NO. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, over which there is a three-way split among six circuits, is:

Whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 *et seq.*, case *pro se* in federal court.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Jeff Winkelman and Sandee Winkelman are petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman respectfully petition for a writ of certiorari to review the interlocutory order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-2a) is unreported. The district court's unreported memorandum of opinion (App., *infra*, 3a-23a) is available at 2005 WL 1315728.

STATEMENT OF JURISDICTION

The district court entered judgment for respondent on June 2, 2005. App., *infra*, 3a-23a. The court of appeals' interlocutory order dismissing petitioner's appeal was entered on November 4, 2005. *Id.* at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1415(i)(2)(A) of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

STATEMENT

Petitioners Jeff and Sandee Winkelman (the Winkelmans), neither of whom is a lawyer, are the parents of petitioner Jacob Winkelman, a now-eight-year old boy afflicted with autism spectrum disorder. Petitioners brought this action under the IDEA to challenge the appropriateness of the special-education program offered by respondent for Jacob and to vindicate various procedural violations of the IDEA committed by respondent and the Ohio administrative hearing officer who presided over petitioners' administrative-level proceedings. The district court entered judgment for respondent after finding that neither respondent nor the hearing officer violated the IDEA. On appeal, but before any briefing of the merits, the court of appeals dismissed petitioners' appeal because

petitioners were prosecuting their appeal *pro se*. Petitioners seek this Court's review because the court of appeals' decision squarely conflicts with the decisions of five other courts of appeals and wrongly decides an important and recurring issue.

A. Statutory Framework

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under the IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. *See* 20 U.S.C. § 1412(a)(4).

The heart of the IDEA system, however, is the set of procedural safeguards that states and localities are required to accord to "children with disabilities and their parents" in order to ensure the provision of a FAPE. 20 U.S.C. § 1415(a); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982) ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard."). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are given access to all relevant records, *see* 20 U.S.C. § 1415(b)(1)(A), and parents must be given full written notice in advance of any change (or refusal to

change) a child's educational services, *see* 20 U.S.C. § 1415(b)(3).

If parents are not satisfied with the IEP offered by their local education agency, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local education agency." 20 U.S.C. § 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(h). "Any party aggrieved" by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. § 1415(i)(2)(A).

Ultimately, as this Court stated in *Rowley*, parental involvement is the key to the enforcement of the statutory scheme. "[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled under the Act," by participating in the formulation of their child's IEP and by undertaking the complaint procedures, beginning with the administrative process and culminating, in appropriate cases, in proceedings in federal court. *Rowley*, 458 U.S. at 182 & n.6, 207, 208-09.

B. Factual and Procedural Background

Beginning in July 2001, Jacob attended preschool at the Achievement Center for Children (ACC) because Jacob did not respond well to respondent's preschool program. App., *infra*, 4a. The Winkelmans and respondent agreed that ACC was an

appropriate placement for Jacob's preschool education for the 2001-02 and 2002-03 school years. *See id.* at 4a.

On June 2, 2003, the Winkelmans and respondent's officials met to discuss Jacob's IEP for the 2003-04 school year – Jacob's kindergarten year. *See id.* at 5a. Respondent proposed an IEP that would educate Jacob in a special education classroom at one of respondent's elementary schools. *See id.* This proposal was not acceptable to the Winkelmans. *See id.* Specifically, the Winkelmans were concerned that the proposed IEP did not contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-on-one instruction, and did not include music therapy. *See id*.

On June 2, 2003, the Winkelmans filed a request for a due process hearing with respondent's superintendent alleging that the 2003-04 IEP proposed by respondent failed to provide Jacob with a FAPE.[1] *See id.* Meanwhile, the Winkelmans enrolled Jacob at the Monarch School (Monarch), a school that specializes in educating autistic children, where "Jacob performed well" during the 2003-04 school year. *Id.* However, because Monarch's $56,000 annual tuition was prohibitively expensive,[2] the Winkelmans did not enroll Jacob at Monarch

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[1] The IDEA provides that when parents allege that their local school district has denied their disabled child a FAPE,

> the parents * * * shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(f)(1); *see also* Ohio Rev. Code § 3323.05(D) & (E).

