No. 09-1759
UNITED STATE COURT OF APPEALS
FOR THE FIRST CIRCUIT

Sam M., et al.,
Plaintiffs-Appellants,
v.
Carcieri, et al.,
Defendants-Appellees

Appeal from the United States District Court for the District of Rhode Island
No. 07-241L

Brief of *Amici Curiae* the National Association of Counsel for Children, the Children's Law Center of Los Angeles, Youth Law Center, the Hofstra Child Advocacy Clinic, the Legal Aid Society, the Children's Advocacy Institute, Children's Law Center of Massachusetts, Lawyers for Children, Prof. Don Duquette, the Rutgers Child Advocacy Center, Children's Law Center of Minnesota, the University of Miami School of Law's Children & Youth Law Clinic, National Center for Youth Law, First Star, and Prof. Michael Dale, in Support of Plaintiffs-Appellants, Sam M. et al.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the following corporate amici curiae each hereby certifies that it has no parent corporations and that no publicly held corporation owns more than 10% of its stock:

National Association of Counsel for Children

The Children's Law Center of Los Angeles

Youth Law Center

The Hofstra Child Advocacy Clinic

The Legal Aid Society

The Children's Advocacy Institute

Children's Law Center of Massachusetts

Lawyers for Children

The Rutgers Child Advocacy Center

Children's Law Center of Minnesota

The University of Miami School of Law and the
Children & Youth Law Clinic

National Center for Youth Law

First Star

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF INTEREST OF AMICI

Founded in 1977, the **National Association of Counsel for Children** is a non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children.

NACC's 30-plus years of work tracks the development and maturation of the field of child welfare law. NACC programs serving its goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the amicus curiae program.

The NACC has promulgated three critical documents outlining the national consensus with respect to best practices in the field of child welfare law. In 1999, the NACC adopted the ABA's Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases as its own, with small revisions. These Standards discuss the day-to-day expectations of attorneys representing children in dependency cases. In 2001, the NACC issued its Recommendations for Representation of Children in Abuse and Neglect Cases, focused on the structural

and system-wide issues present in advocacy for dependent children. Most recently, the NACC created a national network of child welfare law offices around the nation to strengthen their practices and improve the overall delivery of legal services to children, and in 2006 published the Child Welfare Law Office Guidebook: Best Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency Cases.

The American Bar Association accredited the NACC to be the certifying body for child welfare law in 2004. Attorneys receive the Child Welfare Law Specialist credential from the NACC by showing their proficiency in child welfare law through a comprehensive child welfare law competency process, including demonstration of substantial involvement in the practice of child welfare law for the three years immediately preceding the application; satisfactory continuing legal education credit in child welfare law; acquisition of satisfactory peer reviews, including one judge; submission of a satisfactory writing sample; and passage of the NACC national child welfare law exam.

In order to compile the body of knowledge defining child welfare law as a specialized field of legal practice, in 2005 the NACC published Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Marvin Ventrell and Donald N. Duquette, eds. 2005). The volume is scheduled for a second edition in 2010.

Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC expertise in child welfare law and the role of the GAL in dependency proceedings will, it believes, assist the Court in its determination of this appeal.

The Children's Law Center of Los Angeles is a nonprofit legal services organization that serves as the voice in the juvenile court system for foster children and youth, representing almost 100% of the 24,000 abused and neglected children in the Los Angeles County foster care system. Through continuing legal education programs and ongoing supervision and mentoring of staff attorneys, CLCLA seeks to establish and maintain a high standard of professional legal advocacy for foster children.

Youth Law Center, based in San Francisco, is a national public interest legal organization whose mission is to advocate for the rights of at-risk children in out-of-home care in the child welfare and juvenile justice systems. Since 1978, YLC attorneys have represented children in 63 civil rights institutional reform cases in two dozen states, many involving the rights of children in foster care to be free from harm, and to have needed care, services, and treatment, including medical and mental health services.

The Hofstra Child Advocacy Clinic has worked representing children in abuse and neglect cases since 1999. It has been a leader in promoting high standards of representation for children in maltreatment cases and instituting training programs for lawyers who represent children and youth. Its interest in the Sam M. case stems from its experience that improving foster care requires not just excellent advocates in the trial-level courts, but expert representation in class action litigation that can bring pressure to bear at a system-wide level.

The Legal Aid Society is the nation's largest and oldest provider of legal services to poor families and individuals, providing legal representation in more than 300,000 legal matters for clients each year. Legal Aid's Juvenile Rights Practice provides comprehensive legal representation to children who appear before the New York City Family Courts in all five boroughs, in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, its Juvenile Rights staff represented some 34,000 children. Its perspective comes from its daily contacts with children and their families, and also from our frequent interactions with the courts, social service providers, and State and City agencies. In addition to representing many thousands of children each year in trial and appellate courts, Legal Aid also pursues impact litigation and other law reform initiatives on behalf of our clients.

