

No. 18-40057

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**United States Court of Appeals  
for the Fifth Circuit**

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M.D., BY NEXT FRIEND SARAH R. STUKENBERG; Z.H., BY NEXT FRIEND CARLA B. MORRISON; S.A., BY NEXT FRIEND JAVIER SOLIS; A.M., BY NEXT FRIEND JENNIFER TALLEY; J.S., BY NEXT FRIEND ANNA J. RICKER; H.V., BY NEXT FRIEND ANNA J. RICKER; L.H., BY NEXT FRIEND ESTELA C. VASQUEZ; C.H., BY NEXT FRIEND ESTELA C. VASQUEZ; A.R., BY NEXT FRIEND TOM MCKENZIE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs—Appellees,*

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF THE HEALTH AND HUMAN SERVICES COMMISSION OF TEXAS; HENRY WHITMAN, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES OF THE STATE OF TEXAS,

*Defendants—Appellants.*

On Appeal from the United States District Court  
for the Southern District of Texas, Corpus Christi Division

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**MOTION OF THE NATIONAL ASSOCIATION OF COUNSEL FOR  
CHILDREN FOR LEAVE TO FILE ITS *AMICUS CURIAE* BRIEF IN  
SUPPORT OF APPELLEES AND AFFIRMANCE**

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N. Terry Adams, Jr.  
Nicholas D. Stepp  
AKERMAN LLP  
1300 Post Oak Boulevard, Ste. 2500  
Houston, Texas 77056  
Tel: (713) 623-0887  
Fax: (713) 960-1527  
Counsel for Amicus Curiae  
National Association of Counsel for Children

**CERTIFICATE OF INTERESTED PERSONS**

**No. 18-40057**

M.D., BY NEXT FRIEND SARAH R. STUKENBERG; Z.H., BY NEXT FRIEND CARLA B. MORRISON; S.A., BY NEXT FRIEND JAVIER SOLIS; A.M., BY NEXT FRIEND JENNIFER TALLEY; J.S., BY NEXT FRIEND ANNA J. RICKER; H.V., BY NEXT FRIEND ANNA J. RICKER; L.H., BY NEXT FRIEND ESTELA C. VASQUEZ; C.H., BY NEXT FRIEND ESTELA C. VASQUEZ; A.R., BY NEXT FRIEND TOM MCKENZIE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

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*Defendants—Appellants.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

Plaintiffs	Plaintiffs' Counsel
M.D., by next friend Sarah R. Stukenberg	Aaron Finch Joshua Rosenthal Adam Dembrow
Z.H., by next friend Carla B. Morrison	Adriana Teresa Luciano Christina Wilson Elizabeth Pitman
S.A., by next friend Javier E. Solis	Ira Lustbader Jessica Polansky

<p>A.M., by next friend Jennifer Talley</p> <p>J.S. and H.V., by next friend Anna J. Ricker</p> <p>L.H. and C.H., by next friend Estela C. Vasquez</p> <p>A.R., by next friend Tom McKenzie</p>	<p>Michael Kenneth Bartosz Marcia Robinson Lowry Melissa Cohen Sara Bartosz Patrick Almonrode Rachel Brodin Nili Sarah T. Russo Stephen Dixon William Kapell CHILDREN’S RIGHTS, INC.</p> <p>Reagan Simpson R. Paul Yetter Christian J. Ward Lonny Hoffman Dori Kornfield Goldman Christopher D. Porter Wynn B. McCloskey YETTER COLEMAN LLP</p> <p>Barry F. McNeil David Allen Dodds Richard Thaddeus Behrens HAYNES &amp; BOONE LLP</p>
<b>Defendants</b>	<b>Defendants’ Counsel</b>
<p>Greg Abbott, in his official capacity as Governor of the State of Texas</p> <p>Charles Smith, in his official capacity as Executive Commissioner of the Health and Human Services Commission of the State of Texas</p> <p>Henry Whitman, Jr., in his official capacity as Commissioner of the Department of Family and</p>	<p>Ken Paxton Jeffrey C. Mateer Brantley Starr James E. Davis Scott A. Keller Joseph D. Hughes Philip A. Lionberger Angela V. Colmenero Thomas A. Albright Todd L. Disher Andrew B. Stephens</p>

