No. _____

In The
Supreme Court of the United States

COLONIAL SCHOOL DISTRICT,

Petitioner,

v.

RENA C.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, Rena C., filed a fee petition in district court. Finding that Rena C. "was not justified in ignoring and rejecting" Petitioner, Colonial School District's written offer of settlement, and that "[w]hen her counsel did belatedly respond to the ten-day offer, he did so on frivolous grounds, failed to seek clarification of the offer and insisted on pressing frivolous arguments throughout the proceedings," the district court found Rena C. "was not substantially justified in rejecting Colonial's offer." The Third Circuit, using a plenary standard of review, reversed, ruling that rejecting an offer without attorney's fees is substantially justified.

The questions presented are:

1. Whether the court of appeals' decision regarding the phrase "substantially justified" used in the attorney's fee shifting provision in the Individuals With Disabilities Education Improvement Act of 2004 fails to follow this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), and conflicts with the Fifth Circuit Court of Appeals' decision in *Gary G. v. El Paso Independent School District*, 632 F.3d 201 (5th Cir. 2011), by applying plenary review and creating a *per se* legal rule rather than applying abuse of discretion review to the district court's findings that Rena C.'s litigation was frivolous and that she was not substantially justified in rejecting a written offer of settlement?

2. The court of appeals concluded "[h]ad Rena C. accepted the offer, she would not be the prevailing

QUESTIONS PRESENTED – Continued

party," App. at 21, and so not entitled to attorney's fees under *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Contrary to *Buckhannon*'s rejection of the catalyst theory, and contrary to *Evans v. Jeff D.*, 475 U.S. 717 (1986), which rejected the coercive settlement offer argument, the court of appeals proceeded to decide as a matter of law that "[a] parent is substantially justified in rejecting an offer that does not include the payment of reasonable attorney's fees when the school district cannot reasonably believe that no attorney's fees have accrued." App. 25. Did the court of appeals err by creating an "any time a lawyer is involved," *i.e.*, a lawyer as catalyst, exception to *Buckhannon* and a fairness exception to *Evans v. Jeff D.*?

PARTIES TO THE PROCEEDING

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STATEMENT OF JURISDICTION

On May 14, 2018, the court of appeals entered its judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1). Federal jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343.

STATUTORY PROVISION INVOLVED

Section 615 of the Individuals With Disabilities Education Improvement Act of 2008 ("IDEA") provides for an award of prevailing party attorney fees with certain limiting exceptions, in relevant part:

> (B) Award of attorneys' fees.
>
> (i) In general.
>
> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;. . . .

* * *

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) In general.

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

* * *

(E) Exception to prohibition on attorneys' fees and related costs.

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing

> party and who was substantially justified in rejecting the settlement offer.

20 U.S.C. § 1415(i)(D) and (E).

STATEMENT OF THE CASE

The Third Circuit's decision conflicts with relevant decisions of this Court, and directly conflicts with Fifth Circuit precedent. The ruling below is contrary to *Pierce*'s requirements regarding discretionary review. Requiring the public to pay for Respondent's frivolous litigation cannot be said to uphold the purposes of the IDEA and goes against *Pierce*'s instruction that the better course is to let facts develop the law. As *Pierce* predicted, ignoring the district court's closer-to-the-action discretionary findings leads to bad federal law requiring an estimated 1,112 public school districts within the Third Circuit, in addition to hundreds of charter schools, regional associations, and other school entities, to offer up attorney's fees with every settlement proposal any time a school "cannot reasonably believe that no attorney's fees have accrued." This rule, capable of spreading throughout litigation where federal fee-shifting is involved, effectively revives the catalyst theory rejected by *Buckhannon*, albeit a lawyer as catalyst. Even where the lawyer's "assistance" is frivolous.

Respondent Rena C.'s daughter attended a private school at public expense pursuant to an administrative hearing officer's order. Prior to what Petitioner

Colonial School District believed would be the young lady's 9th grade year, Colonial School District developed and offered an Individualized Education Program ("IEP") to Rena C., who subsequently disagreed with the proposed IEP. The parties agreed to mediate the dispute in accordance with 20 U.S.C. § 1415(e). App. 34. Both parties must agree to mediate, 20 U.S.C. § 1415(e)(2), and, under state rules, lawyers are not permitted as participants, http://odr-pa.org/mediation/overview/ (last accessed July 17, 2018).[1] Prior to the mediation date Rena C. retained counsel and, on the advice of her counsel, canceled the mediation. App. 34. Six days afterwards, through counsel, Rena C. filed an administrative Complaint Notice. App. 34-35.

