In The

United States Court of Appeals

For The First Circuit

SAM and TONY M., by Next Friend Gregory C. Elliott; CAESAR S., by Next Friend Kathleen J. Collins; DAVID T., by Next Friend Mary Melvin; BRIANA, ALEXIS, CLARE, and DEANNA H., by Next Friend Gregory C. Elliott; and DANNY and MICHAEL B., by Next Friend Gregory C. Elliott; for themselves and those similarly situated,

***Plaintiffs – Appellants*,**

v.

DONALD L. CARCIERI, in his official capacity as Governor of the State of Rhode Island; JANE A. HAYWARD, in her official capacity as Secretary of the Executive Office of Health & Human Services; and PATRICIA MARTINEZ, in her official capacity as Director of the Department of Children, Youth and Families,

***Defendants – Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND AT PROVIDENCE

BRIEF OF APPELLANTS

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Plaintiffs respectfully request that the Court schedule this appeal for oral argument. This appeal raises issues of first impression in this Circuit that are of broad-ranging importance in the area of abused and neglected foster children's access to the federal courts to vindicate their federal rights. Oral argument is likely to assist the Court in evaluating the issues raised on appeal.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). This Court has subject matter jurisdiction over the district court's Rule 12(b)(1) dismissal pursuant to 28 U.S.C. § 1291. The district court entered final judgment on April 29, 2009. (J.A. 895.) Plaintiffs timely filed their Notice of Appeal on May 28, 2009. (J.A. 896.)

I. STATEMENT OF THE ISSUES

1. Did the district court err as a matter of law in concluding that guardian *ad litem* ("GAL") attorneys appointed for the limited purpose of representing Rhode Island Foster Children in their individual state Family Court proceedings are those children's only "duly-appointed representatives" under the Federal Rules of Civil Procedure Rule 17(c)(1), thereby stripping foster children of their right to bring these claims in federal court through anyone but their state Family Court GALs?

2. Did the district court err as a matter of law in holding that under Rule 17(c)(2), a next friend seeking to appear on behalf of a child in Rhode Island foster care custody must demonstrate a current and significant relationship to the foster child?

3. Did the district court abuse its discretion in concluding that the Next Friends seeking to appear on behalf of the Named Plaintiff Children ("Children") are inadequate?

4. Did the district court err as a matter of law by dismissing the case without ensuring the Children's legal interests at issue were adequately protected and without either providing the Children leave to amend to find different representatives or itself appointing different representatives?

II. STATEMENT OF THE CASE

On June 28, 2007, ten Named Plaintiff foster children ("Children") in the custody of Rhode Island's child welfare system administered by the Department of Children, Youth and Families ("DCYF") brought this Section 1983 civil rights class action through three adult Next Friends.[1] The Children alleged that DCYF is so understaffed, mismanaged and unresponsive that it continually places them and the putative class of more than 3,000 abused and neglected foster children in its legal custody at risk of serious harm, violating their well-established constitutional and statutory rights to be provided basic safety, protection and care. (Am. Compl. ¶¶ 4, 11, J.A. 18–19, 21.) The lawsuit, amended in October 2007, is against the Rhode Island Governor and those state officials charged with administering DCYF, in their official capacities. This lawsuit does not seek damages. It seeks the declaratory and injunctive relief necessary to cure the State's ongoing violations of federal law.

Defendants moved to dismiss under Federal Rules of Civil Procedure Rule 12(b)(1), claiming that the Next Friends had no standing in this federal lawsuit. Full briefing and an evidentiary hearing on the Next Friends' capacity, in which

[1] At the time the action was dismissed, seven Named Plaintiff foster children remained, as Plaintiffs had earlier withdrawn the claims of three original Named Plaintiffs. (Pls.' Obj. to Defs.' Mot. to Dismiss ("Pls.' Obj.") 3 n.2, J.A. 227.)

the Next Friends attested to their suitability under Rule 17(c)(2), was completed by early 2008.

On April 29, 2009, almost two years after the Complaint's filing, the district court granted Defendants' motion and dismissed the case in its entirety on the ground that the Children's GALs, specifically appointed to serve as the Children's special guardians in their individual state Family Court proceedings, are the Children's duly appointed representatives under Rule 17(c)(1). In reaching its decision, the lower court did not address Plaintiffs' assertion that the GALs had a potential conflict with the Children. Despite concluding that the Children had Rule 17(c)(1) general representatives, the court went on to review the qualifications of the adults who appeared as the Children's Next Friends pursuant to Rule 17(c)(2). The district court found that the Children's chosen Next Friends were inadequate because, according to the court's analysis, they had failed to demonstrate a sufficiently significant and current relationship with the Children they sought to represent. The court did not, as the Children had requested, grant leave for the Children to bring their claims through new representatives or appoint other representatives itself.

III. STATEMENT OF FACTS

Rhode Island's child welfare system is so deficient that children in Defendants' custody are more likely to suffer neglect or abuse than children in the general Rhode Island child population. (Am. Compl. ¶ 132, J.A. 60.) In five of the six years from 2000 through 2005, Rhode Island recorded the single highest rate in the nation of children being abused or neglected while in foster care custody. (Am. Compl. ¶¶ 5, 129, J.A. 19–20, 59.) In addition, children in Rhode Island's child welfare system are frequently shuffled from one placement to another, are returned to their parents unsafely, are left without permanent adoptive families when they are unable to return home and languish in foster care for years. (Am. Compl. ¶¶ 5, 145–50, 166–78, J.A. 19–20, 65–67, 72–75.) DCYF also institutionalizes young children in foster care at more than double the national rate, which subjects the children to even further harms from growing up in orphanage-like institutions and which increases their likelihood of spending their entire childhoods in state foster care without ever being adopted. (Am. Compl. ¶¶ 5, 134–41, J.A. 19–20, 61–64.)

The Named Plaintiffs are seven children whose experiences while in Defendants' custody are emblematic of the systemic, pervasive and constitutionally-offensive harms inflicted on children in the custody of the Rhode Island child welfare system. As even the district court recognized, "[t]heir stories are heart wrenching and compelling. . . . [T]hese children have been subjected to

neglect, physical and sexual abuse, poverty and instability," and "[u]nfortunately, DCYF custody seldom seems to have provided a safe haven for these children." (Op. 6, Addendum ("Add.") 6.) The district court nonetheless concluded that the harms these Children suffer are beyond the federal courts' power to address, simply because it deemed their adult representatives in this lawsuit to be improper.

A. THE NAMED PLAINTIFF CHILDREN: THEIR EXPERIENCES WHILE IN DEFENDANTS' CUSTODY

David David, now fifteen, has been in DCYF's custody since he was two. (Op. 10, Add. 10.) David was a toddler when DCYF placed him with foster parent Mary Melvin, who sought to appear as David's Next Friend, and he remained in her care until around the age of five. (J.A. 592.) David has had no adult continuously involved in his life since Ms. Melvin. (Am. Compl. ¶ 65, J.A. 38.) David and Ms. Melvin "grew very close together. He became very attached to me and I to him." (J.A. 593; Op. 11, Add. 11.) David called her "Mom." (J.A. 593.) Had she been able to do so, Ms. Melvin would have adopted David. (J.A. 593.)

Instead, DCYF removed David from her home and cycled him through a series of shelters. (Op. 11, Add. 11.) Since he was five, David has lived only in institutions, including a shelter, a psychiatric hospital and a residential treatment center where he was sexually abused by his roommate. (Op. 11–12, Add. 11–12; Am. Compl. ¶ 62, J.A. 37.) Between 2001 and 2005, David was seen only sporadically by a handful of different DCYF caseworkers, and in two of those

years he was visited only once by a DCYF caseworker. (Op. 12, Add. 12.) David has lived in an out-of-state institution since November 2006. (Op. 13, Add. 13; Supplemental J.A. ("Supp. J.A.") 866–67.) Although David grew up in DCYF custody and has been free for adoption for over eleven years, in January 2005 DCYF deemed David "too damaged for adoption." (Supp. J.A. 783–85, 810–12, 854–56; Am. Compl. ¶¶ 59–63, J.A. 36–38; *see also* Op. 12, Add. 12.)

David has been represented by five different guardians *ad litem* ("GALs") in Family Court since being placed in custody in 1996. (*See* Supp. J.A. 724–25, 743–46, 786–87, 800–01.) On the Family Court forms that memorialize David's Family Court proceedings, a GAL has been clearly marked present at only eleven of his nineteen Family Court proceedings that have occurred since December 2000.[2]

Caesar When he was sixteen months old, DCYF removed Caesar from his mother and placed him in an emergency shelter. (Am. Compl. ¶ 39, J.A. 30–31.)

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[2] (*See* Summary of GAL Attendance at the Children's Family Court Proceedings as Derived from the Record ("Summary Chart"), Add. 59; Supp. J.A. 756–57, 795–96, 830–31, 834–53, 857–58, 862–71.) The Summary Chart is a tabulation of the GAL's attendance at the Children's Family Court proceedings, as derived solely from the exhibits to Defendants' Motion to Dismiss, which is part of the Record below and provided in the Joint Supplemental Appendix.

Prior to December 2000, it is impossible to discern with any clarity from David's Family Court records whether his GAL(s) actually appeared in court for his proceedings. The same is true for Sam and Tony. The remaining Children came into Defendants' custody after that date.

