

No. _____

In the Supreme Court of the United States

DANIELLE HOWARD MARTINEZ, ET AL.

v.

GAVIN NEWSOM, ET AL.

On Application for Extension of Time to File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit No. 20-56404

On Appeal from the United States District Court for the
Central District of California No. 5:20-cv-01796-SVW-AFM

Hon. Stephen V. Wilson, District Judge, Presiding,

Argued and Submitted December 6, 2021,

Opinion Filed August 24, 2022,

Before: Milan D. Smith, Jr., Kenneth K. Lee, and Danielle J. Forrest, Circuit Judges

Opinion by Judge Milan D. Smith, Jr.; Concurrence by Judge Lee

**UNOPPOSED APPLICATION FOR AN EXTENSION OF TIME IN WHICH
TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Maxwell V. Pritt (SBN 253155)
mpritt@bsflp.com
BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293-6800

Attorney for Plaintiffs-Appellants

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Petitioners Danielle Howard Martinez, et al. respectfully request a 30-day extension of the time in which to file a petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in this Court, up to and including Monday, February 13, 2023. *See* Rule 30. The Ninth Circuit panel entered its judgment on August 24, 2022. A copy of the Ninth Circuit's opinion is attached as Exhibit 1. *See Martinez, et al. v. Newsom, et al.*, 46 F.4th 965 (9th Cir. 2022). The Ninth Circuit panel granted Petitioners an extension of time to file a Petition for Rehearing and Rehearing En Banc, and Petitioners timely filed one on September 21, 2022. The Ninth Circuit denied that petition on October 14, 2022. A copy of the Ninth Circuit's order denying the petition is attached as Exhibit 2. Accordingly, Petitioners' time to file a Petition for Writ of Certiorari in this Court currently expires on January 12, 2023. Petitioners are filing this Application more than 10 days before that deadline. *See* Rules 13.5, 30.2.

Petitioners have good cause for a 30-day extension of time in which to file a petition for a writ of certiorari. *See* Rule 13.5.

First, this case raises important issues on which the Ninth Circuit departed from this Court's (and the Ninth Circuit's own) precedent concerning (a) whether a case becomes moot even if some relief remains available to Petitioners; (b) whether allegations that California school districts adopted a systemic policy to not reassess

students with disabilities or otherwise provide necessary accommodations after school closures supports the inference that exhaustion of administrative remedies under the Individuals with Disabilities Education Act (IDEA) is excused; and (c) whether Article III of the U.S. Constitution bars a plaintiff from suing juridically-related defendants.

In this case, after California closed schools in March 2020, Petitioners spent months deprived of educational services deemed necessary under their Individualized Education Programs (IEPs) and settlement agreements under the IDEA. When Petitioners filed their complaint, they were not receiving a free appropriate public education (FAPE) as mandated under the IDEA. Petitioners alleged all of California's schools, including their own schools, were violating their statutory obligations. They also asserted the California Department of Education (CDE) had an obligation to ensure general compliance with the IDEA, but repeatedly abrogated its responsibilities in successive policy guidance. As a result of Respondents' actions, California's students with disabilities lost months of learning—including emotional, intellectual, and behavioral supports guaranteed by the IDEA and settlement agreements—and returned to their classrooms suffering disproportionate consequences. Petitioners sought declaratory and injunctive relief, as well as compensatory damages, on behalf of themselves and a proposed class of similarly situated students.

The District Court dismissed Petitioners' claims on the grounds that Petitioners failed to exhaust administrative remedies under the IDEA. The Ninth

Circuit relied on *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022), to hold that Petitioners’ claims against the CDE for declaratory and injunctive relief were mooted by the return to in-person instruction. But this holding fails to account for Petitioners’ allegations that the CDE did not adopt a policy requiring reassessment to account for months without IEP-mandated accommodations, despite disabled students facing more extreme regression than their non-disabled peers upon the return to in-person learning. Accordingly, there is “not the slightest doubt that there continues to exist between the parties that concrete adverseness which sharpens the presentation of issues” regarding what the IDEA requires. *Chafin v. Chafin*, 568 U.S. 165, 173 (2013) (quotation marks omitted); *see also Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018) (holding case was not moot because the record did not “establish that relief is *impossible*”) (emphasis in original) (citations omitted). A declaration that the CDE violated the IDEA by proclaiming IDEA obligations permissive and by not mandating reassessments for students with disabilities whose IEPs required in-person accommodations would resolve this ongoing dispute. As to the request for injunctive relief, the Ninth Circuit overlooked Petitioners’ ongoing injury for which an order from the court addressing the CDE’s obligations under the IDEA could provide some effective relief. *See Chafin*, 568 U.S. at 172; *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986).

The Ninth Circuit also held that Respondents were not excused from exhausting their claims against California school districts because the districts had not adopted a systemic policy of general applicability. During oral argument,

Petitioners explained that their allegations concerning the CDE's and the school districts' systemic policy of not requiring re-assessment, whether termed one of action or inaction, if proven, could satisfy an exception to the exhaustion requirement. *See, e.g., Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992); *see also Honig v. Doe*, 484 U.S. 305, 326–27 (1988) (recognizing exception to exhaustion requirement where pursuit of administrative remedies would be futile). The Ninth Circuit disagreed, treating Petitioners' claims as analogous to claims of inadvertent neglect, *see Martinez*, 46 F.4th at 974 (citing *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 684 (9th Cir. 1997)), or negligence, *see Martinez*, 46 F.4th at 974 (citing *Student A ex rel. Parent A v. S.F. Unified Sch. Dist.*, 9 F.4th 1079, 1085 (9th Cir. 2021)). Petitioners contend that conclusion contravenes blackletter liberal pleading standards, as well as the court's jurisprudence establishing the contours of the exhaustion exception.

Further, the Ninth Circuit declined to apply the juridical link doctrine to Petitioners' claims against state run schools and school districts in which Petitioners were not enrolled. The court incorrectly analyzed the doctrine under Article III rather than Federal Rule of Civil Procedure 23, and held that the doctrine only applies when juridically related defendants apply a "common rule." It does not. The Ninth Circuit subsequently denied Petitioners' Petition for Rehearing and Rehearing En Banc.

Second, pro bono Counsel for Petitioners are working diligently on the petition for a writ of certiorari, but respectfully submit that an extension of 30 days is necessary to complete preparation of the petition. This case involves difficult issues concerning mootness in declaratory relief actions in the unprecedented context of

state-wide school closures, and the extraordinary nature of state and local government conduct in failing to protect their most vulnerable constituents during a global pandemic.

Finally, pro bono Counsel for Petitioners have had, and continue to have, conflicts and overlapping deadlines in other matters during the current deadline for the filing of a petition for writ of certiorari in this case, as well as long-planned travel for work and the holidays. Among other upcoming deadlines, Lead Counsel for Petitioners, Maxwell Pritt, has a mediation on December 22, 2022; dispositive motion practice in *Naukleros LLC v. Theta Capital Partners LLC*, Case No. CGC-22-603048, S.F. Superior Court; dispositive and anti-SLAPP motion practice in *VillaSport LLC v. Mobomo LLC*, Case No. CIV2103014, Marin Superior Court; and dispositive motion practice in *Envision Healthcare Corp. v. United Healthcare Insurance Co.*, No. CV2022-012385 (Ariz. Super. Ct.). Mr. Pritt also has a long-scheduled family vacation the week after Christmas.

