No. _____

In the

Supreme Court of the United States

LA DELL GRIZZELL,
on Behalf of Her Minor Children,

Petitioner,

v.

SAN ELIJO ELEMENTARY SCHOOL, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CARTER C. WHITE
UC DAVIS SCHOOL OF LAW
CIVIL RIGHTS CLINIC
One Shields Avenue, Bldg. TB-30
Davis, CA 95616

ERIN E. MURPHY
Counsel of Record
JOSEPH J. DEMOTT
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

Counsel for Petitioner

January 29, 2025

QUESTION PRESENTED

Since the Judiciary Act of 1789, all natural persons suing in federal court have held the right to conduct their cases "personally," i.e., *pro se*. 28 U.S.C. §1654. Nothing in the statutory text limits that right to those who are at least 18 years old. And, under Federal Rule of Civil Procedure 17 and this Court's precedents, parents have the authority to initiate litigation on behalf of their minor children and to exercise their children's procedural rights during such litigation. Nevertheless, the Ninth Circuit has adopted a judge-made rule that parents may not conduct *pro se* litigation on behalf of their children. This puts indigent children in a Catch-22: Sue with counsel, or do not sue at all. It also conflicts with decisions from other courts of appeals that have refused to bar the courthouse doors to minors whose parents cannot afford adequate representation.

The question presented is:

Whether children must retain an attorney to pursue claims in federal court, or whether their parents may instead litigate *pro se* on their behalf.

PARTIES TO THE PROCEEDING

The petitioner is La Dell Grizzell, who was plaintiff-appellant below. Ms. Grizzell is litigating this case on behalf of her three minor children, who are (pseudonymously) named plaintiffs.

The respondents are San Elijo Elementary School and San Marcos Unified School District. They were defendants-appellants below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Grizzell v. San Elijo Elementary School*, No.24A589 (U.S. Dec. 17, 2024) (order granting application to extend time to file petition for certiorari)
- *Grizzell v. San Elijo Elementary School*, No. 21-55956 (9th Cir. Aug. 7, 2024) (opinion and judgment)
- *Grizzell v. San Elijo Elementary School*, No. 3:21-cv-863 (S.D. Cal. Aug. 12, 2021) (order granting motion to dismiss)

Petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Since the earliest days of our Republic, the right to proceed *pro se* in civil suits has been enshrined in federal law. *See* Judiciary Act of 1789, ch. 20, §35, 1 Stat. 73, 92. Indeed, "[t]he Founders believed that self-representation [i]s a basic right of a free people." *Faretta v. California*, 422 U.S. 806, 830-31 & n.39 (1975). Today, that right is codified in 28 U.S.C. §1654, and it plays a vital role in ensuring access to justice. And due to the high cost of legal services and relative dearth of free legal aid, a large and growing contingent of Americans are unable to obtain legal representation and instead choose to represent themselves in federal civil litigation. *See, e.g.*, Anna E. Carpenter, *Active Judging and Access to Justice*, 93 Notre Dame L. Rev. 647, 657 (2017). In the Ninth Circuit and several other circuits, however, parents may not exercise that right when litigating on behalf of their children, and instead "must be represented by counsel" to get through the courthouse doors. App.3 (quoting *Johns v. Cnty. of San Diego*, 114 F.3d 874, 866 (9th Cir. 1997)).

That judge-made "counsel mandate" defies federal statutory and constitutional law, deprives indigent children of access to the courts, and sharply conflicts with decisions from other circuits. As the Fifth Circuit recently held, the counsel mandate "is inconsistent with" 28 U.S.C. §1654, which guarantees all natural persons—including minors—"a right to proceed *pro se*" in federal court. *Raskin ex rel. J.D. v. Dall. Indep. Sch. Dist.*, 69 F.4th 280, 282, 285 n.5 (5th Cir. 2023). Well-established principles empower "a parent [to] vindicate that right for her children, just as she can

vindicate her children's other rights." *Id.* at 287 (Oldham, J., dissenting in part and concurring in the judgment). Worse still, the counsel mandate violates parents' fundamental right to make critical decisions for their children and indigent children's fundamental right of access to the courts. *See id.* at 293-95; Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 835-36 & n.27, 860-65 (2019).

The judge-made policy that the Ninth Circuit applied below is billed as a means of protecting minors' interests. *See Johns*, 114 F.3d at 876-77. But nearly three decades of experience have shown that it actually "offers minors a Hobson's choice." *Raskin*, 69 F.4th at 294 (Oldham, J., dissenting in part and concurring in the judgment). For millions of children whose parents are unable to obtain legal representation, the imperative to "litigate [only] with counsel" effectively means "don't litigate at all." *Id.* Far from protecting these children's interests, the counsel mandate deprives them of any hope of vindicating their legal rights, effectively "forc[ing] [them] out of court altogether." *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005).

The decision below acknowledges these "grave implications for children's access to justice," App.7, yet the Ninth Circuit was unwilling to take this case en banc to address them. And while four other circuits have at least "taken a more flexible approach," App.5, most federal courts apply the same unyielding counsel mandate as the Ninth Circuit. This Court should grant certiorari to remove this unconstitutional, judge-made barrier to access to justice.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 110 F.4th 1177 and reproduced at App.1-8. The district court's opinion is unreported but available at 2021 WL 3940848 and reproduced at App.11-13.

JURISDICTION

On October 1, 2024, the Ninth Circuit denied petitioner's timely petition for rehearing en banc. App.9-10. On December 17, 2024, Justice Kagan granted petitioner's application to extend the time to file a petition for a writ of certiorari from December 30, 2024, to January 29, 2025. *Grizzell v. San Elijo Elementary School*, No.24A589 (U.S. Dec. 17, 2024). This Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISION INVOLVED

The relevant statutory provision, 28 U.S.C. §1654, is reproduced at App.26.

STATEMENT OF THE CASE

A. Factual Allegations

Petitioner enrolled her three children in San Elijo Elementary School ("San Elijo"), part of the San Marcos Unified School District ("District"), between 2014 and 2015. App.2. She did so through the McKinney-Vento Homeless Assistance Act, which guarantees "each child of a homeless individual and each homeless youth … equal access to the same free, appropriate public education … as provided to other children and youths." App.2 (second alteration in original) (quoting 42 U.S.C. §11431(1)). Each of petitioner's children was the only black student in his or her class. ER344, ER372; SER8.

The complaint alleges that all three children suffered appalling, racist mistreatment at the hands of their fellow students that the school did little to nothing to prevent. One of petitioner's children "was subjected to racial epithets on the playground." App.2. He also had a sign hung on his neck stating that he was "for sale," in the direct view of a teacher. App.2; *see* App.15-16. "[W]hite students slapped another of [petitioner's] children in the face with a lunch box, threw her food in the trash, and told her 'black people are trash.'" App.2. The school district did not take serious action to remedy this discrimination; to the contrary, its "staff made discriminatory comments" toward petitioner's children and took "disparate disciplinary measures" against them. App.2. For example, one of the children's teachers stated that "certain demographics come to school not properly fed," ER341, and San Elijo's vice principal opined that petitioner's children "did not belong at his school," SER7.

B. Procedural History

1. After years of informal appeals to the school, petitioner filed a *pro se* complaint on her children's behalf in the Southern District of California on May 4, 2021. Just ten days later, the District sent her an Orwellian letter informing her of its decision to disenroll all three children over her objection. App.19-25. The District expressly declined to find that petitioners' children no longer qualified as "Homeless Youth" under McKinney-Vento; instead, the District unilaterally determined—despite a contrary statutory presumption—that "continued enrollment" was "not in [their] best interests." App.24. Petitioner promptly

amended the complaint to challenge the disenrollment.

Instead of addressing petitioner's alarming charges on the merits, the District moved to dismiss the lawsuit on various procedural grounds; as relevant here, it argued that because petitioner is not an attorney, she cannot bring a lawsuit on behalf of her minor children without first retaining counsel to litigate the case. ER186-87. Petitioner responded by arguing that, as a parent, she "has the capacity to file suit on behalf of her minor children," as she is the "primary [person] responsible" for "protect[ing]" their rights. ER107. She further argued that denying her the opportunity to "proceed in court unrepresented by counsel" on her children's behalf "would violate the constitutional rights of [both] parent and child." ER102.

