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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

SHARWLINE NICHOLSON, individually and on behalf of her infant children, Destinee Barnett and Kendell Coles, Infants, and on behalf of all others similarly situated, DESTINEE BARNETT, KENDELL COLES, infants, SHARLENE TILLET, individually and on behalf of infants Winston Denton and Uganda Gray, EKAETE UDOH, individually and on behalf of her infant children, Edu Udoh, Ima Udoh, Ksikak Udoh and Asuno Udoh and J.A. AND G.A., infants on behalf of all others similarly situated,

Plaintiffs-Appellees,

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**BRIEF FOR AMICUS CURIAE BRENNAN CENTER FOR JUSTICE,
IN SUPPORT OF PLAINTIFFS-APPELLEES,
URGING AFFIRMANCE**

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(continuation of caption)

v.

NICHOLAS SCOPPETTA, individually and as Commissioner of Administration for Children's Services, CITY OF NEW YORK, GEORGE E. PATAKI, as Governor of the State of New York, JOHN E. JOHNSON and STATE OF NEW YORK,

Defendants-Appellants,

NAT WILLIAMS, individually and as manager, BETHY VICTORIN, DENISE DEGANNES, SAMUEL HALSTION, LISA CLARK, HOWARD SAFIR, VIVIAN LOPEZ, also known as Jane Lopez, ARLENE IRIZARRY, VINCENT STROPOLI, BRIAN MARTIN, also known as James Roe, JONATHAN LIPPMAN, Jane Doe, individually and attorney for the Administration for Children's Services, John Doe, individually and as Police Officers, YMSI HOLLOWAY, individually and as Supervisor, CHERYL CONSTANTINE, individually and as Supervisor, NIDIA CORDERO, individually and as Supervisor, DORABELLA DELAMOTHE, individually and as Manager, SHAKIRA PANTHER-WILBURG, individually and as caseworker, SYLVIA PARRIS, individually and as a caseworker for the Administration for Children's Services, JANE DORABELLA, individually and as supervisor for the Administration for Children's Services and JOHN TAI, individually and as supervisor for the Administration for Children's Services,

Defendants,

SAFE HORIZON,

Amicus.

Corporate Disclosure Statement

Amicus curiae The Brennan Center for Justice has no parent corporations, and there are no publicly held companies that hold stock in the Brennan Center.

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Interest of the Amicus

The Brennan Center for Justice at New York University School of Law ("Brennan Center") participates as an *amicus curiae* in this case in support of the plaintiffs with the consent of counsel for the subclass A plaintiffs, the subclass B plaintiffs, defendant the City of New York, and defendant the State of New York.

The mission of the Brennan Center is to carry forth the vital legacy of former U.S. Supreme Court Justice William J. Brennan, Jr., by promoting equality and human dignity, while safeguarding fundamental freedoms. The Brennan Center uses scholarship, public education, and legal action to find innovative and practical solutions to intractable problems in the areas of democracy, poverty, and criminal justice.

The particular interest of the Brennan Center in this case arises out of the Brennan Center's Access to Justice project, a national, multifaceted effort dedicated to helping ensure that low-income people have access to effective, enduring, and unrestricted legal assistance in civil cases. Ensuring that low-income domestic violence survivors in New York City involved in neglect proceedings have access to effective counsel – a key issue in this case – falls squarely within this mission.

Summary of Argument

The district court's ruling that the City may not remove children from mothers¹ when the sole basis for the removal is that the mother is the victim of domestic violence vindicates the fundamental right of families to stay together without unnecessary interference from the government. The court's ruling that such mothers are entitled to effective counsel in their neglect proceedings enforces the government's constitutional obligation to provide due process. While each right is critically important, this brief will focus on only the mother's right to counsel, because it turns on issues about which *amicus* the Brennan Center for Justice possesses particular expertise.

The district court correctly held that all members of subclass A are entitled to the appointment of counsel.² For all

¹ This brief will follow the district court's practice of referring to the members of subclass A as "mothers," with the understanding that for purposes of this brief that term is defined as including "legal or actual custodians of children; it is usually a female, but in relatively rare cases, the abused custodian will be a male." *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002). Subclass A consists of victims of domestic violence who have been charged with child neglect by the City of New York solely because they are victims of domestic violence. *Id.* at 163-64, 165.

