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App. Div. 2d Dep't Docket Nos. 2022-02833 & 2022-08736

State of New York
Court of Appeals

In the Matter of

JOSHUA J. AND CHRISTOPHER J.,

Children Under 18 Years of Age
Alleged to be Neglected

WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Respondent.

TAMEKA J.,

Respondent-Appellant.

PROPOSED BRIEF OF FAMILY DEFENSE ATTORNEYS IN SUPPORT OF RESPONDENT-APPELLANT AS *AMICI CURIAE*

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PRELIMINARY STATEMENT

Amici Brooklyn Defender Services, Bronx Defenders, Cattaraugus County Public Defender's Office, Center for Family Representation, Legal Aid Society of Nassau County, Lansner & Kubitschek, Legal Services of the Hudson Valley, Monroe County Assigned Counsel Program, Monroe County Public Defender's Office Family Defense Unit, Neighborhood Defender Service, and Ontario County Conflict Defender's Office provide representation to parents in Article 10 cases in family courts throughout New York State. Collectively, we have represented parents in tens of thousands of permanency hearings. We urge the Court to recognize a mootness exception for the review of permanency hearing orders extending children's placement in the foster system for a simple reason: the absence of substantive appellate review of these life-shaping decisions allows New York children to languish in foster care, needlessly delaying reunification with their families in contravention of clear legislative intent. The families harmed by the lack of review are almost all low-income and disproportionately Black and Latine.[1]

[1] NYS Office of Children & Family Services, Office of Research, Evaluation and Performance Analytics, *Disproportionate Minority Representation in Child Welfare Services Dashboard: 2023 & Five Year Trends* (2024), https://ocfs.ny.gov/reports/sppd/dmr/Disparity-Rate-Packet-2023-Dashboard.xlsx; The New School Center for New York City Affairs, *Data Brief: Child Welfare Investigations and New York City Neighborhoods* 4-5 (June 2019), https://www.centernyc.org/data-brief-child-welfare-investigations; New York State Bar Association, *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child*

Permanency hearings are intended to serve the important purpose of accelerating legal permanency for children. There are clear statutory requirements for the form and substance of these hearings, which are required at regular intervals while a child remains in the foster system. Most importantly for purposes of the present appeal, the family court is required to review each family's current circumstances and enter a written order either reunifying the child with their parents or, if reunification is not possible at that time, continuing the child's placement in the foster system. Crucially, state law prioritizes family reunification. If courts conduct permanency hearings in adherence with statutory requirements, they speed the reunification of families and reduce costs to the state.[2] And when reunification is not possible, properly conducted permanency hearings allow children to attain the alternative form of legal permanency that is in their best interests more quickly.

Yet, in *Amici*'s experience, children are frequently denied these benefits because permanency hearings often fall far short of the statutory standards. The experience of the J. family illustrates as much. The family's case has been pending

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Welfare 6-7, 10 (Apr. 2022), https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf.

[2] *C.f.* Lucas A. Gerber, et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child. & Youth Servs Rev. 42, 52 (2019) (finding that vigorous interdisciplinary representation of parents in Article 10 proceedings speeds permanency for children, reduces their stays in foster care, and thus may save "millions of government dollars").

for *six years* without reunification or any resolution whatsoever. They have been entitled to approximately eleven permanency hearings during that time, but the record below indicates these hearings have fallen short of basic statutory requirements. For instance, in one such hearing, presided over by a referee, Ms. J. was deprived of the opportunity to present any evidence as to why her children should return home. (App. Br. 6.) Further, at multiple hearings, the referee and assigned judge declined to engage substantively with the question that the law places at the heart of every permanency hearing: is it necessary for the children to remain in the foster system, or can they be reunited with their parents at this time? (App. Br. 5-6.)

The J. family's experience is far from anomalous. In family courts across the state, *Amici* witness myriad flaws with permanency hearings. Courts routinely fail to consider whether children can safely be reunified with their parents before continuing their placement in the foster system, as statutorily required, and do not hold the local social services district or child protective agency responsible for the child's removal to their obligation to make reasonable efforts to reunite the family. More often than not, permanency hearings are hearings in name only: courts often rely on agency-produced reports alone and refuse to allow parents and children to make applications or present relevant evidence. Hearings are scheduled or adjourned outside of legally mandated timeframes or sent to referees without the

consent of the parties. These delayed and hollow hearings deprive families of their statutorily guaranteed opportunity for meaningful review of family separations and unnecessarily hinder speedy reunification.