The district court held a hearing on the motion, which lasted for all of nine minutes. App.14-18. The court began by telling petitioner in no uncertain terms: "Before the Court can do anything … you need to have counsel." App.14. The court proceeded to explain that the Ninth Circuit's decision in the *Johns* case flatly prohibits parents from proceeding *pro se* when bringing lawsuits on behalf of their children. App.15-18; *see also* App.12-13 (citing *Johns*, 114 F.3d 874); App.15 ("Those are just the rules. I can't work around the rules. I can't change those rules."). The court maintained that it was not "just ignoring" the Grizzells' allegations, which it described as "serious." App.16. It nevertheless dismissed the complaint "because of the lack of counsel, nothing to do with the merits." App.18. The court's order of dismissal gave

petitioner a brief window during which to file a second amended complaint. App.11-13. Petitioner attempted to find legal representation before her deadline to refile, but she was unable to do so.

2. Petitioner timely appealed and was granted permission to proceed *in forma pauperis*. App.3. Notwithstanding *Johns*, a Ninth Circuit panel determined that the appeal "involves non-frivolous issues," CA9.Dkt.11, and appointed undersigned counsel to represent petitioner on appeal. App.3. "[B]ound by the rule set forth in *Johns*"—i.e., "a parent may not proceed *pro se* on her children's behalf"—however, the panel had no choice but to affirm. App.7.

Despite affirming, the decision below is hardly a ringing endorsement of the counsel mandate. To the contrary, the Ninth Circuit acknowledged that the case "raises concerns with grave implications for children's access to justice." App.7. And, after briefly restating (without endorsing) *Johns*' rationale for the counsel mandate, App.3-4, the court acknowledged the force of petitioner's arguments "that the *Johns* rule is inconsistent with a child's statutory right to proceed 'personally' under 28 U.S.C. §1654, with a child's fundamental right of access to court and equal protection rights, and with parental rights regarding the care, custody, and control of children." App.4. The court further observed that the counsel mandate risks "mak[ing] 'the perfect the enemy of the good,'" by "foreclosing paths to relief for children from low-income families whose options are representation by a *pro se* parent or no legal recourse at all." App.4-5. Notably, the court offered no basis for rejecting these

arguments except that it was bound by a prior decision that did not even address them. *See* App.4-7.

The Ninth Circuit also acknowledged that its absolute bar on *pro se* parent representation conflicts with the "more flexible approach" that "other circuits have taken" in multiple cases. App.5. "[M]ost notably," the Fifth Circuit has "held that 'an absolute bar on *pro se* parent representation is inconsistent with § 1654.'" App.6 (quoting *Raskin*, 69 F.4th at 282). The Seventh Circuit has likewise rejected the Ninth Circuit's approach, holding that the counsel mandate "is 'not ironclad," and should be applied only insofar as it "protect[s] the rights of" minor children. App.6 (quoting *Elustra v. Mineo*, 595 F.3d 699, 706 (7th Cir. 2010)). The Second Circuit has similarly observed "that an unyielding application" of the "counsel mandate" threatens to "'force minors out of court altogether' where 'counsel is as a practical matter unavailable.'" App.6 (quoting *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005)). And the Second, Fifth, and Tenth Circuits have all "relaxed" the counsel mandate "in the context of appeals from the denial of [Supplemental Security Income] benefits." App.5-6 (citing *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1299-1301 (10th Cir. 2011); *Machadio v. Apfel*, 276 F.3d 103, 106-07 (2d Cir. 2002); *Harris v. Apfel*, 209 F.3d 413, 414-17 (5th Cir. 2000)).

Despite the court's discussion of the constitutional and statutory problems with the Ninth Circuit's counsel mandate, App.4-5; its recognition that the Ninth Circuit's approach is at odds with that of at least four of its sister circuits, App.5-6; and its

conclusion that the matter has "grave implications for children's access to justice," App.7, petitioner's timely request for rehearing was denied.

REASONS FOR GRANTING THE PETITION

Whether a parent may litigate her children's claims *pro se* is a frequently recurring issue "with grave implications for children's access to justice." App.7. Federal law gives the Grizzell children the unequivocal right to proceed *pro se* and empowers petitioner to exercise that right on her children's behalf. Under Ninth Circuit precedent, however, petitioner cannot file suit on behalf of her children unless she first retains an attorney. That counsel mandate defies both statutory and constitutional law, and it produces the untenable result of depriving the Grizzells and countless other indigent families of any realistic way to access the federal courts. For precisely that reason, several other circuits have rejected or cabined the counsel mandate rule. Yet the Ninth Circuit declined the opportunity to reconsider its rule notwithstanding an en banc petition filed by court-appointed counsel, and several other circuits continue to follow the Ninth Circuit's hardline approach. This Court should grant certiorari to resolve that circuit split and protect indigent minors' access to the courts.

I. The Ninth Circuit's Decision Defies Clear Statutory Text And Violates Well-Established Constitutional Rights.

A. The Counsel Mandate Contravenes 28 U.S.C. §1654, Which Guarantees the Right to Litigate *Pro Se* in Civil Cases.

The right of self-representation in civil cases "is both ancient and deeply rooted in American law and

history." *Raskin*, 69 F.4th at 299 (Oldham, J., dissenting in part and concurring in the judgment); *see id.* at 290-92. "The Founders believed that self-representation [i]s a basic right of a free people," *Faretta*, 422 U.S. at 830 n.39, and the First Congress enshrined that right in the Judiciary Act of 1789, 1 Stat. 73, 92. *See Iannaccone v. Law*, 142 F.3d 553, 556-58 (2d Cir. 1998). The right of *pro se* access to the courts is thus "a right of high standing, not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata of a particular case." *O'Reilly v. N.Y. Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982).

The civil right to sue personally took on special force in Reconstruction, and so has particular significance for black Americans bringing claims to remedy racist wrongs. Section 1 of the Civil Rights Act of 1866, in a direct response to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), expressly included provisions regarding capacity to sue, guaranteeing "the same right, in every State and Territory in the United States … *to sue* … as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27, 27 (emphasis added); *see* Akhil Reed Amar, *Women and the Constitution*, 18 Harv. J.L. & Pub. Pol'y 465, 468 (1994) (explaining that the basic "civil rights" protected by the Fourteenth Amendment included equal rights in the capacity "to sue and be sued"). That is because "[t]he right to sue and defend in the courts … is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

Today, "[t]he right to proceed *pro se* in civil actions in federal courts is guaranteed by 28 U.S.C. §1654." *Iannaccone*, 142 F.3d at 556. The statute provides, in relevant part, that "[i]n all courts of the United States the parties may plead and conduct their own cases *personally* or by counsel." 28 U.S.C. §1654 (emphasis added). As the Fifth Circuit recently held, this statutory right belongs to adults and minors alike. *Raskin*, 69 F.4th at 285 n.5. After all, "[n]othing in §1654 limits the right to proceed 'personally'—that is, *pro se*—to those who are at least 18 years old." *Id.* at 292 (Oldham, J., dissenting in part and concurring in the judgment).

Of course, "children usually lack the capacity" to "decide how best to protect [their] interests," so they are "ordinarily represented in litigation by parents or guardians." *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977). While questions about who counts as a minor or incompetent person are resolved by applying state law, *see* Fed. R. Civ. P. 17(b), no such questions are presented here; the Grizzell children undisputedly lack capacity to sue under California law (and would lack capacity under the law of any other state). ER5-6, ER321-22; *see* Cal. Fam. Code §§6500, 6601; 43 C.J.S. *Infants* §398 (May 2024 update). Given the children's lack of capacity, Federal Rule of Civil Procedure 17(c) authorizes their mother—petitioner—to sue on their behalf. ER6, ER13.

A parent who "sue[s] or defend[s] on behalf of" her minor child in federal court has full power to conduct the litigation. Fed. R. Civ. P. 17(c); *accord* Cal. Fam. Code §6601 ("A minor may enforce the minor's rights

by civil action or other legal proceedings in the same manner as an adult, except that a guardian must conduct the action or proceedings."). As an initial matter, the parent has "the right to decide whether to proceed with the prosecution of a civil lawsuit by weighing the attendant costs and benefits." *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 67 (1st Cir. 2008); *see K. G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020). Indeed, statutes of limitations generally apply to minors—despite their lack of capacity—precisely because "parents and guardians are assumed to be adequate surrogates" who are "responsible for initiation of suit in a timely manner." *Booth v. United States*, 914 F.3d 1199, 1205-06 (9th Cir. 2019).

