99-7218

To be argued by:
MARC FALCONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PWRW & G

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JOEL A., MICHAEL D., ERIC R., DAVID S., MAXX R. and RAY D.

Intervenor-Plaintiffs-Appellants

MARISOL. A, by her next friend, Rev. Dr. James Alexander Forbes, Jr., by her next friend Raymond Cruz, LAWRENCE. B, by his next friend, Dr. Vincent Bonagura, THOMAS C., by his next friend, Dr. Margaret T. McHugh, SHAUNA D., by her next friend, Nedda de Castro, OZZIE E., by his next friends, Jill Chaifetz and Kim Hawkins, DARREN F., DAVID F., by their next friends, Juan A. Figueroa and Rev. Marvin J. Owens, BILL G., VICTORIA G., by their next friend, Sister Dolores Gartanutti, BRANDON H., by his next friend, Thomas H. Moloney, STEVEN I., by his next friend, Kevin Ryan, on their own behalf and behalf of and all others similarly situated, WALTER S., by his next friends, W.N. and N.N., grandparents, RICHARD S., by their next friends, W.N. and N.N., grandparents, DANIELLE J., by her next friend, Angela Lloyd,

Plaintiffs-Appellees,

v.

RUDOLPH W. GIULIANI, Mayor of the City of New York, MARVA LIVINGSTON HAMMONS, Administrator of the Human Resources Administration and Commissioner of the Dept. of Social Services of the City of New York, GEORGE E. PATAKI, Governor of the State of New York, JOHN JOHNSON, Commissioner of the New York Office of Children and Family fka Commissioner of the Dept. Social Services of the State of New York, NICHOLAS SCOPPETTA, in his official capacity as Commissioner of the New York City Administration for Children's Services,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF INTERVENOR-PLAINTIFFS-APPELLANTS
JOEL A., MICHAEL D., ERIC R., DAVID S., MAXX R. AND RAY D.**

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PRELIMINARY STATEMENT

Intervenor-Plaintiffs-Appellants Joel A., by his next friend Jonathan Cole, Michael D., by his next friend Elise Harris, Eric R., by his next friend Jewelnel Davis, David S., by his next friend Michael Williams, Maxx R., and Ray D. (the "*Joel A.* Objectors") appeal from an order and judgment approving a class action settlement in the Southern District of New York (Ward, J.).[1/]

Lesbian, gay, bisexual, and transgendered youth in the New York City foster care system are targeted for relentless violence, harassment, discrimination, and abuse due to their sexual orientation and gender atypicality. [JA 801][2/] This victimization is perpetrated largely by their straight peers within the class certified in this action (the "*Marisol* Class"), but also by social workers, child care workers, and New York City and State officials charged with the care of these young people. [JA 801-06] Moreover, because this victimization is a direct response to the victims' sexual orientation and identity, it has a profound impact not only on the victims' physical well-being, but also on the victims' mental health and personal development and on the physical, mental, and developmental well-being of indirect victims, *i.e.*, those young people in the foster care

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1/ The *Joel A.* Objectors appear under pseudonyms to protect their privacy.

2/ "JA" designates the Joint Appendix, filed April 15, 1999.

system who live in fear, hiding feelings of same-sex attraction. [JA 813-19]

The *Joel A.* Objectors have filed a putative class action lawsuit on behalf of these severely victimized youth, seeking relief tailored to the cause of their injuries, systemic bias and ignorance concerning adolescent homosexuality. [JA 800 *et seq.*] That lawsuit is now pending before the Honorable Robert J. Ward in the Southern District of New York, who entered the order and judgment in this case from which the *Joel A.* Objectors now appeal.

The *Joel A.* Objectors oppose the *Marisol* Settlement because it imposes oppressively overbroad restrictions on the Class members' rights of access to the courts, in violation of public policy, the Due Process Clause of the United States Constitution, and Federal Rules of Civil Procedures 23(e). In addition, these extraordinary concessions to the *Marisol* defendants were given in exchange for illusory relief. Finally, the record of the fairness hearing and the papers submitted in support of the settlement contain no evidence that the subclass of which the *Joel A.* Objectors are members was adequately represented *vis à vis* the other *Marisol* subclasses during settlement negotiations.

STATEMENT OF JURISDICTION

This is an appeal from a final order approving the complete settlement of a class action lawsuit. The district court exercised jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The district court announced its final decision on the record in open court on January 22, 1999. The *Joel A.* Objectors filed their notice of appeal on February 17, 1999, making this appeal timely pursuant to Fed. R. App. P. 4(a)(2). The district court issued an opinion and entered a written order and final judgment on March 31, 1999.

ISSUES PRESENTED

(1) Did the district court abuse its discretion by approving class action settlement agreements that contain a release and covenants-not-to-sue that are oppressively and impermissibly overbroad in that they severely restrict class members' access to the courts for the purpose of asserting claims that the class representatives did not have standing to litigate and in which the class representatives had no personal stake?

(2) Did the district court abuse its discretion by approving class action settlement agreements that contain a release and covenants-not-to-sue that are oppressively and

impermissibly overbroad in that they severely restrict class members' access to the courts for the purpose of seeking systemic relief from injuries inflicted after the date of the settlement?

(3) Did the district court abuse its discretion by approving a class action settlement pursuant to which an oppressively broad release and covenants-not-to-sue were given in exchange for relief with a practical value so speculative that there is a strong danger that the settlement will have absolutely no value to the class?

(4) Did the district court abuse its discretion by approving an omnibus settlement of claims asserted by three subclasses, certified for the purpose of assuring adequate representation of divergent interests within the class, despite the absence of any indication that, in fact, the subclasses were adequately represented *vis à vis* each other during settlement negotiations?

STATEMENT OF THE CASE

A.
The *Marisol* Litigation and Settlement

On December 13, 1995, eleven named plaintiffs (the "*Marisol* Named Plaintiffs") filed a complaint in the United States District Court for the Southern District of New York against various officials of the City of New York (the "City Defendants") and against various officials of the State of New York (the "State Defendants") who were alleged to be responsible

for the operation or oversight of the New York City child welfare system. [JA 77 *et seq.*] Each defendant, including the Mayor of the City of New York and the Governor of the State of New York, was sued in his or her official capacity. [JA 92-94]

1. *The* Marisol *Complaint*

The complaint contained extensive factual allegations concerning the Named Plaintiffs. [JA 106-41] They purported to represent an omnibus class (the "*Marisol* Class") consisting of

> [a]ll children who are or will be in the custody of the New York City Child Welfare Administration ("CWA"), and those children who, while not in the custody of CWA, are or will be at risk of neglect or abuse and whose status is known or should be known to CWA.

[JA 86]

On behalf of this expansive class, the Named Plaintiffs asserted claims for violations of a sweeping array of legal rights, defined at the highest level of generality. For example, in their First Cause of Action, the Named Plaintiffs alleged:

> As a result of the foregoing actions and inactions of the defendants, plaintiff children are being deprived of the rights conferred upon them by the First, Ninth and Fourteenth Amendments to the United States Constitution. These rights include but are not limited to their right to protection from harm; their right not to be deprived of a family relationship absent compelling reasons; their right not to be harmed–physically, emotionally, developmentally or otherwise–while in state custody; their right not to remain in state custody unnecessarily; their right to be housed in the least restrictive, most appropriate and family-like placement; their right to treatment; their right to equal

> protection of the law and not to be discriminated against by virtue of their handicap or disability; their right to receive care, treatment and services consistent with competent professional judgment; and their right not to be deprived of state or federally created liberty or property rights without due process of law.

[JA 181]

The Named Plaintiffs' Prayer for Relief, like their causes of action, was stated in the broadest terms possible. They asked the district court to

> [e]nter declaratory and injunctive relief necessary and appropriate to remedy the defendants' violations of the plaintiffs' rights under the First, Ninth and Fourteenth Amendments to the United States Constitution; the Adoption Assistance and Child Welfare Act of 1980, 42 United States Code §§ 620-27, 670-79a; the Child Abuse Prevention and Treatment Act, 42 United States Code §§ 5101-06a; the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program of the Medicaid Act, 42 United States Code §§ 1396a, 1396(a) and (r); the Multiethnic Placement Act of 1994, 42 United States Code § 622(b)(9); the Americans with Disabilities Act, 42 United States Code §§ 12101 et seq.; the Rehabilitation Act of 1973, 29 United States Code § 794, 794a; Article XVII of the New York State Constitution; the New York State Social Services Law, Articles 2, 3, 6 & 7; the New York State Family Court Act, Articles 6 & 10; and applicable state regulations, 18 N.Y.C.R.R. §§ 400-484.

[JA 107]

None of the Named Plaintiffs was alleged to be lesbian, gay, bisexual, or transgendered. None alleged injury resulting from bias-related violence, abuse, or harassment or

discrimination based on sexual orientation. None sought relief from discrimination on the basis of sexual orientation or gender atypicality under the Equal Protection Clause of the United States Constitution, nor on any basis under the equal protection and anti-discrimination provisions of the New York State Constitution, N.Y. CONST. art. I §§ 6, 11, or the New York City Human Rights Law, N.Y. COMP. CODES R. & REGS. tit. 8 chs. 1, 6 (1998).