Co-Lead Counsel for Petitioners, Erika Nyborg-Burch, has an arbitration on December 20, 2022, the duration of which is uncertain, and she is assisting in preparation for oral argument before the Louisiana First Circuit Court of Appeals in *June Medical Services v. Landry, et al* (1st Cir 2022-CA-1042; 19th JDC C720988). Ms. Nyborg-Burch also has dispositive motion practice in *Envision Healthcare Corp. v. United Healthcare Insurance Co.*, No. CV2022-012385 (Ariz. Super. Ct.) and is actively managing expedited discovery in *Sparta Ins. Co. v. Pennsylvania Ins. Co.*, No. 21-1105 (D. Mass.).

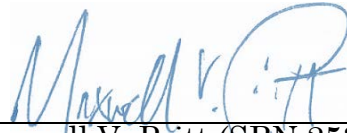
Counsel for Respondents-Defendants have informed Petitioners' counsel they do not oppose this application.

For the foregoing reasons, Petitioners respectfully request that the Court grant this Application for an Extension and extend Petitioners' time to file their Petition for Writ of Certiorari by 30 days, up to and including Monday, February 13, 2023.

Respectfully Submitted,

Dated: December 16, 2022

BOIES SCHILLER FLEXNER LLP



Maxwell V. Pritt (SBN 253155)
mpritt@bsflp.com
BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293-6800

Attorney for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

A copy of this application was served by U.S. mail to the counsel listed below
in accordance with Supreme Court Rule 22.2 and 29.3.

GAVIN NEWSOM, Governor Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 Email: kirin.gill@doj.ca.gov [COR LD NTC Dep State Atty Gen] AGCA-Office of the California Attorney General 1300 I Street Suite 125 Sacramento, CA 95814
STATE OF CALIFORNIA Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 [COR LD NTC Dep State Atty Gen] (see above)
CALIFORNIA STATE BOARD OF EDUCATION Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 [COR LD NTC Dep State Atty Gen] (see above)
CALIFORNIA DEPARTMENT OF PUBLIC HEALTH Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 [COR LD NTC Dep State Atty Gen] (see above)
CALIFORNIA HEALTH AND HUMAN SERVICES Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 [COR LD NTC Dep State Atty Gen] (see above)
SANDRA SHEWRY, State Public Health Officer and Department of Public Health Director Defendant - Appellee,	Kirin K. Gill, Deputy Attorney General Direct: 916-210-6172 [COR LD NTC Dep State Atty Gen] (see above)
CALIFORNIA DEPARTMENT OF EDUCATION Defendant - Appellee,	Amy Bisson-Holloway, Assistant General Counsel Direct: 916-319-0860 Email: ahollowa@cde.ca.gov [COR LD NTC Dep State Atty Gen] CDE - California Department of Education 1430 N Street Suite 5319 Sacramento, CA 95814

Leonard Bruce Garfinkel, Esquire, Deputy
General Counsel
Direct: 916-319-0860
Email: lgarfinkel@cde.ca.gov
Fax: 916-319-0155
[COR NTC Dep State Atty Gen]
CDE - California Department of Education
1430 N Street
Suite 5319
Sacramento, CA 95814

TONY THURMOND, State Superintendent of
Public Education
Defendant - Appellee,

Amy Bisson-Holloway, Assistant General
Counsel
Direct: 916-319-0860
[COR LD NTC Dep State Atty Gen]
(see above)

Leonard Bruce Garfinkel, Esquire, Deputy
General Counsel
Direct: 916-319-0860
[COR NTC Dep State Atty Gen]
(see above)

CALIFORNIA SCHOOL FOR THE DEAF,
Fremont and Riverside
Defendant - Appellee,

Amy Bisson-Holloway, Assistant General
Counsel
Direct: 916-319-0860
[COR LD NTC Dep State Atty Gen]
(see above)

Leonard Bruce Garfinkel, Esquire, Deputy
General Counsel
Direct: 916-319-0860
[COR NTC Dep State Atty Gen]
(see above)

CALIFORNIA SCHOOL FOR THE BLIND
DIAGNOSTIC CENTER, Northern California,
Central California Southern California
Defendant - Appellee,

Amy Bisson-Holloway, Assistant General
Counsel
Direct: 916-319-0860
[COR LD NTC Dep State Atty Gen]
(see above)

Leonard Bruce Garfinkel, Esquire, Deputy
General Counsel
Direct: 916-319-0860
[COR NTC Dep State Atty Gen]
(see above)

FREMONT UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
Email: sgordon@leonealberts.com
Fax: 925-974-8601
[COR LD NTC Retained]

Leone Alberts & Duus, APC
1390 Willow Pass Road
Suite 700
Concord, CA 94520

Louis Leone, Esquire
Direct: 925-974-8600
Email: lleone@leonealberts.com
Fax: 925-974-8601
[COR LD NTC Retained]
Leone Alberts & Duus, APC
1390 Willow Pass Road
Suite 700
Concord, CA 94520

OAKLAND UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

Louis Leone, Esquire
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

MT. DIABLO UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

Louis Leone, Esquire
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

SAN RAMON VALLEY UNIFIED SCHOOL
DISTRICT
Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

Louis Leone, Esquire
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT

Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

Louis Leone, Esquire
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

CUPERTINO UNION SCHOOL DISTRICT

Defendant - Appellee,

Seth Gordon, Esquire, Attorney
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

Louis Leone, Esquire
Direct: 925-974-8600
[COR LD NTC Retained]
(see above)

HAYWARD UNIFIED SCHOOL DISTRICT

Defendant - Appellee,

Lynn A. Garcia, Esquire, Attorney
Direct: 916-448-7888
Email: lynng@sdnlaw.com
Fax: 916-448-6888
[COR LD NTC Retained]
Spinelli Donald & Nott, APC
601 University Avenue
Suite 225
Sacramento, CA 95825

Domenic D. Spinelli, Attorney
Direct: 916-448-7888
Email: domenics@sdnlaw.com
Fax: 916-448-6888
[COR LD NTC Retained]
Spinelli Donald & Nott, APC
601 University Avenue
Suite 225
Sacramento, CA 95825

SAN JUAN UNIFIED SCHOOL DISTRICT

Defendant - Appellee,

Lynn A. Garcia, Esquire, Attorney
Direct: 916-448-7888
[COR LD NTC Retained]
(see above)

Domenic D. Spinelli, Attorney
Direct: 916-448-7888
[COR LD NTC Retained]
(see above)

SBE LATITUDE 37.8 HIGH SCHOOL
Defendant - Appellee,

Katherine C. Den Bleyker, Attorney
Direct: 213-250-1800
Email: katherine.denbleyker@lewisbrisbois.com
Fax: 213-250-7900
[COR LD NTC Retained]
Lewis Brisbois Bisgaard & Smith, LLP
633 W 5th Street
Suite 4000
Los Angeles, CA 90071

