16-173-cv

United States Court of Appeals

for the

Second Circuit

JANE DOE 1 and JANE DOE 2, on behalf of themselves and all similarly situated women,

Plaintiffs-Petitioners,

– v. –

The City of New York and Benny Santiago,

Defendants-Respondents,

FROM AN ORDER DENYING CLASS CERTIFICATION ENTERED ON JANUARY 5, 2016 BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, Case No. 15 CIV. 3849 (AKH)

BRIEF OF PUBLIC ADVOCATE FOR THE CITY OF NEW YORK AND MEMBERS OF NEW YORK CITY COUNCIL AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-PETITIONERS JANE DOE 1 AND JANE DOE 2

LETITIA JAMES, AS
PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
AMANDA MASTERS, ESQ., DEPUTY GENERAL COUNSEL*
1 CENTRE ST., 15TH FLR.
NEW YORK, N.Y. 10007
(212) 669-4253
For amici curiae

**Admission pending*

TABLE OF CONTENTS

LIST OF AMICI ii

TABLE OF AUTHORITIES iii

CONSENT OF THE PARTIES 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE CLASS CERTIFICATION DENIAL MISAPPLIED CORNERSTONES OF CLASS ACTION LAW 4

A. Damages claims do not preclude Jane Doe 1 and 2 from being adequate class representatives who can meet the commonality, typicality, and ascertainability requirements. 5

B. This class is ascertainable under Second Circuit precedents. 6

C. The class certification decision effectively terminates the litigation. 8

II. COURTS SHOULD NOT CONSTRUE RAPE AS SUCH A SPECIAL TYPE OF ASSAULT THAT IT CAN NOT BE SYSTEMICALLY ADDRESSED 9

CONCLUSION 11

LIST OF AMICI

Letitia James
Public Advocate for
The City of New York
1 Centre St., 15th Floor
New York, N.Y. 10007

Helen Rosenthal
Council Member
6th District – Manhattan
250 Broadway, Suite 1744
New York, N.Y. 10007

Vanessa Gibson
Council Member
16th District – The Bronx
250 Broadway, Suite 1770
New York, N.Y. 10007

Jumaane Williams
Council Member
45th District – Brooklyn
250 Broadway, Suite 1754
New York, N.Y. 10007

Corey Johnson
Council Member
3rd District – Manhattan
250 Broadway, Suite 1856
New York, N.Y. 10007

Laurie A. Cumbo
Council Member
35th District – Brooklyn
250 Broadway, Suite 1792
New York, N.Y. 10007

Rosie Mendez
Council Member
2nd District – Manhattan
250 Broadway, Suite 1734
New York, N.Y. 10007

Karen Koslowitz
Council Member
29th District – Queens
250 Broadway, Suite 1872
New York, N.Y. 10007

Annabel Palma
Council Member
18th District – The Bronx
250 Broadway, Suite 1781
New York, N.Y. 10007

Vincent Gentile
Council Member
43rd District – Brooklyn
250 Broadway, Suite 1747
New York, N.Y. 10007

Deborah Rose
Council Member
49th District – Staten Island
250 Broadway, Suite 1868
New York, N.Y. 10007

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Finch v. New York State Office of Children & Family Servs., 252 F.R.D. 192 (S.D.N.Y. 2008) 7

In re Visa Check/ Mastermoney Antitrust Litig. v. Visa, 280 F.3d 124 (2d Cir. 2001) 5

Ingles v. City of New York, 2003 WL 402565 (S.D.N.Y. 2003) 6

Ingraham v. Wright, 430 U.S. 651 (1977) 5

Jeanine B. v. Thompson, 877 F. Supp. 1268 (E.D. Wis. 1995) 7

La Marca v. Turner, 662 F. Supp. 647 (S.D. Fla. 1987) 5, 8

Lovely H. v. Eggleston, 235 F.R.D. 248 (S.D.N.Y. 2006) 8

Marisol v. Giuliani, 126 F.3d 372 (2d Cir. 1997) 6, 7

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Nunez v. City of New York, 11 Civ. 5845 (LTS) (S.D.N.Y. 2015), ECF No. 249 9

Parker v. Time Warner Entm't Co., *L.P*., 331 F.3d 13 (2d Cir. 2003) 7

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Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Tex. 1999) 8

Sosna v. Iowa, 419 U.S. 393 (1975) 8

Statutes

N.Y. City Charter §§ 10(a), 22, 24(a) 1

Other Authorities

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CONSENT OF THE PARTIES

No party withholds consent or objects to the filing of this *amici curiae* brief.

