

No. 24-1168

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IN THE  
**Supreme Court of the United States**

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M.D., BY NEXT FRIEND  
SARAH R. STUKENBERG, *et al.*,  
*Petitioners*,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS  
GOVERNOR OF THE STATE OF TEXAS, *et al.*,  
*Respondents*.

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On Petition For A Writ Of Certiorari To The United  
States Court Of Appeals For The Fifth Circuit

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**BRIEF OF AMICUS CURIAE  
THE NATIONAL CATHOLIC PARTNERSHIP ON  
DISABILITY IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The National Catholic Partnership on Disability (“NCPD”) is a 501(c)(3) nonprofit corporation that advances the full and meaningful participation of individuals with disabilities in the life of the Catholic Church. The NCPD guides parishes toward fully incorporating individuals with disabilities in religious and community activities and seeks to elevate discourse on inclusion of individuals with disabilities in the Church. Catholic principles of dignity, a culture of life, and working to protect the most vulnerable members of society lie at the core of the NCPD’s work.

NCPD is interested in elevating the dignity and care of children with disabilities, both within and beyond the foster care system. NCPD passionately believes that the moral worth of a society is evident in how it treats its most vulnerable members, and urges this Court grant a writ of certiorari to strengthen the legal standards protecting the care of children with disabilities. NCPD’s interests have not been adequately represented in the other briefs.

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<sup>1</sup> 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 of submission of this brief. Sup. Ct. R. 37.6. No person or entity other than amicus and their counsel made such a monetary contribution. *Id.* Counsel for amicus gave notice to counsel of record for the parties of amicus’s intent to file this brief as soon reasonably possible. Counsel for both parties stated that they did not oppose the filing of this brief. *Id.* R. 37.2.

## SUMMARY OF ARGUMENT

This case reduces to a simple question: What is the standard for upholding the judicially determined rights of a uniquely vulnerable population?

Foster children with disabilities lack the power of adulthood, the care of parenthood, and, in some cases, the expressive abilities of children without disabilities. They often require particularized care. The State of Texas took on the responsibility for providing that care, then committed a dereliction of that duty by failing to investigate and address allegations of abuse.

Legal and moral norms require upholding a culture of life that recognizes the equality and humanity of all people. Respondents and the Fifth Circuit instead treated the abuse of this vulnerable population as, in the words of the Fifth Circuit, “just a drop in the bucket.” App.22a. This Court and the American legal system long ago left behind this type of disregard of individuals with disabilities.

This Court should clarify that “substantial compliance” looks to the totality of circumstances and endorse the “all reasonable steps” test used by other circuit courts. The complexity of this case and the uniquely vulnerable population it impacts makes it singularly situated for clarifying the “substantial compliance” standard.

Contrary to the Fifth Circuit’s approach below, numerical metrics are insufficient to establish substantial compliance with a remedial order. A numerical threshold of acceptable abuse undercuts the moral and legal issues of this case.

The Fifth Circuit’s decision below highlights the need for guidance from this Court on the standard for “substantial compliance” of remedial orders as a defense to contempt orders—as do the legal and moral imperatives that the Catholic Church has long recognized for this uniquely vulnerable population.

### ARGUMENT

#### **I. Foster children with disabilities are a uniquely vulnerable population that legally and morally merits protection by the judiciary.**

The family unit is the backbone of society and the source of moral and social good. Children are one of the greatest bounties of life, *Psalms* 127:3, and the “natural bonds of affection” of parenthood facilitate the best interest of children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The family plays a “decisive and irreplaceable” role in building a culture that values human life. Pope St. John Paul II, *Evangelium Vitae*, ¶ 92 (1995). Taking on the task of caring for children who do not have a traditional family is one of the greatest acts an individual or organization can undertake. For this reason, the Catholic Church has served vulnerable children in the United States since the days of its founding. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 528–29 (2021).

When a state accepts this responsibility, special legal and moral duties come into play. Texas, like other states, takes up this mantle of serving its orphaned children. But by failing to protect children with disabilities from abuse and neglect, the State fails to live up to its obligations. There are few acts more heinous than harming a child in one’s custody.