[2] Jacob's sister, Jenna, also suffers from autism. Due to Mrs. Winkelman's disability and the time required to care for Jenna and Jacob, (continued...)

for the 2004-05 school year and instead educated him at home with supplementation from a one- to two-hour per week outreach program at Monarch. *See id.*

On February 25, 2004, the Impartial Hearing Officer (IHO) selected to preside over the Winkelmans' due process hearing issued a decision finding that respondent provided Jacob with a FAPE. *See id.* at 6a. The Winkelmans appealed to the State Level Review Office (SLRO), which on June 2, 2004, issued a decision affirming the IHO's earlier decision. *See id.* Petitioners were represented by counsel before both the IHO and SLRO.

Dissatisfied with the results of the administrative proceedings, on July 15, 2004, petitioners filed this action in the United States District Court for the Northern District of Ohio challenging the IHO's and SLRO's decisions that respondent had provided Jacob with a FAPE and alleging that respondent and the IHO had violated their procedural rights under the IDEA. *See id.* In total, petitioners alleged three procedural violations and three substantive violations of the IDEA. *See id.* at 7a. Specifically, petitioners alleged that their procedural rights were violated (1) when respondent predetermined to place Jacob in its own program "without meaningful input by Jacob's parents" prior to developing his 2003-04 IEP,[3] Compl. ¶ 21; *see also* Pet. Mot. S.J. at 6-8; App.,

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[2] (...continued)
the Winkelmans' household income is less than $40,000 per year. They have no savings, face a monthly mortgage payment of $1,300, and incur significant medical expenses for Jacob and Jenna. Because the Winkelmans are unable to afford counsel, *see* Pet. C.A. Opp'n to Mot. to Dismiss 1, we represent petitioners on a *pro bono* basis. Similarly, the attorney who represented petitioners in a related state case, *J.W. v. Ohio Dep't of Educ.*, No. 05-087043 (Cuyahoga County 2005), did so on a *pro bono* basis.

[3] A school district violates the IDEA when it predetermines a child's placement and fails to give parents a "meaningful" opportunity to participate
(continued...)

infra, 10a; (2) when the IHO impermissibly allowed her research assistant to "co-preside" over the proceedings,[4] Compl. ¶ 23; *see also* Pet. Mot. S.J. at 5-6; App*., infra*, 7a; and (3) when the administrative proceedings lasted longer than the forty-five days allowed by the IDEA's implementing regulation,[5] *see* Compl. ¶ 23; Pet. Mot. S.J. at 5-6; App*., infra*, 8a. Petitioners alleged that Jacob's substantive right to a FAPE was denied because the 2003-04 IEP (1) did not contain specific goals and objectives for occupational therapy,[6] *see*

(...continued)
in the formulation of their child's IEP. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (CA6 2004) (holding that school district predetermined child's placement and violated parents' right to participate in IEP formulation process where school district refused to discuss parents' suggested alternative placement "even in the face of impressive results"); *see also W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (CA9 1992) (holding that school district violated IDEA when it independently developed a proposed IEP that would place the student in a preexisting, predetermined program and refused to consider other alternatives).

[4] The IDEA gives "state authorities * * * limited discretion to determine who conducts [due process] hearings." *Schaffer*, 126 S. Ct. at 532 (citing 20 U.S.C. § 1415(f)(1)). Ohio grants parents the right to participate in the selection of the hearing officer and to know the hearing officer's qualifications. *See* Ohio Admin. Code § 3301-51-08(D)(2) ("The office for exceptional children will send * * * a statement of the qualifications of each hearing officer * * * to both the parent and the district who will have the opportunity to agree upon a hearing officer."); *see also generally id.* § 3301-51-08(E) & (F).

[5] The IDEA's implementing regulations specify that "[t]he public agency shall ensure that not later than 45 days after the receipt of a request for a [due process] hearing – (1) A final decision is reached in the hearing." 34 C.F.R. § 300.511(a); *accord*, Ohio Admin. Code § 3301-51-08(G)(3)(b)).

[6] Among other things, an IEP must include "a statement of annual goals, including short-term objectives [and] a statement of the specific educational services to be provided the child." 34 C.F.R. § 222.50. "[O]ccupational
(continued...)

