No. 22-778

In the Supreme Court of the United States

DANIELLE HOWARD MARTINEZ; D. P., A MINOR, BY HIS GUARDIAN AD LITEM ERICA WEDLOW; K. P., A MINOR, BY HIS GUARDIAN AD LITEM BRITTANY WILLIAMS; T. W., A MINOR, BY HIS GUARDIAN AD LITEM DAHL JOHNSON; P. C., A MINOR, BY HER GUARDIAN AD LITEM RAVEN CAMPBELL; LASHONDA HUBBARD; AMBER WOOD,

Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA; TONY THURMOND, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF PUBLIC EDUCATION AND DIRECTOR OF EDUCATION; CALIFORNIA DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Despite California students with disabilities' *ongoing* exclusion from educational opportunities required by the IDEA after state-mandated school closures and the CDE Defendants' *continued* insistence that the IDEA does not require the agency to take further action, the Ninth Circuit held that Petitioners' claims against the CDE Defendants were moot. That departure from this Court's precedent is of crucial importance to California's disabled students. Their injuries could be remedied, at least in part, by the declaratory and injunctive relief Petitioners originally sought, or by an equitable remedy of compensatory education. Corrective action by this Court could also protect litigants throughout the Ninth Circuit: just this term, another petition also asks the Court to reverse the Ninth Circuit for erroneously dismissing a case as moot before considering available remedies.

Respondents adopt three tactics to keep the Court from reviewing these questions. None has merit. First, Respondents misconstrue Petitioners' claims. Petitioners' alleged injuries did not cease with California's return to in-person instruction, and Petitioners requested relief to address those ongoing injuries. Petitioners assert that, in causing those injuries, Respondents violated the IDEA. Respondents' incomplete and misleading quotation from oral argument is irrelevant to this alleged statutory violation.

Respondents next tell this Court it must disregard that Rule 54(c) supports continued

jurisdiction over Petitioners' claims because Petitioners did not cite the Rule before the Ninth Circuit. But Petitioners are not required to cite a specific Rule, only to properly present their claims, which they did at the first opportunity.

Finally, Respondents attempt to distract the Court from the gravity of the claims against them by suggesting Petitioners might be able to seek redress from their school districts for *those* districts' statutory violations. But Respondents have independent obligations to Petitioners, the systemic breach of which deprived Petitioners and California's other disabled students of a FAPE. Even if an administrative law judge (ALJ) or district court could redress injuries the districts caused, that would not justify immunizing Respondents from accountability.

The petition should be granted.

ARGUMENT

I. The Ninth Circuit's Erroneous Application of This Court's Mootness Doctrine Is Not Sui Generis.

Without reaching the merits of Petitioners' IDEA claim, the Ninth Circuit *sua sponte* held Petitioners lost their interest in remedying the injuries Respondents caused once California resumed in-person instruction. App. 17-19. Hewing to a narrow reading of the relief requested in the Complaint, which was filed when schools were closed, the Ninth Circuit did not acknowledge that returning to in-person instruction could not erase the months Petitioners did not receive accommodations under

their IEPs and were not reassessed. Pet. 18-19. It did not consider whether a declaration that the IDEA required Respondents to mandate immediate reassessments after the 2020-21 school year began, including after students returned to the classroom unable to reach their IEP goals, could provide some relief to struggling students and families. *Id.* at 19-20. Nor did it address whether an order granting other equitable relief, including compensatory services authorized under the IDEA, could redress alleged FAPE deprivations. *Id.* at 21-25.

Respondents contend this result was just the "straightforward application of settled law to a particular set of facts, resulting in a finding of mootness" as to Petitioners' claims against them. Resp. Br. 9. Not so. Petitioners are at least the second litigants *this term* to ask the Court to reverse the Ninth Circuit's clear departure from this Court's direction that a case is not moot unless it is impossible to order *any* effective relief. In *Slockish v. U.S. Department of Transportation*, plaintiffs who worshipped on land subject to a federal easement to a state entity challenged a highway expansion project that desecrated that sacred site. Pet. 6-13 (Oct. 3, 2022), No. 22-321. After dismissing the state entity holding the easement on sovereign immunity grounds, the district court found it retained jurisdiction over claims against federal defendants because it could likely craft some equitable relief. *Id.* at 13-16. On appeal, the Ninth Circuit ordered the case dismissed as moot, holding remedial measures were beyond the reservation of rights to the federal defendant, which excluded uses impairing highway safety. *Id.* at 17.

