No. 20-402

IN THE

Supreme Court of the United States

CHAD AND TONYA RICHARDSON, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF L,

Petitioners,

v.

OMAHA SCHOOL DISTRICT,

Respondent.

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

---

BRIEF IN OPPOSITION

MARHSALL S. NEY
KATHERINE C. CAMPBELL
FRIDAY, ELDRIDGE & CLARK, LLP
3350 S. Pinnacle Hills Parkway, Suite 301
Rogers, AR 72758

THEANE D. EVANGELIS
Counsel of Record
THEODORE J. BOUTROUS, JR.
SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Respondent

QUESTION PRESENTED

Did the Eighth Circuit err in holding that petitioners' claim for attorneys' fees under the Individuals with Disabilities Education Act ("IDEA") is more analogous to a "civil action . . . pursuant to the [IDEA]" under Arkansas Code § 6-41-216(g), than a personal injury action under Arkansas Code § 16-56-105, for purposes of borrowing a state limitations period?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Petitioners Chad and Tonya Richardson filed a due process complaint with the Arkansas Department of Education alleging that their child, "L," was denied a free appropriate public education in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. Although the hearing officer found for petitioners in part, petitioners sought review of that decision in federal district court as an "aggrieved party" under the IDEA. But petitioners never served their complaint on the defendants, and the suit was therefore dismissed.

Petitioners then filed this action. Because the statute of limitations for challenging the hearing officer's decision had since elapsed, petitioners abandoned the claim that they were an aggrieved party and instead sought attorneys' fees as a "prevailing party" before the hearing officer. The district court dismissed this claim as untimely and the Eighth Circuit affirmed, borrowing Arkansas's 90-day statute of limitations for "civil action[s] . . . pursuant to the Individuals with Disabilities Education Act." Ark. Code § 6-41-216(g).

Petitioners now ask this Court to grant certiorari to consider whether their claim for attorneys' fees was timely. They do not dispute that the Eighth Circuit correctly borrowed the applicable statute of limitations from Arkansas law. Instead, they contend that the court borrowed the *wrong* statute of limitations. According to petitioners, an action for attorneys' fees under the IDEA is more closely analogous to a personal injury action under Arkansas Code § 16-56-105, which has a three-year statute of limitations, than a civil action pursuant to the IDEA under Arkansas Code § 6-41-216, which has a 90-day statute of limitations.

This Court should deny review for at least two reasons. *First*, the purported circuit conflict identified by petitioners is insignificant at best. While petitioners argue that the courts of appeals are divided on whether a claim for attorneys' fees under the IDEA is best characterized as an independent action or a challenge to an administrative decision, the answer to this question is not determinative of the limitations period within any particular jurisdiction. Moreover, resolving this question will not promote uniformity across jurisdictions; although petitioners bemoan "widely divergent" limitations periods, they acknowledge that, under their view, the time to bring an attorneys' fees claim will vary from one to six *years*, as compared to one to four *months* under the view adopted by the Eighth Circuit. Pet. at 1. And while petitioners urge that review is nevertheless warranted because statutes of limitations for independent actions are generally longer than those for review of an administrative decision, there is no reason to believe that this difference is material. In fact, petitioners themselves filed a challenge to the hearing officer's decision within 90 days, although that action was dismissed for failure to serve the defendants.

Second, the decision below is correct. Irrespective of how petitioners' claim for attorneys' fees is characterized, there can be little doubt that it is more closely analogous to a "civil action . . . pursuant to the Individuals with Disabilities Education Act" than to a personal injury action. And while some courts have borrowed a longer statute of limitations out of concern that a shorter one would force prevailing parties to seek fees before the time for a merits challenge has expired, this is not unusual in litigation and, in any event, it is not relevant here because the Eighth Cir-

cuit has held that the statute of limitations for an attorneys' fees claim does not begin to run until merits review is complete.

STATEMENT

1. Congress enacted the Individuals with Disabilities Education Act "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). Under the statute, "an 'individualized education program,' called an IEP for short, serves as the 'primary vehicle' for providing each child with the promised" education. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017). The IEP is crafted by school officials, teachers, and parents to "spell[] out a personalized plan to meet all of the child's 'educational needs.'" *Ibid.*

When parents and educators disagree on whether a child is receiving a free appropriate public education, "parents may turn to dispute resolution procedures established by the IDEA." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017). Under these procedures, "[t]he parties may resolve their differences informally, through a '[p]reliminary meeting,' or, somewhat more formally, through mediation." *Ibid.* (second alteration in original) (citing 20 U.S.C. § 1415(e), (f)(1)(B)(i)). If these procedures prove unsuccessful, the parties "may proceed to what the Act calls a 'due process hearing' before a state or local educational agency." *Ibid.* (citing 20 U.S.C. § 1415(f)(1)(A), (g)).