Protective Services of the State of Texas	Marc Rietvelt OFFICE OF THE ATTORNEY GENERAL
<b><i>Amici Curiae</i> in support of Plaintiffs-Appellees</b>	<b>Counsel for <i>Amici Curiae</i></b>
National Association of Counsel for Children	N. Terry Adams, Jr. Nicholas D. Stepp AKERMAN LLP
Disability Rights Texas	Tara Grigg Garlingouse Brian East DISABILITY RIGHTS TEXAS
National Association of Social Workers and its Texas Chapter	Richard P. Hogan, Jr. Jennifer Bruch Hogan James C. Marrow HOGAN & HOGAN  Christopher S. Johns JOHNS & COUNSEL PLLC

The National Association of Counsel for Children is a non-profit child advocacy and professional membership organization organized under Section 501(c)(3) of the Internal Revenue Code. The National Association of Counsel for Children has no separate parent organization. The National Association of Counsel for Children has no stockholders. These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification as provided by Fifth Circuit Rules 29.2 and 28.2.1.

The undersigned counsel of record certifies that the National Association of Counsel for Children is the only entity that has an interest in this *amicus* brief, which is filed in support of the Appellees. No counsel for any party authored any portion of this brief. No party, and no person other than the National Association of Counsel for Children and its counsel, contributed monetarily to the preparation of this *amicus* brief.

These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification as provided by Fifth circuit rules 29.2 and 28.2.1.

Date: April 9, 2018

Respectfully submitted,

/s/ N. Terry Adams, Jr.

Counsel of Record for *Amicus*  
*Curiae* National Association of  
Counsel for Children

No. 18-40057

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for the Fifth Circuit**

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**MOTION OF THE NATIONAL ASSOCIATION OF COUNSEL FOR  
CHILDREN FOR LEAVE TO FILE ITS *AMICUS CURIAE* BRIEF  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

Pursuant to 5TH CIR. R. 29.1, FED. R. APP. P. 27, and FED. R. APP. P. 29(a)(3), the National Association of Counsel for Children, by and through its undersigned counsel, respectfully moves for leave to file the attached *amicus curiae* brief in support of Appellees and affirmance.

This brief and motion for leave to file are timely because they are being submitted “within 7 days after the filing of the principal brief of the party whose position the *amicus* brief will support.” 5TH CIR. R. 29.1.

### **INTEREST OF THE *AMICUS***

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America’s children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children’s law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs advocating the legal interests of children and families in State and federal appellate courts and the Supreme Court of the United States. The substantive due process right

of foster children to be free from an unreasonable risk of harm caused by the State, and the corresponding constitutional duty of the State to foster children, falls squarely within the NACC's core mission and advocacy interest for children.

### AUTHORITY TO FILE

Leave to file a brief *amicus curiae* lies in the discretion of the Court. This discretion should be exercised liberally, especially where matters of public interest are involved. "Even when a party is well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

"Some friends of the court are entities with particular expertise not possessed by any party to the case . . . . Still others explain the impact a potential holding might have on an industry or other group." *Id.* Amicus briefs are regularly accepted by courts, since a "restrictive policy with respect to granting leave to file may also create the perception of viewpoint discrimination." *Id.* at 133.

This *amicus* brief explores and analyzes a central legal issue in this case: the rationale for the existence of foster children's substantive due process right to be free from an unreasonable risk of harm and the



state's corresponding constitutional duty to provide personal security and reasonably safe living conditions. As an association of legal advocates, the National Association of Counsel for Children is uniquely situated to address the Court regarding foster children's substantive due process rights. Oddly, the State appellants address foster children's substantive due process rights only once, in passing in a footnote, and to cast doubt on their existence. Accordingly, this brief does not repeat facts or legal arguments already in the principal briefs, and focuses instead on points not adequately or properly addressed in the State appellants' brief. 5TH CIR. R. 29.2.

### CONCLUSION

The National Association of Counsel for Children, as movant and as prospective *amicus curiae* respectfully requests leave to file the attached *amicus curiae* brief in support of Appellees and affirmance. The Plaintiff-Appellees have consented to the filing of this brief, as noted in the Certificate of Conference. The State has not consented to the timely filing of this brief, as explained in the Certificate of Conference.

Respectfully submitted,

/s/ N. Terry Adams, Jr.