The deficient state of permanency hearings persists, to the detriment of families, because a quirk of timing has allowed permanency hearing orders extending children's placement in the foster system to evade appellate review. Permanency hearing orders are appealable as of right. Yet, even if a parent timely appeals such an order, by the time the appeal is decided, another permanency hearing has almost certainly taken place and an intervening order has been issued. As in this case, the appellate divisions which have considered the issue have held that the issuance of the intervening order moots the appeal and have declined to recognize a mootness exception. These decisions have eviscerated families' access to appellate oversight of permanency hearings and removed a key mechanism to ensure that permanency hearings serve their intended function.

Accordingly, *Amici* urge this Court to make clear that appeals of permanency hearing orders extending children's placement in the foster system are not rendered moot merely by the issuance of subsequent extension orders. Doing so would bring these orders under the oversight of appellate courts, ensure that the hearings that lead to these critical decisions are conducted in compliance with the law, and limit further harm to New York families.

ARGUMENT

I. THE LEGISLATURE INTENDED FOR PERMANENCY HEARINGS TO PROVIDE MEANINGFUL COURT OVERSIGHT TO ENSURE THAT FAMILY REUNIFICATION WAS NOT NEEDLESSLY DELAYED.

The Legislature enacted Section 1089, governing permanency hearings, in 2005 as part of a major overhaul of the Family Court Act. The express purpose of the statute was to ensure that cases in which children had been removed from their homes stayed on the family court's calendar and received regular review, so that children who could safely reunify with their parents did not "stay needlessly longer in foster care." *See, e.g.*, Senate Introducer's Mem. In Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 61 (describing delays in holding permanency hearings under the prior statutory scheme and explaining that "each time a permanency hearing is delayed, a child potentially stays needlessly longer in foster care"); *id.* (noting that "[s]imply providing the Court with continuing jurisdiction should reduce by months the time a child spends in foster care."); *id.* at 62 (explaining that "[t]he requirement … that the date for the initial or next permanency hearing be set while the parties are in Court will keep the case on the Court's calendar and give all the parties notice that the Court will be reviewing the progress made toward reunification"); *see also Matter of Jamie J.*, 30 N.Y.3d 275, 284-86 (2017) (discussing the legislative history behind the passage of section 1089 and related

sections of the Family Court Act, which were intended to "reduce by months the time a child spends in foster care").

In keeping with this purpose, the primary inquiry at every permanency hearing is supposed to be whether the family can be safely reunited at that time. At the conclusion of each hearing, "upon the proof adduced," the family court must determine whether, "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent," the child can return home. Fam. Ct. Act § 1089(d)(1). If—and only if—reunification is not immediately possible, the court may then consider alternatives, such as "placing the child in the custody of a fit and willing relative . . . or continuing the placement of the child [in the foster system] until the completion of the next permanency hearing." *Id.* § 1089(d)(2)(ii).

If the court does not direct that the child be returned to their parents' care at the conclusion of the hearing, it then makes a series of additional findings aimed at furthering permanency for the child. First, the court must determine whether the child's "permanency goal"—the primary plan for the child's legal status and living arrangement—should remain "return to parent" or should be changed to adoption, guardianship, permanent placement with a relative, or "placement in another planned permanent living arrangement." *Id.* § 1089(2)(i)(A)-(E).

Second, the court must determine whether the local social services district or child protective agency[3] responsible for the child's removal made "reasonable efforts" to achieve permanency for the child. *Id.* § 1089(2)(iii). Notably, unless the parents' rights have been terminated or there has been a specific finding that reasonable efforts towards reunification are no longer required, *see id.* § 1039-b, the court is *always* required to assess whether the agency made efforts to "eliminate the need for placement" and "enable the child to safely return home" during the period at issue, even if the child's permanency goal for that period was not return to parent, *id.* § 1089(d)(2)(iii)(A)—a requirement that underscores the legislative intent to prioritize family reunification. If the goal for the child has been changed from return to parent, the court must also determine whether the agency made efforts to achieve that alternative goal during the relevant period. *Id.* § 1089(d)(iii)(B).

Third, the court may issue orders requiring the agency to take specific steps as "future reasonable efforts" towards reunification, such as orders directing the agency to provide services tailored to address the issues underlying the child's placement in the foster system, to expand visitation, or to assist the family to

[3] The local social services agency varies in name across New York State. In New York City, the responsible entity is the Administration for Children's Services, while in most places, the Local Department of Social Services is responsible. In this brief, we will refer to this entity as the "agency" and acknowledge that it may vary depending on the structure of the county in question.

obtain "adequate housing, employment, counseling, medical care or psychiatric treatment." *Id.* §§ 1089(d)(2)(viii)(A), (d)(2)(viii)(F).