After the due process hearing is complete, the IDEA provides for judicial review. The Act states that "[a]ny party aggrieved by the findings and decision" made in the due process hearing "shall have the right to bring a civil action" in federal district court or state

court. 20 U.S.C. § 1415(i)(2)(A). In addition to reviewing the merits of the decision, "the court, in its discretion, may award reasonable attorneys' fees . . . to a prevailing party who is the parent of a child with a disability." *Id.* § 1415(i)(3)(B)(i).

Originally, the IDEA did not provide a limitations period for actions seeking judicial review from a due process hearing. But in 2004, Congress amended the statute to provide, among other things, that "[t]he party bringing [an] action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows." Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2715 (2004), *codified at* 20 U.S.C. § 1415(i)(2)(B). However, most courts have held that this limitations period applies only to a merits challenge brought by an aggrieved party, rather than a claim for attorneys' fees brought by a prevailing party. *See, e.g.*, *D.G. ex rel. LaNisha T. v. New Caney Indep. Sch. Dist.*, 806 F.3d 310, 316 (5th Cir. 2015).

2. Petitioners' child, L, has been enrolled in the Omaha School District since 2011, when L was in first grade. *Richardson v. Omaha Sch. Dist.*, No. 3:17-cv-3111 (W.D. Ark.), Dkt. 1-2 at 5. During that year, L was diagnosed with Autism Spectrum Disorder, ADHD, and other developmental deficiencies. *Id.* at 7. Petitioners worked with school officials to develop an IEP for L on an annual basis. While L showed progress in some areas, his development plateaued and, in some respects, regressed between fourth and sixth grade. *Id.* at 21–25.

In September 2016, when he was in sixth grade, L began to display tics during class. *Id.* at 25. The tics grew worse over time until a particularly severe episode on October 6, 2016 required that L be removed from school and taken to the emergency room. *Id.* at 30–31. L was thereafter diagnosed by a neurologist with Tourette's Syndrome. *Id.* at 34.

Petitioners met with school officials the day after this incident to discuss L's placement. *Id.* at 31. The parties agreed to temporarily move L out of general education classes until his condition stabilized. *Id.* at 32. Ultimately, however, this change was never implemented, as L would only attend school one more day that month. *Id.* at 34. On October 31, 2016, petitioners removed L from school and requested homebound services, which the school district provided. *Ibid.*

3. Petitioners filed a due process complaint with the Arkansas Department of Education on November 29, 2016. Pet. App. 19a. They alleged that the school district violated both its procedural and substantive obligations under the IDEA, and that it violated the Rehabilitation Act to the extent L was bullied at school.

A due process hearing took place across four sessions between February 20, 2017 and March 7, 2017, and the hearing officer issued its decision just over a month later, on April 14, 2017. *Richardson v. Omaha Sch. Dist.*, No. 3:17-cv-3111 (W.D. Ark.), Dkt. 1-2 at 3. The hearing officer rejected petitioners' claim that the school district violated its procedural obligations under the IDEA by failing to reevaluate L every three years. *Id.* at 35–36. It also rejected petitioners' claim that the school district violated its substantive obligations under the IDEA by failing to educate L in the

least restrictive environment when it removed L from general education classes following the October 6, 2016 incident, noting that the change was temporary and designed to limit external stimuli that might contribute to L's tics while his condition stabilized. *Id.* at 48–51. Similarly, the hearing officer denied petitioners' bullying claims, finding that "only one of the four alleged incidents" identified by petitioners "*might* constitute bullying," and "this incident was promptly investigated and resolved" by school officials. *Id.* at 43–48.

Notwithstanding the above, the hearing officer found in favor of petitioners on two grounds. First, it concluded that the school district failed to "take steps to evaluate [L]'s social and emotional status in December 2014." *Id.* at 39. Second, the hearing officer held that, "[w]hile [L]'s IEPs might have been sufficient under" the standard established by this Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), which governed when the IEPs were drafted, they were "inadequate in light of the more demanding standard set forth in *Endrew F.*," which was decided just three weeks before the hearing officer issued its decision. *Id.* at 43.

The hearing officer ordered the school district to "seek all necessary evaluations, including, but not limited to, a psychoeducational evaluation, a speech and language evaluation, and an occupational therapy evaluation," and to then "develop and update [L]'s IEP based on the information received from the updated evaluations." *Id.* at 51–52. At the conclusion of its order, the hearing officer notified the parties that "[a] party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State

Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education." *Id.* at 52.