LONG BEACH UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
Email: sdanforth@aalrr.com
[COR LD NTC Retained]
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive
Suite 300
Cerritos, CA 90703

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
Email: mwadlington@aalrr.com
Fax: 562-653-3333
[COR LD NTC Retained]
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive
Suite 300
Cerritos, CA 90703

SOUTH PASADENA UNIFIED SCHOOL
DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

CAPISTRANO UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

SANTA ANA UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

RIVERSIDE UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

CHAFFEY JOINT UNION HIGH SCHOOL
DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

MILPITAS UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Scott Dale Danforth, Esquire, Attorney
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

Marlon Craig Wadlington, Esquire
Direct: 562-653-3200
[COR LD NTC Retained]
(see above)

GARDEN GROVE UNIFIED SCHOOL
DISTRICT
Defendant - Appellee,

Sydney J. Blaauw
Direct: 949-428-8769
Email: sblaauw@harbottlelaw.com
Fax: 949-428-8779
[COR LD NTC Retained]
Harbottle Law Group
18401 Von Karman Avenue
Suite 200
Irvine, CA 92612

S. Daniel Harbottle, Esquire, Attorney
Direct: 949-428-8780

Email: dharbottle@harbottlelaw.com
Fax: 949-428-8779
[COR NTC Retained]
Harbottle Law Group
18401 Von Karman Avenue
Suite 200
Irvine, CA 92612

Tracy Petznick Johnson, Attorney
Direct: 949-428-8764
Email: tpjohnson@harbottlelaw.com
[COR NTC Retained]
Harbottle Law Group
18401 Von Karman Avenue
Suite 200
Irvine, CA 92612

IRVINE UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Sydney J. Blaauw
Direct: 949-428-8769
[COR LD NTC Retained]
(see above)

S. Daniel Harbottle, Esquire, Attorney
Direct: 949-428-8780
[COR NTC Retained]
(see above)

Tracy Petznick Johnson, Attorney
Direct: 949-428-8764
[COR NTC Retained]
(see above)

CORONA-NORCO UNIFIED SCHOOL
DISTRICT
Defendant - Appellee,

Sydney J. Blaauw
Direct: 949-428-8769
[COR LD NTC Retained]
(see above)

S. Daniel Harbottle, Esquire, Attorney
Direct: 949-428-8780
[COR NTC Retained]
(see above)

Tracy Petznick Johnson, Attorney
Direct: 949-428-8764
[COR NTC Retained]
(see above)

MORENO VALLEY UNIFIED SCHOOL
DISTRICT
Defendant - Appellee,

Sydney J. Blaauw
Direct: 949-428-8769
[COR LD NTC Retained]
(see above)

S. Daniel Harbottle, Esquire, Attorney
Direct: 949-428-8780
[COR NTC Retained]
(see above)

Tracy Petznick Johnson, Attorney
Direct: 949-428-8764
[COR NTC Retained]
(see above)

ETIWANDA ELEMENTARY SCHOOL
DISTRICT

Defendant - Appellee,

Edward Kang
Direct: 818-548-2080
Email: ekang@glendaleca.gov
[COR LD NTC Retained]
City of Glendale City Attorney's Office
613 E Broadway
Suite 220
Glendale, CA 91206

Thomas Madruga, Attorney
Direct: 213-744-0090
Email: tmadruga@omlola.com
Fax: 213-744-0093
[COR LD NTC Retained]
Olivarez Madruga Law Organization, LLP
500 S Grand Avenue
12th Floor
Los Angeles, CA 90071

SAN BERNARDINO CITY UNIFIED SCHOOL
DISTRICT

Defendant - Appellee,

Edward Kang
Direct: 818-548-2080
[COR LD NTC Retained]
(see above)

Thomas Madruga, Attorney
Direct: 213-744-0090
[COR LD NTC Retained]
(see above)

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT

Defendant - Appellee,

Mark Saul Posard
Direct: 415-986-5900
Email: mposard@grsm.com
Fax: 415-986-8054
[COR LD NTC Retained]
Gordon Rees, LLP
275 Battery Street
Suite 2000
San Francisco, CA 94111

LOS ANGELES UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Sue Ann Evans, Esquire, Managing Senior
Counsel
Direct: 562-366-8500

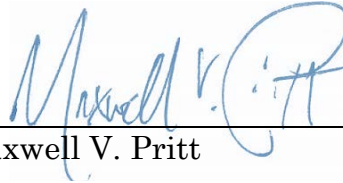
Email: sevans@dwkesq.com
Fax: 562-366-8505
[COR LD NTC Retained]
Dannis Woliver Kelley
444 W. Ocean Boulevard
Suite 1070
Long Beach, CA 90802

SAN JOSE UNIFIED SCHOOL DISTRICT
Defendant - Appellee,

Sue Ann Evans, Esquire, Managing Senior
Counsel
Direct: 562-366-8500
[COR LD NTC Retained]
(see above)

SBC - HIGH TECH HIGH SCHOOL DISTRICT
Defendant - Appellee,

Kevin S. Wattles
Direct: 805-497-7706
Email: kwattles@slfesq.com
Fax: 805-497-1147
[COR LD NTC Retained]
Soltman Levitt Flaherty & Wattles LLP
Suite 300
90 E. Thousand Oaks Blvd.
Thousand Oaks, CA 91360



Maxwell V. Pritt

EXHIBIT 1

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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,
Plaintiffs-Appellants,

v.

GAVIN NEWSOM, Governor; STATE
OF CALIFORNIA; CALIFORNIA STATE
BOARD OF EDUCATION; CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH;
CALIFORNIA HEALTH AND HUMAN
SERVICES; SANDRA SHEWRY, State
Public Health Officer and
Department of Public Health
Director; CALIFORNIA DEPARTMENT
OF EDUCATION; TONY THURMOND,
State Superintendent of Public
Education; CALIFORNIA SCHOOL FOR
THE DEAF, Fremont and Riverside;
CALIFORNIA SCHOOL FOR THE BLIND
DIAGNOSTIC CENTER, Northern
California, Central California

No. 20-56404

D.C. No.
5:20-cv-01796-
SVW-AFM

OPINION

Southern California; FREMONT UNIFIED SCHOOL DISTRICT; OAKLAND UNIFIED SCHOOL DISTRICT; MT. DIABLO UNIFIED SCHOOL DISTRICT; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT; WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT; CUPERTINO UNION SCHOOL DISTRICT; HAYWARD UNIFIED SCHOOL DISTRICT; SAN JUAN UNIFIED SCHOOL DISTRICT; SBE LATITUDE 37.8 HIGH SCHOOL; LONG BEACH UNIFIED SCHOOL DISTRICT; SOUTH PASADENA UNIFIED SCHOOL DISTRICT; CAPISTRANO UNIFIED SCHOOL DISTRICT; SANTA ANA UNIFIED SCHOOL DISTRICT; RIVERSIDE UNIFIED SCHOOL DISTRICT; CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT; MILPITAS UNIFIED SCHOOL DISTRICT; GARDEN GROVE UNIFIED SCHOOL DISTRICT; IRVINE UNIFIED SCHOOL DISTRICT; CORONA-NORCO UNIFIED SCHOOL DISTRICT; MORENO VALLEY UNIFIED SCHOOL DISTRICT; ETIWANDA ELEMENTARY SCHOOL DISTRICT; SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; SAN FRANCISCO UNIFIED SCHOOL DISTRICT; LOS ANGELES UNIFIED SCHOOL DISTRICT; SAN JOSE UNIFIED SCHOOL DISTRICT; SBC - HIGH TECH HIGH