INTEREST OF AMICI CURIAE[1]

New York City Council ("City Council") and the Public Advocate for the City of New York, Letitia James, ("Public Advocate") have been engaged in efforts to address the abuse of inmates on Rikers Island as information about systemic problems has emerged in recent years.

The Public Advocate is one of three city-wide elected officials. She is a member of the New York City Council.[2] The chief role of the Public Advocate is to monitor City agencies and their compliance with the Charter as well as other laws.[3] The Public Advocate is also charged with receiving, investigating, and attempting to resolve constituents' complaints against City agencies.[4] Public Advocate Letitia James took office in January 2014, and since then she has received complaints from constituents and their advocates concerning the conditions women face in our City's jails, including sexual abuse and rape. She has investigated the systemic complaint and found that although nationwide 3.2 % of jail inmates reported sexual

[1] Pursuant to Local Rule of Appellate Procedure 29.1(b), Amicus states that:
(a) No party's counsel authored any part of this brief in whole or in part;
(b) No party's counsel contributed money that was intended to fund preparing or submitting this brief; and
(c) No person contributed money that was intended to fund preparing or submitting this brief.

[2] N.Y. City Charter §§ 10(a), 22, 24(a) (hereinafter "Charter").

[3] *Id.* § 24(i).

[4] *Id.* § 24(h), (f).

victimization, at Rose M. Singer Center ("RMSC") the rate was an alarming 8.6%.[5] And, in April of 2015, Public Advocate Letitia James petitioned the New York City Board of Correction to engage in rule-making to reduce the risk of sexual abuse on Rikers, yet no rules have been issued.

City Council held an oversight hearing on sexual abuse of female inmates on Rikers Island on December 15, 2015. City Council has held more than 19 hearings on Rikers Island in the past three years alone, and enacted eight bills regarding violence and abuses on Rikers Island in the past 12 months.[6]

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[5] *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-2012, Allen J. Beck PhD., NCJ 241399, Office of Justice Programs, Bureau of Justice Statistics, published May 2013, Appendix Table 5, page 71.

[6] Council of City of NY T2015-3850, oversight hearing on the unique issues facing women in city jails (Dec. 15, 2015); Council of City of NY T2015-3501, oversight hearing on higher education access for incarcerated individuals (Sep. 22, 2015); Council of City of NY T2015-2920, oversight hearing on New York City's action plan for behavioral health in the criminal justice system (May 12, 2015); Council of City of NY T2015-2913, oversight hearing on violence in New York City's jails and the City's response (May 6, 2015); Council of City of NY T2014-1819, oversight hearing on treatment of adolescents in New York City jails (Oct. 8, 2014); Council of City of NY T2014-1238, oversight hearing on violence and the provision of mental health or medical services in New York City jails (June 12, 2014); Council of City of NY T2013-7004, oversight hearing on the use of solitary confinement in detention centers (Oct. 24, 2013); Council of City of NY T2013-5874, oversight hearing on violence in New York City jails (Apr. 4, 2013), Council of City of NY Intro No. 0784, hearing on pre-considered inmate bill of rights (May 6, 2015); Council of City of NY Intro No. 0768, hearing on requiring the Department of Correction to report on enhanced supervision housing (May 6, 2015); Council of City of NY Intro No. 0706, hearing on requiring the commissioner of the Department of Correction to post a quarterly report regarding the visitation of incarcerated individuals (May 6, 2015); Council of City of NY Intro No. 0643, hearing on requiring the Department of Correction to provide a monthly report regarding the number of inmates who are on a waiting list for housing in restrictive housing and clinical alternative to punitive segregation units (May 6, 2015); Council of City of NY Intro No. 0753, hearing on requiring DOITT to post a quarterly report on the Department of Correction's website regarding the bail status of New York City inmates (May 6, 2015); Council of City of NY Intro No. 0767, hearing on publication of the Department of Correction's policies on the use of force (May 6, 2015); Council of City of NY Intro No. 0766, hearing on requiring the Department of Correction to post a quarterly report on