DCYF moved Caesar to a foster home, and then into the home of his aunt, where he remained for more than a year despite reports of her drug use and her repeated statements that she was unable to care for him. (Am. Compl. ¶ 39, J.A. 30–31; Op. 8–9, Add. 8–9.) DCYF later moved Caesar to the home of another relative and her son, who had a criminal drug record. Within days DCYF moved Caesar to a different foster home and then back to his aunt's home, even though Caesar, who was then just three years old, told DCYF that she beat him. (Am. Compl. ¶¶ 40–42, J.A. 31; Op. 9, Add. 9.) At age four, DCYF moved Caesar, who had bruises and marks on his arms that a doctor confirmed were from a belt, into an unlicensed home that DCYF had just one year before deemed unfit and unsuitable. (Am. Compl. ¶ 43, J.A. 31–32; *see also* Op. 9, Add. 9.)

Caesar remains in DCYF's custody. (Supp. J.A. 553–54.) In Caesar's almost seven years in DCYF's custody, according to the Family Court forms that memorialize his Family Court proceedings, Caesar has been represented by at least six different GALs. According to those forms, Caesar's GALs were not noted to be present at over thirty-five percent of his Family Court proceedings.[3]

<u>*Sam and Tony*</u> In May 1999, brothers Sam, age four, and Tony, an infant, were committed to DCYF's custody. (Op. 13, Add. 13; Supp. J.A. 561–64, 636–39.) For the next five years, these boys were severely physically and

[3] (*See* Summary Chart, Add. 60; Op. 10, Add. 10; Supp. J.A. 450–61, 474–79, 482–83, 484–85, 488–89, 490–91, 495–500, 506–19, 522–35, 538–43, 547–56.)

psychologically abused, including being burned with a cigarette in a foster home, sexually abused and verbally threatened. DCYF returned the children to their mother's custody three separate times, despite fourteen reports to DCYF that she was not able to safely parent them, eight of which DCYF confirmed. (Op. 13–15, Add. 13–15; Am. Compl. ¶ 27, J.A. 26.)

At the time the complaint was filed, DCYF had moved Sam, twelve years old, through at least ten placements and Tony, nine years old, through at least twelve. (Am. Compl. ¶ 31, J.A. 28.) When DCYF learned that Tony was sexually molested in one of the institutions in which it had placed him, DCYF failed to move him or to investigate the sexual abuse. (Op. 16, Add. 16; Am. Compl. ¶ 30, J.A. 28.) The boys remain institutionalized in separate placements. (Op. 16, Add. 16; Defs.' Mot. to Dismiss ("Defs.' Mot.") 25–26, J.A. 126–27.) According to the forms that memorialize their Family Court proceedings, in the nineteen proceedings on behalf of Sam and the twenty-one for Tony since December 2000, the boys have been represented by at least six different GALs. An attorney has only been clearly noted on these forms to be present in eight of Sam's proceedings and eleven of Tony's.[4]

[4] (*See* Summary Chart, Add. 58–59; Supp. J.A. 569–76, 579–86, 592–93, 598–99, 603–04, 608–13, 620–21, 624–31, 644–55, 658–59, 663–68, 671–78, 683–84, 688–89, 696–97, 700–07.)

Deanna When Deanna was one day old, DCYF took her into custody because of her parents' extensive histories of child maltreatment, which had previously resulted in the termination of her mother's parental rights to five of Deanna's siblings and her father's as to two. (Supp. J.A. 345–49; Am. Compl. ¶ 71, J.A. 40; *see* Defs.' Mot. 15, J.A. 116.) Despite documenting Deanna's father's "chronic substance abuse problem," his expressed lack of interest in "reunification . . . or visitation" (Supp. J.A. 390), and the fact that Deanna's mother had by then lost all parental rights to eight of her children, as of the filing of this action DCYF's goal for Deanna was "reunification." (Am. Compl. ¶¶ 78–80, J.A. 42–44.) According to the forms that memorialize Deanna's Family Court proceedings, Deanna's GAL has been clearly noted present at only four of her thirteen Family Court proceedings; a "substitute" state court GAL was noted present at another.[5]

Danny and Michael In April 2005, when DCYF took legal custody of brothers Danny and Michael, it placed the boys in the unlicensed home of their great-grandmother "although no safety or background check had been conducted of [that] home." (Supp. J.A. 396–98; Op. 17, Add. 17.) Less than a week later, DCYF separated Danny and Michael, moving them to different foster homes, one of which had a significant history of abuse complaints against it. (Op. 17, Add. 17; Am. Compl. ¶¶ 86–87, J.A. 45–46.) DCYF returned Michael to his great-

[5] (*See* Summary Chart, Add. 59; Supp. J.A. 350–51, 356–59, 362–67, 371–76, 384–87.)

grandmother's home but left Danny, age five, in the foster home, where he was sexually assaulted. (Op. 18, Add. 18; Defs.' Mot. 16, J.A. 117; Am. Compl. ¶¶ 88, 91, J.A. 46, 47.) DCYF only then moved Danny to a temporary foster home, then returned him to his great-grandmother's home with Michael, but removed him again a short time later. (Op. 18–19, Add 18–19; Defs.' Mot. 16–17, J.A. 117–18; Am. Compl. ¶ 92, J.A. 47.) DCYF subsequently placed Danny, age five-and-a-half, in a group home. (Op. 19, Add. 19; Am. Compl. ¶ 92, J.A. 47.)

In November 2006, Danny and Michael's parents' rights were terminated. (Op. 19, Add. 19; Supp. J.A. 431–32, 433–34.) DCYF has left Danny in an institution, separated from his brother and all other family or family-like connections, and has left Michael in the home of his elderly great-grandmother; neither of these placements provides the children with any opportunity to be adopted into a permanent family. (Op. 19, Add. 19; Am. Compl. ¶ 94, J.A. 48; Supp. J.A. 435–42.) A GAL has been clearly noted present at only two of Danny's seven state Family Court proceedings and four of Michael's nine proceedings, according to the forms that memorialize those proceedings.[6]

[6] (*See* Summary Chart, Add. 57; Supp. J.A. 399–400, 403–08, 415–18, 423–34, 437–40, 443–47.)

B. THE CHILD ADVOCATE: TAKING LEGAL ACTION FOR RHODE ISLAND'S FOSTER CHILDREN PURSUANT TO HER STATUTORY MANDATE

The Rhode Island Office of the Child Advocate is an independent state agency charged by state law with protecting and vindicating the rights of children in DCYF custody. *See* R.I. Gen. Laws §§ 42-73-1 to 42-73-11 (2009) (Add. 47–51). Under Rhode Island law, the Child Advocate is statutorily mandated to "[t]ake all possible action including, but not limited to . . . formal legal action, to secure and ensure the legal, civil, and special rights of children" committed to DCYF custody. *Id.* § 42-73-7 (Add. 48–49).

The Child Advocate serves as co-counsel in this lawsuit. In the course of her duties, the Child Advocate has utilized the special access that she has been statutorily granted to review Rhode Island foster children's records and has concluded that Rhode Island's foster children are at risk of serious harm as a result of systemic DCYF deficiencies. (J.A. 311; *see also* R.I. Gen. Laws § 42-73-8, Add. 49–50.) The Child Advocate determined that litigation was necessary to remedy the systemic harms occurring to children in DCYF custody and that a federal class action lawsuit would be the most suitable vehicle to protect the rights of Rhode Island's Foster Children. (J.A. 312.)

In order to bring a lawsuit on behalf of these child plaintiffs – who are minors unable to bring suit in federal court on their own, have been removed from

their parents' custody and have no conflict-free representative – the Child Advocate attempted to identify adults who would be willing to serve as the Children's next friends under Rule 17(c)(2). *See* Fed. R. Civ. P. 17(c)(2). Even with her access to otherwise confidential records, locating any adults to stand up for the Plaintiff Children was difficult. As the Child Advocate explained:

> These efforts revealed that each of the Named Plaintiff children lacked a network of stable adults [who were] willing and able to represent them in a federal lawsuit. The persons most closely connected to the children, including foster parents, guardians *ad litem*, or relatives, either posed a potential conflict or expressed concern regarding possible retaliation from the Department [of Children, Youth and Families] or other state entities and declined to become involved.

(J.A. 313.) Despite those obstacles, the Child Advocate identified next friends who she, pursuant to her statutory authority, deemed appropriate to stand up for the Children in order to represent their interests in this action.

C. THE NEXT FRIENDS: COMMITTED TO REPRESENTING THE CHILDREN'S BEST INTERESTS

Mary Melvin, the proposed Next Friend for plaintiff David, was a DCYF foster parent for twenty years, during which time DCYF twice named her Rhode Island Foster Mother of the Year. (J.A. 591–92.) Ms. Melvin cared for David from the time he entered state custody until he was about five; he called her "Mom." (J.A. 593.) There is no evidence that David has since called anyone else "Mom." Instead of maintaining the one stable relationship David had, DCYF moved David between so many placements that ultimately, despite her efforts, Ms.

Melvin was unable to find out any information about him. (J.A. 597.) Ms. Melvin's own testimony establishes why she is an appropriate Next Friend: "David was a child that was part of my family and anything that I could do to be supportive to him and help things be better for him, I was willing to be a part of that." (J.A. 599.)