4. Petitioners filed a complaint in the Western District of Arkansas on July 13, 2017—exactly 90 days after the hearing officer's decision was filed with the Arkansas Department of Education. *See Richardson v. Omaha Sch. Dist.*, No. 3:17-cv-3053-TLB (W.D. Ark.), Dkt. 1. According to the complaint, petitioners were "aggrieved parties arising from a final decision issued in their case by an administrative hearing officer" to the extent that decision "related to the Least Restrictive Environment and the provision of educational services provided to L during the pendency of the Due Process Hearing." *Id.* ¶¶ 2, 27.

Petitioners, however, failed to serve the defendants within the time allotted by Federal Rule of Civil Procedure 4(m). Although they filed a motion to extend the time for service, the district court denied it, explaining that "the only reason offered by Plaintiffs' counsel for the delay was her failure to calendar the service deadline, and this is not a good excuse"—indeed, it was "an especially bad excuse considering the fact that it appears she waited until the last possible day of the applicable limitations period to file the Complaint." *Id.*, Dkt. 7 at 3. The court also noted that "[c]ounsel's disregard for rules and deadlines in the instant case is not an isolated occurrence," and that "[c]ounsel has demonstrated a pattern of disregard for deadlines in her practice before this Court, such that it is fair to say that failing to meet deadlines, and then asking the Court for forgiveness after the fact, is simply the way that counsel chooses to practice law."

Ibid. The court dismissed the action without prejudice on November 8, 2017.

5. Petitioners then filed this action in the Western District of Arkansas on December 4, 2017. Rather than challenge the hearing officer's decision, petitioners now claimed that, "as a result of [their] achieving significant and substantial results for L at the administrative proceeding, they are a 'prevailing party'" entitled to "reasonable attorney fees in the amount of $56,155.50." *Richardson v. Omaha Sch. Dist.*, No. 3:17-cv-3111 (W.D. Ark.), Dkt. 1 ¶¶ 42, 46. They also asserted a host of other claims that were omitted from their original action—including claims under the Rehabilitation Act, the Americans with Disabilities Act ("ADA"), Section 1983, and state tort law. *Id.* ¶¶ 47–144.

a. The district court dismissed petitioners' claim for attorneys' fees as untimely. Although it noted that "the IDEA doesn't expressly state when a prevailing party must make its request for fees," the court agreed with respondent that "the same 90-day statute of limitations that applies to filing IDEA appeals should also apply to filing requests for attorney fees." Pet. App. 51a. According to the district court, "it defies logic that the time to file a claim for fees would be longer than the time to file a substantive appeal of the hearing officer's decision" because "[a] claim for fees is merely ancillary to the administrative action itself." *Id.* at 53a. The court observed that this limitations period "promotes judicial efficiency and encourages the swift administration of justice and the preservation of evidence," as "attorney fee claims cannot be evaluated in a vacuum, but instead must be tested for reasonableness in the context of the work performed

by the attorney at the administrative level below." *Id.* at 54a.

The district court found that petitioners' claim for attorneys' fees was not filed within this limitations period. Because they "never successfully appealed the hearing officer's final decision," that decision "became final as of July 13." *Id.* at 51a. Petitioners therefore "were required to request attorney fees of the district court no later than 90 days after the hearing officer's decision became final, or by October 11, 2017." *Ibid.* But "[p]laintiffs filed their fee request in the instant case on December 4, 2017," nearly two months too late. *Ibid.*

The district court then rejected petitioners' other claims, concluding that petitioners failed to state a claim under Section 1983 and state tort law, *id.* at 57a–62a, and failed to raise an issue of material fact under the Rehabilitation Act and ADA, *id.* at 28a–41a.

b. The Eighth Circuit affirmed. It began by observing that, while "[t]he IDEA includes a default ninety-day statute of limitations for merits actions after the administrative decision if the relevant state has no explicit time limitation," it "does not include a statute of limitations for a prevailing party to file a cause of action for attorneys' fees." Pet. App. 4a. Although petitioners argued that the district court should have borrowed either the four-year federal statute of limitations found in 28 U.S.C. § 1658 for certain actions arising under a federal statute (which the court found waived) or the three-year state statute of limitations for personal injury actions, the Eighth Circuit "agree[d] with the district court's decision to borrow the ninety-day statute of limitations for merits actions

from Arkansas Code section 6-41-216(g), Arkansas's statutory framework for IDEA compliance, because the claim for attorneys' fees is ancillary to judicial review of the administrative decision." *Id.* at 9a.[1]

