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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO: SJC-13666

JAKLIN SUZETH GOTAY & OTHERS,

Plaintiffs-Appellees,

v.

JULIANN CREEN, ROXANNA JOHNSON-CRUZ, BREANNE PETERSON AND CATHERINE VARIAN,

Defendants-Appellants.

ON INTERLOCUTORY APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF WORCESTER COUNTY

BRIEF OF JUVENILE LAW CENTER, NATIONAL CENTER FOR YOUTH LAW AND CHILDREN'S RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES JAKLIN GOTAY AND OTHERS AND AFFIRMANCE

Jean Strout (PHV pending)
National Center for Youth Law
1212 Broadway Suite 600
Oakland, CA 94612
(510) 920-3497
jstrout@youthlaw.org

Katherine E. Burdick, 675736
Juvenile Law Center
1800 JFK Blvd., Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
kburdick@jlc.org

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity. Particularly pertinent to this case, Juvenile Law Center has extensive experience representing young people whose rights have been violated while they were in state custody.

The **National Center for Youth Law** ("NCYL") is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. NCYL's priorities include ensuring that children and youth have the resources, support, and opportunities they need to live safely with

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[1] This brief is submitted pursuant to Mass. R. App. P. 17(a) allowing *amicus* briefs when solicited by the appellate court.

their families in their communities and that public agencies promote their safety and well-being. NCYL represents youth in cases that have broad impact and has extensive experience using litigation to enforce the rights of young people in foster care.

Children's Rights is a national public interest organization based in New York that investigates, exposes, and combats violations of the rights of children. Through strategic advocacy and civil rights impact litigation, Children's Rights holds governments accountable for keeping children and youth safe, healthy, and free from discrimination. Since its founding in 1995, Children's Rights has achieved lasting, systemic change for hundreds of thousands of children throughout the country across over 20 jurisdictions. Children's Rights' litigation has involved multiple child-serving sectors, custodial and non-custodial children, and federal claims of violations of substantive due process rights.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)(5)

No party or counsel for a party authored this brief in whole or in part or contributed money intended to fund its preparation or submission. No person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution for the preparation or submission of this brief. Neither *Amici Curiae* or its counsel has represented any of the parties to this 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.

SUMMARY OF THE ARGUMENT

Amici urge the Court to find that children in foster care have a clearly established substantive due process right to a safe living environment. This conclusion is firmly rooted in the law. (Pp. 13 to 18). Moreover, as national organizations representing youth in foster care, we highlight the grave risk to youth if the state is permitted to remove children from their homes but not required to keep them safe. (Pp. 10 to 11).

Every Circuit to decide the question has found that when the State steps into the role of parent to provide for the "care and protection" of children removed from their homes and placed in foster care, it creates a "special relationship" with these children and a duty to keep them safe from harm and support their wellbeing. (Pp 15 to 16). Courts around the country have similarly long recognized that children in state custody have a substantive due process right to protection from harm. (Pp. 16 to 18). The United States Supreme Court's holding in *DeShaney v. Winnebagao County Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) that the State has an affirmative duty to protect those whose liberty it restrains also extends to youth in foster care. (Pp. 13-16).

As the Supreme Court has recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982), when the state takes individuals into its custody with the purpose of providing for their "care and safety," state actors must apply professional judgment to ensure their wellbeing; this standard is appropriate here given the unique vulnerability of children in foster care and the Commonwealth's commitment to provide for their "care and protection." G.L. c. 119, § 1 ("Declaration of policy, purpose"). (Pp. 18 to 25).

ARGUMENT

This case has broad implications for the rights of children in state custody. When the Commonwealth steps into the otherwise private family sphere and removes children from their homes due to supposed abuse and neglect, there can only be one conclusion: the Commonwealth fully assumes the duty of keeping those children safe and providing for their wellbeing. Yet despite that obligation, state systems have repeatedly subjected children to unthinkable harm and further trauma. In the 2023 fiscal year, Massachusetts had 12,476 children in foster care; 214 of those children were reported to have experienced a substantiated case of maltreatment by a foster parent or group home staff member while in state care. Mass. Dep't of Children & Families, *Annual Report FY2023* 36 (Sept. 2024), https://www.mass.gov/doc/fy2023-dcf-annual-report/download. A similar percentage of children in care were subject to maltreatment while in foster care in

fiscal years 2019 to 2022. *Id.* National data and self-reporting by youth suggest even higher rates of maltreatment of youth in foster care. *See, e.g.*, Mark Courtney et al., Chapin Hall, *Findings from the California Youth Transitions to Adulthood Study (CalYOUTH): Conditions of Youth at Age 19* 154 (2016), https://www.chapinhall.org/wp-content/uploads/CY_YT_RE0516.pdf (studies showing youths' self-reported rates of neglect by an out-of-home care provider ranged from 20 percent to 33 percent, rates of physical abuse ranged from 13 percent to 26 percent, and rates of sexual victimization from 2 percent to 15 percent). These harms are especially pronounced for Black and Hispanic/Latinx children, who are vastly overrepresented in the foster care system. In Massachusetts, they are 2.5 and 3 times more likely than white children to have an open case with the Department of Children and Families. Mass. Dep't of Children & Families, *Annual Report FY2023, supra,* at 4. *See also* (Br. of Amicus Curiae Committee for Public Counsel Services & Children's Law Center of Massachusetts 20–38) (providing detail on the immense harms of the foster care system in the Commonwealth, as well as the disproportionate effect those harms have on Black, Hispanic/Latinx and Native American children and families).