To ensure that the family court has a sufficient record upon which to make these crucial findings, the Legislature included multiple provisions aimed at ensuring that permanency hearings are in fact substantive evidentiary *hearings* that "provide a forum for a more thoughtful and substantive review of the issues that gave rise to foster care and that may be creating barriers to reunification or other permanency for the child." Senate Introducer's Mem. in Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 62.[4] All parties, including the child, have the right to be represented by counsel at the hearing and to present evidence. Fam. Ct. Act § 1089(d). In addition, prior to each hearing, the agency is required to submit a report detailing a wide range of topics, including the services offered to the parent, the steps the parent has taken to access the services, any barriers encountered in

[4] In furtherance of this goal, the State Child Welfare Court Improvement Project has developed a set of "guiding questions" and recommendations designed to ensure "high quality permanency hearings" that "maintain a sense of urgency" in moving children towards permanency and ensuring that the needs of children and families "are being met in a way that will promote permanency." NYS Unified Court System, Child Welfare Court Improvement Project, *Permanency Hearing Guiding Questions* 2 (2018), https://ww2.nycourts.gov/sites/default/files/document/files/2018-10/Permancency_Hearing_Guiding_Questions.pdf. The report identifies the "elements of a high quality permanency hearing" as including: thorough preparation by all parties; timely submission of permanency hearing reports that contain current and accurate information; timely provision of discovery; opportunity to be heard from all parties to the case including children and youth; a focus on the key issues of the case, including enough time to hold a meaningful hearing if requested by a party; a thorough examination of the reasonable efforts made to effectuate permanency and other determinations required by the law; and well-crafted orders that will guide the actions of the parties. *Id.*

delivering the services, and the progress the parent has made towards reunification; a description of the efforts the agency has made to enable the child to return home; a description of the efforts the agency has made to achieve the child's permanency goal, if that goal is not "return to parent"; and the permanency goal recommended by the agency. *Id.* §§ 1089(c)(3), (4), (5).

Finally, in furtherance of the Legislature's stated goal of preventing unnecessary delay and furthering regular, "planned-for" review of the family's progress towards reunification, Senate Introducer's Mem. in Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 62, section 1089 mandates that permanency hearings be held on a strict timeline. The court is required to hold an initial permanency hearing for every child who has been removed from their home within eight months of the child's entry into foster care. Fam. Ct. Act § 1089(a)(2). If the child is not returned to their parents at that time, the court must hold further permanency hearings every six months until the child is reunified with their parents or, if reunification is not possible, either attains permanency in another way or "ages out" of the foster system. *Id.* § 1089(a)(3). The date for the initial permanency hearing must be set as soon as the child is placed, *id.* § 1089(a)(2), and each subsequent date must be set at the conclusion of the prior hearing, *id.* § 1089(d)(2)(iv)—a requirement specifically intended to "obviate calendaring delays in Family Court" and "give all the parties notice that the Court will be reviewing

the progress made toward reunification." Senate Introducer's Mem. in Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 62. *See also Jamie J.*, 30 N.Y.3d at 284-86. Permanency hearings may be adjourned but must be completed within 30 days of the date on which they were originally scheduled to occur. Fam. Ct. Act §§ 1089(a)(2), (3).

II. THERE IS WIDESPREAD FAILURE TO COMPLY WITH THE REQUIREMENTS OF SECTION 1089.

In *Amici*'s experience, permanency hearings often fall far short of statutorily required standards. Recurring issues with permanency hearings include: courts' failure to (1) comply with the statutory mandate to reunify children with their parents when continued placement is no longer necessary; (2) hold full evidentiary hearings, even when there are material issues in genuine dispute; (3) ensure that findings are made based on up-to-date and accurate information; (4) comply with statutory timelines; (5) consider the possibility of finding that the agency failed to make reasonable efforts to enable the child to return home; and (6) obtain consent from the parties before sending permanency hearings to referees to hear and determine. As a result of these widespread and repeated failures, families who should be progressing towards reunification wait to receive the services they require to do so, and children who could be reunited with their parents instead remain in the foster system.