The court acknowledged that other courts of appeals have declined to borrow state statutes of limitations governing review of administrative decisions, but concluded that those decisions were predicated on considerations that were inapplicable in the Eighth Circuit. For example, the Ninth Circuit worried "that 'the adoption of the state law limitations period for judicial review of administrative agency decisions' might mean that the party who prevailed at the administrative hearing would have to determine whether to file an action for attorneys' fees before the party that lost at the administrative hearing decided whether to seek judicial review of the merits of the decision." *Id.* at 7a. But the court noted that this "[wa]s likely not an issue in" the Eighth Circuit, which "ha[s] held that the statute of limitations period for a prevailing party seeking attorneys' fees does not begin to run 'until the 90-day period [expires] for an aggrieved party to challenge the IDEA administrative decision.'" *Id.* at 9a–10a (third alteration in original). And because "parents of the aggrieved student have already hired a lawyer, . . . the shorter period does 'not run the risk of hurting vulnerable unrepresented parents,'"

---

[1] Contrary to the Eighth Circuit's suggestion, the district court neither cited Arkansas Code § 6-41-216(g) nor mentioned borrowing a state statute of limitations. Rather, it agreed with respondent that "the same 90-day statute of limitations that applies to filing IDEA appeals should also apply to filing requests for attorney fees." Pet. App. 51a.

while that shorter period advances *all parties'* "interest 'in the expeditious resolution' of the attorneys' fee issue." *Id.* at 10a.

The Eighth Circuit then proceeded to affirm the district court's other rulings. *Id.* at 11a–17a.

REASONS FOR DENYING THE PETITION

I. THE PURPORTED CIRCUIT CONFLICT IS NOT SUBSTANTIAL.

Petitioners urge this Court to grant certiorari because some federal courts of appeals "analogize fees actions to independent lawsuits separate from the underlying merits of the IDEA administrative proceedings," whereas others "find fees actions merely ancillary to the underlying educational dispute." Pet. at i. While this is true, resolving this disagreement will do little to answer the underlying question regarding the proper limitations period for attorneys' fees claims under the IDEA, and it will do nothing to promote uniformity on this subject among the federal courts. Nor is the resolution of this disagreement likely to materially impact IDEA litigation, as even the shorter limitations periods that generally govern actions that are ancillary to an administrative proceeding provide ample time for prevailing parties to file a claim for attorneys' fees in federal court.

A. Whether Attorneys' Fees Claims Are Independent From, Or Ancillary To, A Due Process Hearing Is Not Determinative Of The Appropriate Statute Of Limitations.

Characterizing claims for attorneys' fees under the IDEA as either an independent action or an action for

judicial review of an administrative decision, as petitioners ask this Court to do, will not meaningfully assist the lower courts in determining the limitations period for such claims. This is because the characterization of a federal cause of action is only one factor courts consider in determining which state statute of limitations to borrow, and irrespective of how the claim is characterized, there will likely be several possible analogs in every State.

A federal claim's characterization is relevant when borrowing a statute of limitations only insofar as it sheds light on the limitations period Congress would have adopted had it considered the matter. "Since 1830, state statutes have repeatedly supplied the periods of limitations for federal causes of action when the federal legislation made no provision," and "[b]ecause this penchant to borrow from analogous state law is not only longstanding, but settled, it is not only appropriate but also realistic to presume that Congress . . . expect[s] its enactment[s] to be interpreted in conformity with them." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (brackets in original; internal quotation marks and citations omitted); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 161–65 (1987) (Scalia, J., concurring in the judgment) (tracing the history of borrowing state statutes of limitations).

Although this practice has led the Court to generally "apply the most closely analogous statute of limitations under state law," this is a proxy, rather than a substitute, for congressional intent. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gil-*

bertson, 501 U.S. 350, 356 (1991) (noting that borrowing is "[r]ooted . . . in the expectations of Congress"). Because "State legislatures do not devise their limitations periods with national interests in mind, . . . it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 367 (1977). And where "state statutes of limitations [are] unsatisfactory vehicles for the enforcement of federal law . . . , it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law," *DelCostello*, 462 U.S. at 161—in which case even a closely analogous state statute of limitations ought not be borrowed.