Amici write in response to the second and third questions posed by this Court for amicus input,[2] and to underscore the importance of and authority for robust legal protections for redress when youth are harmed while in foster care. *Amici* urge the Court to hold that (1) when the state brings children into foster care, it creates a special relationship giving rise to a constitutional duty to provide these children with a safe living environment, and (2) the appropriate standard for evaluating substantive due process claims alleging the state's failure to provide a safe living environment for youth in foster care is whether state officials substantially departed from accepted professional judgment, practice, or standards articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

[2] Specifically, *Amici* write in response to the following inquiries:

Whether a child placed by the Commonwealth in a foster home has a clearly established substantive due process right to a safe living environment due to a special relationship between the Commonwealth and a foster child.

Whether, for purposes of the plaintiffs' substantive due process claims, the proper legal standard is whether the social workers acted with deliberate indifference that shocks the conscience, *see County of Sacramento v. Lewis*, 523 U.S. 833 (1998), or whether their conduct amounted to an absence of professional judgment, *see Youngberg v. Romeo*, 457 U.S. 307 (1982).

I. Children in Foster Care Have a Substantive Due Process Right to Safe Living Environments Based on Their Clearly Established Special Relationship with the Commonwealth.

The Supreme Court has clearly articulated that when the "State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebagao County Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). The State's "affirmative duty to protect [a person] arises . . . from the State's affirmative act of restraining the individual's freedom to act on his own behalf—through imprisonment, institutionalization, or other similar restraint of personal liberty." *Id.* at 200. In laying out this black letter rule, the Supreme Court recognized its precedent requiring the State to provide medical care to incarcerated individuals, and to provide involuntarily committed persons "with such services as are necessary to ensure their 'reasonable safety' from themselves and others." *Id.* at 198–99 (citing *Estelle v. Gamble,* 429 U.S. 97, 103–04 (1976); *Youngberg*, 457 U.S. at 314–25). The *DeShaney* Court explained:

> The rationale for this principle is simple enough: 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, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 200 (citing *Estelle*, 429 U.S. at 103–04; *Youngberg*, 457 U.S. at 315–16).

Although *DeShaney* did not arise in the context of youth in the custody of the foster care system, its rationale squarely applies to this issue. Once minors are committed to the foster care system, they cannot leave of their own will until they turn eighteen. G.L. c. 119, § 26 ("the court may commit the child to the custody of the department until he becomes an adult or until, in the opinion of the department, the object of his commitment has been accomplished"). Youth in care require state protection because they are "placed . . . in a custodial environment . . . [and are] unable to seek alternative living arrangements." *See Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (quoting *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (en banc)). The state decides whether the child in the foster care system will be placed with a relative, a local foster home, or a group facility many states away, and whether and what type of contact the youth will have with their parents and other family members. G.L. c. 119, § 26, § 26B, § 29B, § 35. "[T]he state, by affirmative act, renders the [youth in foster care] substantially 'dependent upon the state . . . to meet [his or her] basic needs.'" *Nicini*, 212 F.3d at 808 (quoting *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992)). Having stripped away the youth's other caretakers, the child welfare system is charged with ensuring youth in foster care receive housing, food, medical and mental health treatment, education, and necessities like clothes. *See* G.L. c. 119, § 21. As the Eighth Circuit has observed, "it cannot be seriously doubted that the state

assumed an obligation to provide" for the needs of children in foster care, given that they were "placed in foster care . . . precisely because [they were] not able to take care of [themselves] and needed the supervision and attention of an adult caregiver." *Norfleet v. Arkansas Dep't of Hum. Servs.*, 989 F.2d 289, 293 (8th Cir. 1993).

This is not controversial. Indeed, the Defendant/Appellant Social Workers in this case have noted the "sufficient persuasive authority from other jurisdictions" and conceded *arguendo* that it was clearly established in 2015 that the "special relationship" doctrine applied to children in foster care. (Br. of Defendant-Appellants 27–28.) While the First Circuit has stopped short of a direct holding on the matter, its opinions are fully consistent with this conclusion. For instance, in *Connor B. v. Patrick*, the court assumed *arguendo* "that a special relationship exists between the state and children in foster care," and noted that defendants there did not challenge the district court's conclusion 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 case (sic.) 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.

774 F.3d 45, 53 (1st Cir. 2014). *See also J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010) ("We assume arguendo that DCYF created a 'special relationship' because it

affirmatively took responsibility for protecting the twins from harm while they remained in foster care.").

