improving-education-outcomes-of-children-in-foster-care-in/download>.

suspensions, than other students. Id. And they were less likely to graduate high school than their peers. Id. See also Mass. Office of the State Auditor, *Local Financial Impact Review, Educational Services for Students in Foster Care and State Care* (2019).¹⁴

More recent data shows continued poor education outcomes for children in substitute care. For example, DCF reports that for the 2020-2021 school year (the most recent available data), more than one-third of youth in foster care failed to graduate high school within five years of enrollment. FY2023 DCF Annual Report, 43. And in the 2022-2023 school year, 11.5% of children in foster care received out-of-school suspensions, compared to 2.5% for all students and 3.8% for “high needs” students. Id. at 44.

Harm Experienced by Youth Who Age Out of DCF Custody

In Fiscal Year 2023, 3,533 children aged out, or reached the age of majority, in the custody of DCF, rather than achieving a permanent custodial arrangement through reunification, guardianship, or adoption. Id. at 24. Children leaving state custody at age 18 or later without a connection to a permanent family experience exceedingly poor outcomes;

¹⁴ Available at <https://www.mass.gov/report/local-financial-impact-review-educational-services-for-students-in-foster-care-and-state-care>.

in 2021, among this population of “transition-age” youth at age 21: (1) nearly one-third had not finished high school nor obtained a GED; (2) nearly half did not have full- or part-time employment; (3) 40% had experienced homelessness; (4) and 23% had experienced incarceration. Annie E. Casey Foundation, *Fostering Youth Transitions: State and National Data to Drive Foster Care Advocacy* (2023), 6.¹⁵ Youth leaving foster care also experience high rates of pregnancy, medical and mental health issues, and being victims of physical and sexual assault. Task Force on Youth Aging out of DSS Care, *Preparing Our Kids for Education, Work and Life* (2008).¹⁶

Harms to LGBTQ+ Youth in DCF’s Custody

LGBTQ+ youth face particularly grievous harms while in foster care. A 2021 report prepared by the Massachusetts LGBTQ Youth Commission — an independent state agency created by the legislature — revealed that DCF failed “to keep LGBTQ foster youth safe and protect them from violence,

¹⁵ Available online at <https://assets.aecf.org/m/resourcedoc/aecf-fosteringyouth-stateprofile-MA.pdf>.

¹⁶ Available online at https://heller.brandeis.edu/cyc/pdfs/DSS_Report_0528.pdf.

abuse, and risks associated with intimate partner violence and exploitation” See Mass. Commission on LGBTQ Youth, *LGBTQ Youth in the Massachusetts Child Welfare System: A Report on Pervasive Threats to Safety, Wellbeing, and Permanency* (2021), 6.¹⁷ LGBTQ youth in foster care also experienced “long delays in accessing medically necessary health care, barriers to education, and invalidation of LGBTQ identities.” *Id.* Not surprisingly, these youth are more likely to experience multiple and inappropriate placements and to leave state custody without connection to a permanent family. *Id.* These harms fall disproportionately on Black and Hispanic/Latinx youth and transgender youth. *Id.* The Commission’s report on DCF is replete with stories from individual children about the harms they suffered in foster care. One described being “bullied constantly” in her group home. *Id.* at 8. Another child was attacked after a staff person at their placement “requested that his cousins beat up the child because the worker felt the child was ‘getting on his nerves.’” *Id.* at 11.

¹⁷ Available online at <https://www.mass.gov/orgs/massachusetts-commission-on-lgbtq-youth>.

B. The harms of out-of-home placements disproportionately affect the rights of the Commonwealth's children of color.

In considering children's rights to safety in DCF custody and foster care, this Court cannot ignore that children of color are disproportionately represented in the Juvenile Court/DCF system. As the following statistics demonstrate, DCF removes and retains the Commonwealth's Black, Hispanic/Latinx, and Native American children at alarmingly higher rates than its white children.¹⁸ By the end of Fiscal Year 2023, Massachusetts Black and Hispanic/Latinx children were 2.6 times more likely to be separated from their families by DCF and put in DCF substitute care placements than white children, and Native American children were 3.5 times more likely to suffer that fate. FY2023 DCF Annual Report, 9.

Of the 1.36 million children living in the Commonwealth at the end of Fiscal Year 2023, Hispanic children accounted for 19.8% of the total population but 32.3% of the children in DCF out-of-home placements,

¹⁸ The *majority* (53%) of Black children in the United States experience an investigation by child protective services during their childhoods. See Baron, et al., *Discrimination in Multi-Phase Systems: Evidence from Child Protection* (2024), 1, available online at <https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=10085>.

Black children accounted for 9% of the total population but 14.4% of the children in out-of-home placements, and Native American children accounted for 0.2% of the Commonwealth's child population but 0.4% of the children in DCF out-of-home placements. *Id.* Massachusetts ranked second in the nation for its disproportionate removal of Hispanic/Latinx children from their families in Fiscal Year 2022, while the Commonwealth ranked fourth in the country for the rate at which it placed Hispanic/Latinx children in foster care. U.S. Dep't of Health & Human Servs., *The Administration for Child. & Families, State Specific Foster Care Data: Entry Rates & Disproportionality Rates - FY 2022 (2024)*.¹⁹

Recent data demonstrates not only that Black, Hispanic/Latinx, and Native American children were more likely to be placed in DCF custody, but that they were more likely than white children to suffer harm once they were in DCF's custody. From the initial report of abuse or neglect to the child's exit²⁰ from foster care, children of color disproportionately came

¹⁹ Available online at <https://www.acf.hhs.gov/cb/report/state-specific-foster-care-data-2022>.