² As the district court explained, since each member is constitutionally entitled to counsel, the government is constitutionally obligated to provide them with effective counsel. However, since the government apparently does not contest that if each member of the subclass has a constitutional

members of the subclass, the private interest, the government's interest, and the risk of error in the absence of the appointment of counsel mandate in favor of the appointment of counsel. Although the State argues that the Supreme Court's ruling in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), requires a case-by-case determination of the right to counsel, that is simply untrue. Moreover, if courts were forced to determine on a case-by-case basis whether the members of subclass A are entitled to counsel, the result would be that the neglect proceedings would be delayed, that there would be a very great risk of error in the right to counsel determination, and that the mothers in subclass A would be deprived of procedural due process.

The district court was also correct to hold that even if the mothers in subclass A are not all entitled to counsel as a matter of procedural due process, once the government has induced them to rely on court-appointed counsel, they become entitled to effective counsel as a matter of procedural due process.

right to counsel, then each is entitled to effective counsel, the argument below focuses only on establishing that all members of the subclass share the underlying right to counsel.

Argument

I. The District Court Correctly Held That It Was Appropriate to Make a Class-Wide Determination That All Members of Subclass A Have a Right to the Effective Assistance of Counsel.

A. All Members of Subclass A Are Constitutionally Entitled to Counsel.

"In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981). Due process thus protects litigants, including the mothers here, by ensuring that the proceedings in which the most important aspects of their lives may be at stake are not weighted against them. Due process also protects our justice system itself, because in the absence of fair procedures it loses its legitimacy, which "depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 866 (1992).

In *Lassiter*, the Supreme Court ruled that due process requires the appointment of counsel in a given situation if the private interest at stake, the government interest at stake, and the risk of erroneous deprivations in the absence of counsel, weighed against each other, favor appointing counsel. 452 U.S.

at 27. The Court held that while these factors would weigh in favor of the appointment of counsel for some parents involved in termination of parental rights proceedings in North Carolina, for other parents the factors would be weighted differently. *Id.* at 27-32. Examining the district court's evaluation of these same factors for the mothers in subclass A, it is apparent that the district court was correct to rule that, unlike in *Lassiter*, all members of subclass A have a constitutional right to counsel.³

As to the first factor, the district court was correct in ruling that "[t]he mothers' interest in family integrity and care of the children is strong." *Nicholson v. Williams*, 203 F. Supp. 2d 153, 255 (E.D.N.Y. 2002); see also *id.* at 251. The interest encompasses a parent's right to the companionship, care and custody of her children, see *Lassiter*, 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see also *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996), and also "the right of the family to remain together without the

³ The government wrongly contends that "the district court made no effort with regard to each of the members of Plaintiff Subclass A to discern whether the federal Constitution requires the appointment of assigned counsel in abuse or neglect proceedings." State's Br. at 48. This contention simply ignores the district court's determination that all members of the subclass had a right to counsel under the federal Constitution because all members share the characteristics that are relevant to the three-pronged *Lassiter* analysis. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 254 (E.D.N.Y. 2002).

coercive interference of the awesome power of the state.”

Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

In *Lassiter*, the Court found the private interest at stake in termination proceedings to be “commanding.” *Lassiter*, 452 U.S. at 27. Although the members of subclass A are charged with neglect, they may have at stake the termination of their parental rights, because federal law requires that once a child has been in foster care for 15 of the last 22 months the government generally must move to terminate the parent’s rights. As a result, once the government charges a mother in subclass A with neglect and places her children in foster care, it may have to move to terminate her rights even before the neglect petition is adjudicated. See Adoption & Safe Families Act, 42 U.S.C. § 675(5); N.Y. Soc. Serv. Law § 384-b(3)(1)(i) (McKinney 1992 & Supp. 2000).

Even where the neglect petition is adjudicated prior to the termination proceeding, the private interest at is, if anything, even greater than that involved in even the most sympathetic termination case considered by the *Lassiter* Court. The neglect proceeding is the government’s first intrusion into the parent-child relationship, while termination proceedings generally come only after the parent has already been adjudicated neglectful and has had his or her fundamental right to the care and custody

of the children abrogated. See *Davis v. Page*, 714 F.2d 512, 528-29 (5th Cir. 1983) (en banc) (Vance, J., dissenting).