The Children's Advocacy Institute is an academic center based at the University of San Diego School of Law and a statewide advocate for child rights. CAI has offered law school courses and clinics in child related law since 1989. CAI executive director Robert Fellmeth is the Price Professor of Public Interest Law at the University and is the author of the text Child Rights and Remedies (2d ed., 2006). The subject matter of this case is at the heart of CAI's work as an academic center and of its director's background as a scholar.

Founded in 1977, the **Children's Law Center of Massachusetts** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in child welfare, juvenile justice and education matters.

Lawyers for Children, founded in 1984, provides free legal and social work services to children in abuse, neglect, termination of parental rights, adoption, and related proceedings in New York City Family Court. This year, LFC will provide services to children and young adults in over 6,000 Family Court cases. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional training sessions, and works to reform systems affecting vulnerable children. LFC's insight into the issues raised in the instant case is borne of nearly twenty five years experience serving as both court-appointed "law guardian" for children in dependency proceedings, and as counsel

for plaintiff children in Federal and State Court litigation designed to redress problems with the foster care system.

Donald N. Duquette, Clinical Professor of Law and Director, Child Advocacy Law Clinic, University of Michigan Law School is the founding director of the oldest child advocacy clinical law program in the nation specializing in child abuse and neglect and children in foster care, which has represented children in protection proceedings since 1976. He was co-director of the successful effort to develop the ABA approved program to certify lawyers as specialists in child welfare law and is co-editor of the NACC's Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases.

The Rutgers Child Advocacy Center serves the needs of children who are at risk and living in poverty, and educates law students to be thoughtful, reflective, and highly-skilled practitioners. What is unique about the RCAC is its comprehensive, collaborative, and interdisciplinary approach to addressing the needs of children and families. Presently, the CAC is the only program in New Jersey which provides such comprehensive services.

The Ohio State University's Justice for Children Project is an educational and interdisciplinary research project housed within the Michael E. Moritz College of Law. The Project's mission is to explore ways in which the law

and legal reform may be used to redress systemic problems affecting children. The Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts.

Children's Law Center of Minnesota is a nonprofit organization that since 1995 has been advocating for children who are the victims of abuse, neglect and abandonment. CLC's mission is to promote the rights and interests of all children – especially children of color and children with disabilities – in the judicial, child welfare, health care and education systems. CLC employs three strategies: (1) representation of abused and neglected children; (2) systemic reform benefiting foster children; and (3) education of child advocates.

The University of Miami School of Law's Children & Youth Law Clinic is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law, which advocates for the rights of children in the foster care system in dependency, delinquency, health care, mental health, disability, independent living, education, immigration and civil rights matters, and it engages in impact litigation and law reform advocacy. Founded in 1995, the CYLC has been counsel in a number of federal and state court class action lawsuits seeking to reform Florida's foster care system.

The National Center for Youth Law is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL attorneys have been counsel in many cases similar to Sam and Tony M. seeking enforcement of the federal constitutional and statutory rights of children in foster care.

First Star is a national not-for-profit organization dedicated to improving the lives of America's abused and neglected children by strengthening their rights, illuminating systemic failures, and igniting reform to correct those failures. First Star pursues this mission through research, public engagement, policy advocacy, and litigation.

Prof. Michael Dale, Ft. Lauderdale, FL is a Professor of Law at the Shepard Broad Law Center at Nova Southeastern University in Ft. Lauderdale, FL. He is a national civil rights litigator and represents individual youth in dependency matters, with more than 35 years of experience in children's law. He is the author of more than 70 publications on juvenile law, including the litigation practice

manual, Representing the Child Client. Prof. Dale also teaches in National Institute for Trial Advocacy programs across the country concerning children.

Amici file this brief with the consent of the parties.

SUMMARY OF ARGUMENT

The District Court's decision that the named plaintiffs' Family Court-appointed lawyers are their "duly appointed representatives" and the only individuals legally capable of suing on their behalf in federal litigation is at odds with 30 years of progress in the field of child welfare law. If endorsed by the Court of Appeals, this dangerous approach would undermine the critical protection that foster children are intended to receive from their independent, zealous counsel.

To guarantee that children's *procedural* right to due process is upheld, and to ensure that the *substantive* outcomes of dependency proceedings favor children as much as possible (considering the severe constraints under which state courts operate), most states provide a lawyer for each and every child before the dependency court. While local practice occasionally varies, national standards provide for one common denominator to the way child welfare attorneys do their work: They should function as lawyers.