Like Petitioners here, the *Slockish* petitioners argue that the Ninth Circuit has misconstrued this Court's clear precedent by failing to consider the district court's equitable authority before dismissing their claims as moot. After challenging the Ninth Circuit's conclusion that the requested remedial measures would implicate highway safety (Pet. 20-25), petitioners argue that two alternative forms of relief could have provided *some* remedy against the alleged unlawful action: first, the court could have directed the government to seek permission to remediate the site (*id.* at 24); and second, the court could have exercised its equitable authority to modify or invalidate the easement (*id.* at 25-28). That the Ninth Circuit has misconstrued well-established jurisprudence twice in short order underscores the importance of this Court's review. That review is even more important here, where the Ninth Circuit's published opinion paves the way for further confusion.

II. Respondents Misapprehend the Factual and Legal Basis for Petitioners' Claim that the Ninth Circuit Erred in Defining Available Relief.

Respondents mischaracterize Petitioners' request for "reassessments relating to distance learning" as reassessments that could only be conducted during remote learning. Resp. Br. 14-15. First, Respondents misconstrue the term "immediate" in Petitioners' request for relief to mean "in the interim until appropriate accommodations were made or until students returned to in-person instruction." *Id.* at 15. Yet the Complaint does not restrict requested reassessments to reassessments during

remote education. Instead, the term "immediate" merely serves to describe the urgency of addressing ongoing deprivations of a FAPE. These deprivations did not disappear when students finally returned to the classroom a year later, nor did the urgency of addressing them.

Additionally, the disjunctive request for relief contemplates that if students with disabilities do not immediately return to in-person education, which they did not, all students who were assigned to remote learning for the 2020-21 school year needed to be reassessed. Petitioners were assigned to remote learning during the 2020-21 school year but did not receive immediate reassessments. As a result, they should still be reassessed to determine what compensatory services are necessary. The reference to the start of the 2020-21 school year clarifies that Petitioners allowed for a grace period between the onset of COVID-19 emergency measures in March 2020 and the beginning of the next school year. By the time that year began, Respondents' ongoing failure to protect Petitioners' FAPE rights required judicial intervention.

Even accepting Respondents' reading, Petitioners were not required to request the specific relief that would ultimately redress their injuries. *See* Tr. of Oral Arg. at 91, *303 Creative LLC v. Elenis* (No. 21-476), https://www.oyez.org/cases/2022/21-476 ("JUSTICE GORSUCH: Put aside the specific relief the company seeks because it's up to courts to fashion relief. MR. OLSON: Yeah. JUSTICE GORSUCH: So that's – that's not going to persuade me."). Petitioners could not have predicted the exact relief that would be

appropriate at an indeterminate point in the future, following California's unprecedented response to the COVID-19 pandemic in forcing students to be educated remotely for the 2020-21 school year. Yet some relief remains necessary to address the significant regression caused by deprivations of mandated accommodations.

Respondents' attempt to distinguish Petitioners' authorities relies on this same fundamental misunderstanding of Petitioners' claims, while omitting the clear directive that availability of some remedy makes these claims justiciable. *See* Resp. Br. 16-17. In *Northwest Environmental Defense Center v. Gordon*, the Ninth Circuit held that a challenge to agencies' management measures for the 1986 fishing season was not mooted at the end of that season because the overfishing the agencies' actions permitted would decrease the returning spawn in the 1989 fishing season. 849 F.2d 1241, 1243–1245 (9th Cir. 1988). Here, too, Respondents' decision not to require reassessments at the start of the 2020-21 school year has had continuing effects on Petitioners' access to a FAPE. As in *Gordon*, this "damage can still be repaired or mitigated" by providing reassessments and compensatory education to address the consequent lost educational opportunities. *Id.* at 1245. In contrast to *Gordon*, none of the authorities Respondents cite held claims were mooted despite ongoing harm. *See Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (no ongoing injury to parents' due process rights to make educational decisions when no longer prevented from sending children to in-person schools); *Maldonado v. Morales*, 556 F.3d 1037, 1041–

42 (9th Cir. 2009) (request to enjoin statutory provision mooted after text that district court found "unconstitutionally privileged commercial speech over non-commercial speech" was amended to "exempt[] noncommercial speech from regulation."); *Hawaii N. D. v. Haw. Dep't of Educ.*, 469 F. App'x 570, 572 (9th Cir. 2012) (claim that policy violated stay-put provision of IDEA mooted when policy rescinded and prior placements restored).