In fact, every Circuit to decide the issue has held that "when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties." *Nicini*, 212 F.3d at 808; *accord, e.g.*, *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 855–56 (5th Cir. 2012); *J.W. v. Utah*, 647 F.3d 1006, 1011 (10th Cir. 2011); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010); *Waubanascum v. Shawano Cnty.*, 416 F.3d 658, 665 (7th Cir. 2005); *Norfleet*, 989 F.2d at 293; *Taylor*, 818 F.2d at 794–97; *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010).

The right to "reasonable safety while in foster care" has indeed been widely established for decades. In *DeShaney* the Supreme Court acknowledged that several Circuits had already recognized the rights of youth in foster care to a safe environment:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeal have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents.

DeShaney, 489 U.S. at 201 n.9 (citing *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981), and *Taylor*, 818 F.2d at 794–97). Other Circuits recognized the right of youth in care to reasonable safety around the same time. *See, e.g.*, *Yvonne L., v. New Mexico Dep't of Hum. Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) ("[C]hildren in the custody of a state ha[ve] a constitutional right to be reasonably safe from harm."); *Norfleet*, 989 F.2d at 293 ("We thus conclude that, in light of the case law existing at the time of this tragic incident, combined with the undeniable nature of the state's relationship with and corresponding obligations to [the child], it was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision."); *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) ("*Youngberg* made the basic duty of the state to children in state custody clear."); *Meador v. Cabinet for Hum. Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that children in state-regulated foster homes have a substantive due process right to personal safety); *see also Lintz v. Skipski*, 25 F.3d 304, 305–06 (6th Cir. 1994) (*Meador* clearly established that children in state-licensed foster homes have a due process right to be protected by state officials); *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) ("[W]hen a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing 'some

responsibility for [the child's] safety and general well-being.'" (quoting *DeShaney*, 489 U.S. at 200)).

Some Circuits have even suggested that *Youngberg* itself clearly established the right to safety for children in foster care when it held that individuals committed to state institutions have a substantive due process right to reasonable safety. *See K.H.*, 914 F.2d at 851–52 ("It should have been obvious from the day *Youngberg* was decided that a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons."); *Yvonne L.*, 959 F.2d at 891–92 ("*Youngberg* arguably reaches the constitutional right plaintiffs assert to be clearly established"—the right to "reasonable safety while in foster care.").

In view of this abundant precedent, and the fundamental need to keep children in state custody safe from harm, this Court should hold that children in foster care have a clearly established substantive due process right to a safe living environment due to a special relationship between the Commonwealth and the child.

II. The Proper Legal Standard for Analyzing Substantive Due Process Claims by Foster Youth is Whether State Actors Responsible for Their Care Substantially Departed from Accepted Professional Judgment.

Substantive due process claims brought by youth in foster care alleging that they were harmed while in state custody should be analyzed under the "substantial departure from accepted professional judgment, practice, or standards" rule defined

in *Youngberg* (hereinafter "*Youngberg* standard" or "professional judgment standard"). *Youngberg*, 457 U.S. at 323. When the state takes individuals into its custody with the purpose of providing for their "care and safety," state actors must apply accepted professional judgment to ensure their wellbeing. *Id.* at 320 n.27. This applies to youth in foster care; indeed, the stated purpose of Massachusetts' child welfare system is to provide "care and protection" for children." G.L. c. 119, § 1 ("Declaration of policy, purpose.").

To justify the use of the professional judgment standard, the Court has also relied on the facts that the individual was committed to state custody involuntarily; that the individual was not confined by the state for the purpose of punishment; and that the individual was subject to "total dependence on his custodians." *Lewis*, 523 U.S. at 852 n.12.; *Youngberg*, 457 U.S. at 321–22. That, too, is precisely the situation facing youth in foster care; they have entered state care involuntarily for the purpose of care and protection, not punishment, and they cannot exit the system before age 18 without state permission. *See* G.L. c. 119, § 1, § 24, § 26(b). As discussed at Section I, *supra*, youth in foster care are also entirely dependent on the child welfare system for meeting their needs from food to housing to medical treatment. In many jurisdictions, they are literally referred to as "dependents" of the state; in Massachusetts, they are referred to as children "in need of care and protection." G.L. c. 119, § 24, § 26(a).

Youth in foster care are particularly vulnerable to state abuse because the state not only assumes the role of custodian, but of *parent*. *See Yvonne L.*, 959 F.2d at 894 ("These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in the place of the parents."). The state substitutes its own decision-making for the parents and families who would normally have the right and responsibility to protect their children. All of these factors align with the Court's stated rationale for using the professional judgment standard.[3] *See also* Andrea Koehler, *The Forgotten Children of the Foster Care System: Making A Case for the Professional Judgment Standard*, 44 Golden Gate U. L. Rev. 221, 250 (2014) ("Because the government actively takes on the role of parent, it assumes a

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[3] That Plaintiffs are children underscores the need for a protective standard. The U.S. Supreme Court has repeatedly recognized that children are different from adults, and that those "distinctive attributes of youth" impact the applicable constitutional standards. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 472–474 (2012). Thus, children sometimes enjoy greater constitutional protections than adults. *See, e.g.*, *id.* at 489 (striking down mandatory imposition of life without parole sentences for children); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking down life without parole sentences for children convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578–579 (2005) (striking down the child death penalty as unconstitutional); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 271–275 (2011) (adopting a "reasonable child" standard for *Miranda* warnings). Here—where children were removed from their parents and held in state care—the bedrock principle that children deserve distinct constitutional protections takes on special importance.

heightened duty to protect foster children" and should be subject to the more protective professional judgment standard.).