In contrast to the duties of attorneys in dependency proceedings, Rule 17(c) representatives in federal class actions have a different role and different obligations. Where the same person serves as dependency attorney and duly appointed representative or next friend, conflicts may arise that burden the rights of foster children. Even in instances where there are no conflicts, nothing in the law requires attorney-GALs to take on the added responsibility of suing on their

clients' behalf in federal court, and as a practical matter most children's attorneys are unable to do so. By giving GALs veto rights over foster children's ability to initiate a federal claim, the District Court's decision would thus bar foster children from federal relief of civil rights violations and undermine the dependency court attorney-client relationship.

ARGUMENT

I. TO PROTECT THEIR RIGHTS IN DEPENDENCY PROCEEDINGS, MOST CHILDREN IN FOSTER CARE ARE REPRESENTED BY AN INDEPENDENT LAWYER, WHOSE WORK IS GUIDED BY NATIONAL STANDARDS.

For the half million children in foster care on any given day, and the 800,000 who spend at least one day in foster care each year, some of the most critical decisions about their lives are made by a state court judge in a dependency proceeding initiated by the state child welfare agency. Dependency judges have the power to award custody of children to the state, to permanently terminate parents' legal rights to their children, and to annually review and approve the agency's basic plans for the children's future.

Under the federal Child Abuse Prevention and Treatment Act of 1974, as amended, states are required (as a condition of receiving federal support for relevant programs) to ensure that every child who comes before the dependency court is assigned a guardian ad litem ("GAL"); the GAL may be an attorney and is

required to have training "appropriate to the role." 42 U.S.C. § 5106a(b)(2)(A)(xiii). Currently, over 30 states and the District of Columbia have a statute or other authority requiring the appointment of an attorney to represent children in dependency proceedings; the balance do not require the GAL to be an attorney, but in practice many GALs in these jurisdictions, including Rhode Island, are in fact lawyers. See Whytni Kernodle Frederick and Deborah L. Sams, A Child's Right To Counsel: First Star's National Report Card On Legal Representation For Children 12-13 (2008).[1]

The majority of states provide a lawyer to children in dependency proceedings because of the dual recognition that foster children are rights-holders in ways unlike children who are not involved in such cases and that only an independent zealous attorney can adequately protect and enforce those rights. "All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues." American Bar Association, Standards of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases 1 (1996) (hereinafter "ABA Standards"). In finding that children in dependency proceedings have a constitutional right to counsel, a federal district court reasoned, "[C]hildren have

[1] Available at http://www.firststar.org/research/documents/FIRSTSTARReportCard07.pdf.

fundamental liberty interests at stake" in dependency proceedings, as well as "in the series of hearings and review proceedings that occur as part of a [dependency] case once a child comes into state custody." Kenny A. ex rel. Winn v. Perdue, 356 F.Supp.2d 1353, 1360 (N.D. Ga. 2005) (citations omitted). See also In re Derick Shea D., 804 N.Y.S.2d 389, 22 A.D.3d 753 (N.Y. App. Div. 2005) (vacating trial court's order terminating mother's parental rights because children's lawyer failed to inform the court they opposed termination); In re A.M.B., 248 Mich.App. 144, 224-227, 640 N.W.2d 262, 305-06 (Mich. Ct. App. 2001); In re Christina L., 194 W.Va. 446, 454, 460 S.E.2d 692, 700 (W. Va. 1995); Matter of Jamie T.T., 599 N.Y.S.2d 892, 892, 191 A.D.2d 132, 135 (N.Y. App. Div. 1993).

The theoretical genesis for children's right to counsel in dependency cases is their right to counsel in delinquency proceedings as explicated by In re Gault, 387 U.S. 1 (1967). Regardless of the case type or label, children can experience court intervention in their lives in substantially the same way. See Kenny A., 356 F.Supp.2d at 1359-60; Roe v. Conn, 417 F.Supp. 769, 780 (M.D. Ala. 1976). Where children's liberty interests are at stake, they need lawyers to protect them.

a. National standards of practice concerning the representation of children in dependency proceedings unequivocally denote the function of the representative as that of attorney, a practice followed in Rhode Island.