2. Marisol *Class Certification*

On June 18, 1996, the district court certified the *Marisol* Class, as defined in the *Marisol* complaint, pursuant to Fed. R. Civ. P. 23(b)(2). [JA 190 *et seq.*] The court subsequently granted the City and State Defendants' applications for interlocutory appeal from the class certification. [JA 1398-99]

This Court affirmed the *Marisol* Class certification, but with reservations. *See Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). The Court noted that the district court found certain legal and factual issues common to all members of the *Marisol* Class by conceptualizing those issues at a "high level of abstraction," and that the district court's generalized characterization of the claims raised by the Named Plaintiffs "stretches the notions of commonality and typicality." *Id.* at 377. Although the Court concluded that it had no basis, "at [that] stage of the litigation," to find that the district court

had abused its discretion by certifying the Class, *id.*, this Court instructed the district court to certify subclasses "well in advance of trial":

> the district court must engage in a rigorous analysis of the plaintiffs' legal claims and factual circumstances in order to ensure that appropriate subclasses are identified, that each subclass is tied to one or more suitable representatives, and that each subclass satisfies Rule 23(b)(2).

Id. at 378-79. This Court directed the district court to undertake such a rigorous analysis so that the district court could "weed out, and, if necessary, dismiss those claims for which no named plaintiff is an adequate representative." *Id.* at 379. Moreover, the Court provided guidance to assist the district court in this task:

> One possible method of developing proper subclasses would divide the present class based on the commonality of the children's particular circumstances, the type of harm the children allegedly have suffered, and the particular systemic failures which the plaintiffs assert have occurred.

Id.

On April 23, 1998, the district court certified three subclasses proposed by the Named Plaintiffs:

Subclass I:	Children whom the defendants know or should know have been abused or neglected/maltreated by virtue of a report of abuse or neglect/maltreatment.
Subclass II:	Children in families in which there is an open indicated report of abuse or neglect.

Subclass III: Children in the custody of the Administration for Children's Services.

[JA 424-26]

According to the *Marisol* complaint, Subclass Three consisted of approximately 43,000 children as of late 1995. [JA 80]

3. *The* Marisol *Settlement*

In July 1998, "[a]fter more than two years of intensive discovery and on the eve of the July 27, 1998 trial date" set by the district court in its Fourth Amended Scheduling Order, Class counsel and the City and State Defendants informed the court that they were engaged in settlement negotiations. [JA 1401] By that time, the City and State Defendants had produced over 100,000 pages of documents to Class counsel and the parties had exchanged extensive expert reports. [JA 1420-21][3/] Over thirty depositions had been taken. [JA 1357] All parties had submitted proposed findings of fact to the district court. [JA 1421] Class counsel believed that they were ready for trial and they were "confident" that they would prevail. [JA 1156] On December 2, 1998, the parties presented two settlement agreements for district court approval pursuant to Fed. R. Civ. P. 23(e): an agreement between the *Marisol* Class and the City Defendants (the "City Settlement Agreement"), and a separate agreement between the *Marisol* Class

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[3/] See also [JA 1357] (Class counsel stating that plaintiffs reviewed "hundreds of thousands of pages of documents").

and the State Defendants (the "State Settlement Agreement"). [JA 728, 755]

The Settlement Agreements provide no direct, concrete, effective or reasonably certain relief for the *Marisol* Class members, yet the Agreements bind Class members to a sweeping release and covenants-not-to-sue. [JA 745-47, 750-51, 775-76] These non-suit provisions extend to claims for relief from future injuries, inflicted after the date of the settlement, as well as to claims for which the Named Plaintiffs lack standing to litigate and in which they have no stake.

Moreover, the terms of the Settlement Agreements indicate that the three *Marisol* Subclasses were treated as a monolith during settlement negotiations, even though the Subclasses had been separately certified to assure adequate representation of their diverse interests *vis à vis* each other. Neither Settlement Agreement even mentions the Subclasses, and the City Settlement Agreement expressly defines "Plaintiffs" with reference to the omnibus class initially certified by the district court in 1996. [JA 730]; *see also* [JA 757] (omission in State Agreement of this Court's order concerning subclasses).

(a) *The City Settlement Agreement*

The City Settlement Agreement provides for the establishment of an independent, privately-funded, Advisory Panel authorized to study five defined areas of the operations of the New York City Administration for Children's Services ("ACS") and

to produce a written Initial Report on each area.[4/] [JA 734-35] In each Initial Report, the Panel may recommend steps for ACS to take as part of the agency's reform effort. [JA 734] These recommendations are not binding; they are "purely advisory." [JA 734] Moreover, the Panel's discretion to make even these non-binding suggestions is restricted. The Panel may not even "*attempt* to suggest approaches" that would differ from the "overall goals and principles" of a reform plan issued by ACS approximately two years before the date of the Settlement. [JA 734] (emphasis added)

The Panel may, "at its sole discretion," extend its review and the subject matter of each Initial Report to ACS activities and programs that, although outside the five defined subject matter areas, nevertheless "directly affect" the subject matter of that Initial Report. [JA 735]

The Panel may provide "informal" written or oral advice to ACS concerning activities and programs that do not "directly affect" one of the five defined subject matter areas, but the

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[4/] Neither the members of the Advisory Panel—four experts in the child welfare field [JA 733]—nor the foundation which funds the Advisory Panel [JA 745] appears to be a party to the Settlement Agreement or to the *Marisol* litigation. They therefore appear not to be bound by the Agreement and to be beyond the jurisdiction of the court for purposes of enforcement. The City Settlement Agreement contains no provision fixing the parties rights *vis à vis* each other if the Advisory Panel cannot or does not perform its role as specified in the Agreement.

Panel may not include such advice "in any Advisory Panel review or report." [JA 736]

The Settlement Agreement establishes no schedule for the issuance of the Advisory Panel's Initial Reports, nor does it establish any fact-finding or other procedures for the Panel to follow.

After the Panel has completed all five of its Initial Reports, it will continue to review the five defined areas of ACS operations, and it will issue Periodic Reports on these areas. [JA 737-39] "The focus of the Periodic Reports will be to determine whether or not, in the Advisory Panel's opinion . . . , ACS is acting in good faith in making efforts toward reform in the operational areas being reviewed." [JA 737] The Panel may not determine whether ACS is acting in good faith based solely on whether ACS is implementing the Panel's recommendations, or adhering to schedules proposed by the Panel, or even "whether any reform efforts are actually effective in bringing about reform." [JA 737]

In addition, the Panel may not determine whether ACS is acting in good faith based solely on whether the City has complied with its only obligation under the entire Settlement Agreement, to provide the Panel with such information as the Panel may request. [JA 737-38] The City Settlement Agreement imposes no obligation whatsoever on at least one of the City Defendants, the Mayor of New York, who, according to the *Marisol*

complaint, "is responsible for ensuring that all New York City agencies comply with all applicable federal and state law." [JA 92-93]

Moreover, a "not in good faith" finding by the Panel is not an arbitral determination. It does not compel ACS or any of the City Defendants to alter their conduct and it does not establish legal liability to the Class. The only consequence of a "not in good faith" finding is that it entitles Class counsel to re-instate a portion of the *Marisol* class action lawsuit, subject to the City Defendants' right to rebut the Panel's bad faith finding in the district court. [JA 739-40]

In sum, *after* the Panel has issued all five of its Initial Reports (whenever that may be), and *if* the Panel subsequently finds that ACS is not pursuing its own reform agenda in good faith (a finding neither compelled nor even permitted based solely on the City Defendants' failure to achieved any degree of actual reform or remedy any violation of the Class members' legal rights), and *if* the City Defendants fail to rebut that finding in the district court, *then* the Class may re-instate those claims—and *only* those claims—already asserted in *Marisol* that are related to the subject matter areas in which the Panel has determined that ACS is not acting in good faith. Having re-instated that portion of the *Marisol* action, the Class will then bear the same legal burden they bore prior to Settlement: the Class must prove liability under the applicable laws already

identified in the *Marisol* pleadings (no new legal theories may be added) subject to all of the City Defendants' applicable defenses to liability and relief. [JA 739-40]

Lest there be any mistake about the very narrow and novel role that the Advisory Panel is to play under the City Settlement Agreement, the parties have expressly disclaimed "any rights for Plaintiffs to utilize the Advisory Panel as, in effect, arbitrators or administrative law judges with respect to any disputes Plaintiffs may have with ACS." [JA 739] The Panel is not a forum for resolving disputes between the Class, or individual Class members, and the City Defendants.[5/]

Nevertheless, the City Settlement Agreement binds Class members to a covenant not to sue and a release that place unprecedented restrictions on the Class members' access to the courts. First, the Agreement, which, by its own express terms, is not a consent decree [JA 733], bars the Class from bringing any action in court to enforce the Agreement itself, at least until and unless the Panel issues a Periodic Report that contains a finding of bad faith.[6/] [JA 739-40, 745-47] In other words, the Class will not have access to judicial enforcement of the

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[5/] In the very next sentence, though, the Agreement does guarantee "rights" to the *City* -- including the right to meet with the Panel before a finding of bad faith is issued -- that "shall [not be] limit[ed]." [JA 739-40]

[6/] It is not clear whether, even then, the Class could bring such an action, or would be limited to pursuing its legal claims stated in the *Marisol* pleadings. [JA 739-40]

Agreement until after the Panel has issued all five Initial Reports. *Supra* at 12-13.