As the district court properly found, there are numerous reasons why the private interest in having effective counsel is even stronger for parents subjected to domestic violence than it is for most parents charged with neglect. The district court observed that the violence may have adversely affected the survivors' relationships with their children, giving the parents "a strong interest in avoiding further trauma to the familial bonds that would result from months of separation." *Nicholson*, 203 F. Supp. 2d at 255. Moreover, since the mothers are subjected to violence by people with whom they are in intimate relationships, the government's disruption of yet another of their intimate relationships – their relationship with their children – can only exacerbate the mothers' trauma. See Laura M. Fernandez, *Domestic Violence and the Child Welfare System*, 189 Practicing Law Institute/Criminal 155, 158 (2002) (when the government removes children from domestic violence survivors, it "reinforces to women that they are powerless and will be punished, no matter what they do"); *Nicholson*, 203 F. Supp. 2d at 201 (citing various authorities). Additionally, "[t]he physical safety of the [mother] is often at risk, and decisions a mother makes in legal matters may have life or death

consequences for herself and her children." *Nicholson*, 203 F. Supp. 2d at 228.

In these respects, this case presents far more compelling parental interests than were presented in *Lassiter*. There, the Court ruled that although most parents had a substantial interest at stake, Ms. Lassiter had a less substantial interest because she had made clear that she was not interested in attending the termination hearing and "had not even bothered to speak to her retained lawyer after being notified of the termination hearing." 452 U.S. at 33. In contrast, the district court found that all members of subclass A – none of whom, by definition, are facing other neglect or abuse charges, *id.* at 250 – "are deeply concerned with caring for their children." *Id.* at 254. Thus, all members of subclass A have a strong private interest in having effective counsel appointed.

The district court was also correct in ruling that the second factor – the government's interest in depriving the members of subclass A of effective counsel – is weak. See *id.* at 255. As with the termination proceedings at issue in *Lassiter*, the government's interest in the welfare of the children gives it a strong interest in ensuring that the results of the neglect proceedings are accurate, which weighs in favor of appointing counsel. *Lassiter*, 452 U.S. at 27-28. That interest is heightened in the instant case, because the mothers

have been charged with neglect based on facts that the government admits should not lead to a neglect finding. See *Nicholson*, 203 F. Supp. 2d at 219 (citing ACS Guiding Principles). Although the government also has an interest in the efficient and economical resolution of the neglect cases, which might weigh against appointing counsel, that interest was not strong enough to overcome even the private interests at stake in *Lassiter*, and it is certainly insufficient to overcome the stronger private interests at stake here. See *Lassiter*, 452 U.S. at 28.

Finally, while in *Lassiter* the third factor – the risk of error – varied from parent to parent, the district court was correct in ruling that for all members of subclass A the risk of error is high in the absence of effective counsel. The *Lassiter* Court noted that while some termination of parental rights proceedings were so complex (for example those involving expert medical and psychiatric testimony) that the risk of an erroneous decision was high, others were informal and uncomplicated, so that the risk of error was low. *Id.* at 29-30. In contrast, all of the neglect proceedings in which the members of subclass A are involved are both formal and complex. See generally *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (discussing the complexity and formality of New York's neglect proceedings, and concluding that "numerous factors combine to magnify the risk of

erroneous factfinding"); *Davis*, 714 F.2d at 530-33 (Vance, J., dissenting) (comparing *Lassiter*'s termination proceedings to neglect proceedings).

Unlike the North Carolina termination proceedings at issue in *Lassiter*, where the government was sometimes represented by social workers instead of by lawyers, and where the rules of evidence did not apply, *Lassiter*, 452 U.S. at 29, in New York City neglect proceedings the City is represented by the Corporation Counsel, *Nicholson*, 203 F. Supp. 2d at 223, and with a few enumerated exceptions the rules of evidence are generally applicable, see McKinney's Family Court Act § 1046. The risk of an erroneous determination in the absence of counsel was reduced in *Lassiter* because the termination proceeding was the last in a series of other proceedings at which the parents had a right to counsel. See *Lassiter*, 452 U.S. at 29 n.4; see also *Davis*, 714 F.2d at 530 (Vance, J., dissenting). The neglect proceedings at issue here, however, are the first proceeding in which a parent participates. *Nicholson*, 203 F. Supp. 2d at 167. Also unlike the termination proceedings at issue in *Lassiter*, neglect cases involving domestic violence are all complex, involving complex legal and factual issues, and also involving the need to develop a detailed case plan for the family. See *Nicholson*, 203 F. Supp. 2d at 228, 254; compare *Lassiter*, 452 U.S. at 29.