The Court's decision in *Owens v. Okure*, 488 U.S. 235 (1989), is illustrative. There, the Court considered what state statute of limitations should be borrowed for claims brought under Section 1983. Although the petitioners argued that "intentional torts are most analogous to § 1983 claims," *id.* at 248, the Court declined to borrow the limitations period for intentional torts, emphasizing that, "[i]n choosing between the two alternatives endorsed by the Courts of Appeals—the intentional torts approach and the general or residual personal injury approach—we are mindful that ours is essentially a *practical* inquiry." *Id.* at 242 (emphasis added). And because "[e]very State has multiple intentional tort limitations provisions," which would undermine the certainty and predictability necessary in federal civil rights litigation, the Court concluded that Section 1983 would borrow

the general or residual statute of limitations governing personal injury actions, as this limitations period "can be applied with ease and predictability in all 50 States." *Id.* at 243.

Consistent with these principles, even those cases cited by petitioners as disagreeing with the decision below turned on a holistic inquiry into congressional intent rather than a formalistic characterization of a claim for attorneys' fees under the IDEA as either independent from, or ancillary to, the due process hearing. The Eleventh Circuit, for example, "reject[ed] the school system's argument that a claim [for attorneys' fees] is analogous to the appeal of an administrative hearing," while also emphasizing that "the short statutes of limitations associated with appeals of administrative procedures . . . are too short to vindicate the underlying federal policies associated with the fee-claims provisions of the IDEA." *Zipperer ex rel. Zipperer v. Sch. Bd. of Seminole Cty.*, 111 F.3d 847, 851 (11th Cir. 1997). The Ninth Circuit agrees, "conclud[ing] that a request for attorneys' fees under the IDEA is more analogous to an independent claim than an ancillary proceeding," but also noting that "the longer time period promotes the purposes of the IDEA." *Meridian Joint Sch. Dist. No. 2 v. D.A.*, 792 F.3d 1054, 1064 (9th Cir. 2015). In neither case was the characterization of the attorneys' fees claim determinative of the limitations period; rather, the courts closely evaluated the particular statutes of limitations available in the forum state and borrowed the one that would best advance the IDEA's underlying policy.

Even if the characterization of a claim for attorneys' fees under the IDEA had some independent significance in identifying the appropriate limitations

period, it still would not be the end of the matter because there are often *several* statutes of limitations that might apply in each State irrespective of how the claim is characterized. This is particularly likely should a claim for attorneys' fees be characterized as an "independent action." As one commentator has observed, "courts [that] have characterized an action for attorney's fees as an independent action" have borrowed limitations periods "provided by state statute[s] for statutory causes of action, for actions for damage or injury to person or property, or for claims against state entities," as well as "'catch-all' limitations periods under state statute." Kurtis A. Kemper, *Statute of Limitations Applicable to, and Accrual of, Actions for Attorney's Fees Brought Under Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B)*, 23 A.L.R. Fed. 2d 553 § 2 (cross-references omitted); *see also, e.g.*, *Meridian*, 792 F.3d at 1064 n.9 (noting that two different state statutes of limitations might be borrowed, but concluding that it "need not decide th[e] issue of state law as the Parents' request for attorneys' fees was timely under either state statute"); *D.G.*, 806 F.3d at 320 ("D.G. asserts that we should borrow Texas's two-year general tort statute of limitations, or one of several other state-law limitations periods for independent causes of action.").[2]

---

[2] Petitioners purport to identify "the *shortest* limitations period" that might apply in each State if their claim for attorneys' fees were characterized as an independent action, Pet. App. 64a (emphasis added), but this is not necessarily the one a court would actually select. Rather, courts borrow the statute of limitations for the *most analogous* cause of action—not simply the shortest one. *See, e.g.*, *Saunders v. District of Columbia*, 789 F. Supp. 2d 48, 55 (D.D.C. 2011) (borrowing a three-year statute

As a result, granting certiorari here would not meaningfully assist the lower courts in determining the proper limitations period in any particular jurisdiction. However a claim for attorneys' fees under the IDEA is characterized, lower courts will have to conduct a case-by-case inquiry into the law of every State in the Nation to determine which of several possible state statutes of limitations is *most* analogous to the "independent action" or "action for judicial review of an administrative decision" provided by the IDEA for recovery of attorneys' fees. And lower courts will then need to independently confirm that this state limiations period is consistent with congressional intent and the IDEA's underlying policies. This would not resolve whatever confusion exists in the lower courts—it would merely transfer the locus of that confusion. *See Owens*, 488 U.S. at 244 ("Were we to call upon courts to apply the state statute of limitations governing intentional torts, we would succeed only in transferring the present confusion over the choice among multiple personal injury provisions to a choice among multiple intentional tort provisions.").

