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.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Disabled Texas foster children await protection from abuse and neglect. They and additional thousands of foster children await full reform of the system that is supposed to keep them safe. Lower courts await guidance regarding enforcement through civil contempt and reassignment of cases. This case is the timely and efficient vehicle for addressing all those needs.

Defendants inaptly downplay this case's importance. They virtually ignore that it involves developmentally disabled children. Not disputing HHSC's abysmal 45% compliance rate as to that vulnerable group, they embrace the Fifth Circuit's mathematical approach, dismissing them as "a tiny sliver." BIO.23. Defendants display no concern about the inevitable delay from changing judges that will prolong the risk to all PMC children.

Now is the time, and this the case, for the Court to address unsettled issues regarding civil contempt and judicial reassignment.

ARGUMENT

I. THE COURT SHOULD ENSURE UNIFORMITY IN HOW COURTS ENFORCE INJUNCTIONS THROUGH CIVIL CONTEMPT.

A. The Court Should Address Whether and How Mandatory Injunctions May Be Enforced by Civil Contempt.

"Contemporary courts . . . routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions." *Int'l Union,*

United Mine Workers of Am. v. *Bagwell*, 512 U.S. 821, 842 (1994) (Scalia, J., concurring). Thirty-one years ago, Justice Scalia foretold that this Court "will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant" enforcement through civil contempt. *Id.* The Fifth Circuit's analysis, which conflicts with how other circuits apply *Bagwell*, *see* Pet.20-23, demonstrates that the time has come for new guidance from this Court. This important and urgent case is a uniquely suitable vehicle for articulating rules and principles for how courts may enforce continuing decrees in extended disputes.

Applying "a particular legal standard" to given facts presents "a legal inquiry." *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 227 (2020); *see also Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112 (1922); *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 376 (1941). So does determining the meaning and effect of a court order. *See Monsalvo Velazquez* v. *Bondi*, 145 S.Ct. 1232, 1239-41 (2025). Contrary to defendants' assertion that this appeal is "factbound," BIO.14, the Fifth Circuit correctly stated, "The issues here are purely legal." App.6a.

The underlying relevant facts about *HHSC's own* investigations are undisputed. *See, e.g.*, BIO.7, 10 (asserting compliance based on DFPS investigations). "Purely legal" questions include (1) whether HHSC's undisputed conduct violated the affirmed injunction; (2) if so, was it nevertheless excused by systemwide "substantial compliance"; and (3) whether the sanctions imposed by the contempt order are entirely criminal or at least partly civil in nature.

Here, these legal questions arise in a scenario much more likely to recur than in *Bagwell*. *See* 512 U.S. at 840 (Scalia, J., concurring) (*Bagwell* was "so extreme on its facts" as to make it "not the best case in which" to decide the correct test for distinguishing criminal and civil contempt). *Bagwell* involved the entirety of a sweeping prohibitory decree, disputed facts, and substantial, fixed punitive fines for widespread completed conduct by individual union members. 512 U.S. at 823-25, 834-38. That case, at most, left unanswered whether discrete components of a comprehensive permanent decree mandating affirmative conduct may ever be enforced through civil contempt or, instead, only through criminal contempt. *Cf. id.* at 841 (Scalia, J., concurring) (historically, "orders that underlay civil contempt fines or incarceration were usually mandatory rather than prohibitory").

This case squarely presents the issue of how courts may and should enforce compliance with comprehensive decrees in institutional-reform and similarly complex cases. The Court should hold that courts may enforce such decrees through prospective sanctions imposed in civil proceedings, at least when violations of discrete components can be established based on undisputed facts. *See Union Tool*, 259 U.S. at 112; *F.T.C.* v. *Trudeau*, 579 F.3d 754, 776 (7th Cir. 2009); *F.T.C.* v. *Kuykendall*, 371 F.3d 745, 748-52, 754, 756-57, 760 (10th Cir. 2004) (en banc). It should further hold that the sanctions imposed here were entirely prospective and civil in nature or could be reformed to make them so. *See* Pet.20-21, 24-25; App.801a-803a (Higginson, J., dissenting).

"[C]ivil contempt vindicates the rights of private parties." *Potter* v. *D.C.*, 126 F.4th 720, 724 & n.1 (D.C. Cir. 2025); *see also Union Tool*, 259 U.S. at 112. Here, the plaintiff class of foster children—including the disabled children most directly affected by the Fifth Circuit's ruling—possess the adjudicated right to reasonable safety. This Court should restore the civil-contempt tool that the district court used to vindicate that right, to protect these children and similarly vulnerable litigants in other cases.