Kathleen Collins is the proposed Next Friend for Caesar. At the time the complaint was filed, she had had both recent and frequent contact with Caesar, whom she describes from her contact as a "totally adorable little boy, albeit with some behavior problems, but who absolutely deserved and needed permanent care and wasn't getting that." (J.A. 621.) By that time, six-year-old Caesar had been cycled through eight placements in DCYF's custody, some of those lasting less than a month. Despite the formidable psychological, emotional and social side effects that such transition can produce, Ms. Collins, a school psychologist for eighteen years, was nonetheless able to develop a relationship with Caesar. (Am. Compl. ¶ 55, J.A. 34–35.)

Ms. Collins bonded with Caesar during the 2006-2007 school year, when she, as his school psychologist, saw him approximately three to four times a week and monitored his therapeutic progress throughout the year. (Am. Compl. ¶ 55, J.A. 34–35; J.A. 613–18.) Even after she changed schools herself, Ms. Collins returned to Caesar's school and attempted to check on him. (J.A. 619.) However,

DCYF had moved him yet again, to a different school outside of Ms. Collins' district. Ms. Collins wanted to serve as Caesar's Next Friend because "I had a lot of concerns about him, his being so young and seemingly out on – out on his own, in a sense, in the world." (J.A. 619.)

Dr. Gregory Elliott is the proposed Next Friend for Sam and Tony, Deanna, and Danny and Michael. Professor Elliott has considerable insight into these children's lives because, as an associate professor of sociology at Brown University, his major area of research is in the causes and consequences of child maltreatment. As he testified in the district court, he has done extensive scholarly research into the concept of "mattering" and the disastrous consequences of being made to feel that one does not matter. He described his work as "very applicable" to the lives of these Children because "it is very often the case that these children . . . [in] state care are in situations where they do not really believe that they matter to individuals or to the agency that is taking care of them [i.e., DCYF], at least nominally taking care of them." (J.A. 662–63.)

Dr. Elliott has not yet met these children, who are in Defendants' custody. But his work gives Dr. Elliott special insight and motivation to help them, and he has no conflicting motivation that would compromise his representation; the district court cited none. Dr. Elliott testified that he decided to serve as Next Friend for these Children after reviewing the complaint because, based upon his

research and experience, "I think these children . . . are in dire circumstances, circumstances that are detrimental to their mental health, and someone needs to step in to see to it that they are relieved of these distresses." (J.A. 666.)

IV. SUMMARY OF THE ARGUMENT

The district court committed four reversible errors in dismissing the Children's case. First, the court mistakenly held that the Children's GALs appointed by the Rhode Island Family Court solely for state Family Court proceedings are as a matter of law the Children's Rule 17(c)(1) duly appointed representatives. As a consequence of this ruling, the Children are prohibited from pursuing their federal claims through any representative other than their Family Court GALs. The court's ruling is wrong. Under Rhode Island law, the Children's GALs are appointed for a limited purpose, to represent the Children *only* with respect to matters arising in the Rhode Island Family Court, and *only* in the proceeding in which the GAL was appointed. The family court GALs are not duly appointed representatives under Rule 17(c)(1) and therefore did not have the obligation (as the district court theorized) to appear on behalf of the Children in these federal court proceedings, just as the GALs do not have the legal obligation to appear on behalf of the Children in state court tort or estate actions or any other legal actions beyond the scope of their appointment.

Since the Children's state family court GALs were not proper Rule 17(c)(1)

representatives, the issue becomes whether the Children's Next Friends were appropriate under Rule 17(c)(2). There, in its second error, the district court applied the wrong legal standard to the question of who may properly appear as a Rule 17(c)(2) next friend on behalf of these Children. A Rule 17(c)(2) next friend is required when a legally incompetent individual has no duly appointed representative under Rule 17(c)(1). Case law establishes that, for children committed to state foster care custody, a Rule 17(c)(2) next friend suffices if he demonstrates a good faith interest in the child's welfare, a proper motive to appear on the child's behalf and the ability to prosecute the action. The district court, however, required that next friends for foster children have a current and significant relationship with the children on whose behalf they appear. That was legal error.

Applying the court's improper standard to the real lives of foster children demonstrates why it is so critical for a court to utilize the correct Rule 17(c)(2) standard. The district court's interpretation of the rule creates an untenable paradox for these Children and others in foster care custody. Caught in a constitutionally deficient system, shuffled from one placement to another, away from their families, schools and communities and denied permanent homes, foster children would be precluded from vindicating their well-established constitutional rights and redressing their harms under the district court's analysis because, *as a*

very result of that shuffling, they often lack ongoing and enduring relationships with adults who could bring suit on their behalf. This outcome contravenes the very purpose of Rule 17(c).

Third, the district court abused its discretion in concluding that the adults who appeared on behalf of the Children in this lawsuit are not appropriate next friends under Rule 17(c)(2). The testimony of each of the three Next Friends unequivocally established that they are acting in good faith, are motivated by a sincere desire to seek justice on the Children's behalf and are able to prosecute this action. Moreover, two of the three Next Friends, David's former foster mother and Caesar's former school psychologist, have significant bonds to the children they seek to represent, as the lower court demanded. Although the remaining children do not have current and significant ties with any adults suitable, willing or available to represent their interests in this case, they properly appeared through an adult Next Friend – a Rhode Island professor whose academic focus is child maltreatment – who has demonstrated the necessary commitment and good faith to meet Rule 17(c)(2)'s requirements.

Finally, after committing the errors above, the district court dismissed the Children's claims outright, without undertaking to "appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person unrepresented in an action," as Rule 17(c)'s plain text requires, and as the Children

requested below. The lower court's dismissal without ensuring that the Children's interests as set forth in this litigation are protected was error as a matter of law.

There is no reason in law, logic or policy to slam the door of the federal courts shut in response to the Children's claims. To deny the Children their rightful access to federal court, as the district court has, is a perversion of both the letter and the spirit of Rule 17(c), which is intended to provide, not deny, children and other legally incompetent individuals with access to these courts.

V. ARGUMENT

A. RHODE ISLAND FAMILY COURT GALS ARE NOT DULY APPOINTED REPRESENTATIVES UNDER RULE 17(c)(1)

Like all children and other legally incompetent individuals, the Children's access to the federal courts is governed by Rule 17(c). That Rule provides two methods of federal court access: through a duly appointed representative under Rule 17(c)(1) and, when no such representative is available, through a next friend under Rule17(c)(2). Under Rule 17(c)(1), when a child has "(A) a general guardian,[7] (B) a committee, (C) a conservator, or (D) a like fiduciary," then that person is the presumed appropriate person to bring suit on behalf of the child in federal court.[8]

[7] A *general* guardian is "one who has the general care and control of the person and estate of a ward." *Black's Law Dictionary* 706 (6th ed. 1990).

[8] Rule 17(c) is reproduced in its entirety in the Addendum at page 42.

As not all children are fortunate enough to have one of these four enumerated types of general representatives, Rule 17(c)(2) separately provides that "[a] minor . . . who does not have a duly appointed representative [under Rule 17(c)(1)] may sue by a next friend or by a guardian ad litem." Fed. R. Civ. P. 17(c)(2).[9] Indeed, where a child is unrepresented in a lawsuit, "[t]he court must appoint a guardian *ad litem* —or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2).

Without explaining or even identifying which of the four enumerated Rule 17(c)(1) categories it applied here, the district court found that each of the Children had a Rule 17(c)(1) representative – "just such a representative has been designated by the Family Court – the guardian *ad litem* or CASA advocate." (Op. 24, Add. 24.) Under the court's ruling, *only* those GALs or CASA advocates could

[9] In practice, for Rule 17(c) purposes, a next friend sues for a minor when the minor is a plaintiff, and a guardian *ad litem* defends the minor when the minor is a defendant. The duties of these representatives in litigation are identical regardless of which title applies. *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 137 n.10 (3d Cir. 1989) (citations omitted). For the purposes of this appeal, reference is to next friends, as the Children are the Plaintiffs in this action. The term guardian *ad litem* as used in Rule 17(c) in no way refers to state family court GALs.

bring a suit in federal court on the Children's behalf.[10] (Op. 30, Add. 30.) The district court's finding that a Rhode Island foster child's state Family Court GAL is by definition her Rule 17(c)(1) representative is a determination of federal law as to the interpretation of Rule 17(c), but state law governs the capacity of a person to sue as a duly appointed representative or like fiduciary. *See*, *e.g.*, *C.J.P.F. ex rel. Fernandez-Vargas v. Pfizer Pharm., Inc.*, 522 F.3d 55, 66 (1st Cir. 2008). Both are subject to de novo review. *See*, *e.g.*, *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) ("a court of appeals should review de novo a district court's determination of state law"); *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 22 (1st Cir. 2001) (determination of federal law reviewed de novo); *United States v. Teague*, 469 F.3d 205, 208 (1st Cir. 2006) (same). Whichever Rule 17(c)(1) category the district court intended to shoehorn the state Family Court GALs into, the court erred.