MARTINEZ V. NEWSOM

3

SCHOOL DISTRICT, <i>Defendants-Appellees.</i>

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted December 6, 2021
Submission Vacated March 7, 2022
Resubmitted August 17, 2022
Pasadena, California

Filed August 24, 2022

Before: MILAN D. SMITH, JR., KENNETH K. LEE, and
DANIELLE J. FORREST, Circuit Judges

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Lee

SUMMARY*

Individuals with Disabilities Education Act

The panel affirmed in part and vacated in part the district court’s dismissal of claims brought by a group of students and parents who alleged that every school district in California failed to adequately accommodate special needs students after California public school transitioned to remote instruction in March 2020 in response to the COVID-19 pandemic.

In this putative class action, plaintiffs alleged that defendants violated the Individuals with Disabilities Education Act and the Fourteenth Amendment, and they sought declaratory and injunctive relief. The district court dismissed plaintiffs’ claims for failure to exhaust administrative remedies under the IDEA.

The panel held that plaintiffs lacked standing to sue school districts in which they were not enrolled and the State Special Schools, which they did not attend, because they did not allege that those defendants injured them personally. The panel held that, even if the “juridical link” doctrine, providing an exception to the rule that a named plaintiff who has not been harmed by a defendant is generally an inadequate and atypical class representative for purposes of Fed. R. Civ. P. 23, ever applies outside of the Rule 23 context, it would not apply here.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the California public schools' return to in-person instruction mooted plaintiffs' claims against the California Department of Education and the State Superintendent of Public Education, as well as their claims against other defendants seeking injunctions requiring a return to in-person instruction or reassessment and services until students return to in-person instruction. Surviving were plaintiffs' claims against the school districts in which they were enrolled seeking compensatory education, a declaratory judgment, and attorneys' fees and costs.

The panel held that under the IDEA, plaintiffs were required to exhaust administrative remedies before filing their claims against their school districts, seeking relief for the denial of a free and appropriate public education (FAPE) during the time they were receiving remote instruction. The panel held inapplicable exceptions to the exhaustion requirement for when plaintiffs seek systemic or structural relief, when it is improbable that adequate relief can be obtained by pursuing administrative remedies, or when exhaustion would be futile. For the systemic exception, plaintiffs did not satisfy the requirement that they identify an agency decision, regulation, or other binding policy that caused their injury. The inadequacy exception did not apply because even though some of their claims were based on the Fourteenth Amendment, plaintiffs sought relief for the denial of a FAPE, and unnamed class members were not required to exhaust. The panel declined to consider for the first time on appeal plaintiffs' argument regarding the futility exception. The panel also declined to consider an argument regarding exhaustion of a claim for breach of a settlement agreement because such a claim was not included in the complaint.

The panel vacated the district court’s judgment dismissing on the merits the claims that plaintiffs lacked standing to bring and remanded with instruction to dismiss those claims for lack of subject-matter jurisdiction. The panel vacated the district court’s judgment as to the claims against the California Department of Education and the State Superintendent of Public Education, which were moot, and remanded with instructions to dismiss those claims. The panel affirmed the district court’s dismissal of the claims against plaintiffs’ school districts for failure to exhaust administrative remedies.

Concurring, Judge Lee wrote separately to urge laying to rest a potential “juridical link” exception to Article III standing. Judge Lee wrote that the majority opinion declined to address whether the juridical link doctrine could ever be viable, reasoning that plaintiffs lacked standing here even if the panel assumed the doctrine applied. Judge Lee wrote that he would prefer extinguishing the remaining embers of any such misguided exception to constitutional standing.

COUNSEL

Maxwell V. Pritt (argued) and Erica Nyborg-Burch (argued), Boies Schiller Flexner LLP, San Francisco, California; Diana Renteria, Law Offices of Sheila C. Bayne, Newport Beach, California; for Plaintiffs-Appellants.

Len Garfinkel (argued), Deputy General Counsel; Amy Bisson Holloway, General Counsel; California Department of Education, Sacramento, California; for Defendants-Appellees California Department of Education, Tony Thurmond, California School for the Deaf, and California School for the Blind Diagnostic Center.

S. Daniel Harbottle (argued), Sydney J. Blaauw, and Tracy Petznick Johnson, Harbottle Law Group, Irvine, California, for Defendants-Appellees Corona-Norco Unified School District, Garden Grove Unified School District, Irvine Unified School District, and Moreno Valley Unified School District.

Marlon C. Wadlington (argued), Scott D. Danforth, and Kristin M. Meyers, Atkinson Andelson Loya Ruud & Roma, Cerritos, California, for Defendants-Appellees Chaffey Joint Union High School District, Capistrano Unified School District, Long Beach Unified School District, Riverside Unified School District, Santa Ana Unified School District, South Pasadena Unified School District, and Milpitas Unified School District.

Kirin K. Gill, Deputy Attorney General, Rob Bonta, Attorney General; Office of the Attorney General, Sacramento, California; for Defendants-Appellees Gavin Newsom, State of California, California State Board of Education, California Department of Public Health, California Health and Human Services, and Sandra Shewry.

Seth Gordon and Louis Leone, Leone Alberts & Duus APC, Concord, California, for Defendants-Appellants Fremont Unified School District, Oakland Unified School District, Mt. Diablo Unified School District, San Ramon Valley Unified School District, West Contra Costa Unified School District, and Cupertino Union School District.

Lynn A. Garcia and Domenic D. Spinelli, Spinelli Donald & Nott, Sacramento, California, for Defendants-Appellees Hayward Unified School District and San Juan Unified School District.

Katherine C. Den Bleyker, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, California, for SBE Latitude 37.8 High School.

Edward Kang and Thomas Madruga, Olivarez Madruga Law Organization LLP, Los Angeles, California, for Defendants-Appellees Etiwanda Elementary School District and San Bernardino City Unified School District.

Mark Saul Posard, Gordon Rees LLP, San Francisco, California, for Defendant-Appellee San Francisco Unified School District.

Sue Ann Evans, Managing Senior Counsel, Dannis Woliver Kelley, Long Beach, California, for Defendants-Appellees Los Angeles Unified School District and San Jose Unified School District

Kevin S. Wattles, Soltman Levitt Flaherty & Wattles LLP, Thousand Oaks, California, for Defendant-Appellee SBC - High Tech High School District.