Once a lawsuit is commenced, the parent "is authorized to act on behalf of [her child] and may make all appropriate decisions in the course of specific litigation." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986); *accord Hull ex rel. Hull v. United States*, 53 F.3d 1125, 1126-27 (10th Cir. 1995). For example, the parent "may make binding contracts for the retention of counsel and expert witnesses" on the child's behalf. *30.64 Acres of Land*, 795 F.2d at 805. Parents may exercise—or waive—their children's constitutional and statutory rights, including the Seventh Amendment right to a jury trial. *See, e.g.*, *Thomas v. Nationwide Child.'s Hosp.*, 882 F.3d 608, 615 (6th Cir. 2018); *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773, 776-77 (8th Cir. 2006); *Callahan v. Woods*, 658 F.2d 679, 682 n.2 (9th Cir. 1981); *Black v. Missouri*, 492 F.Supp. 848, 868 (W.D. Mo. 1980). Parents also have the power to settle their children's claims (subject to judicial

approval) or dismiss them altogether. *See Robidoux v. Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011); *Planned Parenthood Ass'n of Atl. Area, Inc. v. Miller*, 934 F.2d 1462, 1480 (11th Cir. 1991). In short, a parent is empowered to wield *all* a minor child's rights when conducting litigation on the child's behalf.

The "right to litigate *pro se* in federal court" is no exception. *Raskin*, 69 F.4th at 287 (Oldham, J., dissenting in part and concurring in the judgment). Indeed, it is well established that children do not forfeit other rights that ordinarily must be asserted "personally" just because they cannot litigate independently. For example, "Fourth Amendment rights are personal rights that 'may not be vicariously asserted,'" *United States v. Baker*, 58 F.4th 1109, 1116 (9th Cir. 2023), yet children routinely bring Fourth Amendment claims through a parent. *See, e.g.*, *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356 (1990); *Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 n.6 (10th Cir. 1999). The same goes for statutory rights that can be exercised only by "the party in his own person, and not by agent or attorney," such as the change-of-venue procedure discussed in *In re Moore*, 209 U.S. 490, 499 (1908), *abrogated on other grounds by Ex parte Harding*, 219 U.S. 363 (1911). In *Moore*, this Court ratified the Missouri Supreme Court's conclusion that a "next friend" may exercise "person[al]" rights on behalf of an "infant," explaining that the next friend is no mere agent but a stand-in principal possessing "authority to do every act which the interest of the infant demands and the law authorizes." *Id.* (quoting *Raming v. Metro. St. Ry. Co.*, 57 S.W. 268, 275 (Mo. 1900)). After all, it would be "rank injustice" to deny procedural rights to children

merely because they "are unable to act for themselves." *Id.*

Simply put, "federal law gives [petitioner's] minor children the unequivocal right to 'conduct their own cases personally,' 28 U.S.C. §1654," and petitioner "can vindicate that right for her children, just as she can vindicate her children's other rights." *Raskin*, 69 F.4th at 287, 293 (Oldham, J., dissenting in part and concurring in the judgment). Yet the Ninth Circuit has nullified that centuries-old right for tens of millions of minors without even meaningfully addressing §1654. That alone warrants this Court's intervention.

B. The Counsel Mandate Violates Parents' and Children's Constitutional Rights.

The counsel mandate also suffers from multiple constitutional problems. First, the mandate tramples parents' "fundamental liberty interest[]" in "the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). That parental interest encompasses the right to decide whether—and on what terms—a minor child will exercise "[t]he right to sue," which "is one of the highest and most essential privileges of citizenship." *Chambers*, 207 U.S. at 148. After all, "the choice to retain counsel (or proceed pro se)" is "not only a litigation decision," but an expressive, values-driven "parenting choice" about "how (or whether) to allocate limited family resources to vindicate children's legal interests." Martin, *supra*, at 872.

The counsel mandate usurps this parental prerogative by imposing an irrebuttable presumption that it is *never* "in the interest of minors" to sue

without "trained legal assistance." *Johns*, 114 F.3d at 876-77. Even leaving aside the substantive problems with that presumption, *see infra* pp.15-20, the Constitution does not permit courts to "infringe on the fundamental right of parents to make child rearing decisions simply because a … judge believes a 'better' decision could be made." *Raskin*, 69 F.4th at 295 (Oldham, J., dissenting in part and concurring in the judgment) (quoting *Troxel*, 530 U.S. at 72-73 (plurality)); *see also Parham v. J. R.*, 442 U.S. 584, 604 (1979) (observing that "federal courts" are not well-equipped to review the wisdom of "parental decisions").

The counsel mandate also abridges indigent minors' constitutionally protected right to assert legal claims. It is well established that "the right of access to the courts" is a "basic constitutional guarantee[], infringements of which are subject to more searching judicial review." *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004). Applying that principle, this Court has repeatedly invalidated measures that limit "access to judicial processes" for indigent individuals "while leaving open avenues … for more affluent persons." *Mendoza v. Strickler*, 51 F.4th 346, 355 (9th Cir. 2022); *see, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (record-preparation fee for civil appeal); *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971) (divorce filing fees). That is precisely what the counsel mandate does: It "excludes indigent children from federal courts and deters parents from filing meritorious claims on their children's behalf," regardless of the nature of the child's claim or whether it will expire before the child comes of age. Martin, *supra*, at 836.

Furthermore, the counsel mandate violates the constitutional rights of *all* minors and mentally incompetent persons. As this Court recognized in *Moore*, "deny[ing] to infants" a procedural right afforded to all "other litigants"—simply because infants "are unable to act for themselves"—creates a "serious" equal protection problem. 209 U.S. at 499. And the problem is especially acute here because the right at issue is no mere "application for a change of venue," *id.*, but "a basic right of a free people," *O'Reilly*, 692 F.2d at 867.

C. None of the Proffered Rationales for the Counsel Mandate Withstands Scrutiny.

While the decision below acknowledged these constitutional and statutory arguments, it did not meaningfully engage with (much less identify any flaw in) them. The court instead deemed itself bound by the judge-made policy that the Ninth Circuit announced in *Johns*. Yet *Johns* did not address any of these arguments either, and the court could not bring itself to endorse what little reasoning *Johns* did offer, presumably because it is clearly wrong.

1. The core premise of *Johns* is that when minors "have claims that require adjudication, they are *entitled* to trained legal assistance so their rights may be fully protected." 114 F.3d at 877 (emphasis added); *see also Jie Lin v. Ashcroft*, 377 F.3d 1014, 1025 (9th Cir. 2004) ("[T]he right of minors to competent counsel is so compelling that we have joined other circuits in holding that a 'guardian or parent cannot bring a lawsuit on behalf of a minor in federal court without retaining a lawyer.'" (citing *Johns*)). That is a commendable aspiration, but it is not the law: Minors

"ha[ve] no right to counsel in civil actions," and courts will not appoint counsel for an indigent minor absent "exceptional circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009); *see Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 25-27 (1981).

The Ninth Circuit's fallacious reasoning rears its head when children attempt to take a court up on their purported "entitlement" to counsel. In *Duarte v. Figueroa*, 2006 WL 708994 (N.D. Cal. Mar. 21, 2006), for example, the court concluded that appointment of counsel was "not required" because the claims at issue were "not complex" and the *pro se* plaintiff parent had adequately framed the issues for the court thus far. *Id.* at *2. But in *the very next sentence*, the court concluded that it had to dismiss the case for lack of counsel because, under *Johns*, "[p]laintiff cannot represent his minor son in this action." *Id.* The father was thus deemed too competent to meet the high bar for court-appointed representation, yet barred from continuing to litigate *pro se* on his child's behalf.

Nor can indigent minors readily obtain *pro bono* representation; to the contrary, "'[t]here is a dearth of legal services available' in this country 'to meet the legal needs of those who cannot afford to pay.'" *Raskin*, 69 F.4th at 286. Recent studies show that "[l]ow-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems." Legal Servs. Corp., *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* 7 (April 2022), https://tinyurl.com/4nkxm6zn ("*Justice Gap*"). Unable to hire an attorney or obtain free legal services, "a substantial portion of families" simply cannot comply with the counsel mandate because they

are not lucky enough to win the pro bono lottery. *Raskin*, 69 F.4th at 286. The counsel mandate thus leaves child plaintiffs at the mercy of their parent's fortunes—in both senses of the word.