SUMMARY OF ARGUMENT

Women who have been sexually abused in jail deserve no less access to the courts than people who have been subjected to assaults, strip searches, and other abuses in jail. Class actions for injunctive relief exist for circumstances when numerous individual cases cannot be joined. This action, brought on behalf of women detained at Rikers Island who suffer sexual abuse, a marginalized and under-represented group unlikely to access the justice system on their own for myriad reasons, is just such a case. The court below mistook basic principles of class action litigation in denying class certification, creating dire consequences for the vulnerable class members whose claims are now extinguished.

ARGUMENT

This Court reviews *de novo* the district court's conclusions of law that informed a decision to deny class certification.[7] Petitioners seeking leave to appeal pursuant to Federal Rules of Civil Procedure ("FRCP") 23(f) typically demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about

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the population demographics of the city's jails (May 6, 2015); Council of City of NY Intro No. 0758, hearing on requiring the commissioner of the Department of Correction to post a quarterly report regarding the department's grievance system (May 6, 2015); Council of City of NY Intro No. 0292, hearing on punitive solitary confinement reports (June 12, 2014).

[7] *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 18 (2d Cir 2003).

which there is a compelling need for immediate resolution.[8] Both tests are met here, and the Court should grant leave to appeal.

I. THE CLASS CERTIFICATION DENIAL MISAPPLIED CORNERSTONES OF CLASS ACTION LAW

The class representatives sought certification of a class for injunctive relief under FRCP 23(a) and (b)(2) to address pervasive sexual abuse in one New York City jail located on Rikers Island, the RMSC. The putative class was "every woman who is or will be incarcerated at [RMSC]." Appendix ("A")-32:5-7. The court below erred in dismissing[9] the class claims under FRCP 23(a), based on an unsupported belief the representative parties could not fairly and adequately protect the interests of the class because they have individual damages claims. The court also improperly dismissed the claims based on ascertainability, which was clearly present here. The decision below undoubtedly will chill other victims from attempting access to the courts – what woman at Rikers who has been raped would be a suitable class representative if the rationale behind this decision stands?

A. Damages claims do not preclude Jane Doe 1 and 2 from being adequate class representatives who can meet the commonality, typicality, and ascertainability requirements.

[8] *Plaintiffs Class v. Credit Lyonnais Rouse, Ltd.*, (*In re Sumitomo Copper Litigation*), 262 F.3d 134 (2d Cir. 2001).

[9] By summary order which incorporated the reasons articulated by the court on the record, the court denied class certification under 23(a): "For the reasons stated on the record, I find that the class is not sufficiently ascertainable as proposed…and that the named plaintiffs…lack typicality and commonality in their claims, and would not adequately represent the class." A-42:24-43:7; A-46.

Individual damages claims for sexual abuse do not create a conflict of interest for putative class representatives seeking injunctive relief.[10] Given the difficulties women face reporting sexual abuse, and especially abuse in a jail environment,[11] it is imperative to allow these women to represent a marginalized and too-often unheard class. Other than the incorrect conflict of interest idea, the decision below articulates no cognizable reason why these women are not fit to represent the class. The court's suggestion that these two women will abandon the class in favor of a quicker settlement of monetary claims is completely without basis in fact.[12] It is without basis in history, as civil rights have been vindicated for decades by those who suffered great harms themselves and wanted justice for all. It is without basis in law. In cases concerning abuse of male prisoners, courts in this

[10] *See*, *e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 653 (1977) (decision involved a class action certified pursuant to Rule 23(b)(2), where plaintiffs also asserted claims for individual damages; class was defined as "All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board").