Compl. ¶ 27; Pet. Mot. S.J. at 8-13; App., *infra*, 11a; (2) reduced Jacob's speech therapy from ninety minutes to sixty minutes and did not provide for one-on-one academic instruction,[7] *see* Compl. ¶ 26; Pet. Mot. S.J. at 13-14; App., *infra*, 16a-17a; and (3) did not include music therapy,[8] *see* Compl. ¶ 26; Pet. Mot. S.J. at 14-15; App., *infra*, 21a. On June 2, 2005, the district court granted judgment on the pleadings for respondent, essentially affirming the decisions of the IHO and SLRO. *See* App., *infra*, at 23a. Petitioners timely appealed.

On July 14, 2005, respondent filed a motion to dismiss petitioner's appeal because they were prosecuting the appeal *pro se*. *See id.* at 1a. On November 4, 2005, before any briefing of the merits of the appeal had been conducted, the

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[6] (...continued)
therapy" is a "related service[]" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including * * * occupational therapy * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education").

[7] "Speech-language pathology services" are also "related services" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including speech-language pathology services * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education"); *see also supra* note 6. The dispute between the parties over speech therapy and one-on-one instruction concerned whether the sixty minutes of speech therapy offered by respondent and the group instruction used in respondent's special education classroom were each "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also* App., *infra*, 16a-21a.

[8] Although not listed among the IDEA's examples of "related services," music therapy is, nonetheless, a "related service[]" that a school district must provide if necessary "to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A); *see also supra* note 6. The dispute between the parties over music therapy concerned whether Jacob needed music therapy to "receive educational benefits." App., *infra*, 21a-22a.

court of appeals granted the motion and, relying on its prior decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (CA6 2005), dismissed the entire appeal, notwithstanding that petitioners were asserting violations of both Jacob's substantive IDEA rights and the Winkelmans' procedural IDEA rights. *See* App., *infra*, 1a-2a. The court of appeals held, as it had in *Cavanaugh*, that the Winkelmans "are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.*; *see also Cavanaugh*, 409 F.3d at 757(recognizing that it was furthering a circuit split and dismissing entire appeal because "any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to a FAPE"). Rather than make its dismissal order effective immediately upon its issuance, the court of appeals stayed it for thirty days to enable petitioners to attempt to secure counsel. *Id.* at 2a ("[I]n conformity with *Cavanauh* [sic] * * * this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob.").

On November 16, 2005, petitioners filed a motion with the court of appeals seeking an extension of the thirty-day stay to allow them to petition this Court for certiorari. After the court of appeals denied the motion on December 1, 2005, petitioners sought the same relief through an application to Justice Stevens in his capacity as Circuit Justice for the Sixth Circuit. No. 05A506. On December 2, 2005, Justice Stevens granted the application and stayed the court of appeals' November 4, 2005, order "pending the timely filing and disposition by this Court of a petition for a writ of certiorari." Justice Stevens' order provided that, if certiorari is denied, the "stay will terminate automatically fifteen days after the date of the order denying certiorari," or if certiorari is granted, "upon the sending down of the judgment of this Court."

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the circuits are avowedly and intractably divided. In the IDEA, Congress expressly provided that non-lawyer parents of a disabled child may prosecute their child's due process hearing *pro se*. *See* 20 U.S.C. § 1415(h) ("Any party to a [due process] hearing * * * shall be accorded – (1) the right to be accompanied and advised by counsel * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"). There is a widely recognized three-way conflict among six circuits, however, over whether a non-lawyer parent's right to prosecute an IDEA dispute *pro se* carries-over to federal court and, if so, to what extent. This question recurs frequently because of the large percentage of parents with disabled children who are unable to obtain or afford a lawyer.

One court of appeals has held that there are no limitations on a parent's ability to prosecute an IDEA case *pro se* in federal court. Four circuits have limited a non-lawyer parent's ability to prosecute an IDEA case *pro se* by holding that counsel is needed to prosecute a child's substantive IDEA claims but not a parent's procedural IDEA claims. One circuit – the Sixth Circuit below here – has gone even further by holding that non-lawyer parents may not prosecute an IDEA case in federal court *pro se* under any circumstances and regardless of the nature of the IDEA claims being asserted. Although this Court declined several years ago to grant certiorari on the question presented, *see Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 123 (CA2 1998), *cert. denied*, 526 U.S. 1025 (1999); *Devine v. Indian River County School Board*, 121 F.3d 576 (CA11 1997), *cert. denied*, 522 U.S. 1110

(1998), this case is a better vehicle for this Court's review than either *Wenger* or *Devine*. *See infra* at 20.