Failure to comply with the statutory mandate to reunify children with their parents when continued placement is no longer necessary: Regular permanency hearings exist so that children who can safely reunify with their parents do not "stay needlessly longer in foster care." Senate Introducer's Mem. in Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 61. That is why, at the conclusion of each permanency hearing, the family court is specifically required to determine whether the child is able to be returned to their parents at that time. Fam. Ct. Act § 1089(d). Yet, despite the clear directive of the statute, the default outcome at permanency hearings across the state is a continuation of the child's placement in the foster system. In *Amici*'s experience, it is rare for a family court to actively consider the possibility of immediate reunification at a permanency hearing—let alone actually terminate a child's placement and send the child home. This is true even when counsel for one of the parents or the child specifically contests the need for placement and demands a hearing to cross-examine agency staff regarding the information in the permanency hearing report or present their own evidence in support of reunification. Some courts will not even expand visitation between a parent and their child at a permanency hearing.

Failure to hold full evidentiary hearings, even when there are material issues in genuine dispute: In many parts of the state, "permanency hearings" are hearings in name only, as courts routinely treat these appearances as simple

“check-ins” at which the only evidence considered is the permanency hearing report submitted by the agency. At the close of the hearing, the court issues a perfunctory and formulaic order that extends the child’s placement in foster care, approves the agency’s recommended permanency goal for the next six months**,** and finds the agency made “reasonable efforts” toward reunification. In many counties, the only portion of the order that varies is the case caption.

Attorneys from one county reported having experienced at most *two* fully litigated permanency hearings over twenty-five or more years of practice. An attorney with a full caseload in another county has *never* litigated a permanency hearing. When she or her colleagues request the opportunity to put on evidence or cross-examine the agency caseworker regarding the information contained in the permanency hearing report, judges in their county simply note counsel’s “objection” and make the findings requested by the agency; at most, parents’ attorneys are permitted to engage in limited colloquy regarding inaccuracies in the permanency hearing report, which are only amended on the agreement of all counsel.

Failure to ensure that findings are made based on up-to-date and accurate information: Section 1089(c) requires the agency to submit a written “permanency hearing report” to the court at each permanency hearing, containing information about the child’s placement, the services offered to the parents, the

parents' progress, the visitation plan, and other key topics to be addressed at the hearing. *See* Fam. Ct. Act § 1089(c). In most cases, this report produced by the agency is the sole evidence considered at permanency hearings, with parents' and children's counsel not even given an opportunity to cross-examine the Agency employee who prepared the report regarding the basis of the information and conclusions contained in the report.

Yet, in *Amici*'s experience, these reports almost never contain detailed information about the basis for the agency's position that the children should not be returned to their parents' care at the time of the permanency hearing, or the specific steps the agency thinks the parents need to take to achieve reunification—a glaring omission given the findings required to be made at the conclusion of each permanency hearing. *See id.* § 1089(d). The New York State template for all permanency hearing reports includes a section asking the agency to "describe the reason placement continues to be necessary and in accordance with the best interests and safety of the child(ren), including whether the child(ren) would be at risk of abuse or neglect if returned to the parent,"[5] but agencies' responses to this inquiry are generally brief and uninformative, at most consisting of a restatement of the initial allegations against the parents or a statement that the children must

[5] For an example of the template, see NYS Office of Children & Family Services, *Job Aid: Permanency Hearing Reports*, Appendix A, PH-1, https://ocfs.ny.gov/connect/jobaides/JA%20Permanency%20Hearing%20Reports%20Job%20Aid_FINAL.pdf (last visited Jan. 6, 2025).

remain in the foster system because their parents have not yet completed their service plan.

Additionally, permanency hearing reports regularly contain incomplete information regarding other essential topics and are filled with inaccuracies. It is not uncommon for reports to contain basic factual errors regarding the ages of the children, the services parents are engaged in, the visitation schedule, or even the names of the parties themselves. Reports are cut-and-pasted from those prepared for prior permanency hearing dates, regardless of changes in the family's circumstances—or even from reports prepared for *other families*, complete with the other family's names and identifying information. Reports rarely contain complete information about parents' progress in services and often include little or no information about the quality of the family's visitation and the interaction between parents and their children observed by agency staff. Courts often decline to order the agency to provide updated discovery to parents prior to permanency hearings, leaving parents at a disadvantage both in terms of presenting favorable information about their families and in contesting the reports' inaccuracies if they are able to cross-examine agency employees.

Failure to comply with statutory timelines: As the facts of this case indicate, and as this Court is aware, delays are endemic in the state's family courts,

especially—but not only—in the five boroughs of New York City.[6] These delays affect permanency hearings as well. Permanency hearings must be held every six months and must be completed within 30 days of the initial "date certain" on which they were scheduled to begin. Fam. Ct. Act §§ 1089(a)(2)-(3). When permanency hearings are treated as mere "check-ins," as described above, or are genuinely uncontested, they are often—although not always—completed within these statutory timelines. But when permanency hearings *are* treated as the substantive evidentiary hearings they are meant to be, they often extend far longer than 30 days.