[10] In Rhode Island, a GAL is assigned to represent the interests of each child who is the subject of a dependency, abuse or neglect petition. 03-011-001 R.I. Code R. (2009). These GALs are employed by the Office of the Court Appointed Special Advocate ("CASA"), which is "an arm of the Rhode Island Family Court." *Id.* If there is a conflict with the CASA office, the GALs are appointed from the private bar. *Id.*; R.I. Exec. Order, Family Court, No. 2004-02 (March 19, 2004) at 1 (Add. 52).

1. Rhode Island Family Court GALs Are Special Guardians Only for the Particular Family Court Proceedings for Which They Are Appointed

The district court's conclusion that the GALs are the Children's general-purpose representatives was wrong, because under Rhode Island state law, the GALs are specifically appointed by the Family Court for a limited purpose – to represent children in particular Family Court proceedings with respect to matters in those proceedings. In reaching its erroneous conclusion, the district court did not cite a single Rhode Island statute or judicial opinion authorizing a Family Court GAL to function as a child's duly appointed representative for all legal purposes, and indeed none can be found.

In fact, the Rhode Island Family Court GALs' function is specifically limited. In 2004, the Rhode Island Supreme Court issued an executive order that set forth the scope of duties for Family Court-appointed counsel, including GALs in dependency, abuse and neglect cases. R.I. Exec. Order No. 2004-02 (March 19, 2004) (Add. 52). According to that order, "[c]ourt appointed counsel shall provide representation in a case throughout all stages of adjudication *in the Family Court*." *Id.* at 2 (Add. 53) (emphasis added). Nothing in that state court order or elsewhere either authorizes or requires a state court GAL to act for the child as a general-purpose representative outside of the scope of the state Family Court proceeding for which the GAL is appointed. This state court order is consistent with the

traditional legal definition of the scope of a guardian *ad litem*'s duties: "A *guardian ad litem* is a special guardian appointed by the court in which a particular litigation is pending to represent an infant . . . in that particular litigation, and the status of guardian *ad litem* exists *only in that specific litigation in which the appointment occurs*." *Black's Law Dictionary* 706 (6th ed. 1990) (emphasis added).

Rhode Island case law confirms these limitations. As the Rhode Island Supreme Court has explained, a GAL's role is to "assist the court in determining the rights of the minor *in the tribunal where the guardian is appointed*." *Zinni v. Zinni*, 238 A.2d 373, 376, 103 R.I. 417, 421 (R.I. 1968) (emphasis added). In *Zinni*, the Rhode Island Supreme Court rejected a Family Court justice's attempt to appoint a GAL for a child in a Rhode Island Supreme Court appeal as improperly beyond the authority of the family court.[11] *Id.* Because Rhode Island's Family Court is a court of limited statutory jurisdiction "possessing only such jurisdiction as was explicitly conferred upon it by the Legislature," *Carr v. Prader*, 725 A.2d 291, 293 (R.I. 1999) (quotation omitted), and because no statute allows the Family Court to appoint GALs for duties beyond those in its own courts, the district court

[11] A GAL may, upon an adverse decision in the court in which it was appointed, appeal the case on behalf of the child to a higher court. *See Zinni*, 238 A.2d at 376, 103 R.I at 421. However, in *Zinni*, there had been no GAL in the underlying family court proceeding. *Id.*

here was wrong to find the state Family Court GALs to be Rule 17(c)(1) representatives.

Although, as established, the district court needed to look to Rhode Island state law to determine whether the Children's GALs were Rule 17(c) duly appointed representatives, the court failed to cite to any relevant Rhode Island authority in support of its conclusion.[12] Instead, it relied on only a handful of federal court cases interpreting Rule 17(c), not one of which supports its position. Indeed, federal case law clearly establishes that foster children may properly appear in federal civil rights litigation through next friends other than their family court GALs. *See*, *e.g.*, *Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11*, 873 F.2d 25, 31 (2d Cir. 1989) ("*Ad Hoc Comm.*") (finding teachers adequate next friends); *Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 1140920, at *3 (E.D. Mich. Apr. 17, 2007) (finding former foster mother suitable as next friend to foster child); *Olivia Y. ex rel. Johnson v. Barbour*, No. 3:04CV251LN, at *9 (S.D. Miss. Mar. 11, 2005) (Add. 40) (same); *Marisol A. v. Giuliani*, No. 95 Civ. 10533, 1998 WL 265123, at *9 n.14 (S.D.N.Y. May 22, 1998) (finding staff attorney who

[12] The district court cited two Rhode Island state court cases, but neither addresses let alone provides support for the proposition that Family Court GALs are their foster children's duly appointed representatives. *See Carr*, 725 A.2d at 294–95 (recognizing that Rhode Island Family Court has exclusive jurisdiction over matters of parental fitness and child custody); *In re Christina D.*, 525 A.2d 1306, 1308 (R.I. 1987) (considering whether a GAL has standing to appear in an adoption proceeding within Rhode Island Family Court).

worked at teenage homeless shelter suitable next friend to foster child); *Jeanine B. ex rel. Blondis v. Thompson*, 877 F. Supp. 1268, 1287–88 (E.D. Wis. 1995) (finding prominent community members with demonstrated interest in children's issues adequate next friends for children in foster care).

The district court first cited to *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997), a case that is factually and legally inapposite. In *T.W.*, a lawyer had followed a state court custody battle over two African-American siblings between their white foster parents and the children's aunt. *Id.* at 896. After the matter was exhausted in state court, the attorney filed a lawsuit in federal court alleging racial bias and seeking 120 million dollars in damages from a number of defendants, including the children's aunt who had been designated as their custodian and from the guardian *ad litem* who had represented their interests in the underlying custody proceedings. *Id.* at 897. In bringing the action, the lawyer enlisted a self-proclaimed child advocate to serve as next friend. *Id.* at 896. On those facts, the Seventh Circuit had concerns about the children being used as pawns by a lawyer seeking a financial windfall and an ideologue seeking to press a philosophical argument, as well as concerns over the lawyer's clear attempt to make an end run around a state court's final custody decision. *Id.* at 896–97. The Children in this case, in sharp contrast, seek exclusively injunctive and declaratory relief (rather than millions of dollars in damages) and, as more fully discussed below, *infra*

§ B.2., appear through Next Friends who are not self-interested "ideologues," but simply citizens invested in the best interest of the Children.

The district court initially cited *T.W.* for the legal proposition that "a federal court cannot appoint a guardian *ad litem* in an action in which the infant or incompetent plaintiff already is represented by someone who is considered appropriate under the law of the forum state." (Op. 25, Add. 25, quoting *T.W.*, 124 F.3d at 896.) According to the district court's reading of *T.W.*, the "suspicion" that the purported next friend was attempting to make "an end run" around the family court would have been avoided "if the children's general representative sought appointment from the family court to represent the children in the federal lawsuit." (Op. 25–26, Add. 25–26, citing *T.W.*, 124 F.3d at 897 (internal citations omitted).)

Although unclear, it appears that the district court relied on *T.W.* to suggest that, having deemed the Children's Family Court-appointed GALs their general representatives, the Children could not bring this federal suit unless (1) they appeared through their GALs and (2) those GALs first sought permission from the Family Court to appear in federal court. (Op. 26, Add. 26.) This conclusion, however, simply cannot be squared with *Zinni*'s prohibition on a Rhode Island state court appointing a GAL for any responsibilities outside the scope of the appointing court's own jurisdiction. *Zinni*, 238 A.2d at 376, 103 R.I. at 421. As the district court noted, the requirement that a state court approve a next friend to

serve in a federal lawsuit is only possible "if the state court has the power under state law to appoint a guardian *ad litem* in a federal suit." (Op. 26, Add. 26 (quoting *T.W.*, 124 F.3d at 897).) *Zinni* makes clear that Rhode Island law does not permit this. Since no Rhode Island statute authorizes a Rhode Island state court to appoint a representative for a child in a federal court, the court's suggestion that such appointment is a prerequisite for the Children bringing their federal claims is simply wrong.

The Court's reliance on *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989) is similarly misplaced. In *Garrick*, the Tenth Circuit held that a mother could not serve as her child's next friend in a federal court action because the child already had a Rule 17(c) representative for that action. *Id.* at 693. There, a mother and her children were seriously injured in an automobile accident and sued. *Id.* at 689. Because of a potential conflict – the mother and her children were claimants to the same potential settlement fund – at the mother's request the children were appointed a guardian *ad litem pursuant to Rule 17(c)* with respect to claims on that fund. *Id*. at 693. On appeal, with that Rule 17(c) guardian *ad litem* still representing the children, the mother sought to challenge the magistrate's allocation of the settlement fund on behalf of her children. *Id*. at 692–93.

The Tenth Circuit predictably and properly disallowed that effort, because the mother could not "represent her children *in the same action* for which the guardian *ad litem* was appointed." *Id.* at 693 (emphasis added). Here, by contrast, the Children's Family Court guardians *ad litem* were not previously appointed as their Rule 17(c) representatives and this lawsuit is not the same action for which each of the Children's GALs were appointed.

Indeed, to the extent it is relevant, *Garrick* supports rather than undercuts the Children's position. In *Garrick*, the mother's "standing to represent her minor children *in other actions* remain[ed] unaffected," even though her children had a Rule 17(c) guardian *ad litem* appointed for their federal court action. *Id.* at 693 (emphasis added). Similarly, that the Children have Family Court GALs for purposes of those state court proceedings does not affect their ability to have a next friend in this action.

