No. 24-1168

IN THE
Supreme Court of the United States

M.D., BY NEXT FRIEND,
SARAH R. STUKENBERG, ET AL.
Petitioners,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* FOSTER CARE ADVOCACY CENTER, ET AL. IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Foster Care Advocacy Center is a multi-disciplinary non-profit law office in Texas devoted to representing children and parents in ongoing child welfare proceedings involving child fatalities, mental illness or intellectual disabilities, medically fragile children, dual-status youth, and youth aging out of care. Much of Foster Care Advocacy Center's four-hundred-client caseload deals with the welfare of children in the Permanent Managing Conservatorship ("PMC") of the Texas Department of Family and Protective Services ("DFPS").

Founded in 1977, the National Association of Counsel for Children, is a 501(c)(3) non-profit child advocacy and professional membership association that advances children's and parent's rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. The Association's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust

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[1] No counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici* and their counsel made such a monetary contribution. *Id.* Counsel for *amici* timely notified counsel of record for the parties of *amici*'s intent to file this brief. *Id*. R. 37.2.

training and technical assistance arm, and an *amicus curiae* program. Through the *amicus curiae* program, the Association has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States.

Justice for Children is a national organization that holds the system of governmental agencies designed to protect the victims of child abuse accountable and advocates for children lost in this system. Since 1987, Justice for Children has provided a safety net of skilled caseworkers, volunteer lawyers, and lay advocates to advocate for abused and neglected children.

Texas State Employees Union members employed by DFPS protect children, entrusted to the State of Texas's care, from continued abuse and harm. As professionals dedicated to serving vulnerable Texans, union members provide a first-hand perspective into the need for reform within Texas's foster care system.

Professor Lori K. Duke is a co-director of the Children's Rights Clinic at the University of Texas School of Law.[2] She is certified by the Texas Board of Legal Specialization in child welfare law and is a recognized legal scholar who has devoted her career to child welfare advocacy.

National Disability Rights Network is the non-profit membership organization for Protection and Advocacy and Client Assistance Program agencies.

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[2] Professor Duke's institutional affiliation is provided solely for the purpose of identification, and the opinions expressed in this brief do not reflect the views of the law school.

The Network's member agencies collectively provide federally mandated legal support, advocacy, referral, and education in furtherance of the rights of persons with disabilities and their families in these United States.

Amici collectively share an interest in promoting the safety and wellbeing of children in the foster care system as well as the wellbeing of the individuals working in the system. Many of the *amici* are specifically focused on the Texas foster care system. Their interests and perspectives have not been adequately represented in the other briefs.

SUMMARY OF ARGUMENT

In dissenting from the denial of *en banc* rehearing at the Fifth Circuit, Judge Higginson said:

> I would grant the petition for rehearing. The panel opinion conflicts with prior decisions from the Supreme Court and this court, and the questions raised are of substantial public importance. This case warrants a second look.
>
> . . .
>
> It is fundamental in our historic liberties that the state may not set aside due process of law in the care of its wards. But today, we turn away the children protected by those guarantees and shut the doors of this court.

App.798a, 807a.

We agree with Judge Higginson. The same reasons that Judge Higginson highlighted as warranting *en banc* review also justify the grant of a writ of certiorari from this Court.

Foster children with disabilities are among the most vulnerable populations in our society. The investigations of allegations of abuse and neglect involving these children are not "just a drop in the bucket." App.22a.

Foster children with disabilities are entitled to the same respect, dignity, and protection from the State of Texas as other children in the foster care system. It is the federal judiciary's highest calling to protect the constitutionally guaranteed rights of all children in foster care.

The Fifth Circuit's decision below highlights the need for guidance from this Court on the proper standards for reassignment of a district court judge, particularly in cases of institutional reform litigation like this one.

ARGUMENT

I. The safety of foster children with disabilities is an important issue that warrants this Court's attention.

Ensuring the safety of foster children with disabilities and guaranteeing the Due Process rights of these children warrants this Court's attention and justifies the grant of a writ of certiorari in this case. The issue's importance cannot be overstated.

A. Foster children with disabilities are severely harmed by the State's insufficient investigations.

The State's insufficient investigations of allegations of abuse and neglect involving foster children with disabilities placed in Texas's Home and Community-Based Services ("HCS") programs have resulted in severe harms to these children.