[11] Courts have long recognized the underreporting of rapes and sexual assaults within prisons. *See*, *e.g.*, *United States v. Bailey*, 444 U.S. 394, 426 n. 6 (1980) (Blackmun, J. dissenting) (A kid who is raped tells the guards, "his life isn't worth a nickel"); *Martin v. White*, 742 F.2d 469, 473 (8th Cir.1984) (Statistics on inmate assaults reflect "merely the tip of the iceberg as many violent assaults never find their way into the record books."); *Doe v. District of Columbia*, 701 F.2d 948, 966 (D.C.Cir.1983) (Edwards, J., separate statement); *State v. Green*, 470 S.W.2d 565, 569 (Mo. 1971) (dissenting opinion) (Life of inmate of Missouri Training Center for Men who reports a rape not worth "a plugged nickel".); *LaMarca v. Turner*, 662 F. Supp. 647, 686 fn. 32 (S.D. Fla. 1987).

[12] Speculative conflict is not appropriate for consideration at the class-certification stage. *In re Visa Check/Mastermoney Antitrust Litig. v Visa*, *United States*, 280 F.3d 124, 145 (2d Cir. 2001).

circuit have allowed people who have been assaulted or strip-searched to simultaneously represent a class and pursue their own rights to compensation.[13]

The court below erred when it essentially carved out a type of harm – harm from sexual abuse – that would be treated differently from any other sort of harm which might have monetary value. The practical effect of the court's incorrect rationale would make all victims of sexual abuse unfit class representatives.

B. This class is ascertainable under Second Circuit precedents.

The judicially created requirement for ascertainability is premised on the need to know who is in the class and who is out, for providing notice and distributing damages to class members. This Circuit recognizes that the concept is flexible, and when plaintiffs seek institutional reform, it almost evaporates.[14] Consistently, courts in this circuit have not required that a class definition tell us today the names of the people who will become members of the class.[15]

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[13] *See Ingles v. City of New York*, 2003 WL 402565, at *20 (S.D.N.Y. 2003); *Daniels v. City of New York*, 198 F.R.D. 409, 416 (S.D.N.Y. 2001); *Augustin v. Jablonsky* (*In re Nassau County Strip Search Cases*), 461 F.3d 219, 229 (2d Cir. 2006).

[14] *See Marisol A. v. Giuliani*, 126 F.3d 372, 375-78 (2d Cir. 1997) (certifying a class of children who "are or will be at risk of neglect or abuse and whose status is or should be known to" a City agency; Rule 23(b)(2) satisfied "because the plaintiffs seek injunctive relief and they predicate the lawsuit on the defendants' acts and omissions with respect to" the class); *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995) ("civil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category" of 23(b)(2) actions); Advisory Committee Note to Subdivision (b)(2) ("Illustrative are various actions . . . where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration").

[15] *See Biediger v. Quinnipiac Univ.*, No. 09 Civ. 621, 2010 U.S. Dist. LEXIS 50044, 2010 WL 2017773, at *7 (D. Conn. May 20, 2010) (certifying a class of all present and future female students who "want to end Quinnipiac University's sex discrimination"); *Mental Disability Law*

Plaintiffs amended the class definition to "every woman who is or will be incarcerated at [RMSC]."[16] The court held that despite this modification, the "fluidity" of the population at RMSC, combined with the absence of an "opt out" right for FRCP 23(b)(2) class members,[17] meant the class was not ascertainable.[18] The class is straightforward to identify: when inmates are admitted to RMSC they are known to the City. There are no women at RMSC who need to be peeled out of the class because they are not protected by the Constitution and not entitled to

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Clinic v. Hogan, 2008 WL 4104460, at *18 (E.D.N.Y. 2008) (certifying a class of "all individuals who (1) suffer from mental illness" and explaining that "because only declaratory and injunctive relief is sought, individual assessments of disability need not be made"); *Finch v. New York State Office of Children & Family Servs*., 252 F.R.D. 192, 203 (S.D.N.Y. 2008) (injunctive classes need not be precisely defined).

[16] A-32:5-7.