The Supreme Court's decision in *County of Sacramento v. Lewis*, which held that state conduct must "shock the conscience" to violate substantive due process rights, is consistent with this analysis. *See* 523 U.S. at 846–47. As the *Lewis* Court made clear, the type of behavior that shocks the conscience depends on the circumstances under which state officials acted. *See id.* at 850–54 ("That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." (quoting *Betts v. Brady,* 316 U.S. 455, 462 (1942))). For instance, in contexts that demand a police officer make an "instant judgment," such a high-speed chase, police conduct that harms a suspect shocks the conscience only if the officer had "a purpose to cause harm unrelated to the legitimate object of arrest." *Id.* at 836, 853. In comparison, when government actors have more time to deliberate and weigh options, as in making decisions about the care of prisoners in their custody, deliberate indifference alone could shock the conscience. *Id.* at 853. For individuals placed in state custody for their care and safety, the appropriate standard for determining whether state action shocks the conscience is whether the decisions made by state actors substantially departed from accepted professional judgment, standards, or practice.

Standards like purpose to cause harm, deliberate indifference, and professional judgment "are tailored to assist courts in evaluating executive action in specific factual contexts" to determine whether they shock the conscience. *Braam v. State*, 150 Wash. 2d 689, 700 (2003). Tellingly, in *Lewis* the Court not only reaffirmed its holding in *Youngberg*, but also repeatedly emphasized the importance of assessing the circumstances at hand when determining the constitutional demands of substantive due process. *Lewis,* 523 U.S. at 852 n.12, 850–51. Just as the Supreme Court has concluded that a higher threshold than deliberate indifference is needed to shock the conscience in situations like high-speed chases, a lower threshold than deliberate indifference is appropriate in circumstances like foster care where individuals are committed to the state's custody for their own care and safety and for non-penological reasons.[4] *Braam*, 150 Wash. 2d at 703 ("'[D]eliberate indifference' is not well suited for analyzing the claims of the class. Foster children are entitled to a high standard. . . . Something more than refraining from indifferent action is required to protect these innocents." (internal citation omitted)).

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[4] This analysis also applies to children in immigration detention, *see Doe v. Shenandoah Valley Juv. Ctr. Comm'n,* 985 F.3d 327, 329 (4th Cir. 2021) (applying the professional judgment standard where children were held in immigration detention), as well as those adjudicated delinquent as they, too, are "in need of aid, encouragement and guidance" and entitled to "care, custody and discipline" as "approximate as nearly possible [to] that which they should receive from their parents." *See* G.L. c. 119, § 53.

Numerous federal and state courts have reached the same conclusion.[5] As one court has explained, children in foster care "have been removed from their parents by the State for the child's own best interest . . . The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety." *Braam*, 150 Wash. 2d at 703 (holding that in the context of substantive due process claims brought by a class of youth in foster care, substantial departure from accepted professional judgment, standards, or practice would shock the conscience). *See also Johnson ex rel. Est. of Cano v. Holmes*, 455 F.3d 1133, 1143–45 (10th Cir. 2006) (applying *Youngberg* standard to substantive due process claims brought by a youth who was sexually assaulted while in foster care); *Winston v. Child. & Youth Servs. of Delaware Cnty.*, 948 F.2d 1380, 1391 (3d Cir. 1991) (applying *Youngberg* standard to substantive due process claims involving family visitation policies for youth in foster care); *Yvonne L.*, 959 F.2d at 894 (rejecting deliberate indifference and applying *Youngberg* standard to substantive due process claims brought by youth in foster care); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941,

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[5] Neither the First Circuit nor Massachusetts state courts have conclusively ruled on the appropriate standard for substantive due process claims brought by youth in foster care. In its most recent examination of the issue, the First Circuit considered the substantive due process claims of a class consisting of all youth in the custody of the Massachusetts Department of Children and Families. *Connor B.*, 774 F.3d at 49. After determining that these claims could not meet the absence of professional judgment standard, the court ended its analysis and declined to decide whether *Youngberg* or a higher standard was appropriate. *Id.* at 54.