To be clear, *amici* do not argue that ***all*** HCS placements for foster children with disabilities are inappropriate. Children with disabilities in ***safe*** HCS placements can thrive and achieve a level of independence that they are unable to achieve in traditional foster placements. That is largely because HCS home providers are specifically trained to work with individuals with disabilities, and traditional placements do not offer those benefits. HCS homes are less likely to discharge children with challenging behaviors and to inappropriately involve law enforcement. For children with intellectual disabilities who "age out" of foster care, HCS placements also provide the opportunity for long-term stability and permanency. And for youth with frequent placement moves—a particularly acute challenge for children with disabilities—an HCS home can provide long-term stability.

But abuse and neglect do occur in some HCS homes and the problem is the manner in which the State handles investigations of these allegations.

As the panel opinion explained, two remedial orders that are part of the permanent injunction, Remedial Order 3 and 10, are at issue in this appeal:

> Remedial Order 3 requires the Department of Family and Protective Services ("DFPS") to "ensure that reported allegations of child abuse and neglect involving children in the [Permanent Managing Conservatorship ("PMC")] class are investigated; commended and completed on time consistent with the Court's Order; and conducted taking into account at all times the child's safety needs." Remedial Order 10 requires, in relevant part, that the DFPS "[w]ithin 60 days . . . complete Priority One and Priority Two child abuse and neglect investigations that involve children in the PMC class within 30 days of intake." Order 10 permits extensions of the deadline for "good cause" when documented in the investigative record.

App.5a.

After the permanent injunction issued, DFPS was made a separate agency from the Texas Health and Human Services Commission ("HHSC"). App.5a; Pet. at 4. The separation of DFPS and HHSC has been consequential in terms of the State's investigations of allegations of abuse and neglect. While DFPS conducts the majority of abuse-and-neglect investigations for children in foster homes, HHSC conducts the majority of such investigations for

cases that involve children with disabilities in HCS placements.[3]

This is significant because many children with disabilities in PMC in the Texas foster care system are placed in HCS homes instead of foster homes.

HHSC's compliance with the requirements in Remedial Order 3 and 10 has been abysmal. Reports from the independent monitors appointed by the district court reveal that HHSC complied with both requirements in no more than 45% of reviewed cases during a four-month period. App.21a. In the remaining 55% of reviewed cases, HHSC complied with Remedial Order 3 precisely 0% of time. App. 21a. Similarly dismal is HHSC's 18% rate of compliance with Remedial Order 10. App.21a. These findings make plain that HHSC has failed to protect the very vulnerable children entrusted to its care.

By failing to properly comply with either remedial order, HHSC has allowed children with disabilities in PMC to be placed in dangerous living situations with little oversight. These children are among the most vulnerable and defenseless in our society: their parents' rights have been terminated, the State has not identified and/or approved any

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[3] As some of the *amici* have noted in their briefs to the Fifth Circuit, this separation had led to jurisdictional confusion which has resulted in investigations of allegations of abuse and neglect involving children with disabilities falling through the cracks. *See, e.g.*, Br. of Amici Curiae Foster Care Advocacy Center, National Association of Counsel for Children, Justice for Children, Texas State Employees Union, Professor Lori K. Duke in Support of Appellees at *11–12, *M.D. ex rel. Stukenberg v. Abbott*, 119 F.4th 373 (5th Cir. 2024) (No. 24-40248). *See also* App.496a.

family members to take care of them, and they often do not have a viable adoption placement. Their vulnerability is compounded by the fact that they may not have the cognitive or verbal ability to tell anyone if they are being harmed. HHSC's failures to comply exposes the most vulnerable children to the lowest levels of protection against horrific abuse and neglect.

In the anecdotal experience of *amicus curiae* Foster Care Advocacy Center, which represents PMC children in child welfare proceedings in courts on a regular basis, the risk of abuse in HCS placements due to the lack of HHSC oversight is so severe that even DFPS has deemed HCS homes unsafe. Time and again, attorneys representing DFPS have contested the placement of children into HCS homes because they are too dangerous.