OPINION

M. SMITH, Circuit Judge:

A group of students and parents allege that every school district in California failed to adequately accommodate special needs students after California public schools transitioned to remote instruction in March 2020 in response to the COVID-19 pandemic. To address appellants' claims, we examine whether Plaintiffs were required to exhaust administrative remedies pursuant to the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, before filing their lawsuit. We hold that exhaustion was required.

I

Plaintiffs are four students enrolled in the Etiwanda and Chaffey Joint Union High School Districts as well as their parents. They allege that when California public schools transitioned to remote instruction in March 2020, every school district in the state failed to determine “what changes needed to be made to [special needs students’] individualized education programs (‘IEP’) to account for the differences in distance learning compared to in-person instruction.” They allege that their IEPs were not updated to account for remote instruction, they were not offered sufficient accommodations after the transition, and they were denied a free and appropriate public education (FAPE) during the time they were receiving remote instruction.

Plaintiffs filed a putative class action lawsuit on behalf of “all special needs students and their parents in California.” They sued hundreds of defendants, including, but not limited to: (1) the California Department of Education (CDE); (2) California Superintendent of Public Instruction Tony

Thurmond; (3) every school district in the state of California; and (4) the California School for the Deaf, the California School for the Blind, and the Diagnostic Centers of California (the State Special Schools).¹

Plaintiffs’ claims against the school districts are straightforward: they allege that the districts failed to adequately accommodate special needs students after the transition to remote instruction, thereby denying them—and every other special needs student in the state—a FAPE. Plaintiffs’ claims against the CDE and Superintendent Thurmond are more complicated. During the transition to remote instruction, the CDE issued guidance that encouraged the school districts to “[w]ork with each family . . . to determine what [a] FAPE looks like . . . during COVID-19,” “[e]nsure children with disabilities are included in all offerings of school education models by using the IEP process,” and “[u]se [the] annual IEP to plan for [a] traditional school year and while not required, it is suggested LEAs include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.” Plaintiffs allege that because this guidance “encouraged, but did not require, the state’s school districts” to take these measures, the CDE and Superintendent Thurmond either dissuaded or prohibited school districts from updating special needs students’ IEPs and from offering adequate accommodations. At oral

¹ Plaintiffs also sued the following defendants but voluntarily dismissed their claims against them: (1) the state of California, (2) California Governor Gavin Newsom, (3) California’s State Board of Education, (4) the California Health and Human Services Agency, (5) the California Department of Public Health, and (6) the Director of the California Department of Public Health.

argument, Plaintiffs characterized this guidance as “a policy of inaction” and “a blanket decision not to act.”

Plaintiffs allege that Defendants violated the IDEA and the Fourteenth Amendment, and seek declaratory and injunctive relief.² Specifically, Plaintiffs request (1) a declaration that Defendants violated the IDEA, (2) an injunction requiring them “to immediately reassess . . . special needs students assigned to engage in distance learning” or return them to in-person instruction, and (3) an injunction ordering them to provide special needs students with various educational services “until such time as appropriate accommodations are made . . . or they are returned to in-person instruction.” Plaintiffs also request “compensatory education” from the school districts to make up “for [special needs students’] loss of a basic minimum education.”

After some Defendants moved to dismiss, the district court dismissed Plaintiffs’ claims against all Defendants for failure to exhaust, denied Plaintiffs leave to amend, and dismissed the case. Plaintiffs timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review de novo whether the IDEA requires exhaustion in these

² The district court understood Plaintiffs to also allege that Defendants violated the Americans with Disabilities Act and the Rehabilitation Act. We do not read the complaint the same way. The only reference to these statutes in the complaint is Plaintiffs’ allegation that the school districts are “subject to state and federal law, including but not limited to the IDEA, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 as amended), and Title II of the Americans with Disabilities Act of 1990 (‘ADA’); 29 U.S.C. § 794, *et seq.*” But alleging that a defendant is “subject to” a particular statute is not sufficient to state a claim for a violation of that statute. *See Fed. R. Civ. P. 8(a)(2).*

circumstances. *Doe ex rel. Brockhuis v. Ariz. Dep't of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997).

II

Before analyzing exhaustion, we first address two jurisdictional issues.³ See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). First, Plaintiffs sued hundreds of school districts in which they are not enrolled, and the State Special Schools, which they do not attend, without alleging that those defendants harmed them personally. Accordingly, we consider whether Plaintiffs have standing to pursue their claims against these defendants in federal court. Second, California public schools have returned to in-person instruction since Plaintiffs filed their complaint, providing Plaintiffs with much of the relief they seek. See generally *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022) (en banc). We thus also consider whether the return to in-person instruction moots any of Plaintiffs' claims.

A

To have standing to sue a particular defendant, a plaintiff must have experienced an injury in fact that is fairly traceable to the challenged action of that defendant. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). “That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must allege

³ In the district court, the parties appeared to assume that exhaustion is a jurisdictional issue, but it is not. See *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 865, 867 (9th Cir. 2011) (en banc) (“IDEA’s exhaustion requirement is not jurisdictional”; it “is a claims processing provision that IDEA defendants may offer as an affirmative defense.”), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc).

and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). Accordingly, named plaintiffs generally lack standing to sue defendants that have not injured them personally, even if they allege that those defendants injured absent class members. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961–62 (9th Cir. 2004) (holding that class action plaintiffs lacked standing to sue trust companies that “never held a named plaintiff’s loan”). Plaintiffs do not allege that the districts in which they are not enrolled or the State Special Schools, which they do not attend, have injured them personally. Therefore, Plaintiffs lack standing to sue those defendants in federal court.

Citing our opinion in *La Mar v. H & B Novelty & Loan Company*, 489 F.2d 461 (9th Cir. 1973), Plaintiffs argue that we have recognized a “juridical link” exception to these ordinary rules of standing, and that it applies here. We disagree. In *La Mar*, we held that a named plaintiff who has not been harmed by a defendant is generally an inadequate and atypical class representative for purposes of Federal Rule of Civil Procedure 23. *Id.* at 465–66. However, we recognized an exception when “all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.” *Id.* at 466. In elaborating on this exception, we distinguished the case before us from one in which “all the defendants were officials of a single state and its subordinate units of government” who applied a “common rule.” *Id.* at 470.

We did not address Article III standing in *La Mar*. Instead, we concluded that it was unnecessary to address

standing because the plaintiffs' claims failed under Rule 23 even assuming they had standing. *Id.* at 464. The Supreme Court has since disapproved of our practice of assuming standing, so we cannot make the same assumption in this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). But we need not decide whether the juridical link doctrine *ever* allows a named plaintiff to sue a defendant that did not harm him personally because Plaintiffs' claims fall outside the juridical link doctrine. In other words, Plaintiffs lack standing even if the juridical link doctrine were to apply outside of the Rule 23 context.