Because only this Court can bring the required uniformity to how IDEA claims are litigated in federal court, and because the decision below is erroneous, certiorari should be granted.

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED OVER WHETHER, AND IF SO, UNDER WHAT CIRCUMSTANCES, NON-LAWYER PARENTS MAY PROSECUTE AN IDEA CASE *PRO SE* IN FEDERAL COURT

Six courts of appeals are intractably divided over whether, and if so, under what circumstances, non-lawyer parents may prosecute an IDEA case *pro se* in federal court. This division has resulted in a well-recognized 1-4-1 split. *See Mosley*, — F.3d —, 2006 WL 12982, *4 (CA7 Jan. 4, 2006) (cataloguing split); *Cavanaugh*, 409 F.3d at 756, 757 (applying the holdings of the Second, Third, Seventh, and Eleventh Circuits in part, while expressly rejecting the holding of the First Circuit); *Maroni v. Pemi-Barker Reg'l Sch. Dist.*, 346 F.3d 247, 249-50 (CA1 2003) (expressly disagreeing with the holdings of the Second, Third, Seventh, and Eleventh Circuits); *C.O. v. Portland Pub. Sch.*, — F. Supp. 2d —, 2005 WL 3507983, *8 (D. Or. Dec. 22, 2005) (cataloguing split); S. Rep. No. 108-185, 108th Cong., 1st Sess. 41 (2003) (noting split). Under this split, four court of appeals have limited parents' ability to prosecute an IDEA case *pro se* in federal court depending on the nature of the claims asserted, one court of appeals has placed no limitations on parents' right to do so, and one court of appeals – the court to which certiorari is presently sought – has imposed an absolute bar.

As discussed above, the IDEA confers both substantive and procedural rights for a disabled child and procedural rights for the child's parents. *See supra* at 3-4; *see also Mosley*, 2006

WL 12982, at *4. The Second, Fourth, Seventh, and Eleventh Circuits have all concluded that non-lawyer *pro se* parents may prosecute claims asserting violations of their own procedural IDEA rights but not claims alleging violations of their child's substantive IDEA rights. *See Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (CA7 2001) (per curiam) (holding that parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [his child's] legal representative");[9] *Wenger*, 146 F.3d at 123, 126 (holding that "in federal court a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child" but a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated by the [school district's] failure to follow appropriate procedures"); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 233, 235 (CA3 1998) (holding that "the right to proceed *pro se* in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court," but the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court"); *Devine*, 121 F.3d at 581 n.17, 582 (holding that "parents who are not attorneys may not bring a *pro se* action on their child's behalf" but noting that a parent was also a plaintiff and, in appropriate circumstances, could be permitted to prosecute his case without counsel).

The First Circuit has rejected this approach. The First Circuit holds that parents may prosecute an IDEA case *pro se* – "regardless of whether the rights asserted are procedural or substantive" – because they are "parties aggrieved" within the meaning of § 1415(i)(2)(A) of the IDEA. *Maroni*, 346 F.3d at 250. Because "any party aggrieved" by a decision at the final

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[9] The Seventh Circuit recently reaffirmed *Navin* in a published decision. *See Mosley*, 2006 WL 12982, at *4 (citing *Navin* and stating, "We have no trouble concluding that a parent like Mosley may assert her own procedural rights.").

stage of administrative proceedings may "bring a civil action" in federal district court, 20 U.S.C. § 1415(i)(2)(A), parents in the First Circuit may prosecute both their own procedural and their child's substantive IDEA claims in federal court.

Significantly, however, petitioners' appeal does not reside in the First Circuit, where their entire appeal would be proceeding to briefing on the merits. Nor does their appeal reside in the Second, Third, Seventh, or Eleventh Circuits, where, because the Winkelmans had alleged their own procedural claims, at least part of their appeal would have been allowed to proceed to an evaluation of the merits. Petitioners' appeal lies in the Sixth Circuit, which has rejected the First Circuit's approach and imposed an absolute bar to *pro se* prosecution of an IDEA case that goes well beyond the more nuanced approach of the Second, Third, Seventh, and Eleventh Circuits. In the Sixth Circuit, a parent may not prosecute an IDEA case *pro se* regardless of the nature of the claims asserted because, in its view, "any right on which [a parent] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon [the parent's] proceeding, through counsel, with their appeal on [their child's] behalf." *Cavanaugh*, 409 F.3d at 757.