Church of Scientology of California v. United States further confirms that the remedy available now can be different from the remedy the court could have ordered when the case began. 506 U.S. 9 (1992). There, this Court held that a claim of privilege was not mooted after allegedly privileged materials were produced pursuant to a court order because an order requiring the materials to be returned or destroyed would provide a partial remedy. *Id.* at 12–13. The Court explained that "[w]hile a court may not be able to return the parties to the *status quo* ante," the court's ability to "fashion some form of meaningful relief" was "sufficient to prevent this case from being moot." *Id.* A partial remedy also remains available here. An order mandating reassessment now would ensure that Petitioners' IEPs account for the consequences of FAPE deprivations beginning in March 2020. So, too, would an order mandating that Respondents ensure adequate compensatory education.

Whether Respondents' conduct violated the IDEA remains in dispute. While Respondents argue that Petitioners' counsel somehow waived liability on an issue raised *sua sponte* during appellate oral argument, an equivocal statement like "I'm not sure"

cannot operate as a waiver. Resp. Br. 6. Respondents' quotation is also incomplete and misleading. Counsel went on to discuss standing, not the CDE's obligations under the IDEA. Oral Arg. at 6:34. This Court should not countenance Respondents' attempt to ascribe to counsel and students a position they have not taken or to create an unjustified inference based on an incomplete quotation on an issue the Ninth Circuit raised during oral argument.

Finally, a declaration that Respondents violated the IDEA would not be "advisory." Resp. Br. 15. "[W]here the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome." *Gordon*, 849 F.2d at 1245. Because Petitioners sought relief for IDEA violations that have caused ongoing harm the court could remedy, Petitioners' claims remain justiciable.

III. Rule 54(c) Applies Here, and Petitioners Did Not Waive Its Application.

In arguing that Rule 54(c) has no relevance because the district court dismissed the pleadings and never rendered a judgment (Resp. Br. 17), Respondents misunderstand the relevance of Rule 54(c) to the mootness inquiry. Whether Petitioners' claims against Respondents are moot is a question of the appellate court's continued jurisdiction. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). If the Ninth Circuit had concluded they were not moot, it would have considered the district court's dismissal order on the merits. Instead, the court ordered

dismissal on mootness grounds, concluding the requested relief would no longer remedy the alleged wrong, even if Petitioners had stated a cognizable claim. *See* App. 17-19.

Rule 54(c) underscores the error in this conclusion. If Petitioners stated a cognizable claim that Respondents violated their IDEA rights, the district court would not be constrained by the specific relief requested in the Complaint. Instead, under Rule 54(c), the court could order any appropriate equitable relief, including compensatory education. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978) (recognizing on appeal of dismissal order that "a meritorious claim will not be rejected for want of a prayer for appropriate relief"); *Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 513 (7th Cir. 2022) (reversing order granting motion to dismiss, relying in part on Rule 54(c) to reason the court could order equitable relief beyond what plaintiffs' complaint requested); *State of Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 845, 856–57 (9th Cir. 2003) (rejecting defendant's argument that case mooted and invoking Rule 54(c) to conclude that district court could grant equitable relief to intervenor who had not filed complaint); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (improper to dismiss complaint seeking unavailable declaratory and injunctive relief where "there is no indication that [plaintiff] has his heart set on [such] relief" and plaintiff may obtain relief under Rule 54(c)). Thus, before affirming dismissal on mootness grounds, the Ninth Circuit should have considered whether any judicial order

could remedy the alleged wrong should Petitioners prevail on their claim that the wrong was cognizable.