In response, sixteen days later, Colonial School District sent a written offer of settlement in accordance with 20 U.S.C. § 1415(i)(3)(D)(i), a so-called "ten-day offer." Rena C. did not timely reply. App. 35. Months later the parties ultimately resolved the merits of their dispute through a consent order approved by an administrative hearing officer. App. 36. Rena C. then sought attorney's fees for the entire time period, and Colonial School District offered fees incurred through the ten-day offer period. Dissatisfied, Rena C. filed a complaint in federal court seeking attorney's fees. App. 37.

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[1] "Neither school officials nor parents/guardian may include a lawyer at the mediation session." This is the Office for Dispute Resolution's rule, and that office is the entity used by the Commonwealth of Pennsylvania pursuant to 22 Pa. Code § 14.162(p)(1), to coordinate IDEA-based hearings and mediations.

The district court determined that Rena C.'s rejection of Colonial School District's ten-day offer was not "substantially justified."

> Rena was not justified in ignoring and rejecting Colonial's offer which included pendency at DVFS. When her counsel did belatedly respond to the ten-day offer, he did so on frivolous grounds, failed to seek clarification of the offer and insisted on pressing frivolous arguments throughout the proceedings. Therefore, Rena was not substantially justified in rejecting Colonial's offer.

App. 50. The district court also found that "because there was no real dispute about attorney's fees at the time the offer was made, Rena was not justified in ignoring and rejecting Colonial's offer." App. 53. The district court concluded

> that Rena did not ultimately obtain more favorable relief than Colonial had offered. Nor was she justified in persisting in her frivolous arguments. Instead, she and her counsel unnecessarily protracted the litigation. Therefore, we shall award her attorney's fees only for work performed to September 28, 2014, the date the ten-day offer expired.

App. 53. The district court's factual findings show that, far from "assisting," Rena C.'s counsel undermined resolution. Rena C. appealed to the Third Circuit.

Despite the district court's factual findings, the Third Circuit applied a plenary standard of review to all the issues. App. 7. The Third Circuit did not address

the district court's findings relating to Rena C.'s frivolous arguments and lack of substantial justification. Instead, it reasoned that although "[t]he IDEA does not require a school district to include attorney's fees in ten-day offers to parents," App. 20, "[w]e do not read the IDEA to force parents to decide between the resolution of a placement dispute and paying for the attorney who assisted in achieving an appropriate placement for the student," App. 25. As a result, the Third Circuit created a rule of law that "[a] parent is substantially justified in rejecting an offer that does not include the payment of reasonable attorney's fees when the school district cannot reasonably believe that no attorney's fees have accrued." App. 25.

The Third Circuit's decision conflicts with the Fifth Circuit. Facing the same issue of substantial justification under the IDEA, the Fifth Circuit applied an abuse of discretion standard and held that rejecting an offer on the grounds that it does not include attorney's fees is not substantially justified and that a parent can be expected to pay his attorney's fees. The Third Circuit's decision is also at odds with this Court's precedent concerning abuse of discretion review to the phrase "substantially justified" and cautioning against fixed rules of law to questions that are inherently factual. The Third Circuit decision permits an attorney or parent to reject without consequence any IDEA offer, no matter how favorable to the child, if the offer does

not include fees. In effect, the Third Circuit ruling upends this Court's precedent that rejected the catalyst theory and claims of coercive waivers.

ARGUMENT

The court of appeals, in effect, set a *per se* rule requiring fees anytime a lawyer is involved notwithstanding that the IDEA requires no such thing. This particular ruling did not involve interpretation or construction of the ten-day offer's words, the objects of plenary scrutiny in the decision. App. 7. Rather, the first error was using plenary review to reverse the district court's factual determination that Rena C. was not substantially justified, contrary to this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), and its progeny, and diverging from the Fifth Circuit's decision in *Gary G. v. El Paso Independent School District*, 632 F.3d 201 (5th Cir. 2011). The second error was in functionally mandating attorney's fees payments. The first error leads to the second and, as Justice Scalia predicted, the Third Circuit established circuit law "in a most peculiar, secondhanded fashion." *Pierce*, 487 U.S. at 561.

