NO. 21-1373

In the Supreme Court of the United States

D. D., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, MICHAELA INGRAM,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING ON A JUDGMENT OF THE COURT

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APRIL 24, 2023 *COUNSEL FOR RESPONDENT*

PETITION FOR REHEARING ON A JUDGMENT OF THE COURT

Respondent Los Angeles Unified School District[1] ("Respondent") respectfully submits its Petition for Rehearing in response to this Court's April 3, 2023 Order granting Petitioner's writ of certiorari and vacating the Ninth Circuit's *en banc* judgment and remanding back to that court. Quite simply, this Court's recent decision in *Perez v. Sturgis Public Schools*, 143 S.Ct. 859, 215 L.Ed.2d 95 (2023) wherein the Court reversed the Sixth Circuit, and the *Perez* Sixth Circuit decision itself, *Perez v. Sturgis Public Schools*, 3 F.4th 236 (6th Cir. 2021), do ***not*** apply or act to supersede the Ninth Circuit's decision in *D.D. v. Los Angeles Unified School Dist.*, 18 F.4th 1043 (9th Cir. 2021). This is because in *Perez*, it was undisputed that the plaintiff ***in that case*** sought relief or remedies ***not available*** under the IDEA: "This case presents an analogous but different question – whether a suit admittedly premised on the past denial of a free and appropriate education may nonetheless proceed without exhausting IDE's administrative processes if the remedy a plaintiff seeks is ***not one IDEA provides***." (215 L.Ed.2nd at 102 [emphasis added].)[2]

This contrasts markedly with *D.D.*, where the Ninth Circuit's decision went out of its way to confirm

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[1] Addressing Sup. Ct. 29.6, Respondent is a government entity.

[2] The Sixth Circuit recognized this fact, expressly admitting that the plaintiff in that case "seeks a specific remedy that is unavailable under the IDEA: compensatory damages for emotional distress." (3 F.4th at 241.)

the plaintiff's allegations ***in this case*** revealed that the gravamen of his allegations were founded upon the school's failure to provide a FAPE therefore requiring that Petitioner first exhaust the IDEA process before seeking ADA relief: "[t]he only disputed issue is whether the gravamen of ***this*** complaint is the failure to offer a FAPE. Because it is, we affirm." (18 F.4th at 1048 [emphasis in the original].) Indeed, the Ninth Circuit confirmed unequivocally that "[Petitioner] claimed that [Respondent] had denied him a FAPE by, *inter alia*, failing to provide a one-to-one behavioral aide and related supportive services. [Petitioner] then filed a complaint in the district court, alleging that [Respondent] had violated the Americans with Disabilities Act by failing to ***provide the same services sought in the IDEA proceedings***." (*Id.* [emphasis added].) That is, the gravamen of the allegations ***in this case*** (as expressly stated by the Ninth Circuit), and following the dispositive analysis mandated in *Fry v. Napoleon Community Schools*, 580 U.S. 154, 137 S.Ct. 743, 197 L.Ed.2d 46 (2017), was for relief or remedies also available under the IDEA, and indeed, solely for FAPE under the IDEA. Put another way, the Ninth Circuit conclusively found the crux, or gravamen, of Petitioner's claims were IDEA claims, not non-IDEA claims for monetary damages. This is squarely unlike the plaintiff's allegations, or the gravamen of plaintiff's allegations, in *Perez*.

Accordingly, this key distinction means that the Court's recent decision reversing *Perez*, and the Sixth Circuit decision in *Perez* itself, simply do not cover or apply to the *D.D.* case, and therefore unavailing to mandate a reversal or remand of the Ninth Circuit decision.

Moreover, this Court should observe and evaluate Petitioner's attempt to recast his allegations to fit under *Fry's* footnote 4 and avail himself of the *Perez* protective umbrella in ignoring and disavowing this Court's concern over "artful pleading." The Ninth Circuit pointed out Petitioner's conduct in this regard: "[i]n the latter, the operative complaint, D.D. ***reframes*** the same actions and omissions by the District as an ADA violation, but the gravamen remains the same – that the District failed to offer D.D. supports needed to receive a FAPE." (18 F.4th at 1055 [emphasis added]); and (2) "[w]e reject D.D.'s argument that he need not exhaust because he seeks relief that is not available under the IDEA, namely compensatory damages for emotional distress. The threshold problem with this argument is that it ***re-writes*** D.D.'s ADA Complaint." (18 F.4th at 1056 [emphasis added].) This Court should recognize this tactic and disallow its use where Petitioner overreaches or "recasts," "reframes," or "re-writes" his allegations – indeed, this is another key distinguishing factor between this case and *Perez* where there was no similar attempt by plaintiff to "re-write" or "recast" allegations, and thus an additional ground to grant Respondent's request for a rehearing.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the order vacating and remanding should be reversed, and the original petition for writ of certiorari should be denied.

Respectfully submitted,

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APRIL 24, 2023

RULE 44.1 CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ Matthew R. Hicks
Counsel for Respondent

April 24, 2023