B. Answering The Question Presented Will Not Promote Uniformity Among The Courts Of Appeals.

While petitioners elide the fact that resolving the purported circuit conflict would not materially assist in identifying the proper limitations period *within* a

---

of limitations for a retaliation claim under the False Claims Act, rather than the one-year statute advocated by the defendant, because "the anti-retaliation provisions of the District of Columbia False Claims Act . . . are more analogous to the anti-retaliation provisions of the [federal] FCA than any of the other candidates identified by the parties").

jurisdiction, they openly admit that it would confirm vast disparities *among* jurisdictions. Indeed, while petitioners complain that the different approaches currently followed across the country "produce[] widely divergent results," Pet. at 1, *their* approach would not cure this—on the contrary, it "would give parents and their attorneys" anywhere from "a year, and often two or more, up to even six years, to sue for fees" depending on the jurisdiction, *id.* at 2; *see also id.* at 22 ("In fact, 48 of the 52 jurisdictions surveyed . . . have independent-lawsuit limitations of two or more years, and nearly half provide three to six years.").

To be sure, such disparities are an inevitable consequence of borrowing state statutes of limitations. Because "[t]his tradition of borrowing analogous limitations statutes is based on a congressional decision to defer to 'the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action,'" *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (citation omitted), it stands to reason that different States will balance those policies differently.

But it makes little sense to grant certiorari where doing so would *amplify* those differences. Under the approach adopted below, for example, the statute of limitations for attorneys' fees will vary from 45 days in Missouri to 90 days in most other States in the Eighth Circuit; under petitioners' approach, however, it will vary from two years in Iowa and Minnesota to six years in North Dakota. *See* Pet. App. 64a–76a. In the Sixth Circuit, which follows the Eighth Circuit's approach, the limitations periods currently range

from 45 days in Ohio to 90 days in Michigan, Kentucky, and Tennessee; under petitioners' view, it would range from one year in Kentucky and Tennessee to three years in Michigan. *Ibid.*

It is therefore unsurprising that this Court has seldom granted certiorari simply to consider which limitations period to borrow from state law. Although petitioners contend that the "Court routinely grants cert to resolve limitations questions that have divided the lower courts," Pet. at 21, each of the cases they cite considered how to calculate when an *undisputed* statute of limitations would run—for example, when a claim accrues or when the statute of limitations may be tolled.[3] Such cases are a far cry from this one.

---

[3] *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 774 (2020) (considering what the term "actual knowledge" means in 29 U.S.C. § 1113, which provides three years from "the earliest date on which the plaintiff had actual knowledge of [a] breach or violation" to bring an ERISA claim); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) ("The question before us is whether the 'discovery rule' applies to the FDCPA's limitations period," provided in 15 U.S.C. § 1682k(d)); *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) (considering when a fabricated-evidence claim accrues for purposes of triggering a borrowed statute of limitations); *Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018) ("The question presented: Does the word 'tolled,' as used in [28 U.S.C.] § 1367(d), mean the state limitations period is suspended during the pendency of the federal suit[?]"); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2048 (2017) (considering "whether § 13 [of the Securities Act of 1933] permits the filing of an individual complaint more than three years after the relevant securities offering, when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it"); *Kokesh v. SEC*, 137 S. Ct. 1635, 1641 (2017) ("The question here is whether [28 U.S.C.] § 2642, which applies to any 'action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture,

C. The Question Presented Is Not Important.

Petitioners spend much of their petition speculating that the decision below will have dire consequences for the enforcement of the IDEA. In their telling, "shorter statutes of limitations discourage legal representation, in turn burdening parents' efforts to enforce the important rights created by the IDEA," Pet. at 23, while "requiring parents and their attorneys to rush to file fees actions distracts them from the more urgent task of making sure the school district . . . remedies the problem quickly and properly for the benefit of the child," *id.* at 28.

Petitioners offer absolutely no reason to believe this to be the case. On the contrary, although they emphasize "the thousands of IDEA due process hearings completed each year" and "hundreds of judicial decisions address[ing] . . . the IDEA's attorneys' fee provision," Pet. at 22, only five courts of appeals have had occasion to consider the limitations period for those claims—and only one (in addition to the decision below) has done so since Congress amended the IDEA in 2004 to provide an explicit statute of limitations for at least some actions for judicial review of a hearing officer's decision. *See Powers v. Ind. Dep't of Educ.*, 61 F.3d 552 (7th Cir. 1995); *Zipperer*, 111 F.3d 847; *King*

---

pecuniary or otherwise,' also applies when the SEC seeks disgorgement."); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959 (2017) (considering whether laches can bar claims brought within the statute of limitations under the Patent Act); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 676 (2014) (considering whether laches can bar claims brought within the statute of limitations under the Copyright Act).

ex rel. King v. Floyd Cty. Bd. of Educ., 228 F.3d 622 (6th Cir. 2000); *Meridian*, 792 F.3d 1054.