1. This Court's decision in *Pierce*. The case addressed the propriety of an attorney's fee award under the Equal Access to Justice Act ("EAJA") and the exception "unless *the court finds* that the position of the United States was substantially justified." *Pierce*, 487 U.S. at 559 (quoting 28 U.S.C. § 2412(d)(1)(A)

(emphasis supplied by the Court). Soon after, this Court expressly recognized that *Pierce*'s analysis is not limited just to the EAJA. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("in accordance with our analysis of analogous EAJA provisions,. . . ."). *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 302 (2006) (interpreting similar phrases in like manner). Given *Cooter & Gell*, and guidance that like phrases are to be treated similarly, *Pierce*'s requirements apply to "substantially justified" as used in the discretionary IDEA provision at issue.

The *Pierce* decision, authored by Justice Scalia, engendered a fractured vote. Part II of *Pierce*, in which five Justices joined (Chief Justice Rehnquist along with Justices Brennan, Marshall, Blackmun, and Stevens), nonetheless contains two rules that this Court has since followed. First, that a statute's structure leads to the proper standard; in that case, the EAJA's structure emphasized that the determination is to be made by the district court with some degree of deference on appeal. *Pierce*, 487 U.S. at 559. Second, when determining if a mixed question of fact and law is really more of one and less of the other, "sometimes the decision 'has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Id.* at 559–60 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). *See also Cooter & Gell*, 496 U.S. at 403 (discussing *Pierce* and stating "[b]ecause a determination whether a legal position is 'substantially justified' depends greatly on factual

determinations, the Court reasoned that the district court was 'better positioned' to make such factual determinations."). The Court concluded "we are satisfied that the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA." *Pierce*, 487 U.S. at 563. *See also Cooter & Gell*, 496 U.S. at 403 ("*Pierce* also concluded that the district court's rulings on legal issues should be reviewed deferentially.").

More recently, this Court unanimously applied *Pierce* to the question whether a case is "exceptional" and so justifying an award of fees under the Patent Act. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, ___ U.S. ___, 134 S. Ct. 1744, 188 L. Ed. 2d 829 (2014). Noting the Court's "prior cases involving similar determinations," *id.* at ___, 134 S. Ct. at 1748, 188 L. Ed. 2d at ___, and the reasons underlying *Pierce*'s analysis, the Court concluded abuse of discretion is the proper standard because, "[a]lthough questions of law may in some cases be relevant to the § 285 inquiry, that inquiry generally is, at heart, rooted in factual determinations," *id.* at ___, 134 S. Ct. at 1749, 188 L. Ed. 2d at ___ (quotations omitted). *See also McLane Co. v. E.E.O.C.*, ___ U.S. ___, 137 S. Ct. 1159, 197 L. Ed. 2d 500 (2017), *as revised* (Apr. 3, 2017) (applying *Pierce* to determine the standard of review applicable to enforcing an EEOC subpoena); *Cooter & Gell*, 496 U.S. at 403 (applying *Pierce* to determine the standard of review applicable to reviewing a district court's Rule 11 determination).

Like the EAJA, the IDEA's "structure emphasizes that the determination is to be made by the district court with some degree of deference on appeal." *Pierce*, 487 U.S. at 559. *See also Evans v. Jeff D.*, 475 U.S. 717, 730 (1986) (referring to "[t]he text of the Fees Act"). The IDEA allows the court, "in its discretion," to award fees, 20 U.S.C. § 1415(i)(3)(B)(i), and the "substantially justified" provision continues such discretionary language, 20 U.S.C. § 1415(i)(3)(E) ("attorney's fees . . . may be made to a parent. . . ."). The district court, better positioned to address facts, found Rena C.'s approach to be frivolous and not substantially justified.

This Court's subsequent application of *Pierce* to other statutory fee-shifting provisions, the discretionary structure of the IDEA's fee-shifting provisions, the inherently factual inquiry into a substantial justification, together with this Court's requirement that similar provisions be interpreted similarly, show that the Third Circuit failed to adhere to the Court's precedent when it used a plenary standard and reversed the district court's findings about Rena C.'s substantial justification.

2. The Fifth Circuit's *Gary G.* decision. The Third Circuit's decision creates a direct conflict with the Fifth Circuit, which previously confronted the question of substantial justification under the IDEA's fee-shifting provisions. *Gary G.*, 632 F.3d at 208 ("At issue is whether a parent who rejects a settlement offer that includes all requested educational relief, but not attorney's fees, is substantially justified in, or unreasonably protracts the final resolution of the

controversy by, rejecting it.").[2] The split involves not only the question of discretionary review, but also the Fifth Circuit's conclusion that a parent can be expected to pay the parent's attorney.