954 (M.D. Tenn. 2000) (applying professional judgment rather than deliberate indifference standard because "children in foster care were more analogous to the plaintiffs in *Youngberg* than to incarcerated prisoners" (citing *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991), *aff'd and remanded sub nom. LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (applying professional judgment standard to substantive due process claims brought by youth in foster care)); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) ("The required 'professional judgment' standard for the state's care in mental institutions is extended as well to the proper duty of care owed to a foster child.") (citing *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 372 (E.D. Pa. 1994) (finding professional judgment to be proper standard)); *Mark G. v. Sabol*, 93 N.Y.2d 710, 724–26 (1999) (same); *Kara B. by Albert v. Dane Cnty.*, 205 Wis. 2d 140, 159 (1996) ("The same factors that led the *Youngberg* Court to apply a professional judgment standard rather than a deliberate indifference standard are present in this case.").[6]

Most cases applying the deliberate indifference standard in this context do so without addressing the *Youngberg* professional judgment standard. *See Tamas*, 630

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[6] Moreover, even a "deliberate indifference" standard, as applied to youth in the child welfare system, must protect young people if professionals knew or should have known of the risks they faced given the clear responsibility of the system to the young people in their care. *See supra* n.4 (constitutional standards must be calibrated to protect children).

F.3d at 844 (applying deliberate indifference that the shocks the conscience standard without discussing *Youngberg* professional judgment standard); *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006) (same); *Taylor*, 818 F.2d at 795 (same). *See also Nicini*, 212 F.3d at 811 n.9 (applying deliberate indifference that shocks the conscience standard but stating that it did not consider *Youngberg* because it was not argued by either party); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d at 141 (inapposite because decided prior to *Youngberg*). *But see M.D. v. Abbott*, 907 F.3d 237, 251 n.22 (5th Cir. 2018) (applying deliberate indifference standard to substantive due process claims brought by youth in foster care and dismissing *Youngberg* standard in a footnote).

The Supreme Court created the *Youngberg* test for situations in which, under the mandate of providing for their care and safety, the state commits to its custody people who are particularly vulnerable to harm, prevents them from leaving, and renders them completely dependent on the state. *Amici* urge the Court to recognize that this set of circumstances applies to youth in foster care and to hold that the proper legal standard for plaintiffs' substantive due process claims is whether the Defendant/Appellant Social Workers' conduct amounted to a substantial departure from accepted professional judgment, practices, or standards under *Youngberg*.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court hold that (1) a child placed by the Commonwealth in foster care has a clearly established substantive due process right to a safe living environment due to a special relationship between the Commonwealth and the child, and (2) that in evaluating such a substantive due process claim, the correct standard is whether the conduct of the State actors amounted to a substantial departure from accepted professional judgment, practices, or standards pursuant to *Youngberg v. Romeo*, 457 U.S. 307 (1982).

Respectfully submitted,

/s/Katherine E. Burdick
Katherine E. Burdick, 675736
Juvenile Law Center
1800 JFK Blvd., Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
kburdick@jlc.org

/s/Jean Strout
Jean Strout (*PHV pending*)
National Center for Youth Law
1212 Broadway Suite 600
Oakland, CA 94612
(510) 920-3497
jstrout@youthlaw.org

Counsel for Amici Curiae

Dated: November 25, 2024

STATUTORY ADDENDUM

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G.L. c. 119, § 1. Declaration of policy; purpose

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this end; 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.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

The health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child.

In all matters and decisions by the department of children and families, the policy of

the department, as applied to children in its care and protection or children who receive its services, shall be to define best interests of the child as that which shall include, but not be limited to, considerations of precipitating factors and previous conditions leading to any decisions made in proceedings related to the past, current and future status of the child, the current state of the factors and conditions together with an assessment of the likelihood of their amelioration or elimination; the child's fitness, readiness, abilities and developmental levels; the particulars of the service plan designed to meet the needs of the child within the child's current placement whether with the child's family or in a substitute care placement and whether such service plan is used by the department or presented to the courts with written documentation; and the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein. The department's considerations of appropriate services and placement decisions shall be made in a timely manner in order to facilitate permanency planning for the child.

In all department proceedings that affect the child's past, current and future placements and status, when determining the best interests of the child, there shall be a presumption of competency that a child who has attained the age of 12 is able to offer statements on the child's own behalf and shall be provided with timely opportunities and access to offer such statements, which shall be considered by the department if the child is capable and willing. In all matters relative to the care and protection of a child, the ability, fitness and capacity of the child shall be considered in all department proceedings.

For purposes of this section, the words ‘all department proceedings’ shall include departmental hearings and proceedings but shall not include a court proceeding even when the department is a party.

G.L. c. 119, § 21. Definitions applicable to Secs. 21 to 51H

As used in sections 21 to 51H, inclusive, the following words shall have the following meanings, unless the context clearly otherwise requires:--

. . . .

“Appropriate services”, the assessment, planning and care provided by a state agency or non-governmental organization or entity, through congregate care facilities, whether publicly or privately funded, emergency residential assessment services, family-based foster care or the community, including food, clothing,

medical care, counseling and appropriate crisis intervention services, provided: (i) that such agency, organization or entity has expertise in providing services to sexually exploited children or children who are otherwise human trafficking victims; and (ii) that such services are provided in accordance with such regulations that the department of children and families may adopt or the policies of such department.