In light of that reality, the "Hobson's choice" to "litigate with counsel, or don't litigate at all" operates as a lock on courthouse doors for under-resourced minors. *Raskin*, 69 F.4th at 294 (Oldham, J., dissenting in part and concurring in the judgment); *see* Martin, *supra*, at 833 ("[F]ederal courts routinely dismiss children's claims for lack of counsel in the name of protecting children's interests, leaving some of the most vulnerable patrons of the justice system without legal remedies"); Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1804 (2001) ("[C]ourts have failed to address the effects of their own procedural choices in obstructing access to justice … [including] barriers to self-representation … created by the judiciary's own rules and practices."). The Ninth Circuit's counsel mandate thus "force[s] minors out of court," *Raskin*, 69 F.4th at 286—no matter how meritorious their claims—leaving "some of the most vulnerable patrons of the justice system without legal remedies." Martin, *supra*, at 833, 855.

There is a better way. "[G]iving everyone a lawyer is an impossible dream[;] less expensive pro se court reform is far more feasible." Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 971 (2012). Indeed, "we already live on a *pro se* planet," *Raskin*, 69 F.4th at 286, in which *pro se* litigants are commonplace, and when those litigants have meritorious claims—even if that may be less

common than it is for counseled plaintiffs—it is fully within their power to sue, to litigate, and to win. *See* Rebecca L. Sandefur, *Access to What?*, 148 Dædalus 49, 52 (Winter 2019) ("Across a number of common justice problems … nonlawyer advocates and unrepresented lay people have been observed to perform as well or better than lawyers."); Anthony Lewis, *Gideon's Trumpet* (1964) (detailing Clarence Earl Gideon's path to the Court through a *pro se* petition for certiorari).

Undoubtedly, *pro se* parent suits leave an active role for the courts, both because they involve minors and because they are conducted *pro se*. Unsurprisingly, such protections are already built into the structure of federal and state law. Court approval is generally required to settle a minor's claim, *see, e.g.*, *Robidoux*, 638 F.3d at 1181; courts have a duty to ensure no substantial rights are forfeited by a child's guardian absent corresponding benefits, *see, e.g.*, *De Los Santos v. Superior Court*, 613 P.2d 233, 237 (Cal. 1980); *cf.* Fed. R. Civ. P. 55(b)(2) (special court review of proposed default judgments against minors); and courts may replace a parent with an impartial guardian if the parent's interests conflict with the child's interests, *see, e.g.*, *Hull*, 53 F.3d at 1126-27. *Pro se* litigants are entitled to aid from the court in facilitating their suits, most notably through the familiar rule that "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). And in appropriate cases, a court can appoint counsel if a *pro se* party is amenable. *See*

Agyeman v. Corr. Corp. of Am., 390 F.3d 1101, 1103 (9th Cir. 2004). These rules are more than up to the task of protecting children's interests and promoting just, efficient resolution of their disputes without barricading the courthouse doors to keep *pro se* parents out.

2. The Ninth Circuit's next justification for the counsel mandate—that a child whose parents cannot afford counsel can "pursue his cause of action when he reaches eighteen," *Johns*, 114 F.3d at 878—adds insult to juridical injury. For one thing, the statute of limitations for many causes of action does not toll during infancy. Indeed, the default rule is that the limitations period does *not* toll unless "express language" in the statute so provides. *Vance v. Vance*, 108 U.S. 514, 521 (1883); *see, e.g.*, *Booth*, 914 F.3d at 1205 (no tolling during infancy for claims under Federal Tort Claims Act because "[f]ederal courts have consistently applied *Vance*, following minority tolling for federal statutes of limitations only if the statute setting out the limitations period so specifies"). The *Johns* court tacitly recognized this when, in a footnote, it contended that causes of action "often" provide for tolling. 114 F.3d at 878 n.2. It nonetheless opted to "express no opinion" even on the causes of action at issue *before it in that very case*, apparently because it thought resolution of that question could wait until the plaintiff child was 18 (when, of course, it might already be too late). *Id.*

For another thing, many claims merit not just damages, but also injunctive relief. That is true of petitioner's claims here, which seek not only damages but also reversal of the District's unilateral

disenrollment of her three minor children, over her objection and in violation of the McKinney-Vento Act. *See also, e.g.*, *Warner v. Sch. Bd. of Hillsborough Cnty.*, 2024 WL 2053698, at *1 (11th Cir. May 8, 2024) (raising challenge to school-district-boundary drawing that will become moot by the time the minor plaintiff finishes high school), *petition for writ of certiorari filed*, No. 24-718 (U.S. Jan. 2, 2025). By definition, a yearslong delay in justified injunctive relief—after which disputes are often moot, sovereign defendants are immune from paying damages, and irreparable harms have long ago been suffered—cannot be rectified *ex post*. Yet the Ninth Circuit has not made any serious effort to reconcile its counsel mandate with "one of the basic principles of our legal system—justice delayed is justice denied." *Dietrich v. Boeing Co.*, 14 F.4th 1089, 1095 (9th Cir. 2021).

3. The Ninth Circuit's remaining rationales are weaker still. According to *Johns*, "[t]he choice to appear pro se is not a true choice for minors" because they "cannot determine their own legal actions." 114 F.3d at 876. But that is true of *every* litigation decision. It is parents' job to make those decisions on their children's behalf even when they *are* represented by counsel, and courts are "require[d] … to honor" parents' choices. *Raskin*, 69 F.4th at 293 (Oldham, J., dissenting in part and concurring in the judgment); *see Smith*, 431 U.S. at 841 n.44; *Parham*, 442 U.S. at 602. There is no valid reason why the decision to proceed *pro se* "'should be set apart from all other choices routinely reserved to children's legal representatives,' like 'whether, when, and where to bring suit, what claims to advance, what information to disclose, and

whom to sue.'" *Raskin*, 69 F.4th at 293 (Oldham, J., dissenting in part and concurring in the judgment).

Johns' attempt to analogize minors to corporations, trusts, and other entities that may sue and be sued only through counsel, *see* 114 F.3d at 877 (citing *C.E. Pope Equity Tr. v. United States,* 818 F.2d 696, 697 (9th Cir. 1987)), also misses the mark. It is well settled that the right to proceed *pro se* belongs to "natural persons"—and "natural persons only." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 202-03 (1993); *see Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 830 (1824). Children accordingly possess that right, while corporate entities do not. The counsel mandate improperly creates "a special class of litigants"—unique among natural persons—who cannot litigate "without engaging professional counsel to do so for them." *Tindall*, 414 F.3d at 285-86 (questioning the validity of this approach).

In sum, the counsel mandate flouts 28 U.S.C. §1654, tramples on the constitutional rights of parents and children alike, and lacks any plausible policy rationale.

II. The Ninth Circuit's Decision Conflicts With Decisions From Several Other Circuits.

The decision below not only is profoundly flawed, but implicates an entrenched division of authority among the circuits. The federal circuits are firmly split on whether and to what extent parents may litigate *pro se* on their children's behalf. And, as this case makes clear, courts of appeals are unwilling to reconsider their thinly reasoned precedents en banc—even in the rare case where the application of the counsel mandate is appealed in the teeth of binding

precedent and the court goes to the trouble of appointing appellate counsel and holding oral argument. *See* App.9-10; Order, *Warner*, No. 23-12408 (11th Cir. Sept. 4, 2024), Dkt.49 (denying petition for en banc review of counsel mandate). Only this Court can resolve the lower courts' disagreement and eliminate the serious access-to-justice problem they have created.

1. As the decision below observes, at least four other circuits have rejected the Ninth Circuit's hardline approach. Most recently, in *Raskin*, the Fifth Circuit held that "an absolute bar on *pro se* parent representation is inconsistent with [28 U.S.C.] §1654." *Raskin*, 69 F.4th at 282; *accord id.* at 294 (Oldham, J., dissenting in part and concurring in the judgment). The Fifth Circuit expressly rejected contrary "authority from other circuits"—including the Ninth—that have adopted a rigid counsel mandate, explaining that cases like *Johns* do not "fully account[] for" the statutory text. *Id.* at 285 & n.7. And while the *Raskin* panel was divided on the extent of what §1654 permits—the majority concluded that it allows parents to litigate their children's claims *pro se* when "federal or state law designates [those] claims as [the parent's] 'own,'" *id.* at 286, while Judge Oldham concluded that parents may vindicate their children's right to proceed *pro se*, "just as [they] can vindicate [their] children's other rights," *id.* at 287—the panel unanimously agreed that that minors "have a right to proceed *pro se* under §1654." *Id.* at 285 n.5 (majority); *accord id.* at 292 (Oldham, J., dissenting in part and concurring in the judgment).