Finally, the district court's reliance on *M.K. ex rel. Hall v. Harter*, 716 F. Supp. 1333 (E.D. Cal. 1989), is also unwarranted, as the California district court specifically rendered "no opinion" with regard to the question of who may appear in federal court on behalf of a child in foster care custody. *Id.* at 1336. Additionally, the *M.K.* court found the child welfare agency, not the child's family court-appointed attorney, to be the child's representative. *Id.* at 1335. In fact, the

Children have asserted and still maintain that if they have *any* duly appointed 17(c)(1) representative, it is DCYF, which has legal custody over them. (Pls.' Objection to Defs.' Mot. to Dismiss ("Pls.' Obj.") 12, J.A. 236.) However, since DCYF officials are the defendants in this action and therefore have a conflict, Rule 17(c)(2) next friends nonetheless must be appointed.

2. The Court Erred in Not Addressing the Children's Allegation That the State Family Court GALs Have a Potential Conflict That Might Bar Them as 17(c)(1) Representatives

Even if the Children's Family Court GALs were somehow construed to be the Children's duly appointed representatives under Rule 17(c)(1), they could not represent the Children in this action unless they had no conflict. Because the Children have alleged a potential conflict, the court below was duty-bound to determine whether one existed before it found the GALs to be qualified Rule 17(c)(1) representatives. When a general representative, who would otherwise be qualified to appear in court on behalf of a child, "has interests which may conflict with those of the person he is supposed to represent," this Circuit has held that Rule 17(c) allows a next friend, and not the conflicted representative, to appear on behalf of the child. *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689

F.2d 281, 285 (1st Cir. 1982) ("*Developmental Disabilities*") (internal citations omitted)[13]; *see also C.J.P.F.*, 522 F.3d at 67.

As the Rhode Island Child Advocate explained with respect to the potential conflict:

> The persons most closely connected to the [Named Plaintiff] children, including . . . guardians *ad litem* . . . either posed a potential conflict or expressed concern regarding possible retaliation from the Department or other state entities and declined to become involved.

(J.A. 313.) Additionally, the Children asserted below that to the extent that the GALs appointed by the Family Court participated in, approved of or did not object to the DCYF actions challenged in this suit, they have, at a minimum, a potential

[13] The case at bar is readily distinguished from *Developmental Disabilities*. The putative next friend there sought to sue on behalf of mentally retarded residents of a state institution. One of the plaintiffs was a minor whose natural guardian, his mother, opposed the next friend's actions; a second was an adult whose duly appointed guardian, her brother, also disapproved of the suit. *Developmental Disabilities*, 689 F.2d at 285–86. The First Circuit affirmed the district court's decision not to permit the putative next friend to proceed, given that these plaintiffs were otherwise represented by their general guardians and that there was no evidence of any conflict between the plaintiffs and their representatives. *Id.* at 286. Here, in contrast, the Children simply have no conflict-free general representative.

conflict or appearance of conflict that makes them ineligible to serve as Rule 17(c) representatives.[14] (Pls.' Obj. 13, J.A. 237.) Defendants did not contest this point.

By finding the purported Rule 17(c)(1) representatives facially suitable without addressing the asserted potential conflict, the district court erred as a matter of law and should be reversed. *See Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 988 (5th Cir. 1984) (reversing district court for failure to consider a conflict of interest between minor and his guardian before dismissing case for lack of standing); *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 138–41 (3d Cir. 1989) (finding it error to dismiss when GAL had conflict and proposed next friend was inappropriate, thereby leaving child without any representation).

B. LACKING A CONFLICT-FREE DULY APPOINTED REPRESENTATIVE, THE CHILDREN PROPERLY APPEARED THROUGH NEXT FRIENDS WHO ARE ADEQUATE UNDER RULE 17(c)(2)

Having erroneously determined that the Children's state Family Court GALs serve as their general Federal Rule 17(c)(1) "duly appointed representatives," the district court need not even have considered the qualifications of the Children's

[14] While in some instances a family court GAL may be an appropriate Rule 17(c)(2) next friend, that question is not before this Court since the court below found the GALs to be 17(c)(1) general representatives and the court never conducted a Rule 17(c)(2) analysis as to the GALs. The fact that there may be other appropriate next friends does not preclude a suitable next friend from serving in that capacity. *See*, *e.g.*, *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1186 (S.D. Fla. 2000) (approving of next friend, even when, "under different circumstances, the Court can envision other representatives"), *aff'd*, 212 F.3d 1338 (11th Cir. 2000).

proposed Next Friends as, under the court's flawed analysis, the Children were already represented. *See* Fed. R. Civ. P. 17(c)(2) ("A minor or an incompetent person *who does not have a duly appointed representative* may sue by a next friend.") (emphasis added). Nonetheless, in what appears to be a finding in the alternative, the lower court went on to hold that the Children's Next Friends were inadequate under Rule 17(c)(2) based upon an inappropriate and overly burdensome legal standard.

As demonstrated above, the Children have no conflict-free duly appointed representatives who can represent them in this matter as contemplated by Rule 17(c)(1). Accordingly, to vindicate their rights in federal court, the Children properly appeared through next friends. *See* Fed. R. Civ. P. 17(c)(2). The evidentiary record below makes clear that the proposed Next Friends appearing on behalf of the Children were acting in good faith with the sole motivation of seeking justice on the Children's behalf and were able to prosecute this action. As such, when assessed under the proper legal standard, each Next Friend was adequate, and it was reversible error for the lower court to have found otherwise.

1. The District Court Applied the Wrong Standard in Assessing the Adequacy of the Children's Rule 17(c)(2) Next Friends

The district court stated that the showing required to serve as a Rule 17(c)(2) next friend is "1) inaccessibility or incompetence of the real party in interest; 2) the

Next Friend must be fully dedicated to the best interests of the real party in interest; and 3) the Next Friend must have 'some significant relationship with the real party in interest.'" (Op. 27–28, Add. 27–28) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990)). The lower court ruled that the Next Friends in this case had failed to establish the "'propriety' of their status, particularly as to the third prong articulated by the Supreme Court: a significant relationship with the person they seek to represent." (Op. 28, Add. 28.)

The court failed to define what constitutes a "significant relationship." But it is clear from the opinion below that the district court applied what, in the context of foster children's lives, is an almost insurmountably high bar – that a next friend demonstrate a longstanding and current relationship to the foster child. Applying that standard was legal error in two ways. *First*, when children are in state foster care custody courts generally apply a different standard in determining who may appear as a child's next friend. *Second*, the district court misapprehended the law that it invoked in support of the next friend standard it applied.

a. The Proper Standard for Assessing the Adequacy of a Proposed Rule 17(c)(2) Next Friend for Children in State Foster Care Custody is Whether the Next Friend Has Demonstrated Good Faith and a Proper Motive

As the Second Circuit has recognized when addressing the question of who may appear under Rule 17(c)(2) on behalf of foster children seeking to vindicate their rights:

> The term ["next friend"] is broad enough to include any one who has an interest in the welfare of an infant who may have a grievance or a cause of action . . . The right of access to courts by those who feel they are aggrieved should not be curtailed; and this is particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians. Those who propose to speak for the plaintiffs have manifested an interest in their welfare and should, under the circumstances here presented, be allowed to proceed.

Ad Hoc Comm., 873 F.2d at 31 (alteration in original) (quoting *Child v. Beame*, 412 F. Supp. 593, 599 (S.D.N.Y. 1976)).

In the context of children in state foster care custody, the standard for next friends that the district court articulated is both unrealistic and unjustified and should not be approved as the law in this Circuit. Instead, this Circuit, like other courts, "should consider *the good faith of those claiming to speak for the infant*" and ensure "that the 'next friend' is motivated by *a sincere desire to seek justice on the infant's behalf*." *Ad Hoc Comm.*, 873 F.2d at 30–31 (emphasis added). In addition, courts should consider "the ability of the 'next friend' – financial or otherwise – to prosecute the type of action at hand." *Id.* at 31.

Many courts have applied the standard articulated by the Second Circuit or a similar one when assessing the adequacy of next friends for foster children. For example:

- In *Olivia Y. ex rel. Johnson v. Barbour*, No. 3:04CV251LN (S.D. Miss. Mar. 11, 2005), a class action seeking to reform Mississippi's child welfare system, the court found the plaintiff foster children's next friends adequate because each was "generally knowledgeable about the nature and purpose of this litigation, and ha[d] a good faith interest in the named plaintiffs' welfare and in the prosecution of this litigation." *Id.* at 10 (Add. 41).

- In *Marisol A. v. Giuliani*, No. 95 Civ. 10533, 1998 WL 265123 (S.D.N.Y. May 22, 1998), an action to reform New York City's child welfare system, the court approved the next friends, including a next friend who had never met the child on whose behalf she was appearing, having been "satisfied that they understand their role as next friends, and that they are motivated only by a sincere desire to seek justice for the named plaintiffs." *Id.* at *8–9.

- In *Jeanine B. ex rel. Blondis v. Thompson*, 877 F. Supp. 1268 (E.D. Wis. 1995), also a child welfare class action, the court approved next friends for four of the named plaintiff foster children who were "prominent members of the Milwaukee community who ha[d] a demonstrated interests [sic] in children's issues." *Id.* at 1288.