This anecdotal experience is particularly troubling because foster children who do not get placed in HCS homes or foster homes may be categorized as "Children Without Placement" ("CWOP"). App.62a n.4. Such children are housed in unlicensed, unregulated settings rented by the State such as homes or hotel/motel rooms. App.62a n.4. The appendix contains troubling pictures of what these CWOP settings look like. App.345a–369a.

Tellingly, HHSC and DFPS have never disputed that HHSC's investigations of HCS homes are deficient.

This record is replete with evidence that reflects the first-hand accounts relayed by foster children placed in HCS homes, whose stories describe profound emotional and physical abuse. Their accounts describe abuses that were allowed to last for

months—and sometimes over a year—but often resulted in neither protective nor remedial action.

As one former foster youth testified, "[t]hey would tell us when we misbehaved that we were there because our family didn't want us or that because we were bad kids and nobody wants bad kids, and to be appreciated that they even accept us." ROA.62964. That youth further testified that in her HCS home, staff cursed at children and sometimes physically harmed them—one HCS home staff member choked a young girl with a disability, and another broke the arm of a young boy with a disability. ROA.62964–65. An HCS home staff member also texted that teenage foster youth inappropriate things, and this harm was amplified because it evoked memories of her traumatic history with her stepfather. ROA.62965–66. When the foster youth reported the staff member, the youth was punished. ROA.62966.

In another instance, a foster youth accused a staff member of rape—a staff member who was convicted of raping his stepdaughter—but the State's investigator did not properly investigate. ROA.62855.

Sadly, such stories of abuse and neglect are not unique to Texas. Abuse of foster children with disabilities is common nationwide. Children with disabilities are 3.79 times more likely to be physically abused than children without disabilities. *See* Lori A. Legano, et al., *Maltreatment of Children with Disabilities*, 147 Am. Acad. of Pediatrics 401, 404 (2021) (citing Patricia M. Sullivan & John F. Knutson, *Maltreatment and Disabilities: A Population-Based Epidemiological Study*, 24 Child Abuse & Neglect 1257, 1257–73 (2000)).

The widespread abuse of foster children with disabilities has resulted in significant litigation seeking to protect our nation's most vulnerable children.[4] These recurring lawsuits demonstrate the national importance of this issue. The issues in this case are not unique to the Texas foster care system, but rather signal a nationwide problem which requires a national standard by which such cases are managed by the federal courts.

Again, the point is not that HCS placements *writ large* are the problem. A ***safe*** HCS placement offers many benefits to children with disabilities. But where there is an unsafe HCS placement, the State must fulfill its responsibilities to investigate and remedy the situation in a timely and appropriate manner.

B. Investigations involving foster children with disabilities are not "just a drop in the bucket."

Foster children with disabilities are uniquely vulnerable, and therefore, need more investigative protections—not less. But the panel's decision does the exact opposite.

The Fifth Circuit lumped HHSC's failures and DFPS's successes together, and therefore,

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[4] *See, e.g.*, *Jonathan R. v. Justice*, 344 F.R.D. 294, 313 (S.D. W.Va. 2023) (granting a subclass of foster children with disabilities); *Henry A. v. Willden*, 678 F.3d 991, 996–98 (9th Cir. 2012) (discussing claims by foster children with disabilities). *See also Summary of Child Welfare Class Action Litigation*, Casey Family Programs (Mar. 11, 2025), https://web.archive.org/web/20250603185311/https://www.casey.org/class-action-summaries-2025update/ (collecting cases).

characterized HHSC's noncompliance as "just a drop in the bucket." App.22a. But that effectively allows children with disabilities in PMC—that is, the most vulnerable children in the foster care system—to be placed in the most dangerous living situations with the least oversight.

DFPS's rates of compliance with the permanent injunction do not excuse HHSC's blatant failures to comply with judicially mandated requirements for HCS home investigations. To be sure, DFPS's strides in compliance with the permanent injunction are laudable. *See* App.21a–23a. But HHSC should not be permitted to ride on the coattails of DFPS's work.

Simply put, HHSC is not DFPS. Rather, HHSC and DFPS are now separate agencies—each of which follows different policies and different practices. *See* App.5a, 21a–22a, 492a–495a. The two cannot be treated as the same entity in determining substantial compliance.