The sine qua non of the representation of children, as the child welfare law specialty has developed over the last 30 years, is that the child's advocate should be a licensed attorney and should function as a lawyer in the dependency proceedings. If the fundamental purpose of the child's representative is to protect the client's due process rights, then that representative must be an attorney and be authorized to function as an attorney in the proceeding. As one commentator has noted regarding the professional who advocates for children:

> We recognize that in many states this representative's title may be "GAL" and thus the GAL's role—by statute and practice—may differ from traditional *legal counsel.* But regardless of what lawyers for children are *called*, their training *as lawyers* and the *legal skills* are vital to the adequate protection of children's interests.

Miriam A. Rollin, "Improving Children's Legal Representation: An Important Judicial Role," in A Judge's Guide To Improving Legal Representation Of Children 5 (Kathi Grasso ed., 1998).[2]

While the Rhode Island statute does not explicitly require an attorney to be appointed for each child, see R.I.Gen.L. § 40-11-14 (directing the appointment of

[2] Because its former term for children's lawyers—"law guardians"—is "outdated and confusing," New York State has recently moved towards eliminating it in favor of "attorney for the child." New York State Bar Association, Standards For Attorneys Representing Children in Child Protective, Foster Care, and Termination of Parental Rights Proceedings 1 (2007) (hereinafter, "New York Standards"); N.Y. Chief Judge R. 7.2, 22 N.Y.C.R.R. § 7.2.

"a guardian ad litem and/or a court-appointed special advocate"), the administrative code suggests that an attorney is in fact appointed in every case. R.I. Adm. Code § 03 011 001(B)(2) Procedure From Policy 1100.000. Indeed, in the District Court hearing, Defendants' counsel conceded that the named plaintiffs are represented in the Family Court by lawyers, and the District Court found this to be true. See J.A. at 535 (Jan. 16, 2008 Tr. at 16, ll. 10-11); J.A. at 887 (District Court slip op. at 24).

This is consistent with the national approach to child welfare practice, in which GALs are expected to function as lawyers. ABA Standards at § A-2. A separate consideration is how the attorney-GAL formulates his position. GAL's typically advocate a legal position based on their assessment of the child's best interests, though in an increasing number of jurisdictions, the attorney is expected to take positions based on client direction. See generally, Donald N. Duquette and Marvin Ventrell, "Representing Children and Youth," in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases 493-544 (Marvin Ventrell and Donald N. Duquette, eds., 2005).

Regardless of how they formulate their position, a "'child's attorney' means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is

due an adult client." ABA Standards at § A-1; National Association of Counsel for Children, American Bar Association Standards of Practice for Lawyers Who Represent Children In Abuse and Neglect Cases: NACC Revised Version (1999) (hereinafter "ABA NACC Revised Standards") at § A-1.[3] The lawyer must be a zealous advocate, whose basic obligations include investigating and developing a theory of the case, participating in all hearings, negotiations, and discovery practice; and counseling the client concerning the legal process, the child's rights, and the lawyer's role. ABA NACC Revised Standards at § B-1. "The system of representation [for children] must require the appointment of competent, independent, zealous attorneys for every child at every stage of the proceedings." National Association of Counsel for Children, NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001) at ¶ III(A)(1) (hereinafter, "NACC Recommendations").[4] For example, the lawyer should file motions, pleadings, and briefs; present evidence; and examine witnesses. ABA NACC Revised Standards at §§ C-3, D-3, D-4. The lawyer must attend to the possibility of a conflict of interest (particularly when representing multiple siblings

[3] Available at http://www.naccchildlaw.org/resource/resmgr/docs/juvenilejustice.doc.

[4] Available at http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf.

who may have conflicting positions) and to decline or withdraw from representation in appropriate circumstances, just as all attorneys must. ABA NACC Revised Standards at § B-2(2).[5]

b. **National standards of practice limit the scope of children's dependency attorneys' work to matters in the appointing court and nothing in Rhode Island law deviates from this norm, makes GALs "duly appointed representatives" under Rule 17(c), or requires them to act as next friends in federal litigation.**

Recognizing that children have needs that often go beyond the four corners of the dependency case, or are beyond the ability or propriety of the state child welfare agency to handle, standards for the representation of children discuss the appropriate role of children's counsel to protect their rights in matters ancillary to the child welfare proceeding. The basic starting point is that the "role of counsel in these cases is to be an advocate for the client within the scope of counsel's

[5] Several jurisdictions have promulgated similar bodies of practice norms to govern their attorneys who represent children in child welfare proceedings, and these standards also call on the advocates to be lawyers who function as lawyers, including Massachusetts, New York, and Fulton County (Atlanta), Georgia. See Committee for Public Counsel Services, Performance Standards Governing the Representation of Children and Parents In Child Welfare Cases (hereinafter, "CPCS Standards"); New York Standards, supra n. 2; 22 N.Y.C.R.R. §7.2; Kenny A. ex rel. Winn v. Perdue, No.1:02-CV-1686-MHS, dkt # 530 Ex. 1 at ¶ 5, (N.D. Ga. May 16, 2006), available at http://www.childrensrights.org/wp-content/uploads/2008/06/2006-02-13_ga_fulton_consent_decree.pdf (hereinafter "Kenny A. Standards").