See Dante Alighieri, *The Divine Comedy*, Inferno, Canto 33, l. 4–75, at 256–59 (John Ciardi trans, New American Library 2003).

**A. The moral charge of the foster system requires that foster children with disabilities receive appropriate treatment.**

The history and tradition of the United States stresses the centrality of equal treatment and dignity. Despite the complexity of institutional reform litigation and the lengthy procedural history here, this case reduces to simple moral principles.

NCPD stresses the importance of a culture of life that centralizes the value of all forms of human life. This culture teaches that children have “the right to live with dignity and to develop integrally,” a right that applies to individuals who are “born with or develop[] limitations.” Pope Francis, *Fratelli Tutti*, ¶ 107 (2020). Dismissing the value of even one foster child with disabilities as “a drop in the bucket,” as the Fifth Circuit did below, undermines the “incomparable and inviolable worth of human life.” Pope St. John Paul II, *Evangelium Vitae*, ¶ 96 (1995).

The foster care system at its best fulfills this culture of life: It upholds the dignity of the lives of children who, for no fault on their own, lost the benefit of a traditional family. Maltreatment of foster children perverts this culture of life. While the moral charge of foster care requires adequate concern for all, vulnerable foster children with disabilities “deserve preferential concern.” United States Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship*, ¶ 53 (2007).



The American legal tradition mirrors this culture of life. The Fourteenth Amendment—which Texas’s foster care system violated—is rooted in the notion that all individuals are equal in the eyes of the law and are bestowed with inalienable rights. U.S. Const. amend. XIV; App.3a. The long moral arc of the United States bends toward fulfilling this promise through the enforcement of civil rights. This Court stands for the dignity and worth of children’s lives that state and private forces may otherwise diminish.

Acts of physical, emotional, and sexual abuse are anathema to a culture of life. Texas’s incompetent investigations perpetuate the heinous indignity and suffering that foster children with disabilities experienced in their state-determined placements.

The Fifth Circuit’s disregard of incompetent investigations into the abuse of foster children with disabilities as a numerically insignificant “drop in the bucket” further undermines a culture of life. It suggests that some human life can be devalued if there is a numerically sufficient threshold of compliance. But the value of a child is neither diminished nor elevated by how society treats a vaguely defined majority. A culture of life is one in which “no one must feel excluded.” Pope St. John Paul II, *Evangelium Vitae*, ¶ 98 (1995).

Compliance rooted in moral conviction should give preferential attention to the most vulnerable parties. Society’s values are reflected in its treatment of the least among us. *See Matthew* 25:31–46. Texas’s foster care system will only fulfill its moral mandate when it adequately addresses the harm done to foster children with disabilities.

**B. Foster children with disabilities are a uniquely vulnerable population that merits special legal consideration.**

There can be no more vulnerable population than foster children with disabilities. They lack the legal authority of adults, the nurturing care of traditional parenthood, and often the expressive abilities of children without disabilities.

Children lack the authority and agency afforded to adults. They are unable to participate in the political process and lack legal authority to act without parental consent. Children rely on parents for the fulfillment of their political rights, physical well-being, and emotional care.

Foster children also lack the benefits afforded by traditional parenthood. They are unable to relish the ties of kinship and care that parents provide. Instead, they are at the behest of state institutions or volunteer foster families for their care and protection. Children often end up in the foster system because of abuse or neglect. Sarah A. Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 Soc. Pol’y Rep. 1, 3 (2020). While state authorities and foster families often fulfill their moral charge to care for foster children, instances of maltreatment persist.

On top of the above vulnerabilities, foster children with disabilities often lack communicative power. Individuals with intellectual disabilities may “have diminished capacities to understand and process information [and] to communicate.” *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Foster children

with disabilities may not have the cognitive ability to process the abuse they face or express their suffering to others. They may have to wait for a third party to notice the harm before action is taken to protect them.