DFPS has improved its compliance with court orders; HHSC has not. The independent monitor's reports are unambiguous in its assessment of HHSC's investigations. App.21a. Requiring HHSC to comply with the terms of the injunction is necessary for foster children with disabilities to attain the genuine benefits that properly vetted HCS homes can provide.

Scores of children are placed in unnecessarily restrictive settings because DFPS does not have adequate homes for children with disabilities and opposes placement in HCS homes, as noted above, citing concerns with HHSC oversight. The State's failure to address HHSC oversight concerns has resulted in children with disabilities experiencing

heightened placement instability and unnecessarily restrictive placements. DFPS has not replaced HCS homes with foster homes that meet these children's needs. Without access to safe and appropriate HCS homes, children with disabilities find themselves in hotels and shelters.

Timely and accurate investigations of abuse and neglect allegations would allow children with disabilities to enjoy the same levels of safety and wellbeing as their non-disabled peers. Not only will properly conducted investigations reduce the unnecessary risk of harm for children with disabilities already placed in HCS homes, but they will also create the opportunity for other children with disabilities to live in ***safe*** HCS homes.

II. This case highlights the need for guidance for the lower courts on the proper standard for reassignment of a district court judge.

The division of authority over the proper standard for reassignment of a district court judge impacts cases across the nation—but its harms and urgency are magnified in this case, where the relief afforded for foster children by the permanent injunction hangs in the balance.

Liteky v. United States, 510 U.S. 540 (1994), recognized that "[f]ederal appellate courts' ability to assign a case to a different judge on remand rests . . . on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances.'" *Id.* at 554 (quoting 28 U.S.C. § 2106). But *Liteky* did not opine on the "different standard" that this power "may permit" or the "pragmatic reasons" for such a standard. *Id.*

Since *Liteky*, this Court has not provided any guidance on the proper standards for reassignment. *See* Toby J. Heytens, *Reassignment*, 66 Stan. L. Rev. 1, 38 n.167 (2014) (noting dearth of Supreme Court caselaw regarding reassignment).

As a result, the federal circuits have continued to disagree on the relevant factors to be considered in deciding whether or not to reassign a case. Some circuits "stop at considering impartiality and its appearance." Pet. at 35. Other circuits also consider the additional factor of "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." Pet. at 36 (quoting *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc)).

Certiorari should be granted to provide the necessary guidance to resolve that impasse.

Reassignment, by its very nature, imposes upon "a new trial court judge" the burdens of expending additional "time and effort . . . to get up to speed on a [reassigned] case." Heytens, *supra*, at 38.

Such time and effort "is costly" because it inevitably "has to come ***from somewhere***"—be it "the new judge's existing caseload" or the timely adjudication of the reassigned case on remand. *Id.* (emphasis added).[5]

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[5] *See also Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1364 n.9 (11th Cir. 2008) ("reassignment would entail substantial waste and duplication because another judge would need to become familiar with the massive record"); *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta v. Fla. Priory of the Knights Hospitallers of the Sovereign*

Waste-and-duplication concerns should therefore be accorded special weight in light of "the unique features and risks of institutional reform litigation." *Horne v. Flores*, 557 U.S. 433, 447 n.3 (2009). *See also* Pet. at 39.

That is especially so in cases (like this one) that deal with state foster care systems. Delay in such cases (A) imperils a permanent injunction's ability to attain the ends for which it was entered and (B) hamstrings a state's ability to vindicate the interests to which it is entitled as a coordinate sovereign.

A. Unnecessary reassignment creates waste and duplication, thereby threatening judicial efficiency in institutional reform litigation.

Waste and duplication created by reassignment—and the resulting delays—imperil an institutional reform injunction's ability to attain the ends for which it was entered.

"[T]he passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights"—any of which may well undermine the essential purpose of such injunctions. *Horne*, 557 U.S. at 448; *see Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380 (1992) ("the likelihood of significant changes occurring during the life of [a] decree is

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Order of Saint John of Jerusalem, 809 F.3d 1171, 1194 (11th Cir. 2015) ("we are still convinced that reassignment will 'entail waste and duplication out of proportion to [the] gains'").

increased" where it "remain[s] in place for extended periods of time").