appointment." See CPCS Standards, supra n.5, at § 1.1(a) (emphasis added).[6]

Critically, there is nothing in the ABA Standards, NACC Standards, or any other set of practice standards of which the NACC is aware that requires, assumes, or even urges children's lawyers to be Rule 17(c) representatives for their clients in federal litigation. Rhode Island does not have a body of standards to govern the work of GALs in dependency cases, and nothing in Rhode Island law supports the District Court's conclusion that the named plaintiffs' GALs are duly appointed Rule 17(c) representatives merely by dint of their GAL status. To the contrary, Rhode Island law appears to suggest that the GAL role is a narrow one and that the Family Court's appointment of a GAL has no effect beyond that court, except for a direct appeal. Zinni v. Zinni, 103 R.I. 417, 419-421, 238 A.2d 373, 375-76 (R.I. 1968). Indeed, there is nothing inherent to the role of child's dependency lawyer that leads to the conclusion that the lawyer should be, or must be, the child's gatekeeper to federal court.

The role of an attorney-GAL is, as noted above, to be a lawyer for her client in the Family Court proceeding for which she was appointed. While this may require her (in Rhode Island and many other states) to assess and advocate for the

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[6] Available at http://www.publiccounsel.net/Private_Counsel_Manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf (last viewed Jul. 13, 2009).

client's best interests, that advocacy is limited to the dependency proceeding. In contrast, to be a "duly authorized representative" under Rule 17(c) is tantamount to being the child's parent. Rule 17 requires children to sue by a representative because they are deemed unable to bring suit on account of their minority. Most children who are federal plaintiffs are represented by their parents. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954); Tinker v. Des Moines Ind. Com. Sch. Dist., 393 U.S. 503 (1969).

Making parental decisions on behalf of minors to whom they have no familial duty is generally not contemplated to be part of the job of a lawyer, even a lawyer for a child. While it is possible for an attorney-GAL appointed in the dependency court to become her client's next friend in subsequent federal litigation, there are a number of challenges to doing this that must be carefully considered. However, there is nothing about the attorney-GAL role that would bar others from the next friend role; the attorney-GAL does not occupy the Rule 17(c) field to the exclusion of others and is not the child's "duly appointed representative."

II. GUARDIAN AD LITEMS MAY BE UNABLE TO BECOME RULE 17(C) REPRESENTATIVES DUE TO HIGH CASELOADS, LOW COMPENSATION, POLITICAL CONSIDERATIONS, OR PROGRAM RULES LIMITING FOSTER CHILDREN'S ACCESS TO REDRESS AND UNDERMINING THE ATTORNEY-CLIENT RELATIONSHIP.

As the child welfare law specialty has grown in recent decades, jurisdictions across the country have struggled to develop effective structures to ensure that all children before the dependency courts have access to qualified and knowledgeable counsel who have manageable caseloads and adequate compensation to do an effective job. Even though much progress has been made in this area, the reality is that in most jurisdictions, structural barriers prohibit most children's attorneys from being reliably available to do work on their clients' behalf outside the dependency proceeding.

While no national studies have been conducted to document the precise caseloads of children's attorneys, strong anecdotal evidence suggests that these lawyers work under such crushing conditions that they are often barely able to provide effective representation to all their clients within the dependency proceedings, let alone have the time to pursue ancillary matters with much vigor. In 2001, the NACC recommended that children's attorneys carry a caseload of no more than 100 child-clients. NACC Recommendations at § III(A)(2) cmt. A. However, a 2006 survey for the NACC showed that 18 percent of respondents had more than 200 cases, and an additional 25 percent had between 100 and 199 cases—all exceeding the NACC recommended caseload maximum of 100 child-clients. Howard Davidson & Erik S. Pitchal, Caseloads Must Be Controlled So All

Child Clients May Receive Competent Lawyering 6 (2006).[7] For those respondents whose practice was dedicated exclusively to the representation of children in dependency actions, over 70 percent had more than 100 clients and 20 percent had more than 300 cases. Id. at 7.