This is because permanency hearings are generally scheduled for a mere half-hour, in keeping with the idea that they should be mere "check-ins" requiring limited court time. Yet, if counsel for one of the parents or the child contests the child's continued placement in foster care, the reasonable efforts finding, or simply

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[6] *See, e.g.*, New York Advisory Comm. to the U.S. Comm'n on Civil Rights, *Examining the New York Child Welfare System and Its Impact on Black Children and Families* 78-79 (May 2024), https://www.usccr.gov/files/2024-05/ny-child-welfare-system-sac-report_0.pdf; New York State Senate Comm. on the Judiciary, *et al.*, *The Crisis in New York's Family Courts* 3, 11-12, 16, 21, 23, 29 (Feb. 2024), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/2.12-family-court-hearing-report-w-graphics-1.pdf; Franklin H. Williams Judicial Comm'n on the New York State Courts, *Report on New York City Family Courts* 6, 7, 12, 22 (Dec. 2022), https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final %20Report.pdf; Jeh Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts* 56-57 (Oct. 2020), http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqual JusticeReport.pdf; New York State Bar Ass'n Task Force on Family Courts, *Final Report* 29-35 (Jan. 2013), https://nysba.org/app/uploads/2020/02/Task-Force-on-Family-Courts-Final-Report. pdf; Annie E. Casey Foundation, Special Child Welfare Advisory Panel, *Advisory Report on Front Line and Supervisory Practice* 45-46 (Mar. 2000), http://files.eric.ed.gov/fulltext/ED439189.pdf.

asks that they be permitted to cross-examine the agency caseworker concerning the contents of the permanency hearing report, the appearance will almost certainly take more than a half-hour and must be adjourned. Given the family court's overburdened docket, available dates are nearly always weeks or months in the future and may also be limited to 30 minutes or an hour at a time.

As a result, contested permanency hearings are almost never completed within 30 days—and frequently take many months to finish. In New York City, where court time is especially scarce, families may go up to 18 months or more between completed permanency hearings. This practice not only violates the law and delays families' progress towards reunification but is also remarkably inefficient: by the time of the adjourn date, the family's circumstances often have changed, requiring the parties to re-open examination of completed witnesses and otherwise use court time to update the evidence.

Other issues that delay the completion of permanency hearings include the agency's failure to serve permanency hearing reports timely in accordance with the law, *see* Fam. Ct. Act § 1089(b)(1); the agency's failure to ensure that caseworkers with knowledge of the family are present in court on scheduled hearing dates; inaccurate or incomplete permanency hearing reports, which require litigants to use up court time correcting errors rather than addressing substantive issues; and administrative adjournments caused by the need to accommodate other cases on

the family court's crowded docket. Delays in the completion of permanency hearings delay families' access to needed services—which may be ordered as future reasonable efforts required to be provided by the agency, *see* Fam. Ct. Act §§ 1089(d)(2)(viii)(A), (d)(2)(viii)(F)—as well as progress towards reunification through the expansion of visits, and, ultimately, reunification itself.

Failure to consider the possibility of finding that the agency failed to make reasonable efforts to enable the child to return home: In *Amici*'s experience, family courts also fail to enforce the statute's reasonable efforts requirement, making findings that agencies have made such efforts essentially by rote. Attorneys from across the state report that they have seen at most only a handful of "no reasonable efforts" findings over many years of practice—and many attorneys have never seen one at all. This is not a new pattern: a 2009 study "of 463 New York City cases involving children who had been in foster care for at least two years, and thus lacked legal permanency for a significant period of time, revealed that judges found that the government had made reasonable efforts to reach permanency in 457 cases."[7]

Referring permanency hearings to referees to hear and determine without clear instructions regarding the scope of their authority or without

[7] Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 Conn. Pub. Int. L.J. 13, 27 (2010).

the consent of the parties: In some parts of the state, courts regularly send permanency hearings to referees to hear and determine—sometimes even without the consent of the parties, in violation of New York law. C.P.L.R. § 4317(a); *see also Batista v. Delbaum, Inc.*, 234 A.D.2d 45, 46 (1st Dept. 1996). In *Amici*'s experience, this practice creates an additional obstacle to family reunification, because many referees either believe they are not authorized to send children home at a permanency hearing, no matter what the evidence establishes, or do not appear to be comfortable exercising that authority. Referees are also less likely than judges to expand visitation between parents and children at permanency hearings or to enter orders directing the agency to provide specific services tailored to the family's needs as future reasonable efforts pursuant to sections 1089(d)(2)(viii)(A) and (d)(2)(viii)(F).