Even apart from the time needed for a newly assigned judge to sufficiently familiarize himself or herself with the record to enforce the continuing injunction, the unique institutional knowledge of a district judge, like Judge Jack, who has been overseeing the case is irreplaceable.

Ex post facto examination of the record will never be able to fully capture Judge Jack's "years of experience with the problem at hand." *Hutto v. Finney*, 437 U.S. 678, 688 (1978), *abrogated on other grounds by Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42 (2024). Even the most careful and searching analysis of this case's thirteen-year-long record would be an imperfect approximation of Judge Jack's unique familiarity with Texas's foster care system; the reams of evidence about that system's history, failings, and complexities; the State's denials and delays; and the tragic harm caused to children in the foster care system—especially children with disabilities.

Failing to consider the loss of institutional knowledge and delays resulting from reassignment does neither the Petitioners nor the State any good.

Such delay is especially harmful where (as here) the subject-matter of institutional reform litigation concerns children suffering from abuse.

Studies confirm that childhood abuse directly leads to severe negative developmental outcomes. As a recent study published in the American Academy of Pediatrics explains, individuals who were physically abused as a child were 2.14 times more likely to have

to repeat a grade in school, 2.10 times more likely to be diagnosed with a mental health disorder, and 2.61 times more likely to be criminally convicted. Jennifer E. Lansford, et al., *Early Physical Abuse and Adult Outcomes*, 147 Am. Acad. of Pediatrics 1, 4–5 (2021). Myriad other studies further confirm that children who suffer repeated or chronic abuse see even more drastic declines in their development.[6]

Together, these studies reveal an undeniable relationship between the prevalence of childhood abuse and rates of future substance abuse, attempted suicide, and violent crimes. *See* Jonson-Reid, *supra* note 6, at 842–44; Steine, *supra* note 6, at 105–08 (finding that children who were repeatedly sexually abused were significantly more likely to engage in self-harm, suffer from a mental health disorder, and receive government support).

Judicial efficiency and the delay resulting from reassignment is thus an essential consideration where a permanent injunction seeks to prevent the life-long consequences of childhood abuse.

Further heightening the need for judicial efficiency is the limited period during which each class

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[6] *See, e.g.*, Melissa Jonson-Reid, et al., *Child and Adult Outcomes of Chronic Child Maltreatment*, 129 Am. Acad. of Pediatrics 839, 842–44 (2012); Iris M. Steine, et al., *Cumulative Childhood Maltreatment and its Dose-Response Relation with Adult Symptomatology: Findings in a Sample of Adult Survivors of Sexual Abuse*, 65 Child Abuse & Neglect 99, 105–08 (2017); *see also* Elizabeth T.C. Lippard & Charles B. Nemeroff, *The Devastating Clinical Consequences of Child Abuse and Neglect: Increased Disease Vulnerability and Poor Treatment Response in Mood Disorders*, 177 Am. J. Psychiatry 20, 22–23 (2020).

member can obtain the relief to which he or she is entitled.

There is still hope that certain members of the class—all of whom are "children . . . in the Texas PMC [or Permanent Managing Conservatorship]," *M.D. v. Perry*, 294 F.R.D. 7, 30 (S.D. Tex. 2013)—can benefit from the terms of the permanent injunction. But time is ticking, especially for the children who will "age out" of Texas's foster care system once they turn eighteen years old. *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 246 (5th Cir. 2018).

Tragically, a child who "ages out" of foster care prior to Texas complying with the terms of the permanent injunction will never be able to fully obtain his or her judicially decreed relief: the opportunity to grow up in a safe environment free from harm. No doubt, that is the fate that has befallen nearly all of the plaintiffs who were originally named in this case.

Reassignment of Judge Jack, which will inevitably result in delay, will threaten the ability of many current class members to receive any effective relief. Like the originally named plaintiffs, they too will never receive the benefits of the injunctive relief to which they are entitled.

Thus, for current class members—and especially those on the cusp of "aging out"—relief delayed by post-reassignment waste and duplication is relief denied.

In short, the waste and duplication created by reassignment of post-remand proceedings to a new district court judge renders institutional reform injunctions largely ineffective.