The Ninth Circuit's unyielding approach also conflicts with cases from the Second, Seventh, and Tenth Circuits, each of which has held that the counsel mandate "is not ironclad." *Adams ex rel. D.J.W.*, 659 F.3d at 1300 (quoting *Elustra*, 595 F.3d at 705); *accord Tindall*, 414 F.3d at 285 (counsel mandate "is not … absolute"). In *Murphy v. Arlington Central School District Board of Education*, for example, the Second Circuit acknowledged that the district court had clearly violated the counsel mandate by allowing parents to proceed *pro se* in an action in the name of their minor son. 297 F.3d 195, 201 (2d Cir. 2002). But the court nonetheless declined to enforce the rule on appeal because it would not be "in the best interest of [the minor] to vacate an injunction that inures to his benefit so that he may re-litigate [the] issue below with licensed representation in order to re-secure a victory already obtained." *Id.* And in *Elustra*, the Seventh Circuit likewise found "flexibility in the general rule" and permitted consideration of a motion filed by a parent during a month-long window when neither the parent nor the child had counsel. 595 F.3d at 705-06. "[O]verrid[ing] that action" and striking the motion, the court recognized, would "subvert[] the purpose of the rule" (which is, of course, to protect minors). *Id.* at 706.

Courts on this side of the split have also concluded that the counsel mandate need not be enforced where "the reasons for [it] do not apply," which is virtually always true in appeals from the denial of Supplemental Security Income ("SSI") benefits. *Adams ex rel. D.J.W.*, 659 F.3d at 1300 (quoting *Harris*, 209 F.3d at 416). As the Tenth and Fifth Circuits have explained, SSI appeals typically involve

"a minor child living in a low-income family" who "usually cannot exercise the right to appeal *except* through a parent or guardian." *Id.* (quoting *Harris*, 209 F.3d at 416). And because SSI appeals involve relatively straightforward review of an administrative record, they generally "are not subject to abuse" and allow "minors' rights [to] be fully protected" by a non-attorney parent who "me[ets] the basic standard of competence." *Id.* at 1300-01. The Second Circuit has reached the same conclusion, holding that to apply the counsel mandate in SSI cases "would unfairly penalize the children seeking SSI benefits" for their parents' financial inability "to hire counsel." *Machadio*, 276 F.3d at 107.

2. On the other side of the split, six circuits (including the Ninth) adhere to an unyielding counsel mandate. *See Osei-Afriyie v. Med. Coll.*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 401 & n.7 (4th Cir. 2005); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002); *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882 (8th Cir. 2020); *Devine v. Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997), *overruled in part on other grounds by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).[1] Moreover, the Eleventh Circuit, like the Ninth Circuit, reaffirmed that position within the past year. Order, *Warner*, No. 23-12408 (11th Cir. Sept. 4, 2024), Dkt.49.

---

[1] The Fourth Circuit and the Eighth Circuit have signaled, in dicta, that they might carve out an exception for SSI cases. *See Crozier for A.C.*, 973 F.3d at 887-88; *Myers*, 418 F.3d at 401 n.7.

These cases largely rest on the same unpersuasive policy rationales discussed above. The Third Circuit has asserted that "[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys"—but ignored the reality that many minors face a choice between non-attorney representation or no representation at all. *Osei-Afriyie*, 937 F.3d at 883. The Fourth Circuit has opined that the counsel mandate "ensures th[at] children's interests are not prejudiced by their well-meaning, but legally untrained parents." *Myers*, 418 F.3d at 401. And the Eleventh Circuit has likewise averred that barring parents from "bring[ing] a *pro se* action on their child's behalf" will "ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents." *Devine*, 121 F.3d at 582.

To the extent courts on this side of the split have engaged with 28 U.S.C. §1654 at all, they have stated (with little analysis) that the statute "does not permit plaintiffs to appear *pro se* where interests other than their own are at stake." *Shepherd*, 313 F.3d at 970; *see Myers*, 418 F.3d at 400. That rule is unmoored from the statutory text, which provides that "parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. §1654. "Nothing in §1654 limits the right to proceed 'personally'—that is, *pro se*—to those who are at least 18 years old." *Raskin*, 69 F.4th at 299 (Oldham, J., concurring in part and dissenting in part). And it makes no sense to say that parents can litigate their minor children's cases *pro so* only if the claims are the parent's "own," as the phrase "their own" modifies both "personally" and "by counsel." *Id.* at 292. The only reasonable reading of

the statute is that parent-representatives may plead and conduct their children's cases either personally or through counsel. *Id.*

In short, the decision below squarely implicates an entrenched circuit split over the extent to which parents may litigate their children's claims *pro se*. This Court should grant certiorari and end the ongoing division in the courts of appeals on this important and recurring question.

III. The Question Presented Is Important, And This Is An Excellent Vehicle To Resolve It.

No issue should be more important to a court than who may access it. "American society … bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts … that we ultimately look[.]" *Boddie*, 401 U.S. at 375. Courts are charged with "[p]roviding equal justice for poor and rich, weak and powerful alike." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). The first, absolute minimum step toward achieving that end is not to turn away the poor at the courthouse door. The Ninth Circuit nevertheless precludes *pro se* suits not because guardians lack the means, the will, or the dedication to vindicate their children's legal rights, but simply because they cannot afford an attorney.

That draconian result has immense importance for all Americans, but especially for plaintiffs like petitioner and her three children. Petitioner alleges that her children faced appalling, racist mistreatment with the tacit acceptance—or even involvement—of their school and school district. *See* App.2-3. She

spent countless hours communicating her concerns to the District, only to have all three children "disenrolled," over her objection—ten days after she filed this lawsuit—based on the District's unilateral assessment of their "best interests." App.19-24. And because of the counsel mandate, she has been forced to spend countless more hours fighting just so that her children can have their day in court. And data shows the counsel mandate presents similar obstacles for millions of other Americans. The vast majority of poor Americans cannot obtain adequate legal assistance, *see Justice Gap*, *supra* at 7, and more than a quarter of all civil cases have involved at least one pro se party in recent years, *see Raskin*, 69 F.4th at 286. Professor Martin's research has identified more than 500 cases enforcing the counsel mandate—and that is likely just the tip of the iceberg, given the mandate's deterrent effect on potential litigants. *See Martin*, *supra*, at 839 n.45.

The implications are hard to overstate. To give just a few examples: John and Mary Beth Tinker brought their suit for an injunction against their Des Moines school's black-armband policy through their father, Leonard. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F.Supp. 971 (S.D. Iowa 1966), *rev'd*, 393 U.S. 503 (1969). Mark Howlett's suit against his school superintendent for an allegedly unlawful search of his car was initiated by his mother, Elizabeth. *See Howlett*, 496 U.S. 356. A Snapchat-using cheerleader critical of her school filed suit through her parents, Lawrence and Betty Lou Levy. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S.Ct. 2038 (2021). Under the Ninth Circuit's counsel mandate, if any of these plaintiffs had been unable to

obtain counsel—as the vast majority of low-income people cannot—their cases never could have been brought at all, let alone reached this Court. That flies in the face of the principle that everyone, including *pro se* parties, deserves their day in court. The right of a poor American to file a lawsuit is not supposed to be subject to the whims of the *pro bono* bar. Yet that is precisely the system the counsel mandate has created.

This case is an excellent vehicle for resolving the question presented. The district court dismissed the Grizzell children's claims solely "because of the lack of counsel, nothing to do with the merits." App.18; *accord* App.12-13. Petitioner properly preserved her challenge the counsel mandate at every opportunity, and the propriety of the mandate was thoroughly litigated in the Ninth Circuit with the assistance of court-appointed appellate counsel; indeed, it is the only issue discussed in the Ninth Circuit's published opinion. *See* App.1-8. Moreover, despite the frequency with which this issue arises, it is not every day that it is litigated all the way up to this Court; in the vast majority of cases, children confronted by the counsel mandate will either find an attorney or never proceed with their claims at all. This Court should therefore seize the opportunity presented by this petition (and the pending petition in *Warner*) to resolve whether federal courts may prohibit parents from exercising their children's right to proceed *pro se*.