N. Terry Adams, Jr.

Nicholas D. Stepp

AKERMAN LLP

1300 Post Oak Blvd., Ste. 2500

Houston, Texas 77056

Tel: (713) 623-0887

Fax: (713) 960-1527

terry.adams@akerman.com

nicholas.stepp@akerman.com

*Counsel for the National Association  
of Counsel for Children*

## CERTIFICATE OF CONFERENCE

Counsel for *amicus curiae*, the National Association of Counsel for Children, has conferred with counsel for the Appellees, Professor Lonny Hoffman, and their clients consent to the relief requested in this motion for leave to file.

Counsel for *amicus curiae*, the National Association of Counsel for Children, has also conferred with counsel for the Appellants, Scott Keller, who stated that his clients would consent to the filing of this brief provided that it was filed early, on Friday, April 6, 2018, just 4 days after the principal brief of the party being supported, rather than the 7 days provided by the Federal Rules of Appellate Procedure and the Rules of this Court. *See* FED. R. APP. P. 29(a)(6); 5TH CIR. R. 29.1. Accordingly, Appellants do not consent to the timely filing of the attached *amicus* brief.

April 9, 2018

/s/ N. Terry Adams, Jr.

N. Terry Adams, Jr.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to the counsel below through the Court's CM/ECF system.

R. Paul Yetter  
Dori Kornfeld Goldman  
Lonny Jacob Hoffman  
Reagan William Simpson  
Christian J. Ward  
YETTER COLEMAN L.L.P.  
811 Main Street, Suite 3600  
Houston, Texas 77002  
*Counsel for Plaintiffs-Appellees*

Sara Michelle Bartosz  
Stephen Andrew Dixon  
Christina Wilson Remlin  
CHILDREN'S RIGHTS, INC.  
88 Pine Street, Suite 800  
New York, New York 10005  
*Counsel for Plaintiffs-Appellees*

Marica Lowry  
A BETTER CHILDHOOD, INC.  
1095 Hardscrabble Road  
Chappaqua, New York 10514  
*Counsel for Plaintiffs-Appellees*

Scott Keller  
Joseph D. Hughes  
Philip A. Lionberger  
Thomas A. Albright  
Ken Paxton  
Jeffrey C. Mateer  
OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
*Counsel for Defendants-Appellants*

/s/ Nicholas D. Stepp

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Nicholas D. Stepp

No. 18-40057

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**BRIEF OF *AMICUS CURIAE*  
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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N. Terry Adams, Jr.  
Nicholas D. Stepp  
AKERMAN LLP  
1300 Post Oak Boulevard, Ste. 2500  
Houston, Texas 77056  
Tel: (713) 623-0887  
Fax: (713) 960-1527  
Counsel for *Amicus Curiae*  
National Association of Counsel for Children

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<p>L.H. and C.H., by next friend Estela C. Vasquez</p>	<p>Rachel Brodin Nili Sarah T. Russo Stephen Dixon</p>
<p>A.R., by next friend Tom McKenzie</p>	<p>William Kapell CHILDREN’S RIGHTS, INC.</p>
	<p>Reagan Simpson R. Paul Yetter Christian J. Ward Lonny Hoffman Dori Kornfield Goldman Christopher D. Porter Wynn B. McCloskey YETTER COLEMAN LLP</p> <p>Barry F. McNeil David Allen Dodds Richard Thaddeus Behrens HAYNES &amp; BOONE LLP</p>

<b>Defendants–Appellants</b>	<b>Defendants–Appellants’ Counsel</b>
<p>Greg Abbott, in his official capacity as Governor of the State of Texas</p> <p>Charles Smith, in his official capacity as Executive Commissioner of the Health and Human Services Commission of the State of Texas</p> <p>Henry Whitman, Jr., in his official capacity as Commissioner of the Department of Family and Protective Services of the State of Texas</p>	<p>Ken Paxton                      Jeffrey C. Mateer                      Brantley Starr                      James E. Davis                      Scott A. Keller                      Joseph D. Hughes                      Philip A. Lionberger                      Angela V. Colmenero                      Thomas A. Albright                      Todd L. Disher                      Andrew B. Stephens                      Marc Rietvelt                      OFFICE OF THE ATTORNEY GENERAL</p>
<b><i>Amici Curiae</i> in support of Plaintiffs–Appellees</b>	<b>Counsel for <i>Amici Curiae</i></b>
<p>National Association of Counsel for Children</p>	<p>N. Terry Adams, Jr.                      Nicholas D. Stepp                      AKERMAN LLP</p>
<p>Disability Rights Texas</p>	<p>Tara Grigg Garlingouse                      Brian East                      DISABILITY RIGHTS TEXAS</p>
<p>National Association of Social Workers and its Texas Chapter</p>	<p>Richard P. Hogan, Jr.                      Jennifer Bruch Hogan                      James C. Marrow                      HOGAN &amp; HOGAN</p> <p>Christopher S. Johns                      JOHNS &amp; COUNSEL PLLC</p>

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Association of Counsel for Children has no separate parent organization. The National Association of Counsel for Children has no stockholders.