Additionally, in all neglect cases there is the risk that uncounseled parents, or those with ineffective counsel, will sign away various rights at the urging of the City's attorney in order to regain custody of their children as soon as possible. See *Nicholson*, 203 F. Supp. 2d at 254-55; *Garramone*, 94 F.3d at 1450. This possibility simply does not exist in a termination case, where the only two outcomes are terminating or preserving the parent's rights.

Finally, the risk of error is particularly high in neglect cases in New York City because, as the district court found, "ACS caseworkers rely on deficient training and official policies," and because high caseloads and the inadequate 18-B system prevent family court judges from exercising sufficient oversight over ACS, particularly during the period just after a child has been removed from a home. *Nicholson*, 203 F. Supp. 2d at 221-22, 255.

Weighing these factors against each other, it is apparent that in this case, in stark contrast to *Lassiter*, where some but not all parents facing termination of their parental rights in North Carolina were entitled to counsel, procedural due process requires that *all* members of subclass A have a right to counsel.

B. *Lassiter* Does Not Require a Case-by-Case Analysis of the Right to Counsel for Each Member of Subclass A.

There is no basis for the government's argument that the Supreme Court held in *Lassiter* that, even if all members of a class share relevant characteristics entitling them to counsel, trial courts still must determine on a case-by-case basis whether each member of the class is entitled to counsel. See State's Br. at 47-48. The *Lassiter* Court itself explicitly recognized that the amount of process due in particular situations varies according to the characteristics of the situation:

[D]ue process "is not a technical conception with a fixed content unrelated to time, place and circumstances." . . . Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Accordingly, the Court's holding that it could not categorically determine whether all parents involved in termination of parental rights proceedings in North Carolina had a right to counsel was based on the specific characteristics of North Carolina's termination proceedings. See *id.* at 27-32; see also discussion *supra* § I.A. That holding does not control this Court's determination whether

all mothers in New York City charged with child neglect solely because they are domestic violence victims have a right to counsel.

Courts in at least five jurisdictions have recognized that the *Lassiter* Court's requirement of a case-by-case analysis of the right to counsel does not prevent courts from finding a right to counsel on a class-wide basis in proceedings other than North Carolina's termination of parental rights proceedings. Notably, using *Lassiter*'s framework for assessing whether a right to counsel exists in a particular situation, courts have held that the 14th Amendment requires the appointment of counsel categorically for *all* defendants in paternity cases in which the government is involved.⁴ See *Carroll v. Moore*, 423 N.W.2d 757,

⁴ In addition, ten dissenting members of a twenty-four judge en banc panel of the former Fifth Circuit believed that *Lassiter* did *not* require a case-by-case determination of parents' right to counsel in neglect cases in Florida. See *Davis*, 714 F.2d at 524 (Vince, J., dissenting). The dissenting judges stated that the Florida neglect proceedings at issue in *Davis* were different from the North Carolina termination proceedings at issue in *Lassiter*, and therefore were not governed by the Supreme Court's case-by-case holding in *Lassiter*. *Id.* at 526-33. The dissenting judges concluded that the class of indigent parents involved in neglect proceedings in Florida was constitutionally entitled to counsel. *Id.*

Although the government cites *Davis* as standing for the proposition that *Lassiter* always requires a case-by-case analysis of the right to counsel, not only did ten judges specifically dissent from that point, but another eight who concurred with the per curiam opinion did so on other grounds, without expressing an opinion on the *Lassiter* point. See *id.* at

766-67 (Neb. 1988); *Lavertue v. Niman*, 493 A.2d 213, 215, 218-19 (Conn. 1985); *Kennedy v. Wood*, 439 N.E.2d 1367, 1372 (Ind. Ct. App. 1982); *State ex rel. Cody v. Toner*, 456 N.E.2d 813, 815 (Ohio 1983); *Corra v. Coll*, 451 A.2d 480, 487 n.11 (Pa. Super. 1982). Thus, the government's reliance on *Lassiter* for the proposition that the mothers in subclass A may expect only a case-by-case adjudication of their right to counsel is simply wrong.

C. Determining the Right to Counsel for the Members of Subclass A on a Case-by-Case Basis Would Deprive the Members of the Subclass of Their Right to Procedural Due Process.