In *Gary G.*, the Fifth Circuit concluded the question about "substantial justification" requires abuse of discretion review and expressly rejected a *per se* rule with respect to ten-day offers. Consistent with *Pierce*'s reasoning that flexibility is the better course for inherently factual questions, the Fifth Circuit stated there may be a case where a failure to offer fees does properly rise to substantial justification for rejecting the offer. *Gary G.*, 632 at 210. *See also Pierce*, 487 U.S. at 562 (noting substantially justified is not susceptible to useful generalization but "likely to profit from the experience that an abuse-of-discretion rule will permit

[2] A Ninth Circuit case, *Beauchamp v. Anaheim Union High School District*, 816 F.3d 1216 (9th Cir. 2016), muddies the waters and so provides additional reason to grant certiorari. Although *Beauchamp* does not so directly address the issue as the Fifth Circuit's *Gary G.* decision, the outcome turned on the case-specific facts, particularly the fact that the parent "could have sought clarification" of the offer, but didn't, and so "conclude[d] that Beauchamp was not substantially justified in rejecting the offer." *Beauchamp*, 816 F.3d at 1223. *Compare with* App. 50 (finding Rena C. "ignored" the offer and then "failed to seek clarification of the offer"). The Ninth Circuit, however, said it applied *de novo* review to the decision to deny fees after the written offer of settlement. 816 F.3d at 1220. Yet ultimately the Ninth Circuit affirmed the district court's ruling on other factual grounds and set forth a legal rule, followed by the district court in the current matter, that the fact of failing to seek clarification does not support substantial justification.

to develop."). But the facts in *Gary G.* did not present such a case.

"On this record, . . . , and for the following reasons," 632 F.3d at 210, the Fifth Circuit determined that rejecting the offer because it did not include fees was not substantially justified. The district court in *Gary G.* abused its discretion where the facts showed that, "instead of accepting the offer, having that acceptance being made enforceable two weeks later at the resolution meeting, and paying a relatively small amount of attorney's fees, Gary G. caused this matter to continue for another three years. . . ." *Id.* The parallel between *Gary G.* and *Rena C.* is notable. *See inter alia*, App. 50 (finding Rena C. initially ignored the offer and responded, belatedly, "on frivolous grounds, failed to seek clarification of the offer and insisted on pressing frivolous arguments throughout the proceedings.").

The Third Circuit attempts to distinguish *Gary G.*, writing that the school district in *Gary G.* did not know about the attorney's involvement. App. at 23-24. From this, it creates the new rule that a school must offer fees if the school knows an attorney has accrued fees. But the Third Circuit's premise is mistaken.

The decision in *Gary G.* reports that the offer without attorney's fees was reiterated at least twice after the El Paso Independent School District learned of counsel's involvement, 632 F.3d at 209, so the case does not support a rule that a school must pay parent attorney fees once a lawyer is known to be advising parents.

To the contrary, *Gary G.* found that rather than "paying a relatively small amount of attorney's fees [13.8 hours], Gary G. caused this matter to continue for another three years. . . ." *Id.* at 210. It is, according to *Gary G.*, reasonable to expect a parent to pay "a relatively small amount of attorney's fees . . . ," *id.*, given a favorable offer.

The Third Circuit tries to bolster its rule by citing concern that parents have access to lawyers. "Congress enacted the attorney's fees provision specifically to ensure 'that due process procedures, including the right to litigation if that becomes necessary, are available to all parents.' " App. 24. The decision's legislative history finding erroneously elevates fees to child-centered relief. *Gary G.* spurned the notion that a desire for attorney's fees is substantial justification for rejecting an offer that gives all requested educational relief. 632 F.3d at 207. Such an outcome, it concluded, does not foster the purposes of the IDEA. *Id.*

> As noted in *Michael T.* [*v. El Paso Indep. Sch. Dist.*, 37 Fed. Appx. 714 (5th Cir. 2002)], IDEA's purposes are not fostered by withholding consent to a reasonable settlement solely in order to obtain attorney's fees. As discussed above, however, it is the remedy that must foster IDEA's purposes. *See* [*El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417, 421-22 (5th Cir. 2009)] (noting the obtained remedy must foster IDEA's purposes).