Second, the City Settlement Agreement bars Class members from initiating any action for "systemic declaratory, injunctive, or other form of equitable relief" based on events occurring prior to the Settlement and "based on, arising out of, or *relating to* any claims that were *or could have been* asserted" in the *Marisol* pleadings. [JA 746] (emphasis added)

Third, the Agreement bars Class members from initiating any action, ever, for "systemic declaratory, injunctive, or other form of equitable relief" based on "facts, events, actions or omissions . . . which *relate in any way* to any claim raised in the *Marisol* litigation, as described in Plaintiffs' Statement of Claims to be Tried[7/] . . . and which occur *after* the signing of this Agreement and prior to December 15, 2000," the date on which the City Settlement Agreement expires. [JA 746] (emphasis added)

Fourth, the Agreement bars Class members from initiating, prior to December 16, 2000, "any *new* action for systemic declaratory, injunctive or other form of equitable relief based on facts, events, actions or omissions . . . which relate to claims raised [in the *Marisol* pleadings] which were not contained or described in Plaintiffs' Statement of Claims to be

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7/ These are set forth in the Pre-trial Order dated July 16, 1998. [JA 629-68]

Tried[8/] . . . and which occur *after* the signing of this Agreement and prior to December 15, 2000." [JA 746-47]

The agreement permits individual Class members to bring actions for damages and equitable relief, but such actions may seek only relief "tailored solely to the specific circumstances of that individual plaintiff." [JA 747]

(b) *The State Defendants' Settlement Agreement*

The State Settlement Agreement calls for the State Defendants to do several things: to oversee, monitor, supervise, review, evaluate, discuss, recommend, report, provide information, and advertise. [JA 755 *et seq.*] The Agreement also requires the State Defendants to implement a statewide computer system and to decrease the time it takes to answer calls at the State Central Register, which accepts reports concerning domestic violence. [JA 763-65] The Agreement does not, however, provide any direct, concrete, or reasonably certain relief to any members of *Marisol* Subclass Three, even though the State Defendants have oversight authority over ACS. This authority is acknowledged in the State Settlement Agreement provisions calling for the State's Office of Children and Family Services ("OCFS") to undertake case record reviews to determine whether ACS is in "substantial non-compliance with applicable laws, regulations and/or reasonable case work practice" and then to "direct ACS to take Corrective

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[8/] See note 4.

Action designed to improve ACS's performance in the specific areas of non-compliance." [JA 767] OCFS need not exercise this oversight authority prior to completing the case record reviews, and it need not complete these reviews until twenty-one months after entry of the order dismissing the claims against the State Defendants in this case. [JA 766-67] Given the City and State Defendants' record of failing to address obvious atrocities within New York City's child welfare system—as set forth in both the *Marisol* and *Joel A.* complaints [JA 106-80, 801-67]—it is highly likely that any exercise of authority by OCFS is at least two years off.

During those two years of continuing devastation, the *Marisol* Class members will be barred from pursuing relief against the State Defendants through class action claims, and even through individual lawsuits alleging system-wide violations arising out of such claims, even if based on facts or circumstances that occur after execution of the Settlement Agreement. [JA 745-46] Moreover, class-wide or systemic claims arising from new facts and/or circumstances that occur" after execution of the proposed Settlement Agreement would be barred forever if those claims "relate in any way to any claim raised in . . . the Pre-Trial Order" in *Marisol*. [JA 746]

B.
The *Joel A.* Objectors

On January 15, 1999, the *Joel A.* Objectors filed a putative class action lawsuit against certain New York City and State officials who are also defendants in *Marisol*. [JA 800 *et seq.*] Each of the *Joel A.* Objectors is a gay youth in the care and custody of the New York City Administration for Children's Services. [JA 806-09] They are all victims of intense bias-related violence, harassment, abuse, and discrimination based on sexual orientation perpetrated by their straight peers in the foster care system and by the City and State Defendants and the public and private entities for the actions of which the defendants are responsible. [JA 827-52]

The *Joel A.* Objectors seek to represent a class of young people that finds itself in unique and dire circumstances within the foster care system —a class including young people in the New York City foster care system who are lesbian, gay, bisexual, transgendered, or gender atypical (the "*Joel A.* Class"). [JA 809-10] They seek, on behalf of this class, specific and concrete relief from bias-related victimization at the hands of their peers, and systemic discrimination based on sexual orientation, both of which result in physical, emotional, psychological, and developmental injuries. [JA 874-76] Moreover, the chief perpetrators of such victimization are members of *Marisol* Subclass Three; they are the heterosexual

peers of the *Joel A.* Class members against whom the *Joel A.* objectors seek protection, including adequate disciplinary responses to violence, harassment, and abuse perpetrated on the basis of sexual orientation and gender atypicality. [JA 819-52]

The *Joel A.* Objectors allege, in general, that

> 36. By failing to protect Class members from bias-related violence, harassment, and abuse, and by placing Class members in hostile environments that disrupt critical developmental processes and thus cause grave emotional, psychological and developmental injury, the defendants manifest their indifference to the physical and mental health of the Class members and fail to provide Class members with care that meets minimum professional standards. Although researchers have documented the need for a professional response to the dire circumstances in which the Class members find themselves, and although the City defendants have admitted the need for and their failure to provide such a professional response, no defendant has implemented any concrete remedy.
>
> 37. Indeed, the defendants routinely discriminate against Class members in the provision of existing services offered to children in the defendants' care and custody. Class members are frequently excluded from group homes because of their actual or perceived sexual orientation; some group homes even maintain an official policy of excluding lesbian, bisexual, gay, and transgendered youth. When they are admitted to group homes, Class members are frequently denied even basic protection or services. Defendants' staff frequently manifest and adopt a position of deliberate indifference to the bias-related violence, harassment, and abuse to which Class members are subjected by other group home residents, and fail to act in situations where they would intercede on behalf of children whom they did not believe to be gay, lesbian or bisexual.

[JA 812]

In support of these general allegations, the *Joel A.* Plaintiffs allege that members of the class they seek to

represent encounter a common set of challenges to their physical and mental health and their personal development due in large part to the intersection of the critical developmental tasks of personal and social identity development that they must confront, their awakening sense of same-sex attraction or gender atypicality, and the intense heterosexist bias of both their peers, with whom they must live in close contact, and those charged with their care and protection. [JA 813-52] They further allege intense bias-related victimization based on their sexual orientation or gender atypicality. For example:

- Because he is gay, Joel A. has been punched and thrown down a flight of stairs. He has had his shoulder blade and finger broken, and he has had his nose broken twice, once from being hit in the face with a broom. Because of Joel's sexual orientation, one facility where he resided for three years assigned him four times to a special group for residents exhibiting "problematic sexualized behavior."

- Michael D., has had rocks and a textbook thrown at his face, and he has been repeatedly slapped and punched by other kids because he is gay and transgendered. Although he is constantly called "faggot," "'ho," "slug," and "batiman" by his peers, and feels completely isolated and alone, staff at his residence tell him that they won't be able to help him unless he stops acting "so gay."

- Shortly after being warned by a social worker that he would be "torn apart" by the other residents at the group home where Maxx R. was first placed in the foster care system, Maxx was attacked by eight boys who burst into his room at night. After the attack, at about 3:00 A.M., Maxx told the residential staff that he was leaving because the group home was not safe for him. The staff responded by handing Maxx two dollars and showing him the door. Maxx spent the rest of that night at a squatters' house. A case worker subsequently told Maxx that she had intentionally

> denied him a safe placement because she thought he needed to experience and learn to deal with hostility toward gay people.

