No. 24-812

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute and Rule

Other Authorities

REPLY BRIEF

"Providing equal justice for poor and rich … alike" is one of the judiciary's prime directives. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). The decision below is an affront to that principle, as it shuts the courthouse doors on *pro se* litigants seeking to vindicate the rights of their minor children. It is difficult to overstate the problems with that result or the importance of this issue. Even the court of appeals, which was bound by circuit precedent to block petitioner's suit, recognized the "grave implications" of its holding "for children's access to justice." Pet.App.7. Yet, in respondents' telling, there is nothing to see here; no non-lawyer can sue on another's behalf, so parents of minor children must find a lawyer like anyone else—and if they are unable to do so, too bad.

Respondents' casual disregard for the rights of indigent families is both troubling and telling. The Ninth Circuit's paternalistic "counsel mandate"—under which parents who cannot afford or find a lawyer are simply out of luck—was flawed from the start given the dearth of *pro bono* legal assistance in this country. And it has only gotten worse with age, as the multiple amicus briefs underscore and the facts of this case make clear. Petitioner's allegations (which respondents seem to forget must be taken as true) are harrowing: She maintains that her children suffered appalling racist mistreatment at respondents' hands. Yet due to the Ninth Circuit's "counsel mandate" and her inability to afford a lawyer, petitioner has been unable even to have a court hear her challenges to respondents' alleged failure to provide her children—the only Black students in their classes—equal

protection under the law. That is the unfortunate but inevitable result of the Ninth Circuit's rule.

It is therefore no surprise that multiple circuits have rejected the Ninth Circuit's misguided approach in favor of one that respects parents' fundamental rights—regardless of income level. Respondents quibble that the circuit split is complicated, and not everyone on the other side fully agrees with each other. But even the Ninth Circuit acknowledged that "other circuits have taken" a "more flexible approach" that stands in stark contrast to its absolute bar on *pro se* parent representation. Pet.App.5. And the question that has divided the courts could not be more important. No one disputes that most litigants would be better off with a lawyer. But it is equally indisputable that "'[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 v. Dall. Indep. Sch. Dist.*, 69 F.4th 280, 286 (5th Cir. 2023). The Ninth Circuit's rule thus leaves many parents with a "Hobson's choice," *id.* at 294 (Oldham, J., dissenting in part and concurring in the judgment), and will inevitably "force minors out of court," *id.* at 286 (majority), no matter the merits of their claims. This is a case in point. While respondents go to great lengths to belittle petitioner's efforts to take on the daunting task of representing her children in court, the district court dismissed their claims solely "because of the lack of counsel, nothing to do with the merits." Pet.App.18. This case thus presents a clean vehicle to resolve a question of surpassing importance on which the circuits are divided—and one that the Ninth Circuit and others have gotten hopelessly wrong for years. The Court should grant certiorari.

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

"The framers of our Constitution thought self-representation in civil suits was a basic right that belongs to a free people." *Iannaccone v. Law*, 142 F.3d 553, 556 (2d Cir. 1998). Congress enshrined that right in 28 U.S.C. §1654, which authorizes all "parties" in federal court to "plead and conduct their own cases personally or by counsel." The Framers also believed that parents have a "fundamental liberty interest[]" in "the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality), which 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 v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); *see also* Fournier Amicus Br.11 (explaining that a parent had the right to act on behalf of his child in court at common law, citing Blackstone). Today, the Federal Rules of Civil Procedure give effect to those core rights by making explicit that a parent who "sue[s]" in federal court "on behalf of" her minor children has full power to conduct the litigation. Fed. R. Civ. P. 17(c); *see* Pet.10-12.

All of that makes this an easy case (at least on the question presented; the merits have not yet been tested). Indeed, even the Ninth Circuit seemed to agree that petitioner's position is sound. Although the three-judge panel was bound by circuit precedent to hold that petitioner had no avenue to raise her children's claims unless she found a lawyer willing to take the case *pro bono*, *see Johns v. Cnty. of San Diego*,

114 F.3d 874, 876 (9th Cir. 1997), the court of appeals went out of its way to underscore 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." Pet.App.4.

Perhaps that is why respondents spend so little time discussing the merits of the question presented. *See* BIO.6-8, 22-25. Respondents notably do not defend the Ninth Circuit's original rationale for its unyielding counsel mandate. Quite the opposite: Whereas *Johns* posited that a child whose parents cannot afford legal representation can "pursue his cause of action when he reaches eighteen," 114 F.3d at 878, respondents freely admit that "not all causes of action may be tolled," BIO.20. And respondents have nothing to say about the fact that, even when it is available, tolling does no good for children (like petitioner's) who need injunctive relief. Pet.19-20.[1]

Respondents' only defense of the Ninth Circuit's inflexible counsel mandate is the bare *ipse dixit* that neither "the authority to 'sue or defend' on behalf of a minor" recognized in Rule 17(c) nor parents' "constitutional" rights to act on behalf of their children

[1] Respondents make assertions about petitioner's residency they in no way substantiate, BIO.3, 21 n.1, and similarly claim petitioner did not seek injunctive relief—even as they admit in the previous sentence she did, BIO.21-22. In all events, whether petitioner sought or could secure injunctive relief does not change that the Ninth Circuit's rule leaves children who do need injunctive relief but cannot afford a lawyer with no recourse.