The vulnerability of foster children with disabilities is particularly concerning given that children with disabilities suffer more abuse and neglect than children without disabilities. Children with disabilities are up to 6.2 times more likely to experience maltreatment than their peers without disabilities. Siwal Makhoul Khoury, et al., *Neglect of Children with Disabilities: A Scoping Review*, Children, March 2025, at 7. Children with disabilities also remain in the foster care system longer and are less likely to find permanent placement. Rebecca R. Seltzer, et al., *Medical Complexity and Placement Outcomes for Children in Foster Care*, 83 Child. & Youth Servs. Rev. 285, 286 (2017). The risk of poor outcomes in foster care increases with the number of a child's disabilities. *Id.* at 292.

Foster children with disabilities are often placed in Home and Community-Based Services ("HCS") placements that are trained to meet their unique needs. During the course of this litigation, the State separated the Department of Family and Protective Services ("DFPS") from the Texas Health and Human Services Commission ("HHSC"). Most foster placements are overseen by DFPS, which investigates allegations of abuse and neglect. However, it is HHSC which oversees investigations of maltreatment of foster children with disabilities in HCS placements.

The separate oversight of children with and without disabilities by different agencies reflects a recognition that children with disabilities have unique needs and corresponding vulnerabilities. In most placements, HCS caretakers fulfill this charge. Yet HHSC does not apply this tailored care to their maltreatment investigations. By failing to do so, the State shows a callous disregard for the individual needs of each child that has a disability. Texas acknowledges that children with disabilities require different placements; it should be held to account for not applying this fact to its investigations of abuse.

The vulnerability of foster children with disabilities is evident in HSC's insufficient investigations into abuse. The record in this case is replete with failures to take notice of or respond to the individualized limitations of children with disabilities. *See* App.506a–654a. Investigators tried to talk to non-verbal children—who are unable to express themselves through verbal communication—over the phone. App.503a. Investigators noted occasions where children with disabilities seemed unable to comprehend investigators' questions, but the investigators failed to follow up in any meaningful way. App.536a–537a. And investigators failed to timely respond to clear allegations of severe abuse. App.739a. These incidents show “a continuing antipathy [by the State] ... and a corresponding need for more intrusive oversight by the judiciary.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 443 (1985).

**II. This Court should clarify that the “substantial compliance” defense requires taking “all reasonable steps.”**

**A. The Fifth’s Circuit’s failure to consider children with disabilities illustrates the superiority of the “all reasonable steps” standard.**

A court’s review of substantial compliance with a remedial order involves more than determining whether an ordered act occurred. As courts consider substantial compliance, they look at the entire context of a case. Decontextualized numbers and abstract discussions of compliance devoid of the substantive concerns of the harm an order is meant to address threaten to undermine a court’s command to right the previously determined wrongs.

This Court should endorse the legal standard of taking “all reasonable steps” for substantial compliance used by other circuit courts. *E.g.*, *In re Sealed Case*, 77 F.4th 815, 835 (D.C. Cir. 2023); *Coleman v. Newsom*, 131 F.4th 948, 956 (9th Cir. 2025). This standard will better serve vulnerable parties like foster children with disabilities. It enables the judge who issued the remedial order to consider the full context of the order, the underlying harm, and the party seeking redress from the harm.

This longstanding litigation over the Texas foster care system illustrated this: The district judge presided over the case for thirteen years and understood the intricacies of the state agencies and their differential practices. What constitutes “reasonable” was informed by more than a decade of the judge’s experience and institutional knowledge.

The Fifth Circuit’s treatment of “substantial compliance,” on the other hand, lost sight of the underlying harms in this case. HCS staff allegedly abused foster children with disabilities emotionally, physically, and sexually. *See, e.g.,* App.578a; App.626a–627a; App.551a–552a. Through repeated abuse, neglect, and maltreatment, HCS staff inflicted lifelong trauma on the most vulnerable children—and yet HHSC failed to properly investigate, which often left vulnerable children in the hands of their abusers. To each of those children—and for properly assessing “substantial compliance” with the remedial order—it is meaningless that DFPS, a different agency, complied with its obligations for children without disabilities.