[JA 802] *See also* [JA 819-52] Finally, the *Joel A.* Plaintiffs allege that the City and State Defendants named in their complaint have manifested deliberate indifference for their failure to provide members of the *Joel A.* Class with care and protection that meets professional standards. [JA 852-67]

The *Joel A.* Plaintiffs state claims for relief from their bias-related injuries under certain constitutional provisions, statutes, and regulations, including the Equal Protection Clauses of the United States and New York State Constitutions and the New York City Human Rights Law. [JA 868-73] They seek, on behalf of the putative class, specific, concrete relief tailored to the class members' unique and dire circumstances, including, for example, the immediate establishment of safe houses in which these youth can safely develop healthy sexual identities by disclosing and expressing their feelings, and by discussing issues related to sexual identity without fear. [JA 874]

C.
Settlement Approval Proceedings

Class counsel and the City and State Defendants presented the Settlement Agreements to the district court at a hearing on December 2, 1999. [JA 1401] The district court preliminarily approved the City and State Settlement Agreements,

and subsequently ordered the distribution of notice to the Class and scheduled dates for submission of objections and a fairness hearing. [JA 1411-13]

In their papers submitted in support of the Settlement Agreements, Class counsel asserted that they were "confident" that the *Marisol* Class would have prevailed on liability had the Class gone to trial instead of settling. [JA 1156] Class counsel asserted that this judgment was based on extensive discovery and trial preparation. Supra at 9. [JA 1155-56]

Moreover, the settling parties conceded that it was their intent to bar claims for systemic relief such as those asserted in the *Joel A.* class action, and that it is the parties' understanding that such claims are barred by the release and covenants not to sue in the City and State Settlement Agreements. [JA 1166, 1380]

THE DECISION BELOW

After giving an account of the history of the proceedings in *Marisol* and a related case, *Wilder v. Bernstein*, 78 Civ. 957 (RJW) (S.D.N.Y.) [JA 1394-1400], the district court summarized the terms of the City and State Settlement Agreements [JA 1401-11], and summarized the settlement approval process [JA 1411-15]. The court then proceeded to analyze the sufficiency of the settlement consideration under the "*Grinnell* factors" identified by this Court in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990). The district court found that the *Marisol* litigation was highly complex, that few of the indigent children in the *Marisol* Class had filed objections to the Settlement, that extensive discovery had been completed prior to settlement, and that it was unlikely that the *Marisol* Class would have been decertified after trial. [JA 1411-15]

The linchpin of the court's analysis, however, was its finding that the terms of the Settlement Agreements provided the *Marisol* Class with as much relief as the Class could have obtained even if it had prevailed on trial, and that the Settlement terms provided such relief in a more timely manner. [JA 1422-25]

The Court also found that the Settlement Agreements were negotiated at arms length by experienced and competent Class counsel. [JA 1426-32]

After discussing the dismissal of the *Wilder* action, *supra*, pursuant to the terms of the *Marisol* Settlement [JA 740-44], the district court turned to its discussion of the claims raised by the *Joel A.* Objectors [JA 1433-42]. The court rejected the *Joel A.* Objectors claim that the City Settlement Agreement was vague because a key term in the Agreement ("permanency") was defined by reference to a draft document that had been withheld from Class members. The court rejected this claim because (1) the settling parties had access to the document during settlement negotiations, (2) the court found the term defined with reference to the confidential document to be sufficiently clear on its face, and (3) the court found that any ambiguity in the term would beneficially increase the discretion of the Advisory Panel to determine the scope of its review of ACS operations. [JA 1434-36]

The court turned next to the *Joel A.* Objectors' claims regarding the non-suit provisions in the City and State Settlement Agreements and the sufficiency of the settlement consideration obtained on behalf of the Class. The court found that the settlement consideration is not illusory, as the *Joel A.* Objectors argued, because "the City and State Settlement Agreements are designed to benefit these children." [JA 1437] In addition, the court stated that the *Joel A.* Objectors had not indicated how the State Settlement Agreement is illusory. [JA 1438]

The district court also rejected the *Joel A.* Objectors' claim that the release and non-suit covenants contained in the City and State Settlement Agreements were unfair and oppressive. [JA 1438-40] The court's ruling on this point rested on its conclusion that the Class members' right of access to the courts had been sufficiently preserved by the Settlement terms *permitting Class members to bring actions for damages and non-*systemic equitable relief. [JA 1440] Moreover, the court concluded that the City Defendants' commitment to provide information to the Advisory Panel constituted adequate consideration for the Class members' relinquishing their right to initiate lawsuits for systemic relief against the City Defendants for the next two years. [JA 1440]

The district court also rejected the *Joel A.* Objectors' claim that the *Marisol* Named Plaintiffs compromised and released claims with respect to which the Named Plaintiffs could not adequately have represented the *Joel A.* Objectors because the Named Plaintiffs lacked standing to assert and had no personal stake in pursuing those claims. [JA 1440-42] The court construed the objection as one directed at the court's earlier decision to certify Subclass Three, rather than as a challenge to the attempt of Class counsel and the Named Plaintiffs to overstep their negotiating authority during the settlement negotiations and stated that it had previously resolved the issue. [JA 1441-42]

The district court overlooked and did not address the issue whether each of the three *Marisol* Subclasses had been adequately represented *vis à vis* each other during settlement negotiations, although the *Joel A.* Objectors called this issue to the court's attention both in their papers opposing settlement approval and at the fairness hearing. *See* Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement by Intervenor Joel Plaintiffs, at 24-25; [JA 1369-71].

SUMMARY OF ARGUMENT

The Settlement Agreements require the members of the *Marisol* Class to relinquish vital rights of access to judicial relief in exchange for vague and highly speculative relief. The result is a profoundly unfair compromise of their rights and interests.

First, the Settlement Agreements release all existing claims that relate to ACS's provision of child welfare services to the Class. These include the claims of the *Joel A.* plaintiffs, which the class representatives in *Marisol* did not possess and had no standing to assert. The Settlement Agreements also contain non-suit provisions that amount to a two-year-long "free pass," preventing Class members from ever seeking systemic relief on the basis of any actions taken by ACS for two years following the date of the Agreements. If ACS continues its demonstrated malfeasance during these two years, the only recourse left to an abused, neglected or homeless child in the Class is to seek individual representation and bring an individual suit addressed solely to the child's individual circumstances. The desperate circumstances of the Class members render such suits unlikely to be brought, and the desperate need for system-wide improvements instead of stop-gap measures render such suits unlikely to have any lasting effect.

Second, in return for these extraordinary concessions, the Settlement Agreements give the Class members relief so

speculative that it will likely have no practical value. The totality of the relief that the City Settlement Agreement provides is the creation of an Advisory Panel without power to compel ACS to do anything. Its only function is to conduct carefully circumscribed investigations of ACS's activities, to make non-binding recommendations as to how ACS might improve its services, and, if it ultimately concludes that ACS has failed to proceed in good faith, to issue a rebuttable finding to that effect. This finding entitles the Class merely to reinstate portions of the lawsuit that was ready to go to trial in July 1998. Such "relief" would be illusory even if offered in return for only modest concessions. The relief afforded by the State Settlement Agreement is equally speculative. When measured against the sweeping releases contained in the Settlement Agreements, the relief is starkly inadequate.

Third, this profoundly unbalanced Settlement is the result of a process in which no structural precautions were implemented to ensure that the diverse interests of the certified subclasses were adequately represented. The district court made no finding concerning adequate representation of the *Marisol* subclasses *vis à vis* each other during settlement negotiations—and, indeed, had no basis on which to make such a finding due to the failure of Class counsel to address the issue.

The result of this flawed process is a profoundly unfair settlement that makes sweeping concessions in return for

no tangible benefit of any kind. This is a violation of both Rule 23 and the rights of the *Marisol* Class under the Due Process Clause, and it requires that the district court's approval of the settlement be reversed.

ARGUMENT

Writing for the United States Court of Appeals for the Third Circuit in *Georgine v. Amchem Products*, Judge Edward Becker observed that "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." 83 F.3d 610, 617 (3rd Cir. 1996). This is such a case, and just as the Third Circuit in *Georgine* and the United States Supreme Court, on *certiorari*, in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), adhered to the institutional values that protect the rights of unnamed parties in class action litigation, and rejected an improperly negotiated settlement even though it would greatly have mitigated the vexing problem of asbestos litigation, so this Court, adhering to those same values, should reverse the district court's approval of the two Settlement Agreements in this case.

The City and State Settlement Agreements, which the proponents presented to the district court as an "extremely novel" approach to the dire situation of children in New York City's foster care system [JA 1353] are indeed novel in that they bind unnamed class members, who had no opportunity to opt-out of the settlement, to singularly and oppressively broad non-suit provisions in exchange for relief with a practical value so speculative that there is a strong danger that the settlement will have absolutely no value to the class. Moreover, although

the district court complied with the letter of this Court's instruction to certify subclasses on remand from the City and State Defendants' appeal concerning class certification, the record contains no evidence indicating that the purpose of that instruction—to assure that each class member received adequate representation for each claim resolved in this action—was fulfilled during settlement negotiations.

The district court's decision to approve the City and State Settlement Agreements is subject to review for abuse of discretion, but the district court's discretion to approve a class action settlement is limited by the court's fiduciary duty to unnamed class members. The district court must ensure that the settlement terms are fair, reasonable, and adequate as to all unnamed class members and that the interests of each were adequately represented—i.e., vigorously represented by a representative with undivided loyalty—during settlement negotiations. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982); *Papilsky v. Berndt*, 466 F.2d 251, 260 (2d Cir. 1972); *Louis M. v. Ambach*, 113 F.R.D. 133, 137 (N.D.N.Y. 1986). This requirement of vigorous representation is continuing and applies "at all times," including, of course, during settlement negotiations. *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, concurring in part and dissenting in part), citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Moreover, in determining the scope of claims that may be released or compromised in a class action settlement, the district court must ensure that the named plaintiffs have purported to represent the class "only to the extent of the interests they possess in common with members of the class." *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981). Indeed, the Supreme Court has cautioned against the tendency to permit expansive class representation based on the assumption that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161 (1983), quoting *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., specially concurring). That caution against permitting expansive representation is especially appropriate in the context of a settlement such as this, where representatives purport to release a vast spectrum of claims on behalf of a highly diverse class. What may be "most significant" about expansive representation is the unfairness to Class members who find themselves bound by a judgment. *Falcon*, 457 U.S. at 161 citing *Johnson*, 417 at 1127.