[17] The court's "opt out" concern is apparently based on two mistakes of law: the court's belief that future individual damages claims would be precluded, or a belief that future damages plaintiffs should be able to "opt out" of injunctive relief that improves conditions in the facilities. The preclusion fear was error: "It is established in this Circuit, as well as numerous other Circuits, that an individual's claim for money damages are not precluded by a class action where the consent judgment did not by its terms dispose of individual damage claims." *Figueroa v. Dean*, 2002 WL 31426205, *3 (S.D.N.Y., Oct. 30, 2002) (citing *Jones–Bey v. Caso*, 535 F.2d 1360, 1361–62 (2d Cir.1976) (damages case concerning jail conditions not precluded by earlier injunctive class action concerning same conditions); *accord*, *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir.1996), *cert. denied*, 520 U.S. 1103(1997) (noting every federal court of appeals is in accord); *Fortner v. Thomas*, 983 F.2d 1024, 1031–32 (11th Cir.1993); *Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1983); *Herron v. Beck*, 693 F.2d 125, 127 (11th Cir.1982); *Crowder v. Lash*, 687 F.2d 996,1007-09 (7th Cir. 1982); *Bogard v.Cook*, 586 F.2d 399, 408–09 (5th Cir. 1978); *In re Vitamin C Antitrust Litigation*, 279 F.R.D. 90, 115 (E.D.N.Y. 2012).
Likewise, the "opt out" fear was error: "When an action is certified under Rule 23(b)(3), class members are entitled to notice of the pendency of the action and may elect to "opt out" of the class and thereby not be bound by the judgment rendered in the class action. When a class action is certified under Rule 23(b)(2), however, all persons comprising the class become mandatory members. In other words, all those who come within the description in the certification become, and must remain, members of the class because no opt-out provision exists." *Daniels v. City of N.Y.*, 198 FRD 409, 415 (S.D.N.Y. 2001). To deny a 23(b)(2) class because there is no opting out is to deny the 23(b)(2) because it is a 23(b)(2).

[18] A-41:25-42:6.

protection from harm. There is no principled distinction between classes of people who have been physically abused and classes who have been sexually abused.[19] If the decision below were to stand, no class action regarding jail conditions could meet the ascertainability requirement unless the inmates permanently resided in jails. Moreover, classes which consist of all people who are or will be affected by the defendants are commonplace.[20]

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[19] Classes of people affected by uses of force versus acts of sexual abuse are not distinguishable by breadth; each covers a range of actions and injuries. Reported "uses of force" in the city jails range from a blow to the head, broken bone, a bruise, or merely pepper spray. NYC DOC Directive 5006R-C (V)(G)(4)-(5), available at www.nyc.gov/html/doc/html/directives/dept_directives.shtml. Not every reported "use of force" is an "excessive" use of force. It is beyond cavil that the officer-created reports of "use of force" at Rikers, at issue in *Nunez,* did not typically bear admissions of "excessive" force used. This fact did not prevent certification of the *Nunez* class, in fact the City admitted in argument in this case that the City consented to certification in *Nunez* based solely on the numbers of reports of force used. A-28, l. 17. Defendants stated on the record that the Nunez class was "easily ascertainable" based on the sheer number of reports. *Id.* By the City's own logic, this sexual abuse case is also easily ascertainable - more than a hundred sexual abuse reports were recorded by the City in relevant years.

[20] *Sosna v. Iowa*, 419 U.S. 393, 395 (1975) (class defined as persons residing in Iowa for less than a year who desire to initiate divorce actions); *Ingles*, 2003 WL 402565, at *4 (class defined as "all prisoners who are or will be confined in DOC institutions and commands not already subject to court order based on prior use of force litigation"); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 258 (S.D.N.Y. 2006) (class defined as "recipients of public assistance… who have received or will receive a notice from the New York City Human Resources Administration involuntarily transferring their case…"); Consent J., *Nunez v. City of New York*, 11 Civ. 5845 (LTS) (S.D.N.Y. 2015), ECF No. 249 (class defined as "all present and future inmates confined in jails operated by [DOC], except for the Eric M. Taylor Center and the Elmhurst and Bellevue Prison Wards."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 862 (S.D. Tex. 1999), *reversed on other grounds*, 178 F.3d 385 (5th Cir. 1999) ("class action status was granted to the plaintiffs, who represented all past, present, and future inmates in the Texas Department of Corrections"; suit to improve conditions ranging from sexual abuse to inadequate medical care); *Doe v. Lally*, 467 F.Supp 1339, 1345 (D. MD 1979) (declining to de-certify class action brought by prisoner who had been raped, on behalf of all prisoners); *Balla v. Idaho State Bd. of Corrs*., 595 F. Supp. 1558, 1561 (D. Idaho 1984) (class defined as all persons confined in the prison from 1981 to future date of final judgment); *La Marca v. Turner*, 662 F. Supp. 647, 651 (S.D. Fla. 1987) (class allegations of rape;

C. The class certification decision effectively terminates the litigation.

For the thousands of women detained at RMSC each year who are subjected to risk of sexual abuse, evidenced by the hundreds of women who have come forward in the past few years to tell their health practitioners of sexual abuse,[21] the court below has effectively terminated the litigation.