B. Federalism requires that courts consider waste-and-delay concerns in reassignment.

Delay caused by waste and duplication is all the less justifiable in light of the "sensitive federalism concerns" often raised in institutional reform litigation. *Horne*, 557 U.S. at 448.

Crucially, cases of this sort commonly implicate "areas of core state responsibility." *Id.* And they can have "the effect of dictating state or local budget priorities." *Id.* Delays resulting from reassignment amplify the risk of "bind[ing] state and local officials to the policy preferences of their predecessors . . . thereby 'improperly depriv[ing] future officials of their designated legislative and executive powers.'" *Id.* at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

Efficiency in post-judgment enforcement of institutional reform injunctions is therefore paramount to avoiding unjustifiable deprivations of the powers and rights that states properly possess as coordinate sovereigns.

Accordingly, the decision of whether to reassign continuing enforcement of the injunction to a new district court judge must be made in light of the court's duty "to return control to state and local officials as soon as [the] violation of federal law has been remedied." *Id.* at 451. Appellate courts that fail to adequately consider the magnitude of waste and duplication created by reassignment in institutional reform litigation run the risk of "pa[ying] insufficient attention to federalism concerns." *Id.*

Here, the newly assigned district court judge's task of familiarizing himself or herself with "13 years" of procedural history and factual developments is nothing short of Herculean. Pet at 35. There is no legitimate dispute as to the immense burden that reassignment of this case would create, given the intricate "scope of the demands placed upon state agencies that are responsible for a $2 billion budget, over 29,000 children, and 100,000 facilities." Pet. at 38 (quotation omitted).

Given that the time to fulfill those immense demands "has to come from somewhere," Heytens, *supra*, at 38, reassignment of this case to a new district court judge makes it so that there is no end-date in sight for the injunction at hand (or any portion thereof).

Each and every day the newly assigned district court judge takes to familiarize himself with matters—of which Judge Jack is already intimately familiar—is time in which the State has ***no*** chance of obtaining any relief from the judgment. Stated differently, that period of delay effectively ***forecloses*** Texas's ability to vindicate the interests belonging to it as a coordinate sovereign.

Crucially, the consequences of such delay are anything but academic for this case. As the panel majority itself observed, Texas has already "filed a Rule 60(b)(5) motion" seeking relief from parts of the permanent injunction that, according to the State, have been fully satisfied. App.43a.

So, in this case, reassignment is certain to delay Texas's pending efforts to seek relief from what the panel opinion characterized as "[n]early a decade" of

"constant, intrusive, and costly surveillance by a team of monitors and the district court."[7] App.23a–24a.

The "principles of federalism . . . limit the Federal Judiciary's exercise of its equitable powers." *Lewis v. Casey*, 518 U.S. 343, 386 (1996) (Thomas, J., concurring). Courts must therefore be "vigilant in opposing" avoidable waste and duplication, *id.*, that has the effect of further entrenching "a federal court in a role tantamount to serving as an indefinite institutional monitor." *Shakman v. Pritzker*, 43 F.4th 723, 732 (7th Cir. 2022). Reassignment decisions that create such delay-causing waste and duplication have no place in institutional reform litigation.

In deciding to reassign post-remand proceedings to a new district court judge, the panel opinion failed to adequately consider the relationship between waste and duplication and these first principles of federalism. As a result, the Fifth Circuit's decision further ***impinges*** on the State's ability to seek relief from the institutional reform injunction at issue here.

To both ensure the continuing efficacity of permanent injunctions and to preserve federalism's vertical division of power, this Court should grant certiorari and provide guidance on how to

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[7] Notably, the State's pending Rule 60(b)(5) motion ***does not*** state that it has complied with either of the Remedial Orders at issue here. *Compare* Defs.' Rule 60(b)(5) Mot. for Relief from Judgment at 25, *M.D. ex rel. Stukenberg v. Abbott*, No. 2:11-cv-00084, ECF No. 1518 (S.D. Tex. Feb. 13, 2024) ("Remedial Orders 1, 2, 13, 14, 15, 16, 17, 18, 19, 37, B3, and B4"), *with* Pet. at 10 (citing App.54a–56a) ("Remedial Orders 3 and 10").

appropriately consider delay-causing waste and duplication in reassignment decisions.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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