In this case, Class Counsel and the Named Plaintiffs exceeded the bounds of their representation by purporting to release claims which they had no standing to assert and in which they had no personal stake. In addition, the Named Plaintiffs

bound all absent Class members to onerous non-suit provisions that extend to claims based on future injury, and did so in exchange for speculative relief that is likely to have no practical value to the Class.

Moreover, there was no evidentiary basis, either in the papers submitted in support of the Settlements or in the record of the fairness hearing, to support a finding that the Subclass to which the *Joel A.* Objectors belong was adequately represented during settlement negotiations *vis à vis* the other *Marisol* Subclasses. Indeed, the district court made no such finding. Yet in order to fulfill its fiduciary obligation to unnamed Class members, however, the district court must make findings, and those findings must be based on an explanation of the facts, rather than on the arguments and recommendations of counsel. *Plummer*, 668 F.2d at 659. "[A] court may not delegate to counsel the performance of its duty to protect the interests of absent class members." *Id.* at 659 n.4. Moreover, the record must provide an appellate court with "a basis for judging the exercise of the district court's discretion." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983).

I.
The Record Contains No Evidence Indicating That Any Structural Precautions Were Implemented to Assure Adequate Representation of the Diverse Interests of the Three Sub-classes During Settlement Negotiations.

In its opinion affirming the district court's certification of the *Marisol* class, this Court expressly instructed the district court to certify subclasses in order to assure adequate representation of each unnamed class member with respect to the class member's "separate and discrete legal claims." *Marisol*, 126 F.3d at 378-79. This instruction was consistent with the Supreme Court's disapproval of global compromises achieved in the absence of any "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 117 S. Ct. at 2251.

Although the district court complied with the letter of this Court's instruction to certify proper subclasses, *supra* at 8-9, neither the papers submitted in support of the settlement nor the record of the fairness hearing contain any evidence indicating that settlement negotiations were conducted in a manner sufficient to assure that the certification of the three *Marisol* Subclasses served its purpose during those negotiations, to assure adequate representation of the class members' diverse interests *vis à vis* each other. Remarkably, neither the City nor State Settlement Agreements make any reference to the three Subclasses certified by the district court. Both Settlement Agreements treat the three Subclasses as a monolith. *Supra*

at 10. The district court did not appoint separate counsel for each Subclass [JA 422 *et seq.*], and the record contains no evidence suggesting that Class counsel undertook to allocate among themselves the representation of the three Subclasses.[9/] Moreover, neither the papers submitted in support of the Settlements nor the record of the fairness hearing contain any evidence establishing that Class counsel kept all representatives of each Subclass adequately apprised of the course of the settlement negotiations, or obtained the representatives' approval of the Settlement after adequately apprising them of the final terms.[10/] Despite the absence of any evidence indicating that each Subclass was adequately represented *vis à vis* the other Subclasses during settlement negotiations, the district court conducted no inquiry and made no findings concerning this issue.

9/ Class counsel had the resources to do so. The Class was represented by lawyers from two public interests organizations, Children's Right, Inc. and Lawyers for Children, and two prominent law firms, Schulte, Roth & Zabel and Cahill, Gorden & Reindel.

10/ The Seventh Circuit noted in the *General Motors Corporation Engine Interchange Litigation*, that when Class counsel who were not involved in settlement negotiations express support for a settlement that is presented to them as a *fait accompli*, such support does not constitute ratification of the conduct of the negotiations because Class counsel "should know the options considered and the topics discussed during the negotiations before supporting a settlement as fair." 594 F.2d at 1126 n.29. Similarly, especially where diverse subclasses have been jointly represented by Class counsel, the subclass representatives should be apprised not only of the final terms of the proposed settlement, but also of the course of the negotiations.

That omission constitutes a clear abuse of discretion. The proponents of a class action settlement must establish that all requirements for settlement approval have been met. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979). The district court may not shift the burden of proof regarding the fairness of the settlement, including the adequacy of representation during settlement negotiations, from the settlement proponents to objectors. *See General Motors,* 594 F.2d at 1126 n.30.

Moreover, the district court has a "continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation." *Id.* at 1124. This duty arises from the requirement, in Fed. R. Civ. P. 23(a)(4), that the court determine whether "the representative parties will fairly and adequately protect the interests of the class." The duty is heightened in the settlement context by the court's responsibility, under Fed. R. Civ. P. 23(e), to review the fairness of any compromise. *See General Motors,* 594 F.2d at 1124. The court's duty stringently to examine the adequacy of representation during settlement negotiations, and the settling parties' burden of coming forward with evidence establishing that all class members were adequately represented, apply with equal force regardless whether the class was represented by private

counsel, who may be driven to settle by the prospect of earning a large fee, or public interest lawyers, who may be equally driven to settle by the prospect of reputational enhancement. *Id.* at 1125.

Moreover, the issue of subclass representation, which the settlement proponents failed to address, is especially acute in this case. This Court clearly expressed its concern that the district court was "near the boundary of the class action device" when it certified the omnibus *Marisol* Class, because the district court had addressed the commonality and typicality criteria of Fed R. Civ. P. 23(a) based on a conceptualization of the common legal and factual questions in this case at a "high level of abstraction." *Marisol*, 126 F.3d at 377. Indeed, this Court explicitly recognized that "the class certified by the district court implicitly consist[ed] of two large subclasses" and that "in reality, each of these subclasses consist[ed] of smaller groups of children, each of which has separate and discrete legal claims," each of which "is based on one or more specific alleged deficiencies of the child welfare system." Based on this recognition, *id.* at 378, this Court carefully instructed the district court to "engage in a rigorous analysis of the plaintiffs' legal claims and factual circumstances in order to ensure that appropriate subclasses are identified, that each subclass is tied to one or more suitable representatives, and that each subclass satisfies Rule 23(b)(2)." *Id.* at 378-79. The

Court stated its expectation that creation of subclasses in this manner would serve the purpose of "allow[ing] the district court to weed out, and, if necessary dismiss those claims for which no named plaintiff is an adequate representative." *Id.* at 379. In light of this Court's forceful expression of concern regarding the adequacy of representation for the separate and distinct legal claims and factual circumstances peculiar to subclasses within the *Marisol* Class, and in light of the Supreme Court's requirement that there be "*structural* assurance of fair and adequate representation for . . . diverse groups and individuals affected," *Amchem*, 117 S. Ct. at 2251 (emphasis added), the district court abused its discretion by permitting the question whether each Subclass received adequate representation *vis à vis* the other Subclasses to be passed over without comment by the settlement proponents and without evidence sufficient to support an explicit finding in this regard.

II.
The Covenants-not-to-sue and the Release Contained in the Settlement Agreements Are Overbroad, Oppressive, and Violate the Due Process Rights of Absent Class Members.

The Settlement Agreements bind all *Marisol* Class members to onerous non-suit provisions that compromise, and in many cases will extinguish for two years, as a practical matter, their rights to obtain relief from violations of vital legal rights. The Agreements include covenants not to sue and a release that preclude *any* action seeking systemic declaratory,

injunctive or other forms of equitable relief for two years, whether such relief is sought through a class action on behalf of a particular group of children or whether such relief is sought on behalf of an individual child, even if the claim is based on injuries inflicted after the Settlement. *Supra 14-16, 17.* Moreover, the non-suit provisions in the City and State Settlement Agreements extend to claims which the Named Plaintiffs lacked standing to assert and in which they had no personal stake. Although the Agreements permit suits seeking damages and non-systemic relief tailored to an individual's concerns, as a practical matter, this will offer cold comfort to Class members in many important cases, as explained in sub-section C, below.