The undersigned counsel of record certifies that the National Association of Counsel for Children is the only entity that has an interest in this *amicus* brief, which is filed in support of the Appellees. No counsel for any party authored any portion of this brief. No party, and no person other than the National Association of Counsel for Children and its counsel, contributed monetarily to the preparation of this *amicus* brief.

These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification as provided by Fifth Circuit Rules 29.2 and 28.2.1.

April 9, 2018

Respectfully submitted,

/s/ N. Terry Adams, Jr.  
Counsel of Record for *Amicus*  
*Curiae* National Association of  
Counsel for Children

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## INTEREST OF AMICUS CURIAE

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) nonprofit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program.

Through the *amicus curiae* program, the NACC has filed numerous briefs advocating the legal interests of children and families in state and federal appellate courts. The substantive due process right of foster children to be free from an unreasonable risk of harm caused by the State, and the State's corresponding constitutional duty to foster children, presented by this case, squarely falls within the NACC's core mission and advocacy interest for children.

## ARGUMENT

- I. The State does not challenge the district court’s holding that foster children have a Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State.
- A. The State does not raise any issue in its principal brief challenging the existence of foster children’s Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State, or the State’s corresponding constitutional duty to foster children.

The district court held that “Plaintiffs have a Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State.<sup>1</sup> Texas currently violates that right.” (Doc. 368 at 17, 255; incorporated by reference into Doc. 559 at 1–2). The district court’s holding relies on this Court’s decisions recognizing foster care as a situation in which there is a “special relationship” giving rise to a constitutional duty that the State keep foster children free from an unreasonable risk of harm. (Doc. 368 at 15–17 (citing and following *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990); *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel.*

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<sup>1</sup> “State” as used herein means Defendants–Appellants, who are all state officials sued in their official capacity, unless context indicates otherwise.



*Keys*, 675 F.3d 849, 859 (5th Cir. 2012)); see *Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004).

On appeal, the State does not dispute that it has a “special relationship” with foster children. But, the State appears to contend, albeit inadequately, that this “special relationship” does not have constitutional dimension. (State’s Br. at 36 n.7); *infra* at 3–4.

Significantly, the State does not raise any issue in its principal brief challenging the constitutional nature of its “special relationship” with foster children. The State does not raise any issue in its brief challenging the existence of foster children’s Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State, or even the State’s corresponding constitutional duty to foster children. (State’s Br. at 3–4). The State also does not advance any argument or reasoning as to why the district court’s holding about the existence of this due process should not stand. (State’s Br. at 18, 36).

Instead, the “Issues Presented” and “Argument” sections in the State’s opening brief address only the second component of the district court’s holding—that “Texas currently violates that right”—by

challenging “culpability, causation, and class-wide harm.” (State’s Br. at 18, 36). As a result, any assertion by the State in this appeal that foster children do not “have a Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State” has been waived and abandoned by the State. *See Murungi v. Tex. Guaranteed*, 402 F. App’x 849, 850, 2010 WL 3736227, at \* 1 (5th Cir. 2010) (“We begin by noting that when a litigant fails to raise an issue or to provide any citations to the record or case law concerning an issue, the issue is waived as inadequately briefed.”).

**B. The State has further waived any challenge to the district court’s holding that foster children have a substantive due process right to be free from an unreasonable risk of harm caused by the State due to inadequate briefing.**

In footnote 7 of its initial brief, the State notes that “this Court has previously described foster care as creating a ‘special relationship’ out of which a substantive-due-process right arises, *Griffith v. Johnson*, 899 F.2d 1427, 1439 (5th Cir. 1990), [but] the Supreme Court has not yet decided that question. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 n. 9 (1989).” (State’s Br. at 36 n.7).