Although the government does not spell out how it envisions a case-by-case determination of the right to counsel occurring for the members of subclass A, there are at least two ways it could happen. Both methods are extremely cumbersome and lead to the ludicrous result that the family court would have to acknowledge that it was appointing ineffective counsel in some cases. The first method would be for the family court to determine whether the mothers had a constitutional right to counsel. If it determined that they did have such a right, it would assign them effective counsel, while if it determined that they did not it would assign them ineffective counsel. This

524 (Vance, J., dissenting); *id.* at 518 (Tjoflat, J., concurring).

would require an extra step that the court does not currently undertake, because pursuant to state law the courts are supposed to assign counsel to all members of the subclass (although they often fail to provide any counsel at all, and when they do appoint counsel it is often ineffective). The second method would be for the family court to refer cases involving the members of subclass A to the federal district court, which would make the right to counsel determination and then refer the case back to the family court, which would appoint effective counsel or ineffective counsel depending on what the federal court had ruled.

Either method would delay proceedings that are already significantly delayed because of crowded family court dockets. See *Nicholson*, 203 F. Supp. 2d at 221-22. The delay would increase the risk of error in two ways. First, because cases involving the removal of children operate under severe time pressure, there would be pressure for the court to make the right to counsel determination quickly, thus increasing the risk of error. See *id.* at 222 ("Because of their heavy caseloads, Family Court judges cannot immediately devote much time to each case. Yet the urgency of child safety demands that judges often make decisions without critical information."). Second, in order to reduce the delay and regain custody of their children as soon as possible, the mothers might sign away important

rights, including the right to counsel. See *id.* at 254-55. As discussed in section I.A above, all members of subclass A are the same with respect to their right to counsel. Consequently, individual assessments of their right to counsel would not increase the accuracy of those assessments.

The delay and the increased risk of error mean that procedural due process requires a class-wide determination of the right to counsel. In *Mathews v. Eldridge*, the Supreme Court ruled that the three factors that the Supreme Court weighed in *Lassiter* – the private interest at stake, the government’s interest, and the risk of erroneous deprivation – should be applied in any setting to determine whether a proposed procedure is required by procedural due process. 424 U.S. 319, 334-35 (1976). Applying those factors to the government’s proposal that right to counsel determinations be conducted on a case-by-case basis, it is apparent that procedural due process requires a class-wide determination instead.

The private interests at stake – the right to counsel, and the right to care and custody of one’s children – are substantial. Consequently, the members of the subclass have a strong interest in obtaining an accurate assessment of their right to counsel. See discussion *supra* at 5-8. Many members of the subclass also have a particularly strong interest in not having the proceedings delayed, because their children have been

removed before the proceedings begin, so any delay can prolong their separation from their children. This may cause significant emotional and possibly physical harm to both the children and their mothers. *Nicholson*, 203 F. Supp. 2d at 198-99, 203-04. It may also cause the mothers to forego their constitutional and legal rights in order to obtain custody of their children sooner. See discussion *supra* at 15-16.

Because the harm to the mothers and their children occurs as soon as the government intervenes in the child-parent relationship, and lasts until that intervention ends and there is no prospect of the children being removed, the instant case presents a stronger claim for class-wide appointment of counsel than was presented in *Lassiter*. In that case, as the district court noted, the Supreme Court stated that the case-by-case right to counsel determination would be “‘subject, of course, to appellate review.’” *Nicholson*, 203 F. Supp. 2d at 254 (quoting *Lassiter*, 452 U.S. at 32). In neglect cases, unlike in termination cases, if the trial court errs the appellate courts cannot as a practical matter undo the harm either by reversing the neglect decision or by requiring that counsel be provided and that the neglect proceeding be re-tried: the damage to the parent-child relationship already will have taken place.

As to the second factor, the government’s “urgent interest in the welfare of the child” gives the government a strong

interest in ensuring that the neglect proceedings are not delayed and that the right to counsel determination is made accurately. *Lassiter*, 452 U.S. at 27. The government thus has an interest in having the right to counsel determination made on a class-wide basis. Additionally, requiring case-by-case determinations of the right to counsel of the members of subclass A would waste valuable judicial resources, as well as the resources of New York City's Corporation Counsel, which would have to be involved in the right to counsel hearings. *Compare Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (ruling that to deny class representatives ability to appeal denial of class certification whenever defendant offers to settle for maximum representatives could obtain "would be contrary to sound judicial administration," because it would require judges to hear multiple individual cases); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 82 (1988) (discussing "the State's interest in conserving judicial resources").

As to the third factor, as discussed above, the risk of erroneous deprivation in the absence of a class-wide determination is high. See discussion *supra* at 15-16. In addition to the reasons mentioned above, there is the risk that many members of the class will never know that they may have a right to counsel, and will never be able to enforce that right.