A. The covenants and the release unlawfully and unfairly restrict the rights of class members to seek judicial relief for injuries inflicted *in the future.*

The non-suit covenants and release in the City Settlement Agreement bar claims for systemic relief based on "facts, events, actions or omissions by the City . . . which occur *after the signing of this Agreement and prior to December 15, 2000.*" [JA 746] (emphasis added) The State Settlement Agreement has a similar provision, barring any claims for "system-wide violations . . . based upon *new facts or circumstances that occur during the duration of this Agreement.*" [JA 776] (emphasis added)

"No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best

interests of the class as a whole." *J.A. Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 524 (E.D. Tenn. 1993). Indeed, courts and legislatures agree that exculpatory releases violate public policy.[11/] As one New York court explained:

[11/] States have determined that willful or reckless acts that result in injury can never be shielded from liability by waiver or release. *See, e.g.*, CAL. CIVIL CODE § 1668 (West 1999) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."); MONT. CODE ANN. § 28-2-702 (1997) (same); N.D. CENT. CODE § 9-08-02 (1997) (same); *see also Richards v. Richards*, 513 N.W.2d 118, 121 (Wisc. 1994) ("An exculpatory agreement will be held to contravene public policy if it is so broad 'that it would absolve [the defendant] from any injury to [the plaintiff] for any reason.'"); *Restatement (Second) of Contracts* § 195 (1979) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."); *Wagenblast v. Odessa School District No. 105-157-166J*, 758 P.2d 968, 970 (Wash. 1988) (en banc); *Rosenthal v. Bologna*, 620 N.Y.S.2d 376, 378 (App. Div. 1995); *DeVito v. NYU College of Dentistry*, 544 N.Y.S.2d 109, 110 (Sup. Ct. 1989). Also, states have invalidated attempted waivers of civil and human rights, *see* MINN. STAT. § 363.031 (1998), and other waivers that contravene public order and morals, *see, e.g.*, GA. CODE ANN. § 1-3-7 (1998) (prohibiting waiver of laws "made for the preservation of public order or good morals"); N.D. CENT. CODE § 9-08-02 (1997) (fraud, wilful injury, or violation of law) LA. CIV. CODE ANN. art. 7 (1998) (contracts that "derogate from laws enacted for the protection of the public interest"); MONT. CODE ANN. §§ 1-3-204 (1997) (laws "established for a public reason"); OKLA. STAT. tit. 15 § 211(3) (1998) (contracts "contrary to good morals"). States have also recognized that children require special protection from harm and exploitation, invalidating attempts by employers to secure waivers of child-labor laws, or even to insure against such provisions. *See, e.g.*, FLA. STAT. ANN. § 440.54 (1998); MISS. REV. STAT. § 71-3-107 (1998); PA. STAT. ANN. tit. 77 § (continued...)

> While, concededly, exculpatory agreements or covenants not to sue are recognized by courts, under announced public policy they are ineffective to insulate the releasee from intentional, willful or grossly negligent acts. So strong is this policy that it is applicable regardless of whether exemption of such conduct was within the parties' contemplation at the time the agreement was executed.

Great Northern Associates, Inc. v. Continental Casualty Co., et al., 596 N.Y.S.2d 938, 940 (App. Div. 1993) (citations omitted).

The release and non-suit covenants in the City and State Settlement Agreements effectively license the City and State Defendants to commit systemic violations of *Marisol* Class members' legal rights over the next two years. *See Adams v.*

11/ (...continued)
672 (1998). Where the activities of private individuals serve important public functions, as in the case of railroads and other common carriers, States have not hesitated to invalidate attempts by such individuals to escape, through waiver, the consequences of their own malfeasance. *See, e.g.*, ALA. CODE § 37-2-81 (1998) (liability of railroad); ARK. CODE ANN. § 23-10-408 (1997) (railroad); COLO. REV. STAT. § 40-33-106 (1998) (liability of common carrier); GA. CODE ANN. § 34-7-44 (1998) (railroad); KAN. STAT. ANN. § 66-240 (common carrier); KY. CONST. § 196 (common carrier); MONT. CODE ANN. § 69-14-216 (1997) (railroad transporting livestock); NEV. REV. STAT. § 705.320 (railroad); N.M. CONST. art. 20 § 16 (1998) (railroad); N.D. CENT. CODE § 8-07-07 (1997) (common carrier); *id.* § 49-16-05 (railroad); OHIO REV. CODE ANN. § 4973.02 (1998) (railroad); TEX. REV. CIV. STAT. ANN. art. 6442 (1998) (railroad); VA. CODE ANN. § 8.01-60 (1998) (railroad); *id.* 56-119 (transportation companies); WASH. REV. CODE § 81.29.020 (1998) (common carrier); WYO. STAT. ANN. § 37-9-504 (Michie 1998) (railroad); *see also* 235 ILL. COMP. STAT. § 5/6-21 (1998) (servers of alcohol); KY. REV. STAT. ANN. § 189.720 (1998) (liability of parking operator); MASS. GEN. LAWS ch. 231 § 85M (1998) (garage); N.Y. GEN. OBLIG. LAW § 5-325 (1998) (garages and parking places); *id.* § 5-326 (recreational facilities).

Philip Morris, Inc., 67 F.3d 580, 585 (6th Cir. 1996) (holding that a release could not apply to future claims and stating that "[a]n employer cannot purchase a license to discriminate").

The policy against waivers of future civil rights violations is clear. In *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), the Sixth Circuit Court of Appeals examined a consent decree in a class action that included provisions "waiv[ing] the ability of minorities to complain about discrimination which may occur in the future." *Id.* at 924. In large part because of those provisions, the court determined that the consent decree "is illegal and contrary to the public interest." *Id.* at 925. *Cf. Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination.")

Similarly, in *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), the Fifth Circuit determined that certain broadly phrased releases could not bar suits based on future acts, in part because

> the release can have no other acceptable meaning, for notwithstanding that the systemic reforms contained in the decrees have been put into operation . . . the *defendants have an ongoing statutory responsibility* independent of the decrees to see that the corrective measures and goals established thereunder are maintained and updated so that the effects of past discrimination will be wiped out as quickly as due diligence and business necessity permit.

Id. at 855 (emphasis added).

Both the *Williams* and *Allegheny-Ludlum Industries* courts relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which found that prospective waivers of employees' rights under Title VII in the collective bargaining context would be contrary to the very purpose of Title VII in protecting an individual's right to equal employment opportunities. *Id.* at 51-52. Here, by contrast, the proponents of the Settlement Agreement have asserted that even antidiscrimination claims—based on constitutional provisions, statutes, and regulations created in order to protect individuals from bias-related injuries such as those suffered by *Joel A.* Objectors, *see, e.g.* NYC Human Rights Law, Title 8, Chapters 1, 6—are precluded, even if those claims are based on events that have not yet occurred. The Supreme Court's reasoning in *Gardner-Denver*, however, dictates that such restrictive provisions are impermissible and directly contradict statutory protections.[12/]

The actions of the City and State Defendants in providing child welfare services implicate all of the principles that courts and legislatures have sought to protect by

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[12/] Indeed, *Gardner-Denver* dictates that the Marisol Named Plaintiffs themselves cannot release prospective claims that they have brought pursuant to the Americans with Disabilities Act and the Federal Rehabilitation Act of 1973. [JA 103] *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1303 n.25 (D.C. Cir. 1998) (expressing "skeptic[ism]" that ADA claims can be prospectively waived following *Gardner-Denver*).

invalidating exculpatory release.[13/] The Defendants perform an essential and important public function on behalf of minor children in their custody and care; and a serious failure to perform that important public function threatens to deprive those children of their constitutionally and statutorily protected civil rights. Public policy dictates that Defendants not be permitted to obtain a license from those children that frees Defendants from liability for *any* system-wide practice or policy—whether it is reckless, intentionally discriminatory, or simply negligent—that they may choose to implement.

B. The covenants and the release in the Settlement Agreements unlawfully and unfairly restrict the rights of class members to assert legal claims that the class representatives lacked standing to litigate.

This Court has held that the authority of a class representative to represent class members extends only to claims on which there is a commonality of interest. *See National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981). "The justification for permitting the representatives to sue [or settle] on behalf of the class has no application to claims of class members in which the representatives have no interest." *Id.* Moreover, "standing to sue is an essential prerequisite to maintaining an action, whether in one's own right or as a representative of a class." *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 548

13/ See note 9.

(S.D.N.Y. 1995). *See also Gross v. Summa Four, Inc.*, 93 F.3d 987, 993 (1st Cir. 1996); *Denny v. Barber*, 576 F.2d 465, 468-69 (2d Cir. 1978). It is "an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made." *German*, 885 F. Supp. at 548.

In order to establish standing to assert a claim a plaintiff must establish (1) injury-in-fact, (2) causation, *i.e.*, a fairly traceable connection between that plaintiff's injury and the defendant's conduct of which the plaintiff is complaining, and (3) redressability, *i.e.*, a likelihood that the relief requested by the plaintiff will redress the plaintiff's alleged injury. *See Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016-17 (1998); *Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2d Cir. 1996). The Named Plaintiffs appointed to represent Subclass Three might adequately have represented the *Joel A.* Objectors on a variety of claims in which all members of Subclass Three have a truly common interest. Class counsel and the Named Plaintiffs exceeded the limits of their authority as representatives, however, when they purported to bind the absent class members in a highly diverse class to non-suit provisions that extend to claims for relief in which the Named Plaintiffs had no stake and which the Named Plaintiffs lacked standing to assert.

The terms of the release and non-suit covenants contained in the City and State Settlement Agreements restrict

the class members' ability to pursue claims that the class representatives do not have standing to litigate. This is due, in part, to the broad terms of the release and non-suit covenants and, in part, to the high level of generality at which Class counsel stated the claims of the *Marisol* Class. *Supra* at 5-6. The Settlement Agreements bar claims that are merely "related to" or even "which relate in any way" to claims asserted in the *Marisol* Complaint or the *Marisol* Plaintiffs' Statement of Claims to be Tried. [JA 746, 776] The use of such vague, broad terms in a class action release may be suited to actions arising out of discrete past events, such as mass torts, but these terms are not appropriate in a lawsuit such as this one, "concerning continuing conduct that might well vary in its intensity or degree." *J.A. Shults,* 821 F. Supp. at 523.