In *La Mar*, we confined the juridical link exception to plaintiffs suing “officials of a single state and its subordinate units of government” who applied a “common rule.” 489 F.2d at 470. We cited as examples (1) a suit by inmates seeking to enjoin Alabama prison officials from enforcing a Pennsylvania law that required Alabama jails to be segregated by race, (2) a suit by plaintiffs that had been arrested pursuant to Alabama’s vagrancy statute seeking to enjoin Alabama officials from enforcing it, and (3) a suit by female students seeking to enjoin a state regulation that required them to pay higher tuition based on their husbands’ out-of-state residence, even though the students resided in Pennsylvania. *See id.* at 469–70 (citing *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966); *Broughton v. Brewer*, 298 F. Supp. 260 (S.D. Ala. 1969); and *Samuel v. Univ. of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972)). All of these suits involved state officials enforcing mandatory rules.

The guidance Plaintiffs cite, by contrast, does not require the school districts to do anything. Indeed, Plaintiffs admit that it “encouraged, but did not require, the state’s school districts” to take certain measures to accommodate special needs students during remote instruction. Elsewhere in the

complaint Plaintiffs attempt to construe this guidance as a mandatory rule *prohibiting* school districts from accommodating special needs students during remote instruction, and at oral argument Plaintiffs characterized it as “a policy of inaction.” But “we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint,” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir. 1998), and the guidance contradicts Plaintiffs’ claims: it encourages districts to “[w]ork with each family . . . to determine what [a] FAPE looks like . . . during COVID-19,” “[e]nsure children with disabilities are included in all offerings of school education models by using the IEP process,” and “[u]se annual IEP to plan for traditional school year and . . . include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.” In other words, the CDE offered suggestions about how to accommodate special needs students during remote instruction, but ultimately left each district with discretion to decide how to do so. It did not set forth a “common rule” every district was required to follow. Therefore, Plaintiffs’ claims against the State Special Schools and the school districts in which they are not enrolled do not fall within the juridical link doctrine, and Plaintiffs lack standing to pursue their claims against these defendants in federal court even if the juridical link doctrine were to exempt Plaintiffs from ordinary principles of Article III standing.

B

We now address whether any of Plaintiffs’ claims are moot. Plaintiffs filed this lawsuit in August 2020, when most California public schools were holding classes remotely due to the COVID-19 pandemic. Since then, the California

public schools have returned to in-person instruction. Accordingly, we next address how the return to in-person instruction affects Plaintiffs' claims.

We recently held in *Brach* that a similar challenge to California's pandemic school closure orders was moot. In that case, a group of parents and a student challenged California's 2020–21 Reopening Framework, which allowed schools "to permanently reopen once the rate of COVID-19 transmission in their local areas stabilized." *Brach*, 38 F.4th at 9–10. These plaintiffs argued that the federal Constitution required California to reopen schools immediately. *Id.* at 11. Between the summer of 2020, when the suit was filed, and June 2022, when we issued our opinion, much had changed. As vaccines were distributed and COVID-19 transmission declined, California's school closure orders "expired by their own terms" and schools reopened. *See id.* at 10–12. They have remained open for more than a year, despite "the surge of the Omicron COVID-19 variant." *See id.* at 13–14. In addition, California has "unequivocally renounce[d]" the use of school closure orders in the future." *Id.* at 13 (quoting *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019) (alternation in original)). Under these circumstances, we held the plaintiffs' claims were moot. *Id.* at 15.

We requested supplemental briefing on the impact of *Brach* on this case. The parties agree that California public schools have returned to in-person instruction, but Plaintiffs argue that "this case is not moot" because they have not received two forms of relief they seek: (1) a declaration that Defendants violated the IDEA and (2) an injunction requiring compensatory education for students who were not adequately accommodated during remote instruction. Plaintiffs do not contest that their other requests for

injunctive relief, such as their request for a return to in-person instruction, are moot.

We agree that Plaintiffs' request for compensatory education means that some of their claims are not moot. If Plaintiffs were to prevail on the claims for which they requested compensatory education, the district court could award this relief despite the return to in-person instruction. But Plaintiffs requested compensatory education only from the school districts. They did not request compensatory education from the CDE and Superintendent Thurmond. Therefore, we next consider whether Plaintiffs' claims against the CDE and Superintendent Thurmond are moot.

Plaintiffs seek three forms of relief from these defendants: (1) the now-moot injunctive relief described above, (2) a declaratory judgment stating that these defendants violated the IDEA, and (3) attorneys' fees and costs. Since Plaintiffs' requests for injunctive relief against these defendants are moot, we turn to Plaintiffs' requests for a declaratory judgment and for attorneys' fees and costs. Neither form of relief, standing alone, can save Plaintiffs' claims. *See California v. Texas*, 141 S. Ct. 2104, 2115 (2021) ("The Declaratory Judgment Act, 28 U.S.C. § 2201, alone does not provide a court with jurisdiction."); *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 866–67 (9th Cir. 2017) (holding that an "interest in attorney fees and legal costs associated with [the] action . . . standing alone are insufficient to confer Article III jurisdiction"). The plaintiffs in *Brach* were equally curious to learn whether California's school closures were unlawful, but we held that we could not offer an opinion on the matter in light of the schools' reopening. The same is true here. *See also, e.g., N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (holding that claims seeking "declaratory and

injunctive relief against enforcement” of New York City rule were moot after the rule had been amended).

We thus hold that Plaintiffs’ claims against the CDE and Superintendent Thurmond are moot, as are Plaintiffs’ claims against the other defendants seeking injunctions requiring a return to in-person instruction or reassessment and services until students return to in-person instruction. Accordingly, to this point in our analysis, Plaintiffs’ claims against the school districts in which they are enrolled seeking compensatory education, a declaratory judgment, and attorneys’ fees and costs survive.

III

We now turn to Plaintiffs’ only remaining claims: those against the Etiwanda and Chaffey Joint Union High School Districts.

The IDEA requires states accepting certain federal funds to provide students with disabilities a FAPE and to maintain an administrative process students, parents, and educational agencies can use to resolve disputes about whether an educational agency is meeting its obligations. 20 U.S.C. §§ 1412(a)(1), 1415(a); *see also Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 157–59 (2017). A plaintiff seeking relief for the denial of a FAPE ordinarily must exhaust the administrative process before filing a lawsuit, even if the plaintiff asserts claims arising under the Constitution or a federal statute other than the IDEA. *See* 20 U.S.C. § 1415(i)(2)(A), (l); *Fry*, 580 U.S. at 165.

The IDEA sets forth a general framework for the dispute resolution process but allows states to promulgate the details. *See* 20 U.S.C. § 1415. In California, the administrative process begins with a complaint, which

triggers a “resolution meeting” between a student’s parents and relevant local educational officials. Cal. Educ. Code §§ 56500.2, 56501.5(a). The parties may also mediate their dispute. *Id.* § 56500.3. If the resolution meeting and/or mediation do not resolve the dispute, the parties may proceed to a “due process hearing” before an administrative law judge at the state Office of Administrative Hearings (OAH). *Id.* §§ 56501.5(c), 56504.5(a).⁴ A party unsatisfied with the OAH’s resolution of the dispute may file a lawsuit in state or federal court. 20 U.S.C. § 1415(i)(2).