Then, in a single sentence, without any supporting record or case citation, the State appears to challenge the constitutional dimension of its “special relationship” with foster children, as follows: “Defendants contend that they have not “restrain[ed] [the plaintiffs]’ freedom to act on [their] own behalf” in a way that “trigger[s] the protections of the Due Process Clause” and preserve that argument for en banc or Supreme Court review. *Id.* at 200.” (State’s Br. at 22 n.7).

Briefs must include an “argument, which must contain ... appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” FED. R. APP. P. 28(a)(8)(A). “Briefs are inadequate if they fail to cite to any relevant case law from this court and fail to apply the proper test for the disputed issue.” *Gurung v. Holder*, 587 F. App’x 834, 836–37 (5th Cir. 2014). An appellant abandons all issues not raised and argued in its *initial* brief on appeal. A party who inadequately briefs an issue is considered to have abandoned that claim. *Herster v. Board of Supervisors of La. State Univ.*, No. 16-31242, \_\_\_ F.3d \_\_\_, 2018 WL 1614419, at \*3 n.5 (5th Cir. 2018) (quoting *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994)).

The State fails to develop any discernable argument in footnote 7 about why its “special relationship” with foster children does not implicate the Constitution, why foster children do not have a substantive due process right to be free from an unreasonable risk of harm caused by the State, or why the special relationship between foster children and the State does not give rise to a corresponding constitutional duty for the State to protect foster children from unreasonable risks of harm. (State’s Br. at 36 n.7). The State also fails to include a single case citation supporting these positions.<sup>2</sup> Accordingly, the State has further abandoned and waived any challenges on these grounds because it has also inadequately briefed them. *See United States v. Mirza*, 454 F. App’x 249, 257, 2011 WL 5042211, at \*7 (5th Cir. 2011); *Devon La. Corp. v. Petra Consultants, Inc.*, 247 F. App’x 539, 547, 2007 WL 2693647, at \*7 (5th Cir. 2007) (“[A] single paragraph with no citations to authority is insufficient to

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<sup>2</sup> The “*Id.*” citation in this conclusory sentence in footnote 7 is to the Supreme Court’s *DeShaney* decision, but that does not support the State’s apparent contentions in footnote 7 that foster children do not have a due process right to be free from an unreasonable risk of harm caused by the State, as previously recognized by this Court and held by the district court below. Indeed, *DeShaney* was the basis for this Court’s recognition of foster children’s due process right to be free from an unreasonable risk of harm caused by the State. *Griffith*, 899 F.2d at 1439; *Doe*, 675 F.3d at 859.

constitute an argument on appeal. We have consistently held such arguments are abandoned for inadequate briefing. . . . We have also held that an argument consisting solely of one citation to an authority constituted briefing waiver.”).

It is not enough to merely assert in a footnote that one wishes to “preserve [an] argument for en banc or Supreme Court review.” See *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 601 (5th Cir. 2016). As a result, the only preserved issues before the Court are (1) whether the district court committed clear error in its factual findings, *Ball v. LeBlanc*, 792 F.3d 584, 592 (5th Cir. 2015), and (2) whether the district court clearly abused its discretion in entering its permanent injunction, *id.* at 599. This appeal is thus similar in posture to *Hernandez*, where this Court noted that “the only issue on appeal is whether the social workers’ conduct constituted deliberate indifference.” *Hernandez*, 380 F.3d at 880.

- II. The “special relationship” between foster children and the State imposes a constitutional duty on the State to protect foster children from an unreasonable risk of harm.**
- A. The deprivation of liberty entailed in being placed in foster care is sufficient to trigger the protections of the Due Process Clause.**

Even if the State had not abandoned and waived any challenge that its “special relationship” with foster children imposes a constitutional duty on the State, the State’s apparent position on this issue in footnote 7 of its brief is wholly without merit.

Like all other persons, foster children have a constitutional right to be free from deprivations of life, liberty, and property caused by the State without due process of law. U.S. CONST. amend. XIV. When a State takes a person into its custody and holds that person there, the State’s action creates a “special relationship” with the particular person that requires the State to protect that person from harm. *Doe*, 675 F.3d at 855–56, 58. A State’s action in assuming responsibility of finding and keeping children in a safe environment imposes on State officials an obligation to ensure the continuing safety of the environment, and the failure to meet that obligation constitutes a deprivation of liberty under the Fourteenth Amendment. *Griffith*, 899 F.2d at 1439. Every

federal circuit court has followed established Supreme Court precedent, *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989), and reached the same result this court did in *Griffith* and *Doe*.: The custodial relationship between foster children and a State is of constitutional dimension in that it imposes on the State a constitutional duty to protect foster children from an unreasonable risk of harm. *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 892–93 (10th Cir. 1992); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981).