Moreover, the allegations and claims in the *Marisol* Complaint and Plaintiffs' Statement of Claims to be Tried are set forth at such a high level of abstraction that the covenants and release appear "related" and therefore applicable to every conceivable issue that could ever arise in the child welfare context. For example, one claim to be tried is described in part as defendants' "failure otherwise to treat [custodial plaintiffs] in accordance with reasonable professional standards." [JA 630] Accordingly, the covenants not to sue contained in both the City and State Settlement Agreements purport to bar *any* system-wide claim that can be considered related to the unprofessional

treatment of children in the custody of ACS—even if such unprofessional treatment is based on intentionally discriminatory or grossly negligent system-wide policies or practices. For example, although none of the *Marisol* Class Representatives alleged that he or she is gay, lesbian, bisexual, or transgendered, and although none claimed to be a victim of either bias-related violence, abuse, and harassment or systemic discrimination based on sexual orientation, the Settlement proponents clearly expressed to the district court their intent and understanding that the release and covenants in the Settlement Agreements extend to all the claims raised in the *Joel A.* litigation. [JA 1166, 1380]

The breadth of the release and covenants thus violates the due process rights of the *Joel A.* plaintiffs and others similarly situated, and also violates their right to adequate representation during settlement negotiations under Fed. R. Civ. P. 23. Even if, at some extreme level of generality, the *Marisol* Class Representatives could be thought to have suffered all the same injuries as the *Joel A.* objectors, none of the injuries alleged by the *Marisol* Class Representatives was caused by bias-related violence, abuse, or harassment or by discrimination based on sexual orientation. Indeed, the interests of the *Joel A.* Objectors and their peers in *Marisol* Subclass Three are *antagonistic* because much of the harm from which the *Joel A.* Objectors seek relief is perpetrated by their

straight peers in Subclass Three. *Supra* at 18-21. Named plaintiffs cannot represent class members on claims regarding which their respective interests are antagonistic. *See Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

Moreover, none of the injuries alleged by the *Marisol* Class Representatives could be redressed by the relief requested in the *Joel A.* Complaint, *e.g.*, the creation of placements designed to meet the special needs of gay, lesbian, bisexual, and transgendered youth; training of ACS and contracting agency personnel in issues related to adolescent homosexuality; issuance of policy statements designed to deter discrimination based on sexual orientation; and the establishment of privately funded independent technical assistance centers to counsel child care workers regarding the needs of gay, lesbian, bisexual, and transgendered youth.

Because the *Marisol* Named Plaintiffs lack standing to bring any of the claims asserted in the *Joel A.* complaint, they do not even cross the "threshold" necessary to reach the issue whether they were adequate class representatives on those claims under Rule 23. *German*, 885 F. Supp. at 538. Moreover, because the *Marisol* Class Representatives have no stake in obtaining the relief that the *Joel A.* Objectors desperately need, the *Marisol* Class Representatives could not have adequately represented the *Joel A.* Objectors for the purpose of compromising those claims in any way. *National Super Spuds*, 660 F.3d at 17 n.6. Named

plaintiffs in a class action "can represent a class of whom they are a part only to the extent of the interests they possess in common with members of the class." *Id.* at 17.

In addition, the *Marisol* Named Plaintiffs are not adequate representatives with respect to claims that they could not have asserted against the City and State Defendants because neither the Named Plaintiffs nor Class counsel could have used those claims as leverage during settlement negotiations. The Supreme Court has recognized that permitting class representation for claims that the class representative cannot litigate "disarm[s]" Class counsel because she cannot use the threat of litigation on those claims to press for a better offer. *Amchem*, 117 S. Ct. at 2248. *See also Epstein v. MCA, Inc.*, 126 F.3d 1235, 1248 (9th Cir. 1997) ("a plaintiff's power to negotiate a reasonable settlement derives from the threat of going to trial with a credible chance of winning"), *reh'g granted by* Order, June 15, 1998, Dkt. No. 92-55675 (9th Cir.).

Indeed, allowing class representatives to settle claims that they lacked standing to litigate, and in which they had no stake, is especially oppressive where, as here, no relief has been obtained in exchange for those claims. *Infra* at 53-60. The Class as a whole cannot obtain an advantage for the class "by the uncompensated sacrifice of claims of members, whether few or many, which were not within the description of claims assertable by the class." *National Super Spuds*, 660 F.2d at 19.

Moreover, even if the Settlements appeared substantively fair, reasonable, and adequate with respect to all *Marisol* Class members, including the *Joel A.* Objectors (in fact, the Settlements do not satisfy these criteria with respect to any Class member, *infra* at 53-60), the improper representation of the *Joel A.* Objectors during settlement negotiations with respect to claims on which the class representatives lacked standing, and in which the class representatives had no stake, would still doom the Settlements. Due process and Rule 23 require procedural integrity in addition to substantive fairness. The Supreme Court engraved this principle into federal law in *Amchem,* holding that a district court's finding that the substantive terms of a settlement proposal are fair does not constitute and cannot be substituted for a determination that each class member's interests were adequately represented during settlement negotiations. *Amchem,* 117 S. Ct. at 2248-51. The Seventh Circuit explained the point well in the *General Motors Corporation Engine Interchange Litigation*:

> "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might have been "fairer" had the negotiating (attorney) . . . been animated by undivided loyalty . . . . The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1125 n.24 (7th Cir. 1979).

C. The provisions permitting actions by individuals seeking limited relief are inadequate

The district court rejected the argument that the non-suit covenants and release are unfair or oppressive because "[a]ll class members can bring individual suits at any time based on any claim seeking damages or injunctive relief, *as long as the injunctive relief sought is not system-wide and is tailored to the individual's concerns.*" [JA 1439] (emphasis added) Yet the 100,000 indigent children who comprise the *Marisol* class obviously will not be able to engage counsel with the resources to prosecute any matter requiring, for example, extensive discovery or expert analysis and opinion. *See Jackson v. Foley*, 156 F.R.D. 538, 542 (E.D.N.Y. 1994) ("the majority of the class members are from extremely low income households, thereby greatly decreasing their ability to bring individual suits"); *Ray M. v. Board of Educ. of the City Sch. Dist. of the City of New York*, 884 F. Supp. 696, 705 (E.D.N.Y. 1995) (same); *McDonald v. Heckler*, 612 F. Supp. 293, 300 (D. Mass. 1985) ("These individuals claim to be disabled and of low income. It is therefore impracticable for these persons to bring individual lawsuits challenging the Secretary [of Health and Human Services'] policies.").

The prosecution of many lawsuits is economically feasible only when problems can be addressed systemically. As the Supreme Court has observed, "[w]hen it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons *may be without any effective redress* unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (emphasis added). Moreover, certain rights, such as the right to be free from invidious discrimination, cannot be vindicated on any basis less than systemic. Claims seeking to end discriminatory treatment, even when raised by an individual child, cannot be litigated and effectively remedied without discovery of and reference to the practices and policies that defendants implement with respect to similarly situated children. *See Afro American Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) ("[A] suit by a single employee which is not brought as a class action 'is perforce a sort of class action for a fellow employee similarly situated' when it attacks the employment practices of the employer on grounds of discrimination.")

The City and State Defendants know all of this well. Indeed, the City and State Defendants appear to be talking out of both sides of their mouths when they say, on the one hand, that they are entitled under the Settlement Agreements to be free from burdensome litigation and, on the other hand, that the limitation

of actions by Class members to individual suits for non-systemic relief will not significantly impinge the Class members' access to court. The City Defendants stressed that "Defendants have no interest in beginning discovery again, conducting motion practice and preparing for trial in a new suit;" [JA 956], while State Defendants asserted that staff, money and resources were necessary to "defend wide-ranging, time consuming, and overly burdensome class action law suits." [JA 921-22] In short, even the settlement proponents recognize the impracticability of individual suits by indigent children against the City and State of New York.

III.
The Extraordinary Covenants-not-to-sue and Release Were Given in Exchange for Illusory Consideration.

In presenting the Settlement Agreements to the district court, Class counsel and the City and State Defendants stressed repeatedly that the terms of the settlements are "novel." Indeed, they are. In exchange for the singularly expansive release and non-suit covenants that bind Class Members under the City and State Settlement Agreements, *supra* at 38-53, the City and State Defendants are providing relief with a practical value so speculative that "there is a strong danger that the settlement will have absolutely no value to the class." *Clement v. American Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997). This is especially bizarre in light of the expansive non-suit provisions in the City and State Settlement Agreement. "[A] defendant would

normally be expected to pay a premium for this type of global peace." *Clement v. American Honda Finance Corp.*, 176 F.R.D. 15, 29 (D. Conn. 1997) (citation omitted).