The child welfare law practice in Rhode Island appears to be heavily burdened by unmanageable caseloads. According to the Family Court, staff attorneys in the CASA program carry an average caseload of 400. Judiciary of Rhode Island, Family Court Overview: Child Protective Services (2006).[8] Unsurprisingly, at least one of the named plaintiffs never met his GAL. J.A. at 313, ¶ 8 (Decl. of Jametta O. Alston). It is also not surprising, given these caseloads, that named plaintiff Caeser S. was represented by at least three different GALs over the course of approximately six years, contradicting the NACC recommendation that "[t]he same attorney should represent the child for as long as the child is subject to the court's jurisdiction." J.A. at 873 (District Court slip op. at 10); NACC Recommendations at § III(A)(1).

Whether the child's advocate in dependency proceedings is called a GAL or an "attorney for the child" or any other term, there are essentially two structural

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[7] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943059

[8] Available at http://www.courts.state.ri.us/family/overview.htm#departments.

models for providing court-appointed lawyers to children in these cases—the children's law office model and the panel model—but neither is particularly conducive to enabling the attorneys to devote the time needed to adequately fulfill the duties of a Rule 17(c) representative. In the child welfare law office model, a dedicated unit of government (such as the public defender's office) or a non-profit legal services organization is responsible for providing a staff attorney to take all court appointments (except for conflicts). The advantages of a child welfare law office include economies of scale and enhanced training, accountability, and supervision. Nevertheless, because of budget and other structural factors that are often present, child welfare law offices may struggle to maintain appropriate caseloads, particularly if law or contract obligates them to accept appointment to every case. National Association of Counsel for Children, Child Welfare Law Office Guidebook: Best Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency Cases (2006) 54-56 (hereinafter, "NACC Guidebook").

Child welfare law offices may also be constrained by law, contract, or politics from being involved in outside legal cases. Depending on who the decision-maker is for determining which entity will be the body to receive court appointments, the law office may feel significant pressure to conform to certain expectations of complacency and refrain from taking on entrenched interests

through litigation. In Rhode Island, most attorneys appointed to represent children are on the staff of the local Court Appointed Special Advocates program. This office is "an arm of the Rhode Island Family Court," R.I. Adm. Code § 03 011 001(B) Procedure From Policy 1100.000, which raises a serious question about the independence that the office's leadership and staff may exercise. "Children need competent, independent, and zealous attorneys." NACC Recommendations at § III(A)(1) (emphasis added). Indeed, the failure to establish a structure whereby children's attorneys operate free from direct or subtle influence by the appointing court can lead to ineffectiveness. In response to a class of Atlanta foster children's claim of ineffective assistance of counsel, which included lack of independence from the local juvenile court, Fulton County, Georgia, entered into a consent decree that included provisions to establish stand-alone, independent offices. Kenny A. Standards, supra n.5, at ¶ 4. In a small jurisdiction such as Rhode Island, where the attorneys appearing on behalf of children in Family Court work for that court, it stands to reason that few such attorneys will agree to serve as a Rule 17(c) representative in a federal suit against the state without permission from the CASA director and the Chief Judge of the Family Court – who may or may not approve of such adventures.[9]

[9] In fact, in some instances, there may be a direct conflict-of-interest that prohibits a child's dependency attorney from becoming a party to federal litigation against

Despite these structural and political pressures, children's law offices frequently view it as critical for them to protect their clients' rights in forums other than the dependency court. For this reason, the NACC supports the concept of children's dependency lawyers being involved in impact litigation to reform foster care. "While a child welfare law office may not have the budget or expertise to file a suit on its own, the organization can and should forge partnerships with other nonprofits specializing in impact litigation or with private civil firms who are often willing, as part of their pro bono commitment, to provide technical assistance and resources essential to support any such litigation." NACC Guidebook at 75. It is nevertheless unreasonable to expect that in every instance, in every jurisdiction, the local child welfare law office will have the resources or ability to be directly involved in a federal lawsuit, be it as counsel or as Rule 17(c) representative.

The second model for providing lawyers to children is the panel system, similar to the Criminal Justice Act panel used in federal criminal proceedings. For these lawyers, who must maintain their own law businesses, receiving adequate compensation to run their office and earn a living is a daily worry. See, e.g., New

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the child welfare agency. For example, in San Diego, the county court system contracts with the county public defender's office to represent children in dependency cases. As county employees, these attorneys cannot become next friends in litigation against the county's child welfare system. San Diego Co. Dep't of Soc. Svcs. V. Sup. Ct., 36 Cal. Rptr.3d 294, 298 (Cal. Ct. App. 2005).