B. The Court Should Clarify That "Mixed" Contempt Orders Are Separable.

This case also squarely presents the question whether civil contempt sanctions imposed through procedurally adequate civil proceedings may be upheld even though the contempt order also contains arguably criminal sanctions. *See* App.10a. Although longstanding precedent of this Court would seem to answer that question, the Fifth Circuit's confusion about it shows the need for clarification. *Compare Penfield Co. of Cal.* v. *Sec. & Exch. Comm'n*, 330 U.S. 585, 587-89, 591-95 (1947) (stating an order's "criminal aspect" governs "for purposes of *procedure* on review" and affirming substitution of coercive sanction for punitive one (emphasis added)), *with* App.800a-803a (Higginson, J., dissenting) (noting panel's "missteps" from treating sanctions as a unified whole); *see also* Pet.24-28.

Defendants also demonstrate confusion about this issue. They point to *Nye* v. *United States*, 313 U.S. 33 (1941), as an example of this Court reversing an entire contempt order as criminal although it "included compensatory aspects." BIO.18 (citing 313 U.S. at 42, 44-53). But *Nye* is distinguishable.

The "compensatory" aspect in *Nye* was taxing the contemnor with the costs of the contempt proceeding itself. *See* 513 U.S. at 42-43. The cost award could not be upheld when the entire civil proceeding was improper because the alleged misconduct fell under the Criminal Code, not the Judicial Code. *See id.* at 52-53.

Here, by contrast, the issue is whether prospective, coercive sanctions may be upheld if an otherwise meritorious contempt order also improperly included retrospective, punitive sanctions. Even accepting the Fifth Circuit's view that fines connected to investigations that were previously completed or already opened would punish for past conduct, the order could be reformed to reach only investigations *opened after the contempt order issued*. *See* Pet.24-25; App.803a (Higginson, J., dissenting).

Defendants attack a strawman. They misconstrue plaintiffs' position as being that the order could be revised to reach "investigations *closed* after the contempt *hearing*," i.e., potentially reaching HHSC "decisions made before the contempt hearing." BIO.16 (emphasis altered). Rather, plaintiffs' point has always been that the fines are "neatly separable," *id.*, between those involving previously opened investigations and those reaching only investigations commenced after the *order* imposing fines for continued noncompliance.

The Fifth Circuit made such a separation in *Lamar Financial Corp.* v. *Adams*, 918 F.2d 564, 566-67 (5th Cir. 1990), in which the contempt order issued at the hearing. But the existence of *Lamar* and related Fifth Circuit cases does not, as defendants suggest, *see* BIO.17, mean the absence of

a split. The decision in this case and the denial of rehearing en banc establish the Fifth Circuit's position that "mixed" contempt orders are not separable. App.9a-10a; App.802a (Higginson, J., dissenting). And that court's "rule of orderliness" will require panels to adhere to the statement in *In re Stewart*, 571 F.2d 958, 964 n.4 (5th Cir. 1978), that the panel here applied to reach its decision, App. 9a. *See Texas* v. *United States*, 126 F.4th 392, 406 (5th Cir. 2025). Further, the Fourth Circuit also is at least confused about whether criminal and civil components of contempt sanctions can be separated. *See United States* v. *Johnson*, 659 F.2d 415, 419 & n.3 (4th Cir. 1981).

This Court should dispel any confusion and clarify that criminal and civil aspects of a mixed contempt order may be separated and that the civil sanctions may be affirmed if otherwise proper. Appellate courts should approach such situations wielding a scalpel not a hammer. That is especially so in a case like this one, where the district court obviously intended to coerce future compliance, thus protecting the rights of the most vulnerable litigants with limited resources.

Civil contempt should be an effective and efficient tool for enforcing parties' adjudicated rights. It can be neither if, as the Fifth Circuit holds, the slightest taint of punitiveness in a contempt order renders the entire underlying civil-contempt proceeding a waste.

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Defendants persist in mischaracterizing the Fifth Circuit's sovereign-immunity holding as an

unchallenged "alternative, independent ground" for its judgment. BIO.14. As explained in the petition—and on the face of the Fifth Circuit's opinion—the sovereign immunity holding *depends entirely* on the court's criminal-contempt holding. Pet.28; App.17a-19a. Simply put, the Fifth Circuit held that the contempt order violated sovereign immunity *because* it was entirely criminal. The order would not implicate sovereign immunity if it is or were reformed to be purely civil. Thus, the answer to plaintiffs' first question presented will resolve the sovereign-immunity issue.