Gary G., 632 F.3d at 207. It is not the fees, but the remedy that must be aligned with that purpose. *Id.* at 208.

See also Evans v. Jeff D., 475 U.S. at 741 (noting coercive effect of fee-shifting leveraged an "exceptionally generous offer").

Contrary to the IDEA's text and structure, the Third Circuit turned fees that are not required for a settlement offer into a mandatory element, and minimizing the IDEA's child-centered purposes, reasoning instead that an outcome excluding attorney's fees is unfair by forcing a parent to choose between her daughter or her lawyer. App. 25. By law, there is nothing unfair about it. *Evans v. Jeff D.*, *supra*. A parent can be expected to pay her attorney's fees. *Gary G.*, 632 F.3d at 210.

Holding that "[a] parent is substantially justified in rejecting an offer that does not include the payment of reasonable attorney's fees when the school district cannot reasonably believe that no attorney's fees have accrued," App. 25, is in conflict with the Fifth Circuit's correct interpretation and application of the IDEA's purpose and its substantial justification provision.

3. The lawyer as catalyst. The Third Circuit was more concerned with creating a path to recover fees than the relief given in the offer. App. 21 ("relief granted at an administrative hearing creates the condition necessary for parents to seek attorney's fees"), and at App. 25 ("A school district seeking to settle a dispute in which a lawyer has been involved should acknowledge that the parent has accrued attorney's fees. . . ."). The result gives new life to the catalyst theory rejected by *Buckhannon Board & Care Home, Inc.*

v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), albeit with the lawyer as catalyst.

This Court has repeatedly rejected allowing fees whenever a court is so inclined. "In *Alyeska [Pipeline Serv. Co. v. Wilderness Soc'y]*, 421 U.S. [240,] 260 [(1975)], we said that Congress had not 'extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.'" *Buckhannon*, 532 U.S. at 610. But with its rule that "[a] parent is substantially justified in rejecting an offer that does not include the payment of reasonable attorney's fees when the school district cannot reasonably believe that no attorney's fees have accrued," App. 25, the Third Circuit has done just that: deemed fees warranted whenever an attorney is known to be on the case.

Buckhannon involved disabilities law, too, yet did not hold that the aspiration for litigants to have a right to obtain a fee means they must get the fee. *See also Evans v. Jeff D.*, 475 U.S. at 731–32.[3] But the Third Circuit's ruling says otherwise, rendering fees "nonwaivable," requiring a fee offer without knowing if the

[3] "Thus, while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees." (Footnotes omitted.)

parent's counsel might opt to forgo fees, as happens from time-to-time, *see Evans v. Jeff D.*, *supra*, or compromise at all. The premise of an unfair choice, between "paying for the attorney" on the one hand or "resolution of the placement dispute" on the other, is an artifice; the real motivator is the parent-attorney retainer agreement and relationship. The resulting rule is contrary to *Buckhannon* (holding fees require judicial imprimatur) and *Evans v. Jeff D.*, 475 U.S. at 728 (observing that where "the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession."). The resulting rule eliminates a parent attorney's incentive to forgo or reduce fees to secure a generous resolution. The resulting rule takes away a school district's "strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs." *Buckhannon*, 532 U.S. at 609. *See also Evans v. Jeff D.*, 475 U.S. at 732 ("we believe that a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement."). The resulting rule is bad law.

Within the Third Circuit, school districts must include attorney's fees in any offer to parents represented by counsel. Soon, within the Third Circuit, defendants in any case faced with the threat of a fee-shifting provision will be pressed to offer up attorney's fees under the precedential reasoning that

acknowledging the lawyer's involvement is just the fair thing to do, contrary to *Evans v. Jeff D*. It is just a matter of time until the catalyst theory, rejected by *Buckhannon* and thought buried, reemerges Zombie-like across civil rights litigation within the Third Circuit.

* * *

Ultimately, the district court found Rena C. was not substantially justified because she did not discuss the offer and her concerns about fees in a timely manner and, instead, continued with frivolous arguments. The Third Circuit failed to address these facts and created bad law through an analytical process and result that conflicts with this Court's precedent and with Fifth Circuit precedent.

CONCLUSION

The petition for certiorari should be granted to resolve the conflict between the Third and Fifth Circuits and to correct a now-controlling rule of law on an important federal question that conflicts with relevant decisions of this Court.

Respectfully submitted,

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