III. IN THE ABSENCE OF A MOOTNESS EXCEPTION, THE DEFICIENCIES OF PERMANENCY HEARINGS HAVE ESCAPED APPELLATE REVIEW.

Flawed permanency hearings lead to flawed placement orders. But those placement orders, and the hearings that underlie them, have evaded meaningful appellate review because of a persistent issue of timing, as this case aptly illustrates.

If family courts hold permanency hearings are held as scheduled, they issue a new permanency order extending or discontinuing placement approximately

every six months. Fam. Ct. Act § 1089(a)(2-3). A parent who timely appeals a placement order has six months following the filing of a Notice of Appeal to perfect their appeal. 22 NYCRR § 1250.9 (a). Often, parents are assigned new counsel for the purposes of appeal. The assignment of counsel and the time that it takes for new counsel to familiarize themselves with the record may take several months. But if counsel for a parent uses the full six months to which they are statutorily entitled to perfect their appeal, by the time their appeal is perfected and the other parties have filed their briefs, 22 NYCRR § 1250.9 (c), a superseding placement order will have been issued.

Even if counsel for a parent moves swiftly to perfect their appeal, the appellate divisions are unlikely to calendar it within the six-month window.[8] In *Amici*'s experience, some appellate divisions' backlogs are such that even if a subsequent permanency hearing and placement order are delayed beyond the six-month mark, as they often are, an appellate division is still exceedingly unlikely to render a decision before the subsequent placement order is issued.

Practically speaking, the mandated timeline of permanency planning hearings outlined in section 1089 offers no way to avoid appeals of permanency

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[8] *See, e.g.*, Alan D. Scheinkman, *Tackling the Backlog: New Initiatives in the Second Department*, https://www.nycourts.gov/courts/ad2/PJ_Scheinkman_Initiatives.shtml (last visited Jan. 6, 2025) ("As appellate practitioners are all too well aware, the Appellate Division, Second Department, has a significant backlog of perfected civil appeals awaiting calendaring. … [I]t can take as long as 18 months for a civil appeal to obtain a place on the court's day calendar and then more time for a decision to be rendered.").

hearing orders mooting out when the appealable issue is an extension of placement. The three appellate divisions that have considered the question have all held that where a subsequent placement order has been issued, a challenge to a permanency order continuing placement is moot. *See Matter of Malazah W.*, 183 A.D.3d 754, 755 (2d Dept. 2020); *Matter of Jihad N.*, 180 A.D.3d 1164, 1165 (3d Dept. 2020); *Matter of Destiny F.*, 217 A.D.3d 1400, 1401 (4th Dept. 2023); *c.f. Matter of Jonathan F.*, 3 A.D.3d 336, 336 (1st Dept. 2004) (dismissing appeal of permanency order continuing placement on a delinquency docket as moot where order had expired). The appellate divisions do reach the merits on appeals challenging permanency orders that involve changes to permanency goals or contesting reasonable efforts determinations. *See, e.g.*, *Matter of Lacee L.*, 153 A.D.3d 1151, 1151 (1st Dept. 2017), *aff'd sub nom. Lacee L. v. Stephanie L.*, 32 N.Y.3d 219 (2018) (reasonable efforts); *Matter of Titus P.E.*, 213 A.D.3d 929, 931 (2d Dept. 2023) (reasonable efforts); *Matter of Bianca Q.Q.*, 80 A.D.3d 809, 810 (3d Dept. 2011) (reasonable efforts); *Matter of Jaylynn WW.*, 202 A.D.3d 1394, 1396 (3d Dept. 2022), *leave to appeal denied*, 38 N.Y.3d 907 (2022) (goal change). But parents like Tameka J., who are contesting permanency hearing orders that continue their children's placement in the foster system, must navigate a near-impossible timeframe and are virtually always denied access to substantive appellate review of this issue.