This is likely for the simple reason that it is not difficult to comply with the somewhat shorter statutes of limitations applicable to actions for judicial review of an administrative decision. These limitations periods, which range from "one to four months," Pet. at 2, are already longer than the 14 days afforded for seeking fees or costs in ordinary civil actions. *See* Fed. R. Civ. P. 54(d)(2)(B) ("Unless a statute or a court order provides otherwise, the motion [for attorneys' fees] must: (i) be filed no later than 14 days after the entry of judgment."); Fed. R. App. P. 39(d)(1) ("A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs."). And because a prevailing party who seeks attorneys' fees under the IDEA will, by definition, already be represented by counsel, there is no reason they should require years to file a federal action.

Petitioners' counsel certainly had no trouble doing so in this case. As noted above, petitioners timely filed a merits challenge to the hearing officer's decision within the 90 days afforded by 20 U.S.C. § 1415(i)(2)(B), although that action was ultimately dismissed for failure to serve the defendants. Pet. App. 20a. Petitioners then had *another* 90 days—for a total of 180 days from the entry of the hearing officer's decision—to file a claim for attorneys' fees. Whether their failure to meet this deadline was a result of petitioners' decision to add eight new claims to their request for attorneys' fees (all of which were dismissed on the merits), or their counsel's practice of "failing to meet deadlines, and then asking the Court

for forgiveness after the fact," *Richardson v. Omaha School District*, No. 3:17-cv-3053-TLB (W.D. Ark.), Dkt. 7 at 3, their inability to comply with the statute of limitations is not indicative of an important question of law meriting this Court's review.

While petitioners may complain that leaving it to the lower courts to determine the applicable limitations period will cause uncertainty, such "uncertainty [is] inherent in the practice of borrowing state statutes of limitations." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). Where "the problems associated with the practice of borrowing state statutes of limitations" have been particularly profound, Congress has responded by enacting federal limitations periods, *id.* at 380—including in the IDEA itself. To the extent it has not done so with respect to claims for attorneys' fees under the IDEA, prudent counsel may err on the side of caution by complying with the shortest possible limitations period. Indeed, this is precisely what counsel across the country have done since the purported conflict identified by petitioners first arose more than two decades ago.

II. THE DECISION BELOW IS CORRECT.

The purported conflict identified by petitioners is ultimately irrelevant here because, irrespective of how a claim for attorneys' fees under the IDEA is characterized, the 90-day statute of limitations that the Eighth Circuit borrowed from Arkansas Code § 6-41-216(g) is clearly the most analogous state limitations period. In fact, that statute, which appears in Arkansas's Children with Disabilities Act, expressly

encompasses "civil action[s] . . . pursuant to the Individuals with Disabilities Act." Ark. Code § 6-41-216(g).

Petitioners argued below that because Arkansas Code § 6-41-216(g) tracks the language of the IDEA's limitations period, and because the IDEA's limitations period purportedly applies only to challenges to the merits of a hearing officer's decision, it would be inappropriate to borrow that state-law provision for their attorneys' fees claim. But this mistakes how courts select a limitations period from federal, as compared to state, law. As this Court has explained, courts "first ask whether the [federal] statute *expressly* supplies a limitations period" and, if it does not, "generally 'borrow' the most closely *analogous* state limitations period." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005) (emphases added). In other words, even if the language of Arkansas Code § 6-41-216(g) is not sufficiently express to encompass claims for attorneys' fees when it appears in the IDEA, it is still sufficiently analogous to borrow when it appears in state law.[4] And it is certainly more analogous than the statute of limitations urged by petitioners, which applies to

---

[4] Petitioners assert that "it makes little sense to assume that Congress silently intended courts to apply the same statute of limitations to fees actions when it could have said so explicitly." Pet. at 26. But the decision below does not suggest otherwise. The Eighth Circuit borrowed the 90-day limitations period from *Arkansas* law based on its determination that this period most accurately reflected *Arkansas's* "judgment on the proper balance between the policies of repose and the substantive policies of enforcement." *Hardin*, 490 U.S. at 538.

"[a]ll actions founded on any contract or liability, express or implied," among other things. Ark. Code § 16-56-105(3).