A. The City Agreement

In exchange for the sweeping restrictions on Class members' rights to seek judicial relief from present and future injury, the City Settlement Agreement imposes a single obligation on the City Defendants: to provide information to a privately-funded Advisory Panel that is not a party to either the lawsuit or the Settlement Agreement, is not required, in any enforceable sense, to *do anything with the information it receives or to* disclose it to anyone, and has absolutely no authority to compel the City or State Defendants to do anything. *Supra* at 13-14. The Advisory Panel cannot even compel the City Defendants to comply with their commitment to produce information that the Panel requests. *Supra* at 12-13. Moreover, the City Agreement does not impose any obligation on defendant Mayor Rudolph Giuliani, and thus does not obligate the Mayor or his successors in office to ensure that ACS personnel accomplish the agency's reform agenda.

The parties' expectation that the work of the Advisory Panel will result in some actual benefit to the *Marisol* Class is based entirely on hope: hope that the relationship between the City Defendants and the Advisory Panel will be cooperative rather than adversarial; hope that the Mayor will require ACS personnel

to implement the agency's reform objectives; and hope that the Advisory Panel will issue its Initial and Periodic Reports in a timely manner and that the Panel's mission will not be disrupted or frustrated by irreconcilable differences among the four Panel members regarding the areas of ACS operation that they are to review.

Relief based on hope is not fair, reasonable, or adequate consideration for the substantial restrictions imposed on the class members' rights to seek redress from future injury. Indeed, such restrictions are justifiable in a class action, if at all, only if the defendant agrees to a complementary injunction prohibiting the defendant from inflicting upon the class members those injuries within the scope of any restriction on the class members' rights to seek redress.

It was on this basis that the United States District Court for the Northern District of Illinois rejected proposed settlement agreements in the *Brand Name Prescription Drugs Antitrust Litigation*, 1996 WL 167347 (N.D. Ill. April 4, 1996). In that case, a class consisting of tens of thousands of retail pharmacies charged leading manufacturers and wholesalers of brand name prescription drugs with conspiring to fix prices in violation of the Sherman Act. Plaintiffs claimed that these prescription drug manufacturers and wholesalers violated the Act by maintaining a two-tiered pricing system in which defendants offered greater discounts to managed-care entities than to retail

pharmacies based solely on status. *See id.* at *6. The court recognized that the "ultimate purpose" of the lawsuit was to eliminate this two-tiered pricing system to the extent that it was not based on each plaintiff's ability to affect market share, *id.* at *7, and, on that basis, rejected proposed settlement agreements that provided for a general release of the class members' claims, but not for an injunction compelling defendants to change their pricing practices. *See id.* at *2, *6-7. The court held that the failure to provide for such an injunction "doom[ed]" the proposed settlements as "less than fair, reasonable, and adequate" even though defendants had agreed to pay a cash settlement of $408 million, "five times the largest settlement in any [other] antitrust class action not preceded by a prior governmental investigation." *Id.* at *4, *7.

By rejecting the proposed settlement for failing to provide injunctive relief, even while recognizing that the "settlement amount committed to by the defendants [would] surely counsel deterrence," *id.* at *7, the court implicitly held that class members' claims for relief from future injuries cannot be extinguished through a settlement release in the absence of a complementary injunction prohibiting the defendants from inflicting those injuries within the scope of the release. If this were not the law, then class representatives could effectively license defendants to inflict future injuries upon

class members, because the class members would have no access to any avenue of relief from those injuries.

In this case, in which Class counsel sought purely declaratory and injunctive relief for the *Marisol* Class, the ultimate purpose of the lawsuit was to assure the City and State Defendants' future compliance with their constitutional, statutory, and regulatory obligations to the Class members. By approving the City and State Settlement Agreements, however, the district court imposed onerous restrictions on the class members' ability to obtain relief from certain future injuries—indeed, as a practical matter, the Settlement Agreements approved by the district court bar class members from obtaining any relief from many types of future injury, *supra* at 38-53 — without providing any complementary injunctive protection.

The district court nonetheless concluded that the Settlement Agreements were fair, adequate, and reasonable based on its analysis of the Agreements under the "*Grinnell* factors" identified by this Court in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990). [JA 1417] The district court observed that only a few objectors appeared out of a class of over 100,000 children, but as the class was composed entirely of children—and children who, by definition are *in extremis*—this factor counts for very little in this case.

The linchpin of the court's analysis, however, was the court's conclusion that "even assuming that plaintiffs had a

strong chance of success at trial with respect to liability" [JA 1422], "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by ACS." [JA 1423] In addition, the court concluded that the City Settlement Agreement "provides for a streamlined procedure for the plaintiff class to return to this Court if the Advisory Panel finds the City is not acting in good faith in any of the areas designated by the City Settlement Agreement for review by the Advisory Panel or in related areas." [JA 1424] Both conclusions are clearly wrong.

The court offered no support for its conclusion that it might not have been able to enter an order providing more certain relief than the City Settlement Agreement provides [JA 1421-24], and the Court surely could have provided such relief. In an order entered after trial (or even pursuant to a fair, adequate, and reasonable settlement), the court, at least, could have (1) identified the legal rights being violated by the City Defendants, (2) ordered the City Defendants to devise a program to cure these violations, (3) made such modifications to the plan as the Court deemed necessary after hearing objections from the Class, but always giving due deference to the expertise of the City Defendants, and (4) ordered compliance with the plan as modified. The Supreme Court has expressly approved such a procedure. *Lewis v. Casey*, 518 U.S. 343, 362-63 (1996), citing *Bounds v. Smith*, 430 U.S. 817, 818-20, 832-33 (1977). Moreover,

such an order could have applied directly to all City Defendants, including the Mayor of the City of New York in his official capacity.

The court erred also in finding that the City Settlement Agreement benefits the Class by providing "a streamlined procedure for the plaintiff class to return to this Court if the Advisory Panel finds the City is not acting in good faith in any of the areas designated by the City Settlement Agreement." [JA 1424] In light of the extensive discovery taken by Class counsel prior to the Settlements, and in light of Class Counsel's representation that they were prepared to go to trial in July 1998 and are confident that they would have prevailed, supra at 9, the City Settlement Agreement can only be read as creating an obstacle to judicial relief rather than providing the Class with a "streamlined procedure." Under the terms of the City Settlement Agreement, the *Marisol* Class is cut off from judicial relief unless and until (1) the Advisory Panel has issued all five of its Initial Reports, (2) the Panel then issues a Periodic Report finding that ACS is not acting in good faith to reform one of the areas of operation within the scope of the Panel's study, (3) the City Defendants fail adequately to rebut that finding in the district court, and (4) the Class then proves that the City Defendants are in violation of some legal duty to the Class. *Supra* at 12-14. The Panel's finding of bad faith, even if upheld by the district court, does not entitle the Class

to any relief because, in addition to establishing that the City Defendants are not making a good faith effort to reform, the Class must establish that the City Defendants are in violation of their legal obligations to the Class. In this endeavor, the Class would bear all of the burdens of proof it would have born without the Settlement and would be subject to all the same defenses.

B. The State Agreement

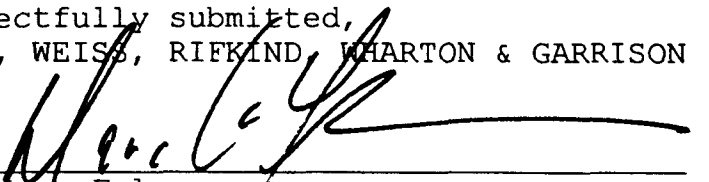
Although the State Settlement Agreement imposes restrictions on Class members' access to the courts that run parallel to the restrictions in the City Settlement Agreement, *supra* at 17, the State Settlement Agreement also fails to provide any direct, concrete, or reasonably certain relief to members of *Marisol* Subclass Three. *Supra* at 16-17. Although the district court stated in its opinion regarding settlement approval that the *Joel A.* Objectors had not explained how the relief provided under the State Settlement Agreement is illusory, *supra* at 24, the *Joel A.* Objectors had, in fact, clearly expressed their position to the district court. *See* Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement, entered January 19, 1999 (document no. 212) at 11-12.

Conclusion

For the foregoing reasons, the decision of the lower court should be reversed.

Dated: New York, New York
April 15, 1999

Respectfully submitted,
PAUL, WEISS, RIFKIND, WHARTON & GARRISON



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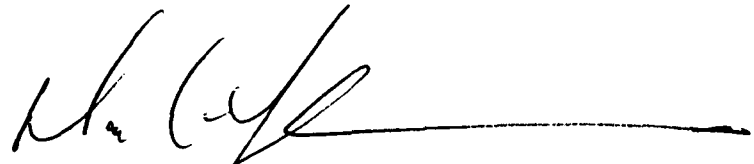
Certificate of Compliance

I, Marc Falcone, attorney of record for Intervenor-Plaintiffs-Appellants Joel A., Michael D., Eric R., David S., Maxx R., and Ray D., do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Federal Rule of Appellate Procedure 32(a)(7). The total number of words in the foregoing brief is 13,960.



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