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE THAT THREATENS THE EFFECTIVE ENFORCEMENT OF THE IDEA

The question presented is recurring and of exceptional importance. That the issue is recurring cannot be denied. In the three months since the Sixth Circuit issued the order dismissing petitioners' appeal, at least two district courts have ordered the dismissal of IDEA cases based on *Cavanaugh*. *See C.O.*, 2005 WL 3507983, at *8-*10 (dismissing action because non-lawyer parents were prosecuting case *pro se*); *Hart v.*

Shelby County Sch. Dist., No. 03-2845 DV, 2005 WL 2991480, *3 (W.D. Tenn. Nov. 7, 2005) (same). Additionally, the issue is presently awaiting decision in at least one pending appeal and one pending district court proceeding. *See, e.g.,* Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965 (urging reversal of dismissal of IDEA case for failure to secure counsel); Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005), *available at* 2005 WL 2979427 (urging summary judgment on basis that parents cannot prosecute IDEA case *pro se*).[10]

Nor can it be denied that the issue is exceptionally important. The IDEA is structured in such a way that the rights of a disabled child are to be pursued by his or her parents in their own name or in the child's name. Congress and the courts have depended on parents to press their child's interests and have commanded schools and educational agencies to get parents involved on the assumption that parental involvement is the best way to ensure maximum protection for the child.

Parents of disabled children, however, face significant difficulties in obtaining counsel to prosecute their IDEA disputes. First, the "majority of lawyers in private practice in the United States work in law firms that represent institutions, not people." David C. Vladeck, *In re Arons: The Plight of the "Unrich" In Obtaining Legal Services*, *in* Legal Ethics: Law Stories 255, 258 (Deborah L. Rhode & David J. Luban eds., 2005). Second, even those lawyers who are willing to represent individuals are often too expensive for the average "unrich" American. *Id.* at 259. That is,

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[10] The public dockets in these cases show that the issue has not been ruled upon as of the filing of this petition. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

> for many Americans legal services are generally unavailable, not by reason of poverty (because most of these people are not poor) but simply because they are not sufficiently wealthy to afford the high cost of legal services. * * * Indeed, many Americans cannot afford anything but the most routine legal services (e.g., preparation of a will).

Id.; *see also* Paula L. Hannaford-Agor, *Helping the* Pro Se *Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 8 (2003) ("The major contributing factor to the increase in self-representation is fairly obvious: a sizeable number of self-represented litigants proceed without a lawyer simply because they lack sufficient income to afford one.")

The IDEA "govern[s] the provision of special education services to nearly 7 million children across the country." *Schaffer*, 126 S. Ct. at 531 (citing Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/ tables27th/ar_aa9.htm). Of these 7 million children, 36% live in households with incomes of $25,000 or less, and 32% live in households with incomes of $25,000 to $50,000. *See* Mary Wagner et al., *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), http://www.seels.net/designdocs/SEELS_ Children_We_Serve_Report.pdf. For the overwhelming majority of these families, like the Winkelmans, the cost of retaining a lawyer is prohibitive. The prospect of recovering attorneys' fees is a partial incentive at best, as they are awarded only to prevailing parties.

Thus, the primary effect of the decision below – and, in cases where parents do not have their own procedural claims, the decisions of the Second, Third, Seventh, and Eleventh Circuits – will be to prevent parents who need to contest

insufficient administrative findings from protecting their children's interests in court. More dramatically, though probably less-frequently, the decision below will allow school districts that lost at the administrative level to obtain *de facto* reversal if they seek judicial review of adverse administrative findings in court and then secure a default judgment against the prevailing parents because the parents are unable to obtain a lawyer to help them defend their administrative-level victory. Both of these scenarios will undermine the effective enforcement of the IDEA.

To this end, it is no surprise that the Senate committee charged with studying and analyzing the IDEA – the Senate Committee on Health, Education, Labor, and Pensions – devoted significant attention to the issue when the IDEA was due for reauthorization in 2004. Specifically, the Committee recognized that

> there has been disagreement as to whether a parent may, in effect, "represent" their child in a civil action that results from an appeal of a due process hearing. The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.
>
> * * * *
>
> Based on current statutory language and on the rich legislative history emphasizing the importance of parental involvement, the committee believes that parents have a right to represent their child in court, without a lawyer,

> for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues.[11]

S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003).