No known case holds that the “special relationship” between foster children and the State lacks constitutional dimension—and for good reason. The Supreme Court has recognized the right to physical safety and security for persons involuntarily committed in a government

custodial setting. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). When a State affirmatively restrains an individual's freedom to act on his or her own behalf, that deprivation of liberty triggers the protections of the Due Process Clause. *DeShaney*, 489 U.S. at 200.

The Plaintiffs are foster children in the permanent managing conservatorship of the Texas Department of Family and Protective Services. (Doc. 368 at 4). The entire premise of the removal and termination processes under Texas law, as well as foster care in general, is to protect children from unreasonable risks of harm. *See, e.g.*, TEX. FAM. CODE § 262.104(a) (providing for the State's immediate possession of a child to protect against immediate risks and promote child safety); *id.* § 161.001(b)(2) (providing that termination may be predicated only upon a finding by clear and convincing evidence that termination is in the best interest of the child); *id.* § 153.001 (announcing that the public policy of Texas in the conservatorship context is to "provide a safe, stable, and nonviolent environment for the child"); *Ledbetter*, 818 F.2d at 798.

The State's suggestion that it has not restrained these PMC plaintiffs' liberty sufficient to trigger the protections of the Due Process



Clause bears no more relationship to the facts than it does to established law. For example, the Department's decisions about the level of services Plaintiff M.D. should receive resulted in M.D.'s being placed in four different locations in five months. (Doc. 368 at 58). After several hospitalizations at the Department's behest, the Department placed M.D. in three different residential treatment centers. At the third residential treatment center, M.D. reported that a staff member sexually assaulted her. That staff member left work early the day of the alleged event, purportedly to deal with an issue related to blood sugar. (Doc. 368 at 61). Despite instructions from police that M.D. should see a Sexual Assault Nurse Examiner immediately, the Department's facility waited 3 days before M.D. saw a doctor, by which time it was too late to administer the exam. When an investigator sought M.D.'s clothes and linens from the Department's facility, those items had been washed. (Doc. 368 at 62). A psychiatrist who interviewed M.D. the following week believed that she was telling the truth. (Doc. 368 at 61). Offered his job back on the condition that he never again work in the female unit, the staff member declined. (Doc. 368 at 62).

M.D. told her caseworker that she wanted to live anywhere but in this residential treatment facility. (Doc. 368 at 67). A court ordered the Department to return M.D. to the care of her mother, but the Department flouted the court order and refused to cooperate with M.D.’s mom as she attempted to obtain housing for herself and for M.D. (Doc. 368 at 66–67).

Other plaintiffs, also in the permanent managing conservatorship of the Department, are at the mercy of the State to determine their location, level of services, and exposure to often grave risks of harm. (See Doc. 368 at 56–154). The district court thus correctly held that State’s custody of foster children in its permanent managing conservatorship is a “special relationship” of constitutional dimension that triggers a duty under the Due Process Clause for the State to protect foster children from an unreasonable risk of harm. (Doc. 368 at 17, 255); *Hernandez*, 380 F.3d at 880. The State provides no argument or authority to the contrary.

**B. The State’s “special relationship” with foster children coupled with the deprivation of liberty entailed in foster care imposes on the State a constitutional duty to provide personal security and reasonably safe living conditions.**

As shown above, the State’s act of restraining the liberty of foster children—through incarceration, institutionalization, and other similar restraints—triggers the protections of the Due Process Clause. *DeShaney*, 489 U.S. at 200. As the Supreme Court has explained, “[i]t must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed . . . in unsafe conditions.” *Id.* at 198. The substantive component of the Due Process clause thus requires the State to provide involuntarily committed persons with such services as are necessary to ensure their reasonable safety. *Id.*

On this basis, this Court has held that when the State places children in foster care, it assumes the constitutional duty to provide adequate care. *Doe*, 675 F.3d at 857; *Griffith*, 899 F.2d at 1439. This Court’s prior holdings comport with the holdings of the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *Supra* at 7–8. The apparently uniform conclusion of courts across our country is that foster children have a constitutional substantive due process right

to be free from an unreasonable risk of harm and a right to reasonable safety. *Braam ex rel. Braam v. Washington*, 81 P.3d 851, 856–57 (Wash. 2003) (describing its conclusion that foster children possess substantive due process rights that the State must respect as doing “no more than follow[ing] the weight of authority among our sister courts,” and collecting cases). Again, the State provides no argument or citation to the contrary.