Even if the Court were forced to characterize a claim for attorneys' fees as either an independent action or an action for review of an administrative decision, and borrow a statute of limitations on that basis alone (it is not, *see supra* at Part I.A), the decision below is still correct. While petitioners assert that "federal courts in an action by an 'aggrieved' party under § 1415(i)(2)(A) *review* the preexisting decision of a state administrative body," whereas "[a]n attorneys' fee action . . . is a new proceeding in which no party has presented the crucial evidence . . . and no prior tribunal has made the necessary findings," Pet. at 25, neither form of judicial review is so clear cut.

Judicial review of a hearing officer's decision is much more thorough than a simple appeal. The deference shown to the decision is limited: "When reviewing a school district's compliance with the IDEA's requirements after an administrative hearing, the district court should make an 'independent decision,' based on a preponderance of the evidence, whether the IDEA was violated." *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006); *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 252 (5th Cir. 1997) ("[T]he district court's 'review' of a hearing officer's decision is 'virtually *de novo*.'"). And in making this independent decision, the court may consider "additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C); *see also Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) ("The district court reviews the admin-

istrative record, which may be supplemented by additional evidence from the parties, and makes an 'independent ruling based on the preponderance of the evidence.'").

At the same time, an action for attorneys' fees is not entirely distinct from the due process hearing. In such an action, the court must review the administrative proceeding to determine, among other things, who the "prevailing party" is, 20 U.S.C. § 1415(i)(3)(B)(i)(I), the "reasonable" fees incurred by that party, *id.* § 1415(i)(3)(B)(i), whether that party "unreasonably protracted the final resolution of the controversy," *id.* § 1415(i)(3)(F)(i), and whether the attorney "provide[d] to the local educational agency the appropriate information in the notice of the complaint," *id.* § 1415(i)(3)(F)(iv). These determinations are inextricably intertwined with the due process hearing. In the Sixth Circuit's words, "[t]he forum shifts, to be sure, when the parent goes into court, but the statute seems to treat the award of attorney fees as another phase of the administrative proceeding." *King*, 228 F.3d at 625; *see also Powers*, 61 F.3d at 556 ("[I]n awarding attorneys' fees, the district court must review not only proceedings in its own court but also proceedings in a state administrative environment.") (internal quotation marks omitted).

As a result, a shorter limitations period makes eminent sense. Because the district court must review proceedings in the due process hearing, a "return to such a quagmire months after adjudication of the merits would result in a needless expenditure of judicial energy." *Powers*, 61 F.3d at 556 (internal quotation marks omitted). This is to say nothing of the one to

six *years* that parties would be able to wait under petitioners' view. Judge Engel admitted as much in his dissent in *King*, although he ultimately concluded that the 30-day limitations period adopted by the majority was "too grudging": "[M]ost of us, as an original matter, would conclude with the majority that five years is too long a time in which to permit an action for attorney fees, that a suit by that time would usually be pretty stale." 228 F.3d at 629 (Engel, J., dissenting).

While petitioners highlight the courts that have borrowed a longer statute of limitations by characterizing a claim for attorneys' fees under the IDEA as an independent action, they gloss over the distinct considerations that underlay those decisions. The Ninth Circuit, for example, assumed that the time to file a claim for attorneys' fees begins to run when the hearing officer *issues* its decision. Based on this assumption, the court worried that a prevailing party might "have to decide whether to file an action seeking attorneys' fees *before* the party that lost before the hearing officer decided whether to seek judicial review," *Meridian*, 792 F.3d at 1064 (emphasis added)—for example, in a jurisdiction where the most analogous state statute of limitations provides 45 days to bring a claim for attorneys' fees, as compared to the 90 days afforded by the IDEA to challenge the merits of the hearing officer's decision. Putting aside the fact that this does not prevent prevailing parties from filing a claim for attorneys' fees, *see supra* at Part I.C, the limitations period for attorneys' fees claims in the Eighth Circuit "does not begin to run 'until the 90-day period [expires] for an aggrieved party to challenge the IDEA

administrative decision,'" such that "the Ninth Circuit's concern . . . is likely not an issue." Pet. App. 9a–10a (brackets in original).

Because the decision below is correct, there is no plausible reason for this Court to grant certiorari simply so it can resolve a non-determinative conflict among the federal courts of appeals—especially when that conflict has already existed for more than two decades without any ill effects on the enforcement of the IDEA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MARHSALL S. NEY
KATHERINE C. CAMPBELL
FRIDAY, ELDRIDGE & CLARK, LLP
3350 S. Pinnacle Hills Parkway, Suite 301
Rogers, AR 72758

THEANE D. EVANGELIS
Counsel of Record
THEODORE J. BOUTROUS, JR.
SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Respondent

DECEMBER 4, 2020