York County Lawyers Ass'n v. State of New York, 2002 WL 34435661, No. 102987/00 (N.Y. Co. Sup. Ct. May 3, 2002) (ordering state to increase hourly rate of compensation to court-appointed panel attorneys from $40 for in-court and $25 for out-of-court to $90 for all work). Whether the jurisdiction pays a flat-fee per case, or an hourly rate (usually up to a maximum aggregate total per case or per lawyer/per year), panel attorneys become reliant on a constant intake of court appointments to guarantee cash flow.

Being a Rule 17(c) representative in federal court is not a paid position, and the time needed to adequately fulfill one's fiduciary duties in this role can be onerous to a panel attorney when it is uncompensated. Moreover, as this litigation amply demonstrates, federal class actions on behalf of foster children against state child welfare agencies are frequently very contentious, so it is not surprising that many panel attorneys who represent children in Family Court would be too nervous about the ramifications to their business to get involved.

Many children's dependency attorneys want to do everything possible to help their clients achieve the best outcomes. These attorneys frequently understand that in child welfare systems that are deeply troubled and broken, only the federal court can offer their clients relief. Unfortunately, because of the external constraints discussed in this section, many lawyers are simply unable to take on the additional role of being a party to federal litigation. It would thus be

particularly cruel to foster children to deny them access to the federal courts simply because their dependency attorneys are not able to participate in the action.

Under the District Court's ruling, children's dependency attorneys will have veto power over their clients' participation as named plaintiffs in federal litigation because unless the attorneys agree to be their Rule 17(c) representatives, the children cannot be involved. Many children who are old enough to comprehend the severity of the dysfunction of the foster care agency desire to participate in federal litigation as named plaintiffs. These children may have excellent, well developed, and trusting relationships with their lawyers; their lawyers will have no doubt empathized with them over their struggles with the system. However, external pressures having nothing to do with an individual lawyer's own wish to assist their clients can prohibit them from participation.

When the lawyer reports to her client that she wants to help and agrees the client should be a named plaintiff, but these external forces make it impossible, it will be devastating to the child and break the hard-earned trust that formed between the advocate and the child. Making the dependency lawyer the gatekeeper to federal court for their foster children clients would be deeply destructive to countless individual attorney-client relationships and threaten the very system of child welfare lawyering that has been carefully nurtured for over 30 years.

Moreover, the District Court's opinion is so broad that it suggests that foster children in Rhode Island cannot bring a federal claim of any type unless it is done by their Family Court-appointed GAL. Thus, children's legitimate claims for civil rights violations outside the foster system context are also handcuffed to the ability and willingness of their GAL's to bring suit on their behalf.

Like all children, those in state custody may experience violations of their First or Fourth Amendment rights. As it was for the Tinker children and Linda Brown, in ordinary circumstances, it is the children's parents who hire an attorney and bring the federal action, pursuant to Fed. R. Civ. P. 17(c)(1). Thus, when their 13-year-old daughter was strip searched by school officials investigating the illicit possession of ibuprofen, Savana Redding's parents brought a claim in federal court, ultimately vindicating her Fourth Amendment rights. Safford Unified Sch. Dist. No. 1 v. Redding, – U.S. –, 129 S.Ct. 2633 (2009).

If Savana Redding had been a foster child in Rhode Island, under the District Court's ruling she would have been completely beholden to her GAL to bring the case and quite likely would have seen her rights violated without any remedy at all. Surely foster children deserve as equal an opportunity to access the courts as their peers who are fortunate enough not to have experienced abuse and neglect.

III. THE ROLES OF GAL IN DEPENDENCY COURT AND RULE 17(C) REPRESENTATIVE IN FEDERAL COURT ARE DISTINCT POSITIONS WITH DIFFERING OBLIGATIONS AND DUTIES TO CHILDREN WITH THE REAL POSSIBILITY OF CONFLICTS, AND IT WOULD UNFAIRLY BURDEN FOSTER CHILDREN TO BE REQUIRED TO WAIVE CONFLICTS TO ACCESS FEDERAL COURT.

In contrast to the duties an attorney has to an individual client, a Rule 17(c) representative in a class action lawsuit has duties far different in scope, leading to the very real potential for conflicts should the same person fill both roles. By establishing a rule that only the child's court-appointed GAL may serve as Rule 17(c) representatives in federal litigation, the District Court does not acknowledge these potential conflicts. Because those conflicts may not be waivable, nor should a child be forced to waive the conflict in order to participate in a federal case, the result of the District Court's decision would be to deny federal civil rights relief to untold numbers of foster children.

As noted supra at 3, the majority of states appoint attorneys in the GAL role, and regardless of the method by which these professionals formulate their position and case theory, attorneys still have a duty of loyalty and confidentiality to their child-clients. ABA NACC Revised Standards § A-1; CPCS Standards at § 1.1(d); New York Standards at § A-5.