- In *Child*, 412 F. Supp. at 599, next friends for foster children were deemed adequate upon a showing that they had an interest in the welfare of the children.

Other non-foster care cases have similarly looked at the good faith and commitment of those seeking to appear as a minor's next friend. *See Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1376 n.4 (S.D. Fla. 2001) (finding next friend appropriate because he was "sufficiently dedicated" to the interests of the minor and had "never put forth any monetary claim for damages on behalf of [the

plaintiff child] that would suggest a self-serving motive"), *aff'd sub nom*. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1186 (S.D. Fla. 2000) (finding next friend to child applying for asylum was appropriate upon a showing "that he ha[d] at heart Plaintiff's interests"), *aff'd*, 212 F.3d 1338 (11th Cir. 2000).

As these cases reflect, the overwhelming weight of authority addressing the requirements of a next friend seeking to appear on behalf of a plaintiff foster child uses slightly varying language to articulate what is in essence the same standard: the next friend should be acting in good faith; he should be motivated by a sincere desire to seek justice on the child's behalf; and he should be able to prosecute the matter. It would be appropriate for this Circuit to join its sister courts in adopting such a standard. Applying the standard articulated by the district court below rewards a state child welfare agency for the harmful practice of repeatedly moving children from placement to placement by assuring that children will not have developed the long-standing and current relationships with adults that the district court required for those children to bring suit against the agency.

b. The District Court Misinterpreted *Whitmore* in Arriving at Its Flawed Legal Standard for Next Friends

In its next friend analysis, the district court relied principally on a mis-apprehension of what it described as the "ultimate authority," *Whitmore v.*

Arkansas, 495 U.S. 149 (1990). (Op. 27, Add. 27.) *Whitmore* simply does not support the unjustified and overly burdensome standard the court applied to the Next Friends in this case. The district court's decision as to which legal standard to apply when assessing a next friend is subject to this Court's de novo review. *See United States v. Maldonado-Rivera*, 489 F.3d 60, 65 (1st Cir. 2007) ("The choice of a legal standard presents an abstract question of law and, thus, triggers de novo review."); *Niehoff v. Maynard*, 299 F.3d 41, 47 (1st Cir. 2002).

As an initial matter, in *Whitmore*, the Supreme Court addressed the capacity of a purported next friend of a competent adult prisoner to stay the prisoner's execution, *when the prisoner himself refused to authorize such representation and had twice knowingly waived his right to appeal*. 495 U.S. at 152–53, 166. The *Whitmore* Court held that a next friend must provide an adequate explanation as to why the real party in interest is unable to appear on his own behalf and that the next friend seeking to prosecute the action must be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Id.* at 163. The Court then noted in dicta that a decision from the United States District Court for the Northern District of Georgia "*suggested* that a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 163–64 (citing *Davis*

v. Austin, 492 F. Supp. 273, 275–76 (N.D. Ga. 1980)) (emphasis added).[15] However, the Court did not itself apply such a standard.

In fact, the Supreme Court held in *Whitmore* that the next friend lacked capacity to represent the inmate because the inmate was not, in fact, incompetent and neither required nor desired representation by the proposed next friend. *Id.* at 165–66. The lack of a significant relationship on the part of the purported next friend played no part in the Court's actual reasoning and holding. The district court's invocation of *Whitmore*, therefore, to require that a next friend in the foster care context have a significant relationship with a child is simply wrong.

In addition, the limitations on the next friend doctrine discussed in *Whitmore* are, in fact, limited to prisoner litigation: "These limitations on the 'next friend' doctrine are driven by the recognition that 'i[t] was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" *Id.* at 164 (quoting *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921)); *see also Bowen v. Rubin*, 213 F. Supp. 2d 220, 228 (E.D.N.Y. 2001) (finding that *Whitmore*'s holding "appears to be limited to the context of habeas litigation").

[15] As in *Whitmore*, in *Davis*, the court rejected a proposed next friend because the next friend sought to appeal the death sentence of a prisoner who had "made a decision [not to appeal] knowingly, intelligently, deliberately, rationally, coherently, and with full understanding," and the prisoner had not been shown to be incompetent. 492 F. Supp. at 276.

Even if it were not dicta, *Whitmore*'s statement regarding a significant relationship would not be applicable to the question of whether the Next Friends *in this case* are adequate to represent the minor plaintiffs pursuant to Rule 17(c). Unlike the competent adult prisoner in *Whitmore*, the plaintiffs here are *children* who, by virtue of their custodial status and age, lack both the ability and legal capacity to seek out representation for themselves. The concern animating the *Whitmore* and *Davis* courts – that an uninvited meddler was seeking to subvert the stated desires of a competent adult – is simply not present in this case. The Children here appear through Next Friends because that is their *only* avenue of access to the federal court.

In examining whether a Rule 17(c) next friend is sufficiently dedicated to the best interest of the plaintiff, some courts have indeed considered, *among indicators*, whether there is a prior relationship to the plaintiff. However, the absence of such a relationship does not establish that the next friend lacks the proper dedication or motivation, which may be demonstrated by other means. *See Gonzalez*, 86 F. Supp. 2d at 1185 (requiring putative next friend to show "some relationship *or other evidence* that demonstrates the next friend is truly dedicated to the interests of the real party in interest" (internal quotation and quotation marks omitted) (emphasis added)).

As other courts have recognized when considering the qualifications of next friends in cases substantially similar to this, it may be impossible for a child who has been trapped for years in a failing foster care system in which she has been repeatedly moved between homes or institutions to develop a lasting relationship with an adult prepared to represent her as a next friend. *See Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 1140920, at *3 (E.D. Mich. Apr. 17, 2007) ("Because the named Plaintiffs, like other foster children, have been removed from home and have had their preexisting ties to family and friends effectively severed, they have few, if any, significant relationships with adults who are suitable and willing to act as 'next friends.'"); *Marisol A.*, 1998 WL 265123, at *8–9 (recognizing that "[i]n an ideal world, there would be concerned family members or friends to represent these children in court," and holding that, in the realities of New York City's foster care system, plaintiffs' next friends were adequate despite in some instances never having met the foster children they represented).

The lower court in this case erred as a matter of law in requiring the Children to demonstrate a significant and ongoing relationship with an adult before appearing in federal court to challenge Defendants' actions, especially as the challenged actions include the failure by Defendants to provide the Children with the opportunity to develop significant relationships. The lower court further erred in finding the Next Friends inadequate at least in part because they did not review

the Children's DCYF, educational, family court or medical records and did not reach out to the Children's guardians *ad litem* or intervene in Family Court hearings. (Op. 8, 13, 17, 19, 21, 22, Add. 8, 13, 17, 19, 21, 22.) Those records are confidential and under the control of Defendants. *See* R.I. Gen. Laws §§ 5-37.3-4(a), 8-10-21, 15-7-7(f), 16-71-3(a)(7), 38-2-2(4)(i)(C), 40-11-13, 42-72-8 (Add. 43–47); *see also id.* § 14-1-5 (Add. 44). Similarly, the Next Friends' intervention in the Children's individual Family Court proceedings would have been impossible; those proceedings are closed to the public. *Id.* § 14-1-30 (Add. 45). There is no requirement that a next friend take any specific steps on behalf of a child before raising the child's federal claims in federal court, especially when, as here, the suggested steps are a practical impossibility.

Because the district court applied the wrong legal standard in assessing whether the Children's Next Friends were adequate under Rule 17(c), reversal is appropriate.

2. The Children's Proposed Next Friends Are Appropriate

The district court erred in concluding that the Children's Next Friends were not adequate. There is no evidence that any of them has any agenda in this lawsuit other than to protect the Children. Each Next Friend offered uncontroverted

evidence that he or she is acting in good faith, is motivated by a sincere desire to seek justice on the Children's behalf and is capable of prosecuting the action.[16]

a. Mary Melvin, Who Appears on Behalf of David, Is an Appropriate Next Friend

The district court ruled that Mary Melvin had failed to demonstrate her "propriety" as next friend principally because she has not been in contact with David for several years. (Op. 28, Add. 28.) As explained above, Ms. Melvin cared for David as his foster mother from the time he entered state custody until he was about five. Ms. Melvin testified that during that time: "He became very attached to me and I to him." (J.A. 593.) The district court cited no evidence that, since DCYF removed David from Ms. Melvin's care and cycled him through at least ten separate placements (Am. Compl. ¶¶ 56–66, J.A. 35–38; Op. 11–13, Add. 11–13), he has developed a similar relationship with anyone. Indeed, Ms. Melvin had wanted to adopt David. (J.A. 593.) After leaving her home, the State put David in a shelter – one of nine institutions David would be subjected to after leaving Ms. Melvin's home. (Am. Compl. ¶¶ 56–66, J.A. 35–38; Op. 11–13, Add. 11–13.)

The lower court's criticism of Ms. Melvin is temporal – that she has not had recent contact with David. In fact, Ms. Melvin tried to keep in contact with him.

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[16] As previously discussed, to the extent that the district court suggested that the Next Friends were required to be appointed by the Rhode Island Family Court in order to serve as next friends in this federal lawsuit, that was error. See *supra* § A.1.