**C. The Court should reject any notion that a State’s duty to foster children is based solely in tort.**

The State’s refusal to recognize that its admitted “special relationship” with foster children triggers the protections of the Due Process Clause implies that the State views its “special relationship” with foster children as creating only duties of care sounding in negligence-based torts. (State’s Br. at 36 n.7); *see HBH et al. v. Washington*, 387 P.3d 1093, 1098 (Wash. App. 2017); *see also* RESTATEMENT (SECOND) OF TORTS § 315 (“A ‘special relationship’ for tort liability is characterized by either (1) a duty by one party to control the conduct of a third party, or (2) a right by one party to the protection of the other.”).

Plaintiffs' claims are based on 42 U.S.C. § 1983, so, under the State's apparent—although unarticulated—view, Texas would never have any liability to, or accountability for, foster children. No federal court would have jurisdiction over Texas residents' tort claims against the State. And the State could rebuff any tort claims by resorting to sovereign immunity in any event.

Such a holding would contravene the prior holdings of this Court, the rationale of *DeShaney*, and the uniform body of case law. It would also place foster children in a virtual “no-man's land” where the State could continue its course of conduct with impunity. This Court must decline the State's *sub silentio* invitation to write the *Korematsu*<sup>3</sup> for foster children, and instead reaffirm that the State's “special relationship” with foster children indeed triggers the protections of the Due Process Clause, as articulated in *Griffith* and *Doe*.

**III. The district court correctly found that Texas violates the substantive due process rights of foster children.**

The district court also correctly found that the State violates the substantive due process rights of foster children. To demonstrate a

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<sup>3</sup> *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (approving of the exclusion of persons of Japanese descent from U.S. society despite the acknowledged lack of evidence of disloyalty to the United States).

viable substantive due process claim in cases involving executive action, a plaintiff must show that the State acted in a manner that shocks the conscience. *Hernandez*, 380 F.3d at 880 (citing *Sacramento Cnty. v. Lewis*, 523 U.S. 833, 846 (1998)). Such a showing is made when a plaintiff demonstrates that the State consciously disregarded a known and excessive risk to the plaintiff's health and safety. *Id.* The state official must be both aware of facts from which the inference could be drawn that a substantial risk of harm exists and the official must also draw the inference. *Id.* at 881.

Courts may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious. *Id.* An obvious risk of harm is demonstrated in this case by the fact that the State has known of the very failures in the foster care system that these Plaintiffs complain about since 1996. The State's own reports from 1996 identified several failures in the foster care system. When in 2009–10, the Texas foster care system was again evaluated by a State committee, the committee found that only 3 of its 14 concerns had not been raised in the 1996 report. In the end, the State's own committee concluded that the foster care system of Texas is doing more harm than good for

children. (Doc. 368 at 11). There is ample evidence from the State's own documents—to say nothing of the evidence in Plaintiffs' case files—to infer that the State has known of, and consciously disregarded, obvious and substantial risks of harm to children in the State's custody.

Accordingly, the district court's ruling that the State's conduct constituted deliberate indifference to the due process right of foster children to be free from an unreasonable risk of harm caused by the State must also be affirmed.

Respectfully submitted,

/s/ N. Terry Adams, Jr.

N. Terry Adams, Jr.

Nicholas D. Stepp

AKERMAN LLP

1300 Post Oak Boulevard

Suite 2500

Houston, Texas 77056

Tel: (713) 623-0887

Fax: (713) 960-1527

terry.adams@akerman.com

nicholas.stepp@akerman.com

*Counsel for Amicus Curiae  
National Association of Counsel  
for Children*

**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 this brief contains 3,399 words, exclusive of the certificate of interested persons, table of contents, table of authorities, certificate of service, certificate of digital submission, and this certificate of compliance, which are exempted by Fed. R. App. P. 32(f).

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 in a proportionally spaced typeface using a plain, roman-style, 14-point font.

April 9, 2018

/s/ Nicholas D. Stepp  
Nicholas D. Stepp

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 9, 2018.

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