A survey of appellate division cases reveals just how rare it is for parents in Tameka J.'s position to receive appellate review on the merits of their claim. Cases collected from across the departments show that it is common for a subsequent extension of placement to be issued before an appellate division decides an appeal of the prior placement extension. *See, e.g.*, *Lacee L.*, 153 A.D.3d at 1151; *Matter of Jolani P.*, 188 A.D.3d 1071, 1072 (2d Dept. 2020); *Malazah W.*, 183 A.D.3d at 755; *Jaylynn W.W.*, 202 A.D.3d at 1396; *Jihad N.*, 180 A.D.3d at 1165; *Destiny F.*, 217 A.D.3d at 1401; *Matter of Kimberly G.*, 203 A.D.3d 1418, 1419 (3d Dept. 2022).[9] As a result, it is exceedingly rare for the appellate division to reach the merits of parents' claims that a family court improperly continued placement. It has done so in just a handful of cases over the last twenty years. *See Matter of Sabrina M.A.*, 195 A.D.3d 709, 709-10 (2d Dept. 2021) (rejecting father's claims without mention of mootness); *Jolani P.*, 188 A.D.3d at 1072-73 (reaching merits of mother's claims where there had not yet been a subsequent permanency hearing during the COVID shutdown era); *Matter of Anthony Q.Q.*, 48 A.D.3d 1014, 1014-15 (3d Dept. 2008) (rejecting father's claims without mention of mootness). Instead, the lion's share of appellate cases considering challenges to children's continued placement are dismissed as moot, rendering parents' statutory right to

[9] This is a representative sample of cases in which the appellate courts reviewed *some* aspect of a permanency decision where a subsequent permanency decision had been issued in family court prior to the issuance of the appellate decision.

appeal all orders issued in Article 10 proceedings hollow as to these crucial determinations.[10]

This review of appellate case law makes clear why this Court should find that permanency decisions extending placement are within an exception to the mootness doctrine. *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010) (setting forth standard for exception to mootness). These decisions are "substantial," *id.*, as they immediately affect families' substantive due process rights. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). They are likely to recur, *Maul*, 14 N.Y. at 507, as permanency hearings continue across the state for thousands of children each year. And they are likely to evade review, *id.*, given the temporal mismatch between the permanency hearing timeframe and the appellate timeframe. *See Matter of Heaven C.*, 71 A.D.3d 1301, 1302-03 (3d Dept. 2010) (acknowledging that the frequency of permanency hearings and the ensuing application of the mootness doctrine often means that issues arising from these hearings are likely to recur and evade appellate review, while constraining application of the exception to mootness to the issue of whether the permanency hearing report had to be signed). By declining to recognize an exception to the mootness doctrine for these

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[10] A review of appellate decisions over the last decade shows that in appeals where parents challenged the continuation of placement or the continuation of a permanency goal but *did not* challenge reasonable efforts or some other specific aspect of the permanency hearing order, the appellate divisions reached the merits in just 4 of 23 cases.

cases, the appellate divisions have allowed lawless permanency hearing practices to go unchecked.

IV. THE UNCHECKED DEFICIENCIES OF PERMANENCY HEARINGS DELAY FAMILY REUNIFICATION AND HARM MARGINALIZED NEW YORK FAMILIES.

The absence of appellate review for placement decisions allows deficiencies in permanency hearings to persist. Those deficiencies cause significant, lasting harm to New York families, particularly low-income families and families of color. Permanency hearings are designed to reunite families more swiftly; if they are not conducted in a timely fashion and if courts do not allow families to present evidence and fail to apply the proper legal standard favoring reunification, *Amici's* experience shows that courts are more likely to issue orders continuing family separation. The case law, in turn, shows that the appellate divisions are unlikely to upset—or even review—those orders. Thus, more children stay in the foster system, for longer periods of time, in contravention of clear legislative intent.

Family separation, no matter its duration, causes concrete, lifelong harm to children. Decades of social science research finds that children experience placement in foster care as a traumatic event.[11] They feel the "debilitating effects"

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[11] *See, e.g.*, Delilah Bruskas & Dale H. Tessin, *Adverse Childhood Experiences and Psychosocial Well-Being of Women Who Were in Foster Care as Children*, 17 Permanente J. 131, 138 (2013); Miriam R. Spinner, *Maternal-Infant Bonding*, 24 Canadian Fam. Physician 1151, 1151 (1978); New York Advisory Comm. to the U.S. Comm'n on Civil Rights, *supra*, at

of an all-encompassing uncertainty introduced into their lives, as they do not know with whom they will live, for how long, why they are there, when they will see their families, and when (or if) they will go home.[12] Their ability to form positive and healthy attachments can be permanently and negatively impacted.[13] Compared to similarly situated children who stayed home, children removed to foster care experience higher rates of teen pregnancy, medical episodes, and involvement with the juvenile delinquency system.[14]

While even short-term foster placements damage children,[15] delayed reunification deepens these harms. Children experience time differently than adults. As the American Academy of Pediatrics noted, children's "sense of time focuses exclusively on the present and precludes meaningful understanding of

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85; Melissa Friedman and Daniella Rohr, *Reducing Family Separations in New York City: The Covid-19 Experiment and a Call for Change*, 123 Colum. L. Rev. F. 52, 58-61 (2023).