* * *

In sum, the unyielding counsel mandate that the Ninth Circuit applied below is egregiously wrong, as underscored by the court's conspicuous failure to offer a justification for it or to address (much less refute)

petitioner's constitutional and statutory arguments. The counsel mandate nullifies minors' statutory right to proceed *pro se*, 28 U.S.C. §1654; abridges parents' fundamental right to care for and control their own children; raises serious equal protection problems; and deprives countless children like the Grizzells of any opportunity to assert legal claims, no matter how meritorious, simply because lawyers are expensive and their family cannot afford to hire one. The Ninth Circuit's approach is at odds with more flexible approaches taken by at least four other circuits, not to mention Judge Oldham's well-reasoned dissent in *Raskin*. This Court should intervene to resolve that circuit split, give effect to the plain meaning of §1654, protect fundamental rights, and make clear that indigent children deserve equal access to justice.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

CARTER C. WHITE
UC DAVIS SCHOOL OF LAW
CIVIL RIGHTS CLINIC
One Shields Avenue, Bldg. TB-30
Davis, CA 95616

ERIN E. MURPHY
Counsel of Record
JOSEPH J. DEMOTT
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

Counsel for Petitioners

January 29, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55956

LA DELL GRIZZELL,

Plaintiff-Appellant,

JOHN DOE, Minor #1; Minor #2, Minor #3,

Plaintiff,

v.

SAN ELIJO ELEMENTARY SCHOOL; SAN MARCOS UNIFIED SCHOOL DISTRICT,

Defendants-Appellees.

Argued: July 18, 2024
Filed: August 7, 2024

Before: Kim McLane Wardlaw, Richard A. Paez, and Gabriel P. Sanchez, Circuit Judges

---

OPINION

WARDLAW, Circuit Judge:

La Dell Grizzell, acting on behalf of her minor children, sued the San Elijo Elementary School and the San Marcos Unified School District, alleging that the school violated the federal and state civil rights of her children. The district court dismissed the action

without prejudice because of our long-established rule, dubbed the "counsel mandate," that precludes Grizzell, as a nonlawyer, from representing her children *pro se* in pursuing their claims. Grizzell appeals the order dismissing her children's claims. For the reasons that follow, we affirm.

I. BACKGROUND

La Dell Grizzell enrolled her children in San Elijo Elementary School, a part of the San Marcos Unified School District, under the McKinney-Vento Homeless Assistance Act, a federal law designed to ensure that "each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths." 42 U.S.C. § 11431(1). Grizzell's *pro se* complaint alleges that her children faced racial discrimination and other civil rights violations while enrolled at San Elijo.

According to the amended complaint, one of the Grizzell children was subjected to racial epithets on the playground; white students slapped another of the Grizzell children in the face with a lunch box, threw her food in the trash, and told her "black people are trash"; a "for sale" sign was placed around one of the Grizzell children's necks during drama class; teachers and staff made discriminatory comments, employed disparate disciplinary measures toward the Grizzell children, and engaged in other forms of "discrimination, retaliation, conspiracy, [and] abuse of power"; and ultimately, the school unlawfully unenrolled all of the Grizzell children. The *pro se* complaint lists 40 claims, including claims under the Equal Protection and Due Process Clauses of the

Fourteenth Amendment, Title IV and Title VI of the Civil Rights Act of 1964, and several other federal and state education laws.

Grizzell sought to proceed without counsel before the district court. The district court held an initial hearing in which the court explained that "before the Court can do anything on the merits," Grizzell "need[ed] to have counsel." Acknowledging that "there may be some very serious allegations here," the district court explained that no matter how meritorious a suit might be, "[a] person can represent themselves, but you cannot represent others, including your own children." Following the hearing, the district court entered an order dismissing the complaint in its entirety because "Ms. Grizzell concedes that this lawsuit only concerns claims of her children." The district court instructed that "[i]f the minor plaintiffs wish to proceed with their claims, they may do so only through an attorney licensed to practice in this court." Grizzell appealed and was granted permission to proceed *in forma pauperis*. With the benefit of court-appointed pro bono counsel, she challenges the district court's dismissal of her children's claims.

II. ANALYSIS

Grizzell contends that she should be permitted to advance her children's claims *pro se*. Our binding precedent forecloses her from doing so.

In *Johns v. County of San Diego*, we held that "'a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child.'" 114 F.3d 874, 866 (9th Cir. 1997) (quoting *Osei-Afriyie v. Med. Coll.*, 937 F.2d 876, 882-83 (3d Cir. 1991)). We

reasoned that the right to proceed *pro se*, codified in 28 U.S.C. 1654, does not create a "true choice for minors who under state law . . . cannot determine their own legal actions." *Id.* at 876 (quoting *Osei-Afriye*, 937 F.2d at 882-83). Echoing the Third Circuit, we also observed that it "goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys." *Id.* (quoting *Osei-Afriye*, 937 F.2d at 882-83). Moreover, we opined that this rule necessarily followed from the more general rule that "a non-lawyer 'has no authority to appear as an attorney for others than himself.'" *Id.* at 877 (quoting *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir.1987)).

Grizzell raises a series of statutory, constitutional, and policy arguments challenging the "counsel mandate" recognized in *Johns*. Grizzell contends that the *Johns* rule is inconsistent with a child's statutory right to proceed "personally" under 28 U.S.C. § 1654, with a child's fundamental right of access to court and equal protection rights, and with parental rights regarding the care, custody, and control of children.[1] As a policy matter, Grizzell argues that the *Johns* rule makes "the perfect the enemy of the good," foreclosing paths to relief for children from

[1] Grizzell relies heavily on a recent dissent from the Fifth Circuit as well as the scholarship of Professor Lisa V. Martin. *See Raskin on behalf of JD v. Dallas Indep. Sch. Dist.*, 69 F.4th 280, 290-99 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in judgment); Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 856 (2019).

low-income families whose options are representation by a *pro se* parent or no legal recourse at all.

Grizzell also emphasizes that other circuits have taken a more flexible approach in certain circumstances. Although most circuits have adopted the "counsel mandate" as a general rule,[2] some circuits have relaxed the rule in the context of appeals from the denial of social security (SSI) benefits. *See, e.g.*, *Harris v. Apfel*, 209 F.3d 413, 414-17 (5th Cir. 2000) (observing that "prohibiting non-attorney parents from proceeding *pro se* in appeals from administrative SSI decisions, on behalf of a minor child, would jeopardize seriously the child's statutory right to judicial review"); *Machadio v. Apfel*, 276 F.3d 103, 106-07 (2d Cir. 2002) (allowing a non-attorney parent to bring an SSI appeal on behalf of his or her child without representation by an attorney if the district court determines that the parent "has a sufficient interest in the case and meets basic standards of

---

[2] *See Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll.*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 401 (4th Cir. 2005); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002); *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (7th Cir. 2001); *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882 (8th Cir. 2020); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997). *See also Winkelman*, 550 U.S. at 536 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part) (observing that "[b]oth sides agree . . . that the common law generally prohibited lay parents from representing their children in court, a manifestation of the more general common-law rule that nonattorneys cannot litigate the interests of another" and that "[n]othing in the IDEA suggests a departure from that rule").

competence"); *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1299-1301 (10th Cir. 2011) (adopting the *Harris* and *Machadio* courts' views).

Even beyond the SSI context, several of our sister circuits have acknowledged concerns about the potentially harmful effect of an unyielding application of the "counsel mandate" on children's access to justice. For example, in *Tindall v. Poultney High School District*, 414 F.3d 281, 286 (2d Cir. 2005), the Second Circuit—bound by precedent to apply the counsel mandate—observed that an unyielding application of the general rule might "force minors out of court altogether" where "counsel is as a practical matter unavailable." Further, in *Elustra v. Mineo*, the Seventh Circuit observed that the counsel mandate is "not ironclad" and decided to "give effect" to a mother's *pro se* motion, a one-off action during a brief and critical period when she was unrepresented, ratified by counsel she was later able to procure. 595 F.3d at 705-06. *Elustra* explained that this decision was the only one consistent with the purpose of the rule: "to protect the rights of the represented party." *Id.* at 706. And most notably, the Fifth Circuit in *Raskin* observed that "the absolute bar may not protect children's rights at all," and held that "an absolute bar on *pro se* parent representation is inconsistent with § 1654, which allows a *pro se* parent to proceed on behalf of her child in federal court when the child's case is the parent's 'own.'" *Raskin*, 69 F.4th at 282, 286. The Fifth Circuit conducted a nuanced analysis acknowledging that both federal and state law have

the potential to render a child's case the parent's "own."[3] *Id.*

As a three-judge panel, however, we are bound by the rule set forth in *Johns*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (a three-judge panel remains bound by prior panel precedent absent "clearly irreconcilable" intervening precedent of a higher authority). Indeed, Grizzell concedes as much and acknowledges that the only path to relief in her case is en banc review.