See also ABA NACC Revised Standards at § B-4(3) (prohibiting child's attorney from revealing basis for request that court appoint a separate GAL in the event the attorney deems the child's preferences to be seriously injurious to the child).

In contrast to the role of the child welfare lawyer in dependency court, the role of the Rule 17(c) representative is that of party, because she stands in the shoes of a minor who is unable to sue on his own behalf. For example, in a class action, next friends must be adequate representatives of the interests of the entire class, just as named plaintiffs must be. Fed. R. Civ. P. 17(c); id. R. 23(a)(4); Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d 32, 38 (1st Cir. 2003). To satisfy Rule 23, next friends must provide "vigorous" advocacy to the class. Marisol A. v. Giuliani, 1998 WL 265123 at *8, No. 95 Civ. 10533 (RJW) (May 22, 1998). It is entirely possible that on a particular issue, an attorney representing an individual child-client in dependency court would need to advocate in a manner contrary to the overall class-wide interests of all foster children; the attorney would thus be placed in an untenable conflict with her Rule 17(c) representative role.

Moreover, as parties to the federal litigation, Rule 17(c) representatives are subject to discovery rules, including deposition and disclosure of their case files. They can be fairly expected to produce documents and answer questions covering every known detail of the child's case and circumstance. In order to comply with the Federal Rules of Civil Procedure and maintain the action, dependency

attorneys doubling as Rule 17(c) representatives may be required to divulge material and information known to them because of their attorney-client relationship—material subject to privilege. This would put the individual in an untenable, conflicted position. See New York State Bar Ass'n, Ethics Opinion 648 3 (1993). The child-client would thus be forced to waive her privilege in order for her dependency attorney to be her federal representative. If only GALs could serve in this role, then the only children who could participate as named plaintiffs would be those willing and able to waive their privilege. There may be some who are, but it is an inappropriate barrier to federal relief to require this waiver as a precondition to accessing the courthouse door.

As the one person who has the most knowledge and independence about a foster child's circumstances, it does make sense for the child's dependency attorney to take steps to protect her outside legal interests as those become known to the lawyer. Thus, for example, the District of Columbia Bar Ethics Committee has determined that the GAL "is obligated to take reasonable steps" to preserve claims and ensure that they "do not simply drift away because no one else is aware of them, especially in a situation where the child is unlikely to turn elsewhere for help." District of Columbia Bar Ass'n, Ethics Op. No. 252 (1994). Where a foster child has valid federal claims, a GAL who is unable for any reason to take further steps to prosecute them should not have veto rights over such a lawsuit.

CONCLUSION

For the half million children who, on any given day, are in state custody for their own safety, their court-appointed lawyer is often the only person who can speak up on their behalf, marrying the power of the law with the skill of the advocate to ensure the best outcomes possible for their young clients. To prohibit anyone other than the GAL to bring suit on their behalf would present a Hobson's choice, with GALs either playing the role of parent—thus diluting their strength and power as lawyers in dependency court—or declining to do so, with the inevitable result that few children could receive the relief of the federal courts.

For all the foregoing reasons, and for those stated in the brief of the Appellants, amici curiae respectfully requests that the Court vacate the decision below and remand for further proceedings.

Dated: August 14, 2009

Respectfully submitted,

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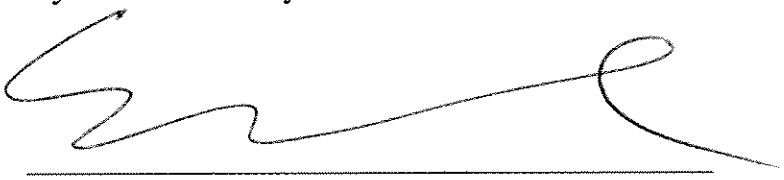

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS OF RULE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 6,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements Fed. R. App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14 point, Times New Roman font.

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Dated: August 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2009, I caused two copies of the foregoing Brief of Amici Curiae to be served by first class mail, postage prepaid, upon each of the following individuals:

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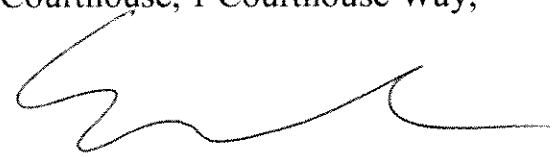
I further certify that on this 14th day of August, 2009, I filed the foregoing Brief of Amici Curiae by sending nine copies of the document, along with an electronic version of the brief, by first class mail to the Clerk, United Stated Court of Appeals for the First Circuit, John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston, MA, 02210.



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