Plaintiffs admit in their complaint that they did not exhaust this administrative process before filing this lawsuit. They argue that they were not required to do so because their claims fall within an exception to the exhaustion requirement. We have held that IDEA plaintiffs are not required to exhaust administrative remedies in three circumstances: (1) when they seek systemic or structural relief, (2) when “it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought),” and (3) when exhaustion would be futile. *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303–04 (9th Cir. 1992). Plaintiffs argue that all three exceptions apply.

A

The systemic exception to the IDEA’s exhaustion requirement is something of an enigma. We first recognized the exception 30 years ago, but “no published opinion in this

⁴ Section 56504.5(a) requires the CDE to contract with “another state agency or . . . a nonprofit organization or entity to conduct mediation conferences and due process hearings.” Plaintiffs allege, and the CDE agrees, that the CDE has contracted with the OAH to provide these services.

circuit has ever found that a challenge was ‘systemic’ and exhaustion not required.” *Student A ex rel. Parent A v. S.F. Unified Sch. Dist.*, 9 F.4th 1079, 1084 (9th Cir. 2021). After canvassing our precedent, we conclude that to fall within the systemic exception, a plaintiff must, at a minimum, identify an “agency decision, regulation, or other binding policy” that caused his or her injury. *Doe*, 111 F.3d at 684. Because Plaintiffs do not satisfy this requirement, their claims do not fall within the systemic exception.

In *Hoefl*, we held that exhaustion is not required when “an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.” 967 F.2d at 1303–04 (quoting legislative history). Five years later, a group of plaintiffs alleged that the Arizona Department of Education adopted “a policy or practice of not complying with the IDEA” because the Department did not monitor whether juveniles were present at the Pima County Jail and therefore did not provide the juveniles that were present with a FAPE. *Doe*, 111 F.3d at 684. We held that the plaintiffs were required to exhaust because the Department of Education’s failure to provide educational services was the result of “inadvertent neglect” rather than an “agency decision, regulation, or other binding policy.” *Id.*

More recently, a group of plaintiffs filed a class action lawsuit alleging that the San Francisco Unified School District was “failing its responsibilities to students under the IDEA by not timely identifying evaluating students with disabilities, and, after identifying them, by providing them with insufficiently individualized, ‘cookie-cutter’ accommodations and services.” *Student A*, 9 F.4th at 1081. The plaintiffs argued that they were not required to exhaust because their claims were systemic. *Id.* We disagreed. We first explained that “describing problems as broad and far-

reaching is not enough to meet the standard; a policy or practice is not necessarily ‘systemic’ or ‘of general applicability’ simply because it ‘applie[s] to all students’ or because ‘the complaint is structured as a class action seeking injunctive relief.’” *Id.* at 1084 (quoting *Hoelt*, 967 F.2d at 1304, 1308). We then held that the plaintiffs’ claims were not systemic because the plaintiffs failed to “identif[y] any policy, much less one of general applicability that the administrative process could not address,” *id.*, and their allegations were “of bad results, not descriptions of unlawful policies or practices,” *id.* at 1085. Considering the facts of the case, we concluded that the plaintiffs were not seeking “anything other than increased funding and greater adherence to existing policies.” *Id.* at 1085.

These cases demonstrate that to fall within the systemic exception, the injury the plaintiff complains of must “result[] from an agency decision, regulation, or other binding policy.” *Doe*, 111 F.3d at 684. A plaintiff cannot rely on the systemic exception simply by reframing an act of inadvertence or negligence as a policy or practice of not complying with the IDEA. *See Student A*, 9 F.4th at 1085 (holding that plaintiffs were required to exhaust because they were unable to identify the “unlawful policies or practices” that caused them harm and appeared to base their claims on the district’s failure to adhere to existing policies); *Doe*, 111 F.3d at 684 (holding that plaintiffs were required to exhaust because their injuries were caused by “inadvertent neglect” rather than “an agency decision, regulation, or other binding policy”). But that is exactly what Plaintiffs attempt to do here. Essentially, Plaintiffs assert a negligence claim: they allege that the districts failed to adequately accommodate special needs students after the transition to remote instruction. Plaintiffs’ attempts to reframe this claim as a

policy or practice of not complying with the IDEA does not allow them to evade the exhaustion requirement.

B

Plaintiffs next argue that their claims fall within the inadequacy exception because OAH cannot resolve constitutional claims, “cannot hear class actions,” and “lacks the authority to issue injunctions.” Plaintiffs further argue that requiring all 800,000 special needs students in California to exhaust would overwhelm the administrative process so that it would be impossible to exhaust these claims in a timely manner. None of these arguments is persuasive.

First, the Supreme Court held in *Fry* that would-be plaintiffs must exhaust administrative remedies whenever they “seek relief for the denial of a FAPE,” 580 U.S. at 165, even if they bring claims “under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities,” 20 U.S.C. § 1415(*l*); *Fry*, 580 U.S. at 161. That rule applies here because Plaintiffs seek relief for the denial of a FAPE. They allege that “Defendant Districts have . . . denied . . . Plaintiffs and the members of the Proposed Class a FAPE,” and they seek remedies designed to compensate for the denial of a FAPE: “compensatory education, including related services to correct for the denial of a FAPE.” Because Plaintiffs seek relief for the denial of a FAPE, they are required to exhaust administrative remedies, even though some of their claims are based on the Fourteenth Amendment.

Second, “the mere fact the complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion.” *Hoefl*, 967 F.2d at 1308. Third,

Plaintiffs' fears about 800,000 students overwhelming the administrative process are unfounded because unnamed class members need not exhaust. *Id.* at 1309–10.

C

Plaintiffs argue that pursuing administrative remedies would be futile because after the district court dismissed the complaint one of the named plaintiffs initiated the administrative process and the OAH dismissed his claim. But our review is limited to “the original papers and exhibits filed in the district court,” Fed. R. App. P. 10(a)(1), and the documents Plaintiffs submitted for the first time on appeal are not part of the record. *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *cf. Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (“[A] plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial notice of such facts.”). Therefore, we express no opinion regarding whether this named plaintiff's attempt to exhaust would satisfy the futility exception to IDEA's exhaustion requirement if it were properly presented.

D

Finally, Plaintiffs argue that they are not required to exhaust because one of the named plaintiffs is entitled to services from the Etiwanda School District pursuant to a settlement agreement, and plaintiffs seeking to enforce IDEA settlement agreements are not required to exhaust because these claims are simply breach of contract claims.

We need not address this issue because Plaintiffs did not include a claim for a breach of this settlement agreement in their complaint. *See Chafin v. Chafin*, 568 U.S. 165, 172

(2013) (“Federal courts may not . . . give ‘opinion[s] advising what the law would be upon a hypothetical state of facts.’”) (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990)); *Riggs v. Prober & Raphael*, 681 F.3d 1097, 1104 (9th Cir. 2012) (“A plaintiff may not try to amend her complaint through her arguments on appeal.”). The 64-page complaint references the settlement agreement only twice, and only amid the factual allegations. Although the complaint includes several counts listing Plaintiffs’ causes of action, it never asserts a breach of contract claim. Indeed, the word “breach” does not appear anywhere in the complaint. The absence of such a claim is unsurprising because it would make little sense to bring a class action on behalf of every special education student in the state of California based on a settlement agreement that sets forth the particular services to which a single student is entitled. Accordingly, Plaintiffs did not assert a claim based on an alleged breach of a settlement agreement, and we decline to issue an advisory opinion regarding whether such a claim must be exhausted.