III. CONCLUSION

Grizzell unquestionably raises concerns with grave implications for children's access to justice. Our panel, however, is bound by *Johns*, which holds that a parent may not proceed *pro se* on her children's behalf. For this reason, we affirm the district court's dismissal

---

[3] The *Raskin* litigation also demonstrates at least two other potential positions on the "counsel mandate." Judge Oldham, dissenting in part, would have held that "federal law gives Raskin's minor children the unequivocal right to 'conduct their own cases personally,'" and that state law lodges the capacity to exercise that right in parents. *Id.* at 293 (Oldham, J., dissenting in part and concurring in the judgment). It is this position which Grizzell urges us to embrace. In addition, a court appointed amicus in the *Raskin* case advocated a case-by-case approach based upon the rationales courts have offered to justify the social security exception. *See* Brief of Court-Appointed Amicus Curiae Supporting Appellant Allyson Raskin, No. 21-11180, 2022 WL 3356573 at *24-25 (5th Cir. August 8, 2022) (setting forth a four-step framework for courts to apply in determining whether parents may proceed *pro se* in a particular case, including factors such as the complexity of the case and availability of counsel).

without prejudice of Grizzell's claims on behalf of her children.[4]

AFFIRMED.

[4] Grizzell's motion for initial hearing en banc, Dkt. 38, is denied. *See* General Order 5.2. Grizzell's motion to dismiss the answering brief, Dkt. 17, and motion for reconsideration, Dkt. 21, are denied as moot in light of the replacement briefing.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55956

LA DELL GRIZZELL,

Plaintiff-Appellant,

JOHN DOE, Minor #1; Minor #2, Minor #3,

Plaintiff,

v.

SAN ELIJO ELEMENTARY SCHOOL; SAN MARCOS UNIFIED SCHOOL DISTRICT,

Defendants-Appellees.

Filed: Oct. 1, 2024

Before: Kim McLane Wardlaw, Richard A. Paez, and Gabriel P. Sanchez, Circuit Judges

---

ORDER

Judge Wardlaw and Judge Sanchez vote to deny the petition for rehearing en banc (Dkt. 73), and Judge Paez so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en

banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

IT IS SO ORDERED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 21-cv-863

LA DELL GRIZZELL, et al.,

Plaintiffs,

v.

SAN ELIJO ELEMENTARY SCHOOL, et al.,

Defendants.

Filed: Aug. 12, 2021

ORDER

On August 12, 2021, the Court held a hearing on Defendants' motions to dismiss [Doc. No. 13, 14]. As stated at the hearing, it is hereby **ORDERED** as follows:

1. The motion to dismiss based on La Dell Grizzell's lack of capacity to represent her children in this lawsuit [Doc. No. 14] is **GRANTED**, and the minor plaintiffs' claims in the amended complaint are **DISMISSED WITHOUT PREJUDICE**. Because Ms. Grizzell concedes that this lawsuit only concerns claims of her children [Doc. No. 36], the amended complaint is dismissed in its

entirety. If the minor plaintiffs wish to proceed with their claims, they may do so only through an attorney licensed to practice in this court.

2. The minor plaintiffs may file a second amended complaint, through licensed counsel, on or before **October 12, 2021**. If no such complaint is filed, this case will be closed without further order of the Court.

3. Because La Dell Grizzell does not bring any claims on her own behalf, and because she is not an attorney licensed to practice in this Court, she may not file anything else pro se in this litigation. All subsequent filings by Ms. Grizzell that are not made by a licensed attorney on her behalf will be rejected and not considered by the Court.

4. The motion to dismiss the complaint for failure to state a claim and lack of jurisdiction [Doc. No. 13] is **DENIED AS MOOT**. Defendants may raise the same arguments for dismissal in response to a second amended complaint, if warranted.

5. Ms. Grizzell's motion to be appointed as guardian ad litem [Doc. No. 28] is **DENIED**. If Ms. Grizzell is in fact the minor plaintiffs' mother and general guardian, she may represent their interests in a lawsuit pursuant to Federal Rule of Civil Procedure 17(c)(1)(A), and appointment as guardian ad litem is unnecessary. She may not, however, serve as their counsel and minors may not appear in a pro se capacity. *See Johns v. Cty.*

of San Diego, 114 F.3d 874, 877 (9th Cir. 1997) ("[A] parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer.").

6. The motion for a preliminary injunction [Doc. No. 10] is **DENIED**.
7. The motion to strike [Doc. No. 21] is **DENIED**.
8. Defendants' motion for a security for their costs and attorneys' fees [Doc. No. 32] is **DENIED** without prejudice to re-filing if a second amended complaint is filed on behalf of the minor plaintiffs.

It is **SO ORDERED**.

Dated: August 21, 2021

[handwritten: signature]
Hon. Cathy Ann Bencivengo
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 21-cv-863

LA DELL GRIZZELL, et al.,
Plaintiffs,

v.

SAN ELIJO ELEMENTARY SCHOOL, et al.,
Defendants.

Date: Aug. 12, 2021

STATUS CONFERENCE TRANSCRIPT

---

[2] PRO SE GRIZZELL: My name is La Dell Grizzell.

THE COURT: Thank you.

ATTORNEY CREIGHTON: Good afternoon, Your Honor. Jennifer Creighton on behalf of San Marcos Unified School District.

THE COURT: Thank you. All right. There are a number of motions that have been filed with the Court. I could have ruled on a number of them just on the papers, but I thought it was very important to have the plaintiff come in because fundamentally before the Court can do anything on the merits of this case, you need to have counsel.

You cannot represent your children in court. There is a difference between being their guardian and, therefore, standing in their shoes as a plaintiff and being an attorney. A person can represent themselves, but you cannot represent others, including your own children. Those are just the rules. I can't work around those rules. I can't change those rules.

You do not have the capacity to be their lawyer, and, therefore, I can't hear anything in this case. You have to get an attorney because you can't be a pro se lawyer for your children. And it appears to the Court from everything you've filed, including the most recent declaration you filed, all the claims you're bringing here are on their behalf, not specific [3] to you.

So there may be some very serious allegations here. There's a lot to parse through. There's some legitimate challenges to the pleadings. They're a little verbose, but I understand you have serious things you want to bring before the Court, but you need to have a lawyer to do this on behalf of your children. You cannot do it yourself.

So really that's all I can do for you today. I would suggest you contact the San Diego County Bar Association or the ACLU and see if you can get somebody who will pro bono help you with this and represent you. But you can't do it. Do you have any questions on that?

PRO SE GRIZZELL: Yes. I mean, I understand what you're saying, but the fact of the matter is, is that my children suffered a great deal of discrimination. I mean, nooses around their necks, like signs wrapped around their necks saying "for sale," and so it was

pretty detrimental. And then for opposing counsel to kind of—kind of make it about herself, you know, wanting it to be about security bonds and stuff like that, it's—you know, this thing is about three innocent children.

THE COURT: And I understand that. And that's why I say the allegations here, the Court is not just ignoring them. They are serious. If any of them have merit, they are serious, and if something like that is going on, it needs to be [4] addressed, but as a procedural matter, I cannot have you be the attorney here. You're not—you're not an attorney. You can't do it.

PRO SE GRIZZELL: Okay. And what about the guardian ad litem?

THE COURT: First of all, you don't need to be appointed as a guardian. You are your children's guardian. You're their custodial parent, so you represent them. A guardian ad litem is appointed when there is no custodial parent, or there's a conflict between the parent and the child and to protect the children's interests, someone is appointed by the court to protect the children's interest. That's not the same thing as being a lawyer.

PRO SE GRIZZELL: Um-hmm.

THE COURT: You're the guardian. You can file the lawsuit, but it needs to be brought to the court and prosecuted by an attorney. If you were an attorney, you could do it. But you're not.