Thus, all of the *Eldridge* factors weigh in favor of making the right to counsel determination on a class-wide basis.

II. The District Court Correctly Held That Even if the Members of Subclass A Have No Per Se Right to Counsel, Once the Government Undertakes to Provide Counsel, Due Process Requires That It Provide Effective Counsel.

Even if this Court were to find that some members of subclass A do not have a procedural due process right to counsel, it should uphold the district court's ruling based on that court's induced reliance reasoning. As the district court held, by promising counsel to members of subclass A, and thereby dissuading the members of the subclass from attempting to locate other counsel or to advocate for themselves, New York has violated the procedural due process rights of the members of the subclass. *Nicholson*, 203 F. Supp. 2d at 256-57. There are two lines of cases, in addition to the "good samaritan" cases cited by the district court, *id.* at 256, that support the district court's reasoning.

First, the Supreme Court has long recognized that due process may require the government to permit individuals to obtain the assistance of attorneys or other advocates at administrative proceedings and civil trials. For example, in *Goldberg v. Kelly* the Court warned, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 397 U.S. 254, 270 (1970)

(internal quotation omitted). Therefore, the Court held, a welfare recipient attending a pre-termination hearing “must be allowed to retain an attorney if he so desires.” *Id.*; see also *Burr v. New Rochelle Municipal Hous. Auth.*, 479 F.2d 1165, 1170 (2d Cir. 1973) (holding that when municipal housing authority raises rents in subsidized housing, it must accord due process, including permitting the tenants to be represented by counsel when they file written objections); *Moore v. Ross*, 502 F. Supp. 543, 551 (S.D.N.Y. 1980) (due process requires that applicants for unemployment insurance whose applications are denied be provided hearings at which counsel may be present), *aff’d*, 687 F.2d 604 (2d Cir. 1982). The role of counsel is to promote fairness by “ensur[ing] that the agency [or court] will acquire the information it should have in a manner fairly calculated to illuminate the issue for reasoned decision making.” *Elliot v. Weinberger*, 564 F.2d 1219, 1223 (9th Cir. 1977), *rev’d in part on other grounds sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (“[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.”).

In such cases, courts have recognized that while the Supreme Court has not required the appointment of counsel in all administrative and civil proceedings, the government may not

interfere with the ability of individuals dealing with government agencies or civil tribunals to obtain and confer with counsel. For example, in *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988), the Sixth Circuit held that when the plaintiff's trial counsel in a Title VII case withdrew several days before the trial, the district court's failure to adjourn the proceedings to permit the plaintiff to retain counsel violated his due process rights. See *id.* at 747. By promising counsel to members of the subclass, thereby dissuading them from bringing their own counsel to the neglect proceedings, and at the same time operating an assigned counsel system that practically ensures that counsel will be ineffective, see *Nicholson*, 203 F. Supp. 2d at 223-28, New York likewise deprives members of the subclass of due process.

The second line of cases involves the government's use of "bait and switch" tactics. The Supreme Court has ruled that the government violates procedural due process when it promises individuals a certain type of process, thereby dissuading them from taking advantage of other types of process, and then reneges on that promise. For example, in *Reich v. Collins*, the Supreme Court ruled that even though Georgia was constitutionally entitled to designate either predeprivation hearings or postdeprivation hearings as the exclusive remedy for wrongfully collecting taxes, once the state had offered

taxpayers a postdeprivation remedy, thereby inducing some taxpayers to forego using the predeprivation hearing process, the state could not change course midstream and decide that the predeprivation process was the only remedy. 513 U.S. 106, 110-12 (1993). See also *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 445 (1998) (per curiam) (requiring remedy for taxpayer who "reasonably relied on the apparent availability of a postpayment refund"). As in *Reich*, the government has advised the members of the subclass that they have a remedy (effective appointed counsel) that does not in fact exist, precluding them from finding other ways to exercise their due process rights (such as finding other counsel or vigorously representing themselves). Due process prevents the government from now contending that the members of the subclass have no right to effective counsel.

Conclusion

For these reasons, *amicus curiae* the Brennan Center for Justice respectfully urges the Court to affirm the holding of the district court that the government is constitutionally required to provide the members of subclass A with effective counsel.

Dated: New York, New York
October 16, 2002

Laura K. Abel

Certification Regarding Length of Brief

I hereby certify that there are 5,012 words in this brief, exclusive of the corporate disclosure statement, table of contents, table of citations, and this certification.

Dated: New York, New York
October 16, 2002

Laura K. Abel