C. The Court Should Define "Substantial Compliance" to Require "All Reasonable Steps."

The decision below also demonstrates the need for this Court to address the "substantial compliance" defense to civil contempt. That "substantial compliance is a highly contextual inquiry," BIO.22, does not prevent the Court from deciding the legal standard courts should apply in making the inquiry. *See Guerrero-Lasprilla*, 589 U.S. at 227.

Lacking guidance from this Court, the Fifth Circuit adopted—and defendants embrace—a strictly mathematical test that leaves the relevant population of disabled children unprotected. To vindicate the rights of these and other similarly vulnerable litigants, the Court should endorse the approach requiring alleged contemnors to show they have taken "all reasonable steps" to comply with court orders.

As applied here, whether viewing HHSC's conceded failures in isolation or on a systemwide basis, Texas cannot show that it took all—indeed, any—reasonable steps to protect the affected disabled children.

Third, Fourth, Sixth, Ninth, and D.C. Circuit precedent requires alleged contemnors to show they took "all reasonable steps" and have committed no more than "technical or inadvertent" violations. *Coleman* v. *Newsom*, 131 F.4th 948, 956 (9th Cir. 2025); *see In re Sealed Case*, 77 F.4th 815, 834-35 (D.C. Cir. 2023), *cert. denied sub nom. X Corp.* v. *United States*, 145 S.Ct. 159 (2024); *De Simone* v. *VSL Pharms., Inc.*, 36 F.4th 518, 529 (4th Cir. 2022); *F.T.C.* v. *Lane Labs-USA, Inc.*, 624 F.3d 575, 590-91 (3d Cir. 2010); *Glover* v. *Johnson*, 934 F.2d 703, 708 (6th Cir. 1991). The Tenth and Federal Circuits have, at least in unpublished opinions, also adhered to that standard. *Codexis, Inc.* v. *EnzymeWorks, Inc.*, 759 F. App'x 962, 964 (Fed. Cir. 2019); *Phone Directories Co.* v. *Clark*, 209 F. App'x 808, 815-16 (10th Cir. 2006). And multiple circuits reject the Fifth Circuit's purely mathematical approach. *Coleman*, 131 F.4th at 958; *Joseph A. by Wolfe* v. *N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1085 (10th Cir. 1995); *Fortin* v. *Comm'r of Dep't of Mass. Pub. Welfare,* 692 F.2d 790, 795 (1st Cir. 1982).

Defendants' suggestion that this case would have come out the same under the "all reasonable steps" standard does not fly. Perhaps it would have had the Fifth Circuit properly limited its review to HHSC's own performance, in accord with circuits that separately consider each defendant's compliance, *e.g.*, *Kuykendall*, 371 F.3d at 758.

Considered alone, HHSC's admitted 45% compliance rate among relevant investigations, App.500a-501a, surely would flunk even the Fifth Circuit's forgiving math test. *Cf.* BIO.23 (arguing that California's mathematically low compliance rate explains *Coleman*'s no-substantial-compliance holding).

Even burying HHSC's non-performance within DFPS's aggregate statistics—as the Fifth Circuit did here—a court that applies the "all reasonable steps" test would ask if defendants took all reasonable steps to comply with Orders 3 and 10 as to *all* children in the system, including these profoundly disabled children, and whether any noncompliance had "serious and consequential" effects. *E.g.*, *Coleman*, 131 F.4th at 957-59. In other words, an all-reasonable-steps court would meaningfully analyze whether the State was doing all it could to comply and whether its deficiencies harmed disabled children. *Cf.* App.804a (Higginson, J., dissenting) (in extensive analysis, "the district court described how HHSC's procedures led to ineffective and delayed investigations that left children in harm's way, in contrast to the procedures implemented by DFPS under the court's orders"). A court applying that test would not simply dismiss abuse and neglect affecting this discrete but especially fragile population as "just a drop in the bucket," App.22a, or, as defendants would label them, "a tiny sliver." BIO.23.

This case is a suitable and needed vehicle for the Court to address "substantial compliance."

II. THE COURT SHOULD ENSURE UNIFORMITY IN HOW CIRCUITS HANDLE REASSIGNMENT.

This case is also an excellent vehicle for providing the circuits with needed guidance on reassignment, another important topic this Court has not previously addressed. Deciding whether to remove an Article III judge is unquestionably a weighty matter. That crucial issue never arises in a vacuum. If this Court waits for a case presenting it in platonic form, the circuits will await guidance forever. The Court should address reassignment in this urgent and important case, where further delay may have life-or-death consequences for Texas children.