Without any authority, Respondents tell this Court Petitioners waived any argument citing Rule 54(c). Resp. Br. 17. But "parties are not limited to the precise arguments they made below"; rather, they can "make any argument in support of" a properly presented claim. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Elder v. Holloway*, 510 U.S. 510, 516 (1994) (court reviewing a question of law may "use its 'full knowledge of its own [and other relevant] precedents") (alteration in original); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (waiver doctrine is prudential). First, Respondents did not argue on appeal that Petitioners' claims were moot. Instead, the Ninth Circuit raised the question *sua sponte* when it directed the parties to address it at oral argument. Dkt. 75.[1] After an en banc panel of the Ninth Circuit decided in *Brach* that the end of California's remote education mooted parents' constitutional challenges to private school closures and request for in-person learning, 38 F.4th at 9, the parties were allowed supplemental briefing. Dkt. 85. In their briefing, Petitioners addressed the ongoing dispute over whether Respondents breached their IDEA obligations, and the availability of equitable relief—including compensatory education—to remedy any violation. Dkt. 90.

In its subsequent decision, the Ninth Circuit departed from this Court's settled precedent by

[1] Docket references are to the docket in the Ninth Circuit, Case No. 20-56404, unless otherwise specified.

considering only whether an order identical to the relief requested in the Complaint would remedy Petitioners' injuries. App. 17-18. In petitioning for rehearing of that decision, Petitioners argued, as they argue here, that the Ninth Circuit should have considered whether *any* relief could remedy their injuries. They cited many of the same authorities they cite to this Court. Dkt. 102. Petitioners were not also required to cite Rule 54(c) in arguing that equitable remedies remained available. Where Petitioners could not predict the legal error in the Ninth Circuit's mootness analysis, and thus did not preemptively address it in prior briefing, they have not waived the right to raise it before this Court.

IV. Whether Petitioners Could Bring Claims Against Other Parties Does Not Justify Dismissing Petitioners' Claims.

In addition to bringing a cause of action against Respondents, Petitioners also alleged that the school districts they attended violated their statutory obligations. In their response, Respondents attempt to undermine Petitioners' interests in a finding that Respondents breached *their* obligations to California's students with disabilities by pointing out other potential avenues for relief from students' districts. But a court or ALJ with jurisdiction over Petitioners' claims against the school districts still cannot address Petitioners' independent cause of action against Respondents. That cause of action alleges the agency adopted a systemic policy effectively waiving IEP requirements for districts state-wide, and that this policy was contrary to the agency's statutory obligations. The Ninth Circuit's holding on mootness

renders this policy immune from judicial scrutiny, and leaves Petitioners without a remedy for the harms it caused. *See generally Perez v. Sturgis Public Schools*, Slip Op. at 3, 598 U.S. ___ (2023) (IDEA should not be construed to restrict an individual's ability to seek remedies under federal laws protecting children with disabilities); *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 88 (3d Cir. 1996) (holding IDEA provides cause of action against state educational agencies where Congress relied "on a private action as one of the principal enforcement mechanisms of the rights guaranteed under [the] IDEA").

Likewise, an ALJ considering an administrative complaint likely would find it lacked authority to order the agency to take corrective action. The ALJ has jurisdiction to hear cases against an agency providing special education or related services, but Respondents have taken the position that the CDE does not provide direct services to Petitioners, and so is not subject to the ALJ's jurisdiction. *Compare M. C. v. Los Angeles Unified Sch. Dist.*, 559 F. Supp. 3d 1112, 1118–19 (C.D. Cal. 2021), *with* Dkt. 34 (CDE Answer Br.), 13 ("The proper respondent at OAH is the LEA"). Thus, an ALJ could not issue an order directing Respondents to correct their policies, including to ensure Petitioners receive compensatory educational services.

Moreover, even if the possibility of a remedy for one defendant's wrongs somehow could justify improper dismissal of claims against another defendant (it cannot), that justification would not apply. Respondents suggest that an ALJ could consider whether a student's FAPE rights were

violated and, if so, order compensatory education from the student's school district. But this argument ignores the two-year statute of limitation for claims alleging a FAPE violation. *See* 20 U.S.C. § 1415(b)(6). Because more than two years have passed since California's school districts first deprived Petitioners of their FAPE rights, Petitioners and other students with disabilities likely can no longer seek relief through the administrative process.

In short, this Court's review of the questions presented remains essential for Petitioners and California's disabled students who have been deprived a FAPE. This Court has jurisdiction to review these questions, and certiorari is warranted to do so.

Respectfully submitted,

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