III. NEITHER THE DECISION BELOW, NOR THE DECISIONS OF THE SECOND, THIRD, SEVENTH, AND ELEVENTH CIRCUITS, CAN BE RECONCILED WITH A PLAIN READING OF THE IDEA'S STATUTORY TEXT

As the First Circuit has recognized, "[o]n a plain reading of the statute," parents are "parties aggrieved" within the IDEA's right-to-sue provision, 20 U.S.C. § 1415(i)(2)(A). *Maroni*, 346 F.3d at 251. The right-to-sue provision of IDEA, 20 U.S.C. § 1415(i)(2)(A), provides that "[a]ny party aggrieved by the findings and decision made [in a due process hearing] * * * shall have the right to bring a civil action * * * in a district court of the United States." In IDEA cases, federal courts review the outcome of due process hearings. The IDEA grants parents the right to invoke those due process hearings under subsections (f) and (k): "Whenever a complaint has been received * * *, the parents involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1). "If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing." 20 U.S.C. § 1415(k)(6)(A)(i). Other sections of the IDEA also refer to

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[11] The Committee's statements were made in support of a proposal to "clarify" and "make clear" "that a parent of a child with a disability may represent the child in any action * * * in State or Federal court, without the assistance of an attorney." S. Rep. No. 108-185, at 42. Ultimately, however, the Committee's clarifying proposal was not enacted.

parents' right to a due process hearing. *See* 20 U.S.C. § 1415(e)(2)(A)(ii) (requiring that mediation not be used to "deny or delay a parent's right to a due process hearing"). Under the IDEA, states may permit parents to transfer this right to a due process hearing to their child only after their child reaches the age of majority. *See* 20 U.S.C. § 1415(m)(1)(B). Because the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of "parties aggrieved" given the right to sue.

This reading is buttressed by the provisions of the IDEA that allow appeals to the state educational agency. When a due process hearing is conducted before a local educational agency, 20 U.S.C. § 1415(g) permits "any party aggrieved by the findings and decision rendered in such a hearing [to] appeal such findings and decision to the State educational agency." As the First Circuit noted, in interpreting § 1415(g), numerous courts have treated parents as "parties aggrieved" within the meaning of § 1415(g). *See Maroni*, 346 F.3d at 251-52 (collecting cases). If parents are "parties aggrieved" by due process hearings when seeking to appeal to a state administrative agency, then, logically, they are also parties aggrieved by due process hearings when seeking judicial review. There is no reason why the term "party aggrieved" should have a different meaning in § 1415(i) than in § 1415(g).

This interpretation is further supported by the requirement of administrative exhaustion. Generally, the right to bring an IDEA action under 20 U.S.C. § 1415(i)(2)(A) is subject to the condition precedent that an "aggrieved party" must exhaust administrative remedies, although there are exceptions. By statute, it is the parents who may invoke those administrative remedies. *See* 20 U.S.C. § 1415(f)(1). It would make little sense if the parents who are explicitly permitted to invoke those administrative remedies and to exhaust them could not be parties for purposes of bringing suit.

The Third Circuit held that, if Congress had intended the term "party aggrieved" under IDEA to mean parents, it would have explicitly said so. *Collinsgru*, 161 F.3d at 232. Congress did explicitly say that parents could bring due process hearings, and so, according to *Collinsgru*, the rule of *expressio unius est exclusio alterius* means that Congress did not intend parents to be able to sue. *See id.* This rule has no application here. Congress needed to include several categories of plaintiffs – school districts, parents, and children – and so used a collective term. The IDEA does not refer to "child aggrieved" as it easily could if only the child could sue. Nor does § 1415(i)(2)(A) refer to school districts, even though they may seek review under it. The only plausible explanation for the IDEA's use of the term "party aggrieved" instead of "parents" is that Congress sought to confer the right to judicial review of due process hearings upon all parties involved in such hearings: school districts, parents, and children.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

A. The Issue Presented Was Squarely Decided Below, There Are No Impediments to this Court Granting Petitioners the Relief They Seek, and the Circuit Split Over the Issue Is Now Mature and Ripe for this Court's Review

This case presents an appropriate vehicle to resolve the question presented. The issue was squarely presented and resolved below; indeed, it was the only issue decided in the order that would be the subject of this Court's review. Moreover, petitioners would manifestly benefit from a ruling their favor, inasmuch as it would allow them to avoid dismissal solely because they are unable to afford a lawyer and continue to prosecute their appeal.