The court rationalized terminating this litigation with the suggestion that the class representatives would be better off pursuing damages. But the voyeurism, touching, and forcible rape suffered by this class would not necessarily have monetary values large enough to incentivize lawyers to bring civil rights cases.[22] Contrary to the court's rationale, sending a "message" via monetary damages or a *Monell* claim is not a more powerful way to achieve systemic change.[23] More importantly, that analysis has no place in a 23(b)(2) case. The court erred by importing the "superiority" concept from 23(b)(3) into the analysis of ability to represent the class. The decision below is the death knell for this injunctive case, and will likely prevent access to justice in any form for these women.

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class was "those persons within the Florida prison system who are or will be incarcerated at GCI").

[21] In 2014, for example, 116 people detained at Rikers Island reported sexual abuse to their medical provider.

[22] If the women did obtain counsel, then the court would be burdened with managing hundreds of related cases.

[23] *See* Richard Emery and Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000).

II. COURTS SHOULD NOT CONSTRUE RAPE AS SUCH A SPECIAL TYPE OF ASSAULT THAT IT CAN NOT BE SYSTEMICALLY ADDRESSED

It is understandably tempting to focus on the exceptionally abhorrent aspects of sexual abuse. But focusing on sexual abuse exceptionalism,[24] which is a subtext of the opinion below, is hazardous when it deprives sexual abuse survivors of equal access to the courts.

Sexual abuse in jails has systemic causes, and is amenable to a systemic fix. Public perception may be formed by sporadic news reports giving the impression of a few bad apples.[25] But our justice system does not rely on perceptions and conjecture. The roots of sexual abuse in jails are system failures: lack of supervision, monitoring, training, and discipline; poor staffing patterns; inadequate paths for reporting; and inadequate investigations. Plaintiffs should be allowed discovery on these issues, not foreclosed based on conjecture. Systems fixes for sexual abuse in jails are what Congress attempted to create with the Prison Rape

[24] Commentators have noted that creating "special rules for rape reifies gender inequality rather than combating it." I. Bennett Capers, *Real Women*, *Real Rape*, 60 UCLA L. REV. 826, 832.

[25] Data, on the other hand, shows a persistent problem. 2012 DOJ survey figures suggest that approximately 48 women at RMSC reported experiencing at least one incident of staff sexual misconduct in 2012, 46 were pressured into some sexual activity by staff, and 19 were physically forced into sexual activity by staff. *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-2012, Allen J. Beck PhD., May 2013, NCJ 241399, Office of Justice Programs, Bureau of Justice Statistics, page 8.

Elimination Act (PREA). PREA lacks a private right of action, but is a useful touchstone here[26] because PREA offers avenues for fashioning injunctive relief.

Allowing these class claims to see the light of day serves the important social purpose of removing stigma and creating an environment where women have less fear of reporting and more confidence in our justice system.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that this Court should grant leave to appeal pursuant to FRCP 23(f).

[26] "For example, these standards may influence the standard of care that courts will apply in considering legal and constitutional claims brought against corrections agencies and their employees arising out of allegations of sexual abuse." National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37196, 37196 (June 20, 2012).

Dated: January 26, 2016

Respectfully Submitted:

OFFICE OF THE PUBLIC ADVOCATE FOR
THE CITY OF NEW YORK
AMANDA MASTERS, ESQ.,
DEPUTY GENERAL COUNSEL
1 CENTRE ST., 15TH FLOOR
NEW YORK, N.Y. 10007
(212) 669-4253
For amici curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word Times New Roman, 14-pt. font.

_____
Amanda Masters