. . . .

G.L. c. 119, § 24. Procedure to commit child to custody or other disposition; notice and summons; emergency order transferring custody; investigation; abandoned children

A person may petition under oath the juvenile court alleging on behalf of a child within its jurisdiction that the child: (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.

The court may issue a precept to bring the child before the court, and shall issue a notice to the department and summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or why any other appropriate order should not be made. A petition under this section may be brought in the judicial district where the child is located or where the parent, guardian with care and custody or custodian is domiciled. The summonses shall include notice that the court may dispense with the right of the parents to notice of or consent to the adoption, custody or guardianship or any other disposition of the child named therein if it finds that the child is in need of care and protection and that the best interests of the child would be served by any such disposition. Notice shall be by personal service upon the parent. If the identity or whereabouts of a parent is unknown, the petitioner shall cause notice in a form prescribed by the court to be served upon such parent by publication once in each of 3 successive weeks in any newspaper as the court may order. If no parent can be found after reasonable search, a summons shall be issued to the child's legal guardian, if any, known to reside within the commonwealth and, if none, to the person with whom such child last resided, if known.

If the court is satisfied after the petitioner testifies under oath that there is reasonable cause to believe that: (i) the child is suffering from serious abuse or neglect or is in

immediate danger of serious abuse or neglect; and (ii) that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child for up to 72 hours to the department or to a licensed child care agency or individual described in subclause (ii) of clause (2) of subsection (b) of section 26.

Upon entry of the order, notice to appear before the court shall be given to either parents, both parents, a guardian with care and custody or another custodian. At that time, the court shall determine whether temporary custody shall continue beyond 72 hours until a hearing on the merits of the petition for care and protection is concluded before the court. The court shall also consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.

Upon the issuance of the precept and order of notice, the court shall appoint a person qualified under section 21A to investigate the conditions affecting the child and to make a report under oath to the court, which shall be attached to the petition and be a part of the record.

If the child is alleged to be abandoned, as defined in section 3 of chapter 210, hearings on the petition under section 26 shall be expedited. If the parents or guardians consent, a child may be committed to the department under this section without a hearing or notice.

G.L. c. 119, § 26. Procedure at hearing; order of commitment; petition to dispense with parental consent to adoption; reimbursement of commonwealth; petition for review

(a) If the child is identified by the court and it appears that the precept and summonses have been duly and legally served, that notice has been issued to the department and the report of the person qualified under section 21A is received, the court may excuse the child from the hearing and shall proceed to hear the evidence.

(b) If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is in need of care and protection. In making such adjudication, the health and safety of the child shall be of paramount concern. If the child is adjudged to be in need of care and protection, the court may commit the child to the custody of the department until he becomes an adult or until, in the opinion of the department, the object of his commitment has been accomplished, whichever occurs first; and the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.

The court also may make any other appropriate order, including conditions and limitations, about the care and custody of the child as may be in the child's best interest including, but not limited to, any 1 or more of the following:

(1) It may permit the child to remain with a parent, guardian or other custodian, and may require supervision as directed by the court for the care and protection of the child.

(2) It may transfer temporary or permanent legal custody to:

(i) any person, including the child's parent, who, after study by a probation officer or other person or agency designated by the court, is found by the court to be qualified to give care to the child;

(ii) any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child; or

(iii) the department of children and families.
(3) It may order appropriate physical care including medical or dental care.

(4) It may dispense with the need for consent of any person named in section 2 of chapter 210 to the adoption, custody, guardianship or other disposition of the child named therein.

In determining whether such an order should be made, the standards set forth in section 3 of said chapter 210 concerning an order to dispense with the need for consent to adoption of a child shall be applied. If the child who is the subject of the petition is under the age of 12, and if the court adjudicates the child to be in need of care and protection under this section, the court shall enter an order dispensing with the need for consent to adoption upon finding that the best interests of the child, as defined in paragraph (c) of said section 3 of said chapter 210, will be served thereby. The entry of such an order shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein.

The department shall file a petition or a motion to amend a petition to dispense with parental consent to adoption, custody, guardianship or other disposition of the child if: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such

murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of such parent; or (iii) the child has been in foster care in the custody of the state for 15 of the immediately preceding 22 months. Under this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, under section 24 or this section, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. The department shall concurrently identify, recruit, process and approve a qualified family for adoption.

The department need not file such a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child if the child is being cared for by a relative or the department has documented in the case plan a compelling reason for determining that such a petition would not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C are required to be made with respect to the child.

Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; or (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent.

(5) The court may order the parents or parent of said child to reimburse the commonwealth or other agency for care in appropriate cases.