However, the frequency with which DCYF moved David and the nature of the institutional settings in which DCYF placed him – multiple shelters, several psychiatric facilities and a number of residential treatment centers (Am. Compl. ¶¶ 56–66, J.A. 35–38; Op. 11–13, Add. 11–13) – made that difficult for her. According to Ms. Melvin, "the last place that I called, they didn't give me any information on him." (J.A. 597.) David now resides in yet another facility, this one located out of state. (Am. Compl. ¶ 66, J.A. 38; Op. 13, Add. 13.) The district court made no findings to suggest that the passage of time had transformed someone David called "mom" into someone the court could not trust to act in his best interest. It is difficult to imagine how David would have had the opportunity to develop a closer relationship with any other adult that would have endured his many moves through these various institutional settings, given his early removal from his family and community and his subsequent experiences.

Ms. Melvin herself testified that David is "family" to her and that her motivation for appearing as his Next Friend is to "continue to create a bond. I want David to know that anything I can do to help him or to be there for him, I'm a willing participant." (J.A. 599–600.) Although not legally required, their relationship is significant. The case law confirms that Ms. Melvin was and is qualified to serve as David's next friend. *See*, *e.g.*, *Dwayne B.*, 2007 WL 1140920, at *3 (finding former foster mother of

named plaintiff's sibling suitable as next friend); *Olivia Y.*, No. 3:04CV251LN, slip op. at 9–10 (finding one former foster parent and friend of another former foster parent suitable as next friends) (Add. 40–41); *see also Gonzalez*, 86 F. Supp. 2d at 1186 (finding next friend sufficient where "[h]e has embraced the responsibility of prosecuting the instant case; he has cared for Plaintiff in his own home for more than two months, and he demonstrated sufficient interest in the child such that the [defendant] itself placed Plaintiff in his hands").

b. Kathleen Collins, Who Appears on Behalf of Caesar, Is an Appropriate Next Friend

The district court also deemed Kathleen Collins unfit to serve as Caesar's next friend, on the grounds that she had not seen him in two years and did not have personal knowledge of his current status or circumstances. (Op. 28, Add. 28.) The court erred with respect to its recitation of the facts and abused its discretion in its findings.

Ms. Collins was Caesar's school psychologist throughout the 2006–2007 academic year. She devoted time to forming a relationship with Caesar through her work with him both inside and outside the classroom. (J.A. 613–17.) She described Caesar as "thriv[ing] really well on praise. . . . [I]f he came to see [her] individually, he absolutely adored the idea that somebody would spend time with him individually, would encourage him to draw and talk and share his feelings."

(J.A. 615.) When asked whether she and Caesar had established a relationship, Ms. Collins responded with an unqualified "Absolutely." (J.A. 618.) These facts establish Ms. Collins as an adequate next friend even under the district court's erroneous standard.

As with Ms. Melvin, the district court's opinion used a temporal justification for finding Ms. Collins inadequate. The court asserted that Ms. Collins "has not seen [Caesar] at all for almost two years." (Op. 28, Add. 28.) This factual assertion is demonstrably false. When the complaint was filed in June 2007, Ms. Collins had seen Caesar less than *one month* earlier and continually for that just-ending school year. (J.A. 613–19, 629.) In calculating that Ms. Collins had not seen Caesar in almost two years, the lower court included the period in which the parties were engaged in motion practice, along with the more than twelve months between the time the court heard testimony from the Next Friends and the date it issued its opinion. Ms. Collins tried, but was unable, to maintain *current* contact with Caesar because of DCYF's actions in moving him. (J.A. 619.)

Ms. Collins can hardly be described as an ideologue or as seeking to use Caesar as a pawn to promote her own agenda. Instead, her purpose in agreeing to serve as a next friend was only to look out for Caesar's best interests, because, as Ms. Collins testified, "it just seemed that there was nobody that was able to care for him, and that just seemed really tragic to me that here was this totally adorable

little boy, albeit with some behavior problems, but who absolutely deserved and needed permanent care and wasn't getting that. So that was a major concern for me." (J.A. 621.) Kathleen Collins chose to stand up for Caesar because, she said, "this child deserves justice . . . . And there didn't appear to be anybody else that was really willing to do this for this child." (J.A. 623.)

Ms. Collins is an appropriate Next Friend. *See*, *e.g.*, *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) ("a professional who has worked with a child" can be an appropriate next friend); *Olivia Y.*, No. 3:04CV251LN, slip op. at 9–10 (finding next friend suitable who was friend of foster parent who had previously cared for named plaintiff) (Add. 40–41); *Marisol A.*, 1998 WL 265123, at *5, *8–9 (finding social worker at a teen program suitable next friend).

c. Dr. Gregory Elliott, Who Appears on Behalf of Sam and Tony, Deanna, and Danny and Michael, Is an Appropriate Next Friend

Dr. Elliott demonstrated through his testimony that, although he had not yet met the Children for whom he sought to appear, he can serve effectively as their Next Friend. His professional work gives him both empathy for and insight into these Children's lives. He has no conflicting motivation that would compromise his representation or philosophical agenda that he is seeking to promote. As he explained, "I think these children . . . are in dire circumstances, circumstances that are detrimental to their mental and physical health, and someone needs to step in to

see to it that they are relieved of these distresses." (J.A. 666.) He is ready, willing and able to do so. Through no fault of their own, these Children have no stable network of adults who are familiar with their situations. (J.A. 313.) It would be perverse to turn that absence into a legal weapon to keep these Children out of federal court.

Fortunately, however, when children in dire circumstances lack connections with adults capable of serving as their representatives, the law allows next friend representation from a person like Dr. Elliott. *See*, *e.g.*, *T.W.*, 124 F.3d at 897 (finding that a stranger next friend may serve in desperate circumstances); *Lofton*, 157 F. Supp. 2d at 1376 n.4 (finding next friend to child adequate although next friend lacked a relationship to child, lacked knowledge of the child and lacked expertise in child development when there was no evidence of self-serving motive); *Marisol A.*, 1998 WL 265123, at *8–9 (upholding next friends of plaintiff children in foster care where "they understand their role as next friends, and that they are motivated only by a sincere desire to seek justice for the named plaintiffs," even though many of them had not met or had had very limited contact with the plaintiffs); *Jeanine B.*, 877 F. Supp. at 1287–88 (finding community members with demonstrated interest in children's issues adequate next friends for children in foster care); *Child*, 412 F. Supp. at 599 (permitting next friend, who did not know plaintiff children before agreeing to serve as their next friend, to litigate on their

behalf because he had "manifested an interest in their welfare"). It would be appropriate for this Circuit to confirm that the law permits such representation.

C. DISMISSAL OF THIS ACTION UNJUSTLY DEPRIVES THE CHILDREN OF A FEDERAL FORUM IN WHICH TO VINDICATE THEIR RIGHTS

The lower court's errors in finding the GALs to be the Children's duly appointed representatives and failing to allow the proposed Next Friends to serve is compounded by its wrongful dismissal of the lawsuit. To do so was error, whether as a matter of law subject to de novo review or an abuse of discretion. *Compare United States v. 30.64 Acres of Land*, 795 F.2d 796, 797, 804–05 (9th Cir. 1986) *with Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 141 (3d Cir. 1989).

The lower court's dismissal completely undermines the purpose of Rule 17(c), which is "to ensure that the minor has proper access to the federal judicial system at all." *Gaddis v. United States*, 381 F.3d 444, 453–54 (5th Cir. 2004) (en banc) (finding the need to protect minors' rights and interests in federal court proceedings "extremely vital"). In cases involving minors, a court may dismiss a lawsuit based on a finding that the next friend is inappropriate only if the court has made a finding on the record that the child's legal interests at issue in the suit are adequately protected. *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 988–89 (5th Cir. 1984); *see also Gardner*, 874 F.2d at 138, 141. If there is an indication of conflict between the child and an adult representative, the court must find that the

child's interests are nonetheless protected. *Adelman*, 747 F.2d at 988. The court made no finding that the Children's interests were otherwise protected in this lawsuit and did not address indications of a potential conflict, *see supra* § A.2. Accordingly, its order of dismissal should be reversed.

1. The Children's Substantive Interests *at Issue in This Case* Are Not Otherwise Protected

Before dismissing a suit on Rule 17(c) grounds, a court must satisfy itself that "the child's *interests in the litigation*" are protected. *Gardner*, 874 F.2d at 140 (emphasis in original). The lower court summarily concluded that dismissal was warranted "[b]ecause the minor Plaintiffs are within the jurisdiction of the Family Court, where guardians have been appointed to represent their interests." (Op. 2, Add. 2; *see also* Op. 23, 29, Add. 23, 29.) However, the district court made no findings to support the conclusion that the Children's legal interests in a child welfare system that does not cause them harm are adequately protected within the context of their individual Family Court proceedings. In fact, the court rejected Plaintiffs' offer of factual testimony as to why the Children's claims at issue in this litigation cannot be addressed in the Children's individual state Family Court proceedings. (J.A. 652–54.) The Children's interests are not protected here or elsewhere.

First, the narrow Family Court proceedings do not, and cannot, address the infrastructure problems within the State's child welfare system that are the direct

and immediate cause of the ongoing and systemic constitutional violations alleged in this case. For example, in the context of an individual child's Family Court proceeding, the Family Court cannot impose caseload limits on all DCYF caseworkers or order DCYF to develop a larger number of foster home placements.