PRO SE GRIZZELL: Okay. I understand, but I did have grounds, and I was allowed to file.

THE COURT: Yes. Well, no, you can't—it has to be filed by an attorney—

PRO SE GRIZZELL: I understand.

THE COURT:—representing you and your children as the clients.

[5] PRO SE GRIZZELL: Okay.

THE COURT: So the whole thing is just—it's procedurally improper, and it's stricken, and you need to start again. So you have to find an attorney. And, again, given the allegations you have made, I would hope you could find someone who would be interested in helping you to bring these things to the attention of the court and perhaps defense counsel in terms of getting to the heart of what's going on here to see if this is can be resolved.

Alternatively, you can see if you can engage them in some kind of non-court mediation discussion where you don't need an attorney. But to be here in federal court to bring this case, it needs to be filed by an attorney.

PRO SE GRIZZELL: I understand.

THE COURT: Okay. That's all for today. Everything else is just deemed withdrawn as there is no counsel representing the plaintiff.

ATTORNEY CREIGHTON: Thank you, Your Honor. Just for clarification, the first amended complaint is stricken?

THE COURT: Yes. The Court will issue an order outlining specifically in writing for you to make sure that the plaintiff understands what you need to do going forward and what the status of everything is.

But the motion—any motion for cost or fees is denied without prejudice. Any motion for preliminary [6] injunction is denied because there is no valid complaint pending. The plaintiff's motion to strike is denied. The motion for appointment of guardian add litem isn't necessary because you're the custodial parent. And there is no default here because they filed a motion to dismiss. But the complaint is dismissed because of the lack of counsel, nothing to do with the merits. This is a necessary procedural hurdle for you though. You have to get an attorney.

PRO SE GRIZZELL: I understand, Your Honor.

THE COURT: Okay. Thank you.

ATTORNEY CREIGHTON: Thank you, Your Honor.

(Court in recess at 2:09 p.m.)

Appendix E

Letter from San Marcos School District to La Dell Grizzell re: Notice of Disenrollment and Appeal Rights (May 14, 2020)

Dear Mrs. Grizzell:

The purpose of this letter is to notify you that the San Marcos Unified School District (District) has determined that it is in the best interest of your three children ([REDACTED]) to be disenrolled from San Elijo Elementary School (SEES) at the end of the 2020-21 school year. I would be happy to assist you in enrolling your children in their school(s) of residence or other appropriate educational option for the 2021-22 school year.

This determination is made pursuant to the provisions of the McKinney-Vento Homeless Assistance Act (Act). Under the Act, with respect to a qualifying child or youth, ***and according to the child's or youth's best interest,*** the District is required to either (1) continue the child's or youth's education in the school of origin for the duration of homelessness and for the remainder of the academic year; or (2) enroll the child or youth in any public school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend. (42 U.S.C. § 11432(g)(3)(A).)

In determining the "best interest" of the child or youth, the District is required to (1) presume that keeping the child or youth in the school of origin (i.e., SEES) is in the child's or youth's best interest, except when contrary to the wishes of the parent; and

(2) consider student-centered factors related to the child's or youth's best interest, including factors related to the impact of mobility on achievement, education, health, and safety of homeless children and youth, giving priority to the request of the parent. If, after conducting the best interest determination described above, the District determines that it is not in the child's or youth's best interest to attend the school of origin or the school requested by the parent or guardian, the District is required to provide the parent with a written explanation of the reasons for its determination and include information relating to appeal rights. (42 U.S.C. § 11432(g)(3)(B).)

In this case, the District has determined that it is not in the best interest of your three children to continue being enrolled at SEES (or the middle school in which it feeds), as the children's school of origin, for the following reasons:

- The distance from your residence to SEES appears to have prevented you from picking up materials, supplies, and work packets for your children when needed, or meeting with school administration when requested, to ensure that you have received the class materials, supplies, and work packets for your children. You have instead asked others to pick up materials for you and then claimed they were incomplete. When administration offered to meet to ensure all materials are being provided included, you declined.
- For much of this school year during distance learning, you have not allowed your children to fully participate in their education. You

have not permitted them to have their video cameras on, or to participate by audio, and you did not want teachers to interact with your children. Many attempts to engage your children were criticized and challenged by you. In response to your complaints about your child's teacher, the District offered a change in teacher for your child, but you declined. You also would not allow your child(ren) to participate in the District's iReady diagnostic academic testing which is used in classrooms to determine academic levels and progress over the school year. You also indicated that you did not want your children to participate in social-emotional learning exercises that were conducted in classes. You declined to participate in parent-teacher conferences that were set up in February. In sum, you have objected to the many efforts made by the District and SEES to engage you and your children in their education and with school staff in a meaningful way.

- Your children do not appear to have a positive attachment to the school or the District. For the past several weeks, your children have not attended school at all (via distance learning) by logging on to class, despite repeated notices and reminders that class attendance is required for attendance credit. You have claimed that you are not having your children participate online due to "abuse" by the District. All of your allegations of wrongdoing on the part of school and District personnel over the past school year have been fully

investigated and were not substantiated. You have been notified of the outcomes of both informal and formal investigations in this regard and have exercised your appeal rights. Regardless of whether you agree with those outcomes, the fact that you do not wish your children to have any interactions with the school further supports disenrollment from SEES. A fresh start at another school—their school of residence—could be a very positive change for your children.

- As the schools move back to in-person instruction in the fall, it will be important for your children to attend school close to where they are living so they can participate in afterschool activities, programs, and events more easily and develop positive relationships with peers, teachers, and other members of the school community. This will also make it easier for you to attend school events such as back-to-school night, school programs or awards/recognition events that may involve your children.

- You have declined offers of assistance and support from school administration and the Homeless Youth Liaison. On March 15, 2021, in response to an email from the Homeless Youth Liaison asking if your family was in need of resources or your living situation has changed, you provided the following response: "*After all these years and you are finally reaching out.... it is bad enough I have* to *be a McKinney Vento participant with all the ill*

> *treatment my children and I have received at the school and district and now during a "pandemic" I am asked if my housing situation has changed.... I personally feel this is a way to "poke fun" of my housing situation for during a pandemic one would deduce things have gotten worse compounded with the ongoing racial discrimination and violation of my children's and I civil rights.*" This is an example of many emails you have sent to District and school staff when attempts are been made to engage your family in a positive way. When the Homeless Liaison reached out again this month by email, checking in to see if your family is in need of support, you did not respond.

It should also be noted that, although the District has allowed your children to remain enrolled at SEES due to your claim of McKinney-Vento status, the District has not been able to verify your current living situation in order to determine whether your children continue to qualify for McKinney-Vento assistance and residency rights. You have not provided the District an address or explanation of your living situation for years, since first claiming McKinney-Vento status. You have also not provided a current phone number where you can be reached. As noted above, you have not been responsive to efforts from the District's Homeless Youth Liaison to contact you by email to provide support and assistance. The District has reason to believe that you and your children have been living in a stable situation during the 2020-21 school year and that your children may no longer qualify as homeless youth, as defined by law. This lack

of transparency regarding your living situation has interfered with the ability of school and District staff to provide your children with the supports needed to be successful at school, academically as well as social-emotionally. To be clear, the purpose of this letter is not to conclude that your children do or do not qualify as Homeless Youth under the McKinney-Vento; rather it is to inform you that, assuming they do qualify, the District has made a determination that continued enrollment in the school of origin (i.e., SEES) is not in the best interests of your children.

- The District recognizes that homeless children and youths should have access to the education and other services they need to meet the same challenging State academic standards to which all students are held. (42 U.S.C. § 11431.) Because of the importance of maintaining school stability for homeless youth, the District has allowed your children to continue to be enrolled at SEES for the duration of the current school year. However, for the reasons described in this letter, the District has determined that it is not in your children's best interest to continue enrollment at SEES (or the middle school in which it feeds). The District believes your children would have better access to the education, services, and supports they need by enrolling in their local school district. I am happy to assist you with any enrollment processes that may be required in transitioning your children to their next school(s).

Appeal Rights

If you disagree with this determination, you have the right to appeal this decision to the San Diego County Office of Education by initiating the Dispute Resolution process as described in the enclosure documents. If you do not timely appeal, your children will be disenrolled from SEES at the end of the school year.

Sincerely,

Cynthia Flores
SMUSD Homeless Liaison

Appendix F

RELEVANT STATUTORY PROVISION

28 U.S.C. §1654

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.