²⁰ A child "exits," or leaves, DCF custody through reunification, adoption, guardianship, or emancipation (i.e., reaching the age of majority or "aging out"). FY2023 DCF Annual Report, 21-24.

into contact with and bore the brunt of negative outcomes in the DCF and Juvenile Court systems at nearly every step.

In Fiscal Year 2023, the Commonwealth's Hispanic/Latinx and Black children were 2.4 times and 2.5 times, respectively, more likely to have a 51A report alleging abuse or neglect filed concerning them. FY2023 DCF Annual Report, 29. This disparity endured through the screening and investigation processes, as allegations were screened in, supported, and/or substantiated for concern at similar rates across race and ethnicity in proportion to the initial disparate reporting. Id. at 29, 31-32.

As explained above, placement instability is well understood to be “disruptive to a child’s emotional, social, and academic well-being,” and it “tends to increase the time to permanency.”²¹ Id. at 18. Children of color moved placements more frequently than white children in the Commonwealth, and at nearly twice the rate of the national average. DCF moved Hispanic/Latinx children who entered its custody in Fiscal Year 2023 among placements at an average rate of 7.41 moves per 1,000 days of

²¹ Permanency refers to a long-term custodial relationship for a child, such as reunification, guardianship, or adoption. Id. at 59.

foster care, DCF moved Black children who entered its custody that year an average of 9.76 times per 1,000 days of foster care, and Asian children at an average rate of 8.13 moves per 1,000 days of foster care. *Id.* at 19. White children entering care in Fiscal Year 2023 fared better, with DCF moving them among placements at an average rate of 5.77 moves per 1,000 days of placement. *Id.*

Moreover, Black and Hispanic/Latinx children in DCF's custody also are less likely than their counterparts to enjoy the benefits of kinship care placements. It is undisputed that "placement with kin provides continuity for children and reduces trauma." *Id.* at v. There are also considerable educational advantages that come along with placement with kin: a recent study found that, "[s]tudents placed in kinship homes had fewer school changes, better school attendance, lower rates of discipline, and lower grade retention rates than students in non-kinship homes." *Stable Placement, Stable School*, 8.²² But only 33% of Black children and 37% of Hispanic/Latinx children in DCF out-of-home placements were placed

²² Available online at <https://www.mass.gov/doc/stable-placement-stable-school-improving-education-outcomes-of-children-in-foster-care-in/download>.

with kin, compared to 44% of white children DCF placed out of the home. FY2023 DCF Annual Report, 14. In Fiscal Year 2023, DCF placed only 19% of Black children and 27% of Hispanic/Latinx children who entered care that year with kin as their initial placement, as opposed to 37% of white children. Id. at 15.

Once children of color are in DCF's clutches, they are also less likely to exit DCF custody before they reach the age of majority. Specifically, in Fiscal Year 2023, Hispanic/Latinx children were 1.2 times more likely than white children in DCF placement to exit to emancipation (as opposed to reunification, adoption, or guardianship), and Black children were 1.3 times more likely than white children to exit foster care to emancipation. Id. at 24.

DCF's special relationship with all the children in its care requires DCF to provide them with reasonable care and protection. As discussed, the childhoods of the Commonwealth's children of color, however, are disproportionately impacted by the negative effects of nearly every aspect of this system. Likewise, a ruling from this Court confirming that children have a clearly established substantive due process right to reasonable care and safety in DCF substitute care placements may disproportionately

improve circumstances for the Commonwealth's children of color and the generations that will come after them.²³

CONCLUSION

This Court should confirm that children have a clearly established substantive due process right to reasonable care and safety in DCF custody and substitute care placements. When DCF infringes upon the personal and fundamental interests of a child to be raised within her own family by separating her from her parents and placing her in the custody of the State, the State must have a corresponding duty to ensure that child is free from harm and receives reasonable care. Otherwise, the State cannot credibly claim that taking the child, with all the harm that entails, is justified to ensure her safety or give her the care and protection that a parent did not.

²³ See generally Schachter, et al., *The Intergenerational Effects of the Child Welfare System and the Legal Obligation to Rectify Them*, 19 Rutgers J.L. & Pub. Pol'y 211, 212 (2022).

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The brief was prepared using Microsoft Word and size 14 Book Antiqua font. The word count for the relevant sections under Rules 16 and 20 is: 5868 words.

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CERTIFICATE OF SERVICE

I, Lauren Russell, counsel for Amici Curiae Committee for Public Counsel Services and Children's Law Center of Massachusetts, hereby certify that, on November 14, 2024, I served by electronic means, through the e-file system, and in accordance with Mass. R. App. P. 13(d), a copy of the enclosed Brief of Amici Curiae in Support of Neither Party, to the following registered users:

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