Taking account of the unique needs of children with disabilities “is not only legitimate but also desirable.” *City of Cleburne*, 473 U.S. at 444. This Court’s precedents establish the special consideration involved with the unique circumstances of individuals with disabilities. A lack of consideration for the unique circumstances of individuals with disabilities or a de minimis treatment violates legal norms and the expectations of a “civilized and decent society.” *Id.*; *see Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 402–03 (2017).

Evidence shows that individual tailoring is critical to the success and treatment of children with disabilities in the foster care system. The nature of the maltreatment of children with disabilities differs based on the specific type of disability. Siwal Makhoul Khoury, et al., *Neglect of Children with Disabilities: A Scoping Review*, Children, March 2025, at 10. HHSC

should also adjust its investigation procedures to meet the individual needs of each child with a disability.

The Fifth Circuit exhibited its disregard for the realities of the remedial order in its failure to use the words “disabled” or “disability” a single time in its opinion finding substantial compliance. *See generally* App.1a–47a. In wrongly dismissing the core differences between HHSC and DFPS as “superficial distinctions” and claiming to emphasize “substance,” the court performed only a surface-level analysis of the underlying difference between the two. App.22a. The Fifth Circuit never asked the simple question: What was unique about the sixty-nine investigations HHSC conducted that were unconfirmed or inconclusive? What sets them apart? This Court should grant cert to indicate that such an oversight undermines the equity principles of a remedial order and the life-affirming needs of vulnerable children in the State’s care.

**B. A numerical test for substantial compliance undermines the concerns of the remedial order.**

The Fifth Circuit’s emphasis of numerical compliance also shifts the focus away from the context of the remedial order and the nature of the harm it is designed to address.

An emphasis on numbers will also turn substantial compliance disputes into arguments over the appropriate level of generality. This case is a perfect example of the distorted nature of that approach. The Fifth Circuit rejected Petitioner’s showing of thirty-eight inadequate investigations by HHSC in favor of Respondent’s claim of thousands of compliant investigations by DFPS and HHSC

combined. But the debate over which number is the correct reference misses the larger picture: Foster children with disabilities were abused and the court-appointed Monitor identified that HHSC did too little to investigate. App.501a–503a. Setting a quantitative threshold of appropriate abuse is perverse and undermines the moral teachings of the Catholic Church and the legal issue of this case.

This Court has indicated in other contexts that numerical thresholds should be supplemented by contextual information. *Cf., e.g., Thornburg v. Gingles*, 478 U.S. 30, 55–56 (1986); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223–24 (2023); *McCleskey v. Kemp*, 481 U.S. 279, 294–96 (1987). This Court should similarly hold that substantial compliance requires more than just a quantitative analysis.

There is no numerically acceptable threshold of abuse. Just as the shepherd leaves the ninety-nine sheep for the one who is at risk of harm, so should the State apply particular care to the vulnerable population of foster children with disabilities. *Matthew* 18:12–14. The State and the Fifth Circuit treat this as a “drop in the bucket,” but at some point, one is left to wonder: How big a drop and how small a bucket? Substantial compliance should not allow adequate justice for some children to justify the suffering of other children.

The Fifth Circuit’s emphasis on numerical compliance also risks setting a dangerous precedent: A liable party need not worry about failing to comply with a remedial order for a minority subclass if it can dilute that failure with broader compliance.



Remediation of constitutional wrongs is not a numbers game; it is about accounting for a violation of a fundamental right.

This concern is heightened where the difference is based on a protected classification. Foster children with disabilities undergo a separate investigative process by HHSC due to their disability and need for particular care. While the question presented does not allege discriminatory practices against individuals with disabilities, this Court should not dismiss the concern that the State fails to equally consider its treatment of this protected class.

Even when numerical evidence is relevant to compliance, the broader “all reasonable steps” standard will allow courts to consider quantitative evidence without basing “substantial compliance” determinations on fights over numbers.

**CONCLUSION**

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

Respectfully Submitted,

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