A. Because Judge Jack May Resume Service, Reassignment Is Not Moot.

The reassignment issue is not moot. Judge Jack may—and almost certainly will—resume service to take back this case.

Judge Jack has not resigned her judicial office. She "retain[s] the office" in senior status. 28 U.S.C. §371(b)(1); *see* Southern District of Texas, *Second Amended Division of Work Order*, No. 2025-10 (June 12, 2025), bit.ly/3JkxU1L; *cf.* 28 U.S.C. §371(a) (providing judges the alternative option to "retire from the office"). As "an inactive senior judge," she may "elect to resume service." *The Evolution of Judicial Retirement*, https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement (last visited Aug. 28, 2025); *see also* 28 U.S.C. §371(e); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 453, 461 (2007).

Given her dedication during 13 years of managing this important litigation, it is unimaginable that Judge Jack would not resume service to see it through.

B. The Court Should Require the Circuits to Meaningfully Consider Judicial Efficiency.

The Court should use this case to direct circuit courts contemplating reassignment to consider whether it entails "waste and duplication out of proportion to any gain in preserving the appearance of fairness," as a majority of circuits do. *E.g.*, *United States* v. *Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc); *see* Pet.35-36. Equally if not more importantly, the Court should instruct the circuits to give this factor *meaningful* weight—especially in cases like this one, where delay has manifestly profound consequences.

Defendants effectively concede that a split exists between circuits that consider the judicial-efficiency factor and those that disavow it. *See* BIO.28-29; *see also* Pet.36-37. Defendants contend that this case does not implicate the split because the Fifth Circuit purported to consider that factor. BIO.28; *see* App.44a-45a. But the Fifth Circuit's cursory consideration of judicial efficiency—in this case where delay puts children at risk during formative years—shows all the more why the circuits need guidance.

In cases involving much lower stakes than the welfare of parentless children, other circuits have found judicial-efficiency considerations dispositive even when judicial conduct included "offensive,"

"wholly inappropriate" remarks or the like. *Sovereign Mil. Hospitaller Ord. of Saint John of Jerusalem of Rhodes & of Malta* v. *Fla. Priory of Knights Hospitallers of Sovereign Ord. of Saint John of Jerusalem, Knights of Malta, Ecumenical Ord.*, 702 F.3d 1279, 1297 (11th Cir. 2012); *see, e.g.*, *Sierra Club* v. *Van Antwerp*, 526 F.3d 1353, 1364 n.9 (11th Cir. 2008). The Court should repudiate the Fifth Circuit's superficial treatment of this factor and direct the circuits to give it weight proportionate to that of the interests threatened by delay in each particular case.

C. The Court Should Confirm That *Liteky* Governs the Impartiality Analysis.

Similarly, this case is a uniquely suitable and worthy vehicle through which the Court may promote uniformity by confirming that circuits should apply *Liteky* v. *United States*, 510 U.S. 540 (1994), when analyzing impartiality in the reassignment context.

Defendants implicitly acknowledge that, at best, it is unclear whether *Liteky* applies. *See* BIO.30. This case—in which, for 13 years, the judge presided over complex litigation aimed at protecting thousands of vulnerable children—presents a rare opportunity to address the distinction between impermissible "bias or prejudice" and opinions "properly and necessarily acquired in the course of the proceedings." *Liteky*, 510 U.S. at 551.

For all talk of need for a "contextual inquiry," BIO.29, defendants studiously ignore crucial context. They barely acknowledge that the HHSC investigations relevant to the underlying contempt

order involved especially vulnerable developmentally disabled children. *See* BIO.3 (defendants' oblique sole mention that relevant investigations involved children with "disabilities"). In discussing musings about adults being tasered and living off McDonald's in "cheap motels," BIO.30, defendants fail to note that such references harken to real-life mistreatment routinely suffered by Texas foster children. *E.g.*, App.335a-342a; ROA.63272-75.

Judge Jack's deep familiarity with the realities facing children in the class favors retaining her, not reassignment. *See Liteky*, 510 U.S. at 551 ("not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings"); App.807a (Higginson, J., dissenting) ("I fear that we have inadvertently decided that we cannot leave the case with a district court judge who is deeply familiar with the parties and their conduct and with the substantial public interests at stake.").

Properly viewed under *Liteky*'s standard, Judge Jack's remarks reflect no more than well-founded concern for the long-ignored wellbeing of Texas children, acquired through this litigation. The Court should use this case to instruct the circuits on how to evaluate allegations of bias in this and similar litigation contexts.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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