(c) On any petition filed in any court under this section, the department or the parents, person having legal custody, probation officer or guardian of a child or the counsel or guardian ad litem for a child may petition the court not more than once every 6 months for a review and redetermination of the current needs of such child whose case has come before the court, except that any person against whom a decree to dispense with consent to adoption has been entered under clause (4) of subsection (b) shall not have such right of petition for review and redetermination. Unless the court enters written findings setting forth specific extraordinary circumstances that require continued intervention by the court, the court shall enter a final order of

adjudication and permanent disposition, not later than 15 months after the date the case was first filed in court. The date by which a final order of adjudication and permanent disposition shall be entered may be extended once for a period not to exceed 3 months and only if the court makes a written finding that the parent has made consistent and goal-oriented progress likely to lead to the child's return to the parent's care and custody. Findings in support of such final order of adjudication and permanent disposition shall be made in writing within a reasonable time of the court's order. The court shall not lose jurisdiction over the petition by reason of its failure to enter a final order and the findings in support thereof within the time set forth in this paragraph.

G.L. c. 119, § 26B. Grandparent visitation; sibling visitation; appeal of decision to deny visitation

(a) Whenever a child is placed in family foster care, the court and the department shall ensure that a grandparent of a child who is in the department's care or is the subject of a petition under this chapter shall, upon that grandparent's request, have access to reasonable visitation and that the department establish a schedule for that visitation, unless it is determined by the court or the department that grandparent visitation is not in the child's best interests. In determining the best interests of the child, the court or the department shall consider the goal of the service plan and the relationship between the grandparent and the child's parents or legal guardian. Upon recommendation by the department or on its own accord, the court may establish reasonable conditions governing grandparent visitation, including requiring that the grandparent be restrained from revealing the whereabouts of the child's placement.

A grandparent of a child who is placed with the department voluntarily under clause (1) of subsection (a) of section 23 or placed in the custody of the department under an adoption surrender under section 2 of chapter 210, who is denied grandparent visitation by the department, may appeal through the department's fair hearing process. A grandparent may appeal the decision reached through the department's fair hearing process by filing a petition in the probate and family court for grandparent visitation. That grandparent shall have the right to court review by trial de novo.

A grandparent of a child who is the subject of a petition under this chapter and placed in the custody of the department may file a petition for visitation in the court which has committed the child to the custody of the department.

(b) The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings in other foster or pre-adoptive homes or in the homes of parents or extended family members throughout the period of placement in the care and custody of the department, or after such placements, if the children or their siblings are separated through adoption or long-term or short-term placements in foster care.

The court or the department shall determine, at the time of the initial placements wherein children and their siblings are separated through placements in foster, pre-adoptive or adoptive care, that sibling visitation rights be implemented through a schedule of visitations or supervised visitations, to be arranged and monitored through the appropriate public or private agency, and with the participation of the foster, pre-adoptive or adoptive parents, or extended family members, and the child, if reasonable, and other parties who are relevant to the preservation of sibling relationships and visitation rights.

A child in foster care or sibling of a child placed voluntarily under clause (1) of subsection (a) of section 23 or under an adoption surrender under section 2 of chapter 210, who are denied visitation rights by the department, may appeal through the department's fair hearing process. The child or sibling may appeal the decision reached through the department's fair hearing process by filing a petition in the probate and family court for visitation. That child or sibling shall have the right to court review by trial de novo.

For children in the custody of the department pursuant to petition under this chapter, a child, sibling, parent, legal guardian or the department may file a petition for sibling visitation in the court committing the child to the custody of the department.

Periodic reviews shall evaluate the effectiveness and appropriateness of sibling visitations.

Any child over 12 years of age may request visitation with siblings who have been separated and placed in care or have been adopted in a foster or adoptive home other than where the child resides.

(c) A parent: (i) against whom a decree to dispense with consent to adoption has been entered under clause 4 of subsection (b) of section 26 or section 3 of chapter 210 or (ii) who has signed a voluntary adoption surrender under section 2 of chapter

210 shall not have the rights provided under this section as to the child who is the subject of that decree or surrender.

(d) A child, parent, guardian, grandparent or the department may appeal a decision or order of the trial court to the appeals court under this section if such person or the department is a party thereto. The claim of appeal shall be filed in the office of the clerk or register of the trial court within 30 days following the court's decision or order. Thereafter, the appeal shall be governed by the Massachusetts Rules of Appellate Procedure.

G.L. c. 119, § 29B. Determination of future status of committed children; orders; permanency hearings; appeals

(a) Except as provided in subsection (d), within 12 months of the original commitment, grant of custody or transfer of responsibility of a child to the department by a court of competent jurisdiction and not less than every 12 months thereafter while the child remains in the care of the department, the committing court shall conduct a permanency hearing, in accordance with rules established by the chief justice of the trial court, to determine and periodically review thereafter the permanency plan for the child. The plan shall address whether and, if applicable, when: (i) the child will be returned to the parent; (ii) the child will be placed for adoption and the steps the department will take to free the child for adoption; (iii) the child will be referred for legal guardianship; (iv) the child will be placed in permanent care with relatives; or (v) the child will be placed in another permanent planned living arrangement. No child under the age of 16 shall have a permanency plan for another permanent planned living arrangement. The department shall file a permanency plan prior to a permanency hearing that shall address the above placement alternatives. The court shall consult with the child in an age-appropriate manner about the permanency plan developed for the child, including for children and young adults whose permanency plan is another permanency planned living arrangement, asking the child or young adult their desired permanency plan. At each hearing where the court determines that a permanency plan for a child is another permanency planned living arrangement, the court shall specify why this plan is in the child’s best interest and the compelling reasons why it is not in the child’s best interest to: (i) return home; (ii) be placed for adoption; (iii) be placed with a legal guardian; or (iv) be placed in a permanency planned living arrangement with other relatives.