[12] Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What is Going On? Examining Children's Lived Experience of the Transition Into Foster Care*, 32 Child & Youth Serv. Rev. 437, 442-43 (2010); Monique B. Mitchell, The Neglected Transition: Building a Relational Home for Children Entering Foster Care (2016).

[13] Douglas F. Goldsmith, David Oppenheim, & Janine Wanlass, *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 Juv. & Fam. Ct. J. 1, 6 (2004).

[14] Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1584 (2007) (cited in *Matter of Jamie J.*, 30 N.Y.3d 275, 280 n.1 (2017)).

[15] Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Pa. J.L. & Soc. Change 207, 212 (2016); Administration for Youth and Families, 65 Fed. Reg. 4051, 4052 (Jan. 25, 2000).

'temporary' versus 'permanent' or anticipation of the future."[16] Younger children in particular cannot comprehend periods of weeks or months.[17] Thus, "[d]isruption . . . with a caregiver for even 1 day more may be stressful."[18] The longer the child's placement is extended, the more harm accrues.[19]

The harms of extended family separation fall disproportionately on low-income families and families of color. Black and Latine children continue to be overrepresented in the foster system throughout New York State.[20] The disproportionality is highest in New York City, where Black or Latine children make up 92 percent of children in the foster system, but only 56 percent of the general population.[21] Across the rest of state, Black and Latine children make up 49 percent of the population in the foster system, compared with 31 percent of the general population.[22] Further, a high proportion of children in the foster system

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[16] American Academy of Pediatrics, Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care* 106 Pediatrics 1145, 1146 (Nov. 2000), https://www.umassmed.edu/globalassets/faces/documents/fostercare-general/developmental-issues-for-young-children-in-foster-care.pdf
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] NYS Office of Children & Family Services, Office of Research, Evaluation and Performance Analytics, *Disproportionate Minority Representation in Child Welfare Services Dashboard: 2023 & Five Year Trends* (2024), https://ocfs.ny.gov/reports/sppd/dmr/Disparity-Rate-Packet-2023-Dashboard.xlsx; Jeh Johnson, *supra*, at 26; New York Advisory Comm. to the U.S. Comm'n on Civil Rights, *supra*, at 39-40.
[21] NYS Office of Children & Family Services, Office of Research, Evaluation and Performance Analytics, *supra*.
[22] *Id.*

come from low-income families.[23] The concentration of the harms of the foster system on low-income families and families of color inflicts broader harms on low-income communities and communities of color, eroding trust in social institutions and increasing social isolation.[24]

The absence of meaningful permanency hearings and the absence of meaningful appellate review of permanency hearing orders continuing placement extends the duration of family separation and deepens harms to New Yorkers who are already marginalized and disadvantaged. The statutory requirements for permanency hearings are far more than mere formalities. They are a mechanism for reducing these very real harms. Without the enforcement of these requirements, New York families suffer.

CONCLUSION

For the foregoing reasons, this Court should recognize a mootness exception for appeals from permanency hearing orders extending children's placement in the foster system.

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[23] The New School Center for New York City Affairs, *Data Brief: Child Welfare Investigations and New York City Neighborhoods* 4-5 (June 2019), https://www. centernyc.org/data-brief-child-welfare-investigations; New York State Bar Association, *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare* 6-7, 10 (Apr. 2022), https://nysba.org/app/ uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf.

[24] Kelley Fong, Investigating Families 37-45 (2023); Jeh Johnson, *supra*, at 57; New York Advisory Comm. to the U.S. Comm'n on Civil Rights, *supra*, at 91.

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)(1), Amy Mulzer hereby certifies that according to the word count feature of the word processing program used to prepare this brief, this brief contains 6,490 words, which complies with the limitations stated in § 500.13(c)(1).

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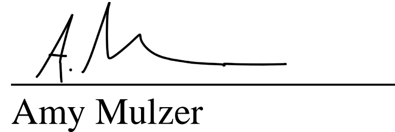

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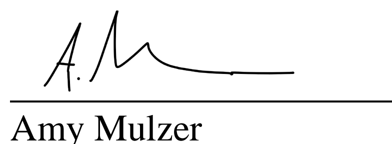

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