Additionally, this case is a far more suitable vehicle than the two previous cases presenting the issue where review was sought. *Devine* was the first appellate decision to confront the issue. Accordingly, as the *Devine* petitioners conceded themselves, there was no inter-circuit conflict. *See* Pet. for Cert. 10, *Devine v. Indian River County Sch. Bd.* (No. 97-929) ("[W]e cannot represent that there is a square conflict.").

The same is true with respect to *Wenger*, which was decided just seven months after *Devine* and was the third of three consecutive appellate decisions to confront the issue and decide it the same way. *See generally* Pet. for Cert., *Wenger v. Canastota Cent. Sch. Dist.* (No. 98-7722).

In stark contrast, a square conflict among the circuits has developed in the nearly eight years since the *Devine* and *Wenger* petitions were filed. *See supra* at 11-13. That three-way split is mature and ripe for this Court's intervention. *See supra* at 11-13.

B. Supreme Court Rule 11 Should Not Apply Because This Case Is Not a True Case of Certiorari Before Judgment

Supreme Court Rule 11 states that this Court will grant certiorari "before judgment is entered in [a court of appeals] * * * only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." We anticipate that respondent will argue that Rule 11 makes this case an inappropriate vehicle for deciding the question presented because, in opposing petitioners' stay application, respondent did so.[12]

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[12] Justice Stevens, who applied the traditional four-factor test for a stay pending certiorari – one factor of which is whether there is a "reasonable probability" that certiorari will be granted, *see California v. Am. Stores Co.*,

(continued...)

Crucially, this case is not a "true case of certiorari before judgment" because it "did not bypass the court of appeals." James Lindgren & William P. Marshall, *The Supreme Court's Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 267; *see also id.* at 277 ("Certiorari before judgment is designed to permit the Court to * * * bypass[] the court of appeals."); Robert L. Stern et al., Supreme Court Practice § 4.20, at 262 (8th ed 2002) (noting that certiorari before judgment is traditionally considered to involve "skipping the court of appeals").[13] Rather, in this case, certiorari is sought to review an order that originated in the court of appeals. Accordingly, this petition is more akin to one that seeks review of an interlocutory district court order over which the court of appeals has already passed than it is to a certiorari before judgment case. In both a traditional interlocutory review case and in this case, no intermediate court is being bypassed and no court other than this Court can afford relief.

While we recognize that certiorari from interlocutory appeals is disfavored, *see, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v.*

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[12] (...continued)
492 U.S. 1301 (1989) (O'Connor, J., in chambers) – when he granted petitioners' stay application, apparently did not believe that Rule 11 was this petition's death knell.

[13] Indeed, our survey of cases in which this Court has granted certiorari before judgment show that, in all but one case, certiorari was sought to bypass the court of appeals entirely. In other words, in all but one case, certiorari before judgment was sought to review the district court's judgment – not an interlocutory decision of the court of appeals. The one exception is *Barefoot v. Estelle*, 463 U.S. 880 (1982) (reviewing court of appeals' denial of certificate of probable cause and stay of execution before court of appeals had reviewed the merits of the district court's denial of petitioner's underlying habeas petition).

Gamble, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review"), "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review." Stern et al., *supra*, § 4.18, at 260; *see also id.* § 4.18, at 259 (noting that when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"). Accordingly, this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); *see also, e.g., Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (granting certiorari to review interlocutory order where "effect of the order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be meaningful"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing court of appeals' reversal of a district court's denial of a motion to dismiss a complaint because "fundamental to the further conduct of the case").

This case clearly presents an issue which is "fundamental to the further conduct of the case." *Land*, 330 U.S. at 734 n.2. Absent this Court's intervention, petitioners will have to choose between either (a) allowing the court of appeals' dismissal order to become final so they can once again petition this Court for review or (b) obtaining a lawyer that they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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