(b) The committing court shall continue to hold annual permanency hearings as described in subsection (a) for young adults to whom subsection (f) of section 23 applies. The young adult shall be entitled to counsel under section 29.

c) If a child or a young adult is not to be returned to the child or young adult's parents, the permanency plan shall consider in-state and out-of-state placement options. In the case of a child placed in foster care outside the state in which the home of the parents of the child is located or a young adult in an out-of-state placement, the permanency plan shall also address whether the out-of-state placement continues to be appropriate and in the best interests of the child or young adult. In the case of a child who has attained age 14 or any young adult, the permanency plan shall also address the services needed to assist the child or young adult in making the transition from foster care to a successful adulthood; provided, however, that the court shall consult with the child or young adult in an age-appropriate manner about the permanency plan. If the permanency plan for the child is another permanency planned living arrangement, the permanency plan shall address the efforts the department has made to place the child or young adult with a parent or relative or in a guardianship or adoption placement. If a person in the custody of or under the responsibility of the department has attained the age of 17 years and 9 months, the permanency plan shall also address the status of and the topics of the transition plan required under 42 USC § 675(5)(H); provided, however, that the court shall retain jurisdiction until it finds, after a hearing at which the person is present unless the person chooses otherwise, that a satisfactory transition plan has been provided for the person.

(d) In conducting a permanency hearing, the court may make any appropriate order as may be in the child or the young adult's best interests including, but not limited to, orders with respect to care or custody. At the same time, the court shall consider the provisions of section 29C, and shall make the written certification and determinations required by said section 29C. The health and safety of the child or young adult shall be of paramount, but not exclusive, concern.

The permanency hearing for a child or young adult shall be held within 30 days of a hearing at which a court determines that reasonable efforts to preserve and reunify families are not required pursuant to section 29C. The court may, however, make such determination at the time of the permanency hearing.

If continuation of reasonable efforts to return a child or young adult safely to the child or young adult's parent or guardian are found to be inconsistent with the permanency plan for the child or young adult or if reasonable efforts are not required

pursuant to section 29C, or in the case of any young adult to whom subsection (f) of section 23 applies, the department shall make reasonable efforts to place the child or young adult in a timely manner in accordance with the permanency plan including, if appropriate, through an interstate placement, and to complete whatever steps are necessary to finalize the permanent placement of the child or young adult. In subsequent permanency hearings held on behalf of the child or young adult, the court shall determine whether the department has made such efforts in accordance with section 29C.

(e) A child, parent of a child, guardian, young adult, or the department may appeal to the appeals court from the determination or order of the trial court. The claim of appeal shall be filed in the office of the clerk or register of the trial court within 30 days following the court's determination or order. Thereafter, the appeal shall be governed by the Massachusetts Rules of Appellate Procedure. The scope of appellate review shall be limited to abuse of judicial discretion.

G.L. c. 119, § 35. Furnishing parent or guardian information as to child; permission to visit; notice; parents convicted of first degree murder

If the parent or guardian of a child placed in charge of any person, association or public or private institution by any state department, town board, or by any public or private corporation or body of persons authorized by law to so place children, or if one of the next of kin of an orphan so placed in charge and without guardian, is not, upon request, informed by such department, board, corporation or body of persons where the child is, the probate court for the county where such child has his legal residence may, upon petition of such parent, guardian or next of kin, and upon notice, if in its opinion the welfare of the child and the public interest will not be injured thereby, require such department, board, corporation or body of persons to give the information and permit the parent, guardian or next of kin to visit the child at such times and under such conditions as the court orders; and the court may revise its order or make new orders or decrees as the welfare of the child and the public interest may require. No court shall make an order providing visitation rights to a parent who has been convicted of murder in the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.

G.L. c. 119, § 53. Delinquent children; liberal construction; nature of proceedings

Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

CERTIFICATION PURSUANT TO MASS. R. APP. P. 17(c)(9) & 20

I hereby certify that the foregoing brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 17 and 20. The brief uses Times New Roman 14-point font and was composed in Microsoft Word 365. This brief contains 4,895 non-excluded words as calculated by Microsoft Word's word count function.

/s/Katherine E. Burdick
Katherine E. Burdick, 67573

CERTIFICATE OF SERVICE

I, Katherine E. Burdick, Attorney for *Amici Curiae*, in the above-captioned matter, hereby certify that on November 25, 2024, I served all parties via the Court's electronic filing system.

/s/Katherine E. Burdick
Katherine E. Burdick, 67573

Counsel for Amici Curiae