IV

The district court lacked jurisdiction to resolve Plaintiffs’ claims against the school districts in which they are not enrolled and the State Special Schools, which they do not attend. We therefore vacate the district court’s judgment dismissing those claims on the merits and remand with instructions to dismiss them for lack of subject-matter jurisdiction.⁵ Further, in light of the California public

⁵ The district court also erred in dismissing Plaintiffs’ claims against many of these defendants on the merits when the defendants were not parties to the case because they had not been served. See *Omni Cap. Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“Before a federal court

schools' return to in-person instruction, Plaintiffs' claims against the CDE and Superintendent Thurmond are moot. We therefore vacate the district court's judgment and remand with instructions to dismiss Plaintiffs' claims against those defendants. Finally, we affirm the district court's dismissal of Plaintiffs' claims against the Etiwanda and Chaffey Joint Union High School Districts for failure to exhaust administrative remedies.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.⁶

LEE, Circuit Judge, concurring:

I concur with Judge Smith's excellent opinion, but I write separately to urge laying to rest a potential "juridical link" exception to Article III standing that our court hinted at in *La Mar v. H & B Novelty & Loan Company*, 489 F.2d 461 (9th Cir. 1973). In that case, we observed that a plaintiff who was not harmed by the defendant obviously cannot

may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *West v. United States*, 853 F.3d 520, 524 (9th Cir. 2017) ("It was clear error for the district court to dismiss the claims against Gordwin, who wasn't a party to the case because he hadn't been served and the time for service had not expired."). We have held, however, that a district court may dismiss claims for lack of subject-matter jurisdiction even if the defendants against whom they are asserted have not been served. *See Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337, 1342 (9th Cir. 1981). Therefore, on remand, the district court need not wait for Plaintiffs to serve these defendants before dismissing Plaintiffs' claims against them for lack of subject-matter jurisdiction.

⁶ Appellants shall bear costs.

serve as a class representative under Rule 23. *Id.* at 464–66. But we also recognized a potential exception if “all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.” *Id.* at 466. The *La Mar* court, however, did not address Article III standing.

Relying on *La Mar*, Plaintiffs argue that this supposed juridical link exception allows them to sue districts in which they are not enrolled and schools that they do not attend. The majority opinion declines to address whether the juridical link doctrine could ever be viable, reasoning that Plaintiffs lack standing here even if we assume it applied. I would prefer extinguishing the remaining embers of any misguided “juridical link” exception. I fail to see how a plaintiff’s injury resulting from one defendant’s conduct gives him or her standing to sue other defendants who caused no harm, even if the defendants are state officials enforcing mandatory rules that injured other parties.

* * * * *

When this court decided *Lar Mar*, there were competing approaches to standing. 13A Charles Alan Wright & Arthur R. Miller *Federal Practice and Procedure* § 3531.1 (3d ed. 2022). The Supreme Court’s decisions from the late 1960s to the early 1970s alluringly offered courts the opportunity to issue sweeping decisions, even if the plaintiffs seemingly suffered little or no concrete harm. The Court had “greatly expanded the types of ‘personal stake(s)’ which are capable of conferring standing on a potential plaintiff.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 616–617 (1973); see *Baker v. Carr*, 369 U.S. 186, 204–08 (1962) (individual voters have standing to challenge state apportionment); *Flast v. Cohen*, 392 U.S. 83, 85–86, 99–101 (1968) (taxpayers have standing

to challenge use of federal funds to support instructional activities and materials in religious and sectarian schools).

At the same time, however, the Court was also reviving a restrictive approach to standing, in part, by requiring plaintiffs to show personal injury. *See Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (“[T]he ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”); *Linda R.S.*, 410 U.S. at 617 (“Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.”).

A few years after *La Mar*, the Supreme Court addressed the relationship between standing doctrine and class-action litigation. In *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court held that class representatives cannot gain standing through injuries to class members. 426 U.S. 26, 40–46 (1976). Named plaintiffs must show personal injury. *Id.* at 40 n.20 (“That a suit may be a class action . . . adds nothing to the question of standing). And if the named plaintiff is an organization, it may seek “associational standing,” and must demonstrate that “its members would otherwise have standing to sue in their own right.” *Hunt v. Wash. State Apple Advert. Com’n*, 432 U.S. 333, 343 (1977).

We thus measure a class representative’s standing by the test set forth for individual plaintiffs in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 2:4 (6th ed. 2022); *see Lierboe v. State Farm Mut. Auto. Ins. Co.*,

350 F.3d 1018, 1022–1023 (9th Cir. 2003). Named plaintiffs must allege that the defendant they chose to sue has wronged them in a legally cognizable way. *Lujan*, 504 U.S. at 560–61; see *Easter v. Am. W. Fin.*, 381 F.3d 948, 961 (9th Cir. 2004) (requiring a named plaintiff in a class action “allege a distinct and palpable injury to himself” that arises from the defendant’s actions). That conduct must be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 563 (alterations is original) (citation omitted). Importantly, “a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

We conduct this analysis at the claim level. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press.”); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”). For each asserted claim, the named plaintiff “must always have suffered a distinct and palpable injury to himself.” *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (internal quotation marks omitted). So if no class representative has standing to bring a challenge against a defendant’s actions, then the claim fails—even if those defendants have allegedly injured other class members. See *Lewis*, 518 U.S. at 357. Put another way: “Standing cannot be acquired through the back door of a class action.” *Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring in part and dissenting in part).

Given these developments in standing doctrine, it is hard to imagine a juridical link exception to Article III standing could exist in any form. See *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62–65 (2d Cir. 2012) (rejecting the juridical link exception to standing); *contra Payton v. Conty. of Kane*, 308 F.3d 673, 680–82 (7th Cir.2002), *cert. denied sub nom., Carroll Conty. v. Payton*, 540 U.S. 812, 124 (2003) (holding that a court should decide class certification first and treat the class as the relevant entity for Article III purposes). Standing doctrine “assures that ‘there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.’” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted). “Where that need does not exist, allowing courts to oversee legislative or executive action ‘would significantly alter the allocation of power . . . away from a democratic form of government.’” *Id.* (alteration in original) (citation omitted).

In short, post-*La Mar* decisions from the Supreme Court have unequivocally closed the books on any potential “juridical link” exception to Article III standing.

EXHIBIT 2

FILED

UNITED STATES COURT OF APPEALS

OCT 14 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DANIELLE HOWARD MARTINEZ; et al.,

No. 20-56404

Plaintiffs-Appellants,

D.C. No.

v.

5:20-cv-01796-SVW-AFM

GAVIN NEWSOM, Governor; et al.,

Central District of California,
Riverside

Defendants-Appellees.

ORDER

Before: M. SMITH, LEE, and FORREST, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on it. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.