Second, the Family Court-appointed GALs themselves cannot protect the Children's interests in a functioning child welfare system that are articulated *in this litigation*. GALs do not have the authority to protect those interests due to the limited scope of their representation; they are assigned solely to "provide representation in a case throughout all stages of adjudication in the Family Court," R.I. Exec. Order No. 2004-02 (March 19, 2004) (Add. 53), and those proceedings do not address the systemic deficiencies challenged in this lawsuit.

Third, the record shows that the GALs have not been available to protect the Children's interests. The GALs have had limited if any contact with the Children (J.A. 313) (noting that "[o]ne of [the] Named Plaintiffs had never met the guardian *ad litem* who has represented the child for many years"), and GALs carry extremely high caseloads averaging 400 children per attorney.[17]

While the district court asserted that the GALs "have, for the most part, consistently attended the proceedings in Family Court on behalf of their clients," (Op. 24, Add. 24), the record shows otherwise. The Family Court records upon

[17] (*See* Pls.' Obj. 40 n.44, J.A. 264.)

which the court relied show that the GALs in fact had a poor record of actually *appearing* in Family Court for these children and that there was a routine turnover of GALs in their cases. For example, for Named Plaintiff brothers Danny and Michael, the court below noted that both boys were represented by one attorney. (Op. 19, Add. 19.) However, the attorney was marked present for Danny in only two of seven court dates and in only four of nine instances for Michael.[18]

As to Sam and Tony, while the court below stated that both brothers have been represented in Family Court by either one or two CASA attorneys (Op. 16–17, Add. 16–17), in fact the boys have each had six GALs since December 2000. For Sam, a GAL was marked present in Family Court only eight of nineteen times. For Tony, a GAL was marked present only eleven of twenty-one times.[19]

As to David, the district court noted that he has been represented in the Family Court by one GAL since 1996. (Op. 12–13, Add. 12–13.) However, David has had five GALs since then.[20] As of December 2000, a GAL had been clearly

[18] (*See* Summary Chart, Add. 57; Supp. J.A. 399–400, 403–08, 415–18, 423–34, 437–40, 443–46.)

[19] (*See* Summary Chart, Add. 58–59; Supp. J.A. 569–76, 579–86, 592–93, 598–99, 603–04, 608–13, 620–21, 624–31.)

[20] (*See*, *e.g.*, Supp. J.A. 724–25, 743–46, 786–87, 800–01.)

marked present in only eleven of David's nineteen Family Court proceedings.[21] (*See* Summary Chart, Add. 59; Supp. J.A. 756–57, 795–96, 830–31, 834–53, 857–58, 862–71.)

The actual facts as of December 2000 show that the GALs failed to appear at just under half of all the Children's Family Court events. The district court abused its discretion by erroneously "finding" that the GALs "for the most part, consistently" attended those proceedings. (Op. 24, Add. 24); *see Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 6 (1st Cir. 2005) (recognizing that it is an abuse of discretion to base a ruling on a "clearly erroneous assessment of the evidence" (internal quotation omitted)). This record does not support the conclusion that the GALs are available and able to adequately protect the Children's interests in this litigation.

[21] The district court below also noted one GAL for Deanna in Family Court. (Op. 7, Add. 7.) However, Deanna has had at least two GALs in as many years in custody, and a GAL was noted to be present in only five of thirteen court events. (*See* Summary Chart, Add. 58; Supp. J.A. 350–59, 362–67, 371–76, 384–87.) Caesar has had at least six GALs over his nearly seven years in custody; in only twenty-four of thirty-eight court events has a GAL been marked present. (*See* Op. 10, Add. 10; Summary Chart, Add. 60; Supp. J.A. 450–61, 474–79, 482–85, 488–91, 495–500, 506–19, 522–35, 538–43, 547–56.)

While the lower court stated that "this Court will not invade the jurisdiction of the Rhode Island Family Court and appoint Next Friends for children who are already represented by counsel," (Op. 30, Add. 30), federal courts must exercise the jurisdiction that is given to them, *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989). Because the Children's interest as articulated *in this litigation* – their interest in a constitutionally adequate child welfare system that does not harm them – is not protected by the Family Court proceedings as required under Rule 17(c), the lower court erred in relying on those proceedings to dismiss this action.

2. The District Court's Failure to Allow the Children to Secure New Representatives or to Itself Appoint Suitable Representatives Was Error

Having rejected the Children's proposed Next Friends, the lower court left the Children unrepresented in this action. Rule 17(c), however, requires the court to "appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2). *See also Berrios v. New York City Hous. Auth.*, 564 F.3d 130, 134–35 (2d Cir. 2009) (holding that court may not dismiss lawsuit without ensuring that

incompetent person's interests are protected by suitable representative); *Gardner*, 874 F.2d at 140.[22]

Even if the district court found that the proposed Next Friends were unqualified, the court's obligation under Rule 17(c) required it to do one of two things: allow the Children to substitute new next friends or appoint other next friends itself. Courts in numerous cases have found a representative inadequate, but allowed the plaintiffs to substitute new next friends. *Washington v. Ladue Sch. Dist. Bd. of Educ.*, 564 F. Supp. 2d 1059, 1061 n.2 (E.D. Mo. 2008) (noting that minor plaintiff had substituted next friend); *Lindsly v. Worley*, No. 1:07-CV-588, 2008 WL 2388116, at *1 (S.D. Ohio June 6, 2008) (denying motion to dismiss for failure to comply with Rule 17(c)(2) and allowing plaintiff to substitute next friend where incompetent plaintiff filed suit without next friend); *Baby Neal v. Casey*,

[22] None of the cases cited by the lower court undermine this conclusion. In *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997), the Seventh Circuit would not have dismissed the case had its only concern been the adequacy of the next friend. *Id.* at 898. In *M.K. ex rel. Hall v. Harter*, 716 F. Supp. 1333, 1336 (E.D. Cal. 1989), the court dismissed the case on the merits, not on next friend adequacy. In *Developmental Disabilities*, dismissal was appropriate precisely because the plaintiffs had immediate family members who were their general guardians and had no conflict of interest, and those general representatives expressly disagreed with the purpose of the lawsuit and chose for the plaintiffs not to participate. 689 F.2d at 285–86. As recognized in *C.J.P.F.*, the right of a general guardian "encompasses the right to decide whether to proceed with the prosecution of a civil lawsuit," 522 F.3d at 67, and in *Developmental Disabilities* the general representatives exercised their authority not to proceed. In this case, the Children do not have conflict-free general representatives who have made the determination not to prosecute their federal constitutional and statutory claims.

No. 90-2343, 1992 WL 58311, at *1–2 (E.D. Pa. Mar. 20, 1992) (granting plaintiffs' motion to substitute next friends after previously disqualifying original next friends), *rev'd in part on unrelated grounds*, 43 F.3d 48 (3d Cir. 1994).

In other instances, courts have recognized their inherent power to appoint other next friends upon finding proposed representatives inadequate. *See*, *e.g.*, *In re Chicago, Rock Island & Pacific R.R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986); *Gardner*, 874 F.2d at 140–41; *see also T.W.*, 124 F.3d at 897 ("[T]he court may appoint . . . in desperate circumstances, a stranger whom the court finds to be especially suitable to represent the child's interests in the litigation."). The lower court erred in failing to allow the Children to substitute new next friends or to appoint new next friends itself.

As other courts have noted: "The power to dismiss . . . has been described as the most severe sanction that a court may apply." *M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977) (internal quotation omitted). "[T]he district court should consider that access to the courts by aggrieved persons should not be unduly limited, particularly, as in the instant case, where an incompetent person raises allegations of violations of his rights attributable to his custodians, and further alleges a failure to act on the part of his legal guardian." *Adelman*, 747 F.2d at 989 (citations omitted). *See also Ad Hoc Comm.*, 873 F.2d at 31 ("The right of access to courts by those who feel they are aggrieved should not be curtailed; and this is

particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians." (internal quotation omitted)). The lower court's dismissal of the instant lawsuit contravenes the very purpose of Rule 17(c) and should be reversed.

VI. CONCLUSION

Rhode Island's child welfare system has failed the Children, and the class that they seek to represent, for essentially their entire lives. The district court was wrong to allow the federal judicial system to fail the Children too. Rhode Island's mismanaged, overextended and underfunded child welfare system is harming these Children and poses serious risks to thousands of other children like them every day. Their only recourse is to raise their claims in this federal court. The Children are entitled to litigate them on the merits.

Rule 17(c) is the exclusive vehicle through which the Children can bring their claims in federal court. The district court was wrong to use it to bar their entry. The Children respectfully ask that this Court reverse the district court's determinations that the Rhode Island Family Court GALs are the Children's duly appointed representatives under Rule 17(c)(1) and that the proposed Next Friends were not necessary or adequate under Rule 17(c)(2), and remand for litigation on the Children's motion to certify the class and, thereafter, on the merits.

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Attorney for Appellants

Dated: August 7, 2009

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of August, 2009, I filed the required number of paper and electronic copies of this Brief of Appellant, Joint Appendix and sealed Supplemental Joint Appendix, via UPS Next Day Air, with the Clerk's Office of the United States Court of Appeals for the First Circuit, and further certify that on this day I caused to be served, via hand delivery by co-counsel John W. Dineen, the required number of paper copies, as well as one electronic copy, of said brief and appendices on the 10th day of August, 2009, to the following:

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