"justif[ies] allowing a non-attorney parent to act as legal counsel for their minor child." BIO.6-7, 22 (capitalization altered). That is a non-sequitur. When a person sues on her own behalf, she does not act "as legal counsel"; she exercises her "basic right of" "self-representation." *See Faretta v. California*, 422 U.S. 806, 830 n.39 (1975). That is no less true when a parent steps into that role for her minor child, who cannot do it himself. *See* Pet.9-13. Respondents' *reductio* argument about Rule 17(c), *see* BIO.7-8, thus misses the point. Parents are not mere "authorized representatives" of their children. BIO.7. In fact, parents do not need any positive law to authorize them to act on their children's behalf—and any law that purported to strip them of that right would be subject to grave constitutional doubt. Pet.14-15; *see* Fournier Amicus Br.14; AAF Amicus Br.17-18.

Unable to deny the myriad legal problems with the Ninth Circuit's counsel mandate, respondents pivot to policy. *See* BIO.8-22. Of course, not even the weightiest policy argument could trump clear statutory and constitutional rights. Yet respondents' particular policy positions are not just unavailing, but pollyannish. Of course it would be "best" if all litigants, rich or poor, had the benefit of "trained legal counsel." BIO.19. But "giving everyone a lawyer is an impossible dream." Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 971 (2012). In the real world, most indigent individuals do not receive any legal counsel even for significant legal challenges, because there simply is not enough free legal representation to go around. And even

individuals who manage to clear the indigent bar often struggle to find legal representation they can afford.

That gives the lie to respondents' paean to district courts' authority to appoint *pro bono* counsel. BIO.20. To be sure, courts have the power to appoint counsel in appropriate circumstances. But that power is not without bounds, as the Thirteenth Amendment means that no lawyer can be compelled to work for free. And while parties are more likely to receive offers of *pro bono* assistance the higher up in the federal-court system their case gets, most indigent individuals never get past the threshold. For a number of reasons, including the fact that trial-court work is far more time-intensive, securing *pro bono* counsel is most difficult at the district-court level—which, of course, is when it is most necessary. Pet.16-17 (citing sources).

This is not disputable. As the Fifth Circuit recently recognized, "'there 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 (quoting Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 856 (2019)). There is thus an obvious "benefit to the minor in allowing [his] non-lawyer parents" to pursue claims on his behalf. *Contra* BIO.17. The choice for most indigent children in this country is not between "trained legal counsel" and "non-lawyer parents"; it is between having a parent bring their claim *pro se* or having no one bring it at all. *See* Pet.16-17. Yet under the Ninth Circuit's counsel mandate, even that latter choice is illusory.

The decision below nullifies §1654 for children, vitiates parents' fundamental rights, and closes the

courthouse doors on thousands of families. Any one of those defects would justify intervention. A mandate marred by all three of them demands it.

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

In addition to being profoundly flawed, the decision below implicates an entrenched circuit split. At least four circuits have rejected the Ninth Circuit's hardline approach, under which parents can never stand in their minor child's shoes *pro se*. Pet.22-24.

This is neither disputed nor disputable. While respondents are quick to point out that the majority in *Raskin* did not adopt Judge Oldham's more fulsome view, BIO.28, they cannot deny what the Ninth Circuit itself candidly acknowledged: "[T]he Fifth Circuit in *Raskin* … held that 'an absolute bar on *pro se* parent representation'"—i.e., the Ninth Circuit's rule—"'is inconsistent with §1654.'" Pet.App.6 (quoting *Raskin*, 69 F.4th at 282). And the Fifth Circuit is not alone. The Ninth Circuit recognized that three other circuits (the Second, Seventh, and Tenth) allow parents to litigate *pro se* on their minor children's behalf in at least some circumstances. Pet.App.5-6. Indeed, even respondents grudgingly admit that those four circuits all allow parents to sue *pro se* on their child's behalf in certain cases, whereas the Ninth Circuit never allows it.

Respondents' effort to limit the cases on the other side of the split to their facts falls flat. To be sure, most of the cases in which parents have been allowed to sue *pro se* on their children's behalf arise in the Supplemental Security Income context. BIO.29. But the Ninth Circuit's rule applies in *every* context. The

decision below was candid about this: The "panel" was "bound by *Johns*, which holds that a parent may not proceed *pro se* on her children's behalf," full stop. Pet.App.7. That is not the rule in four other circuits.

In all events, SSI cases do not cover the waterfront of the other side of the split. Consider the Seventh Circuit. As the Ninth Circuit explained, the Seventh Circuit not only has held "that the counsel mandate is 'not ironclad,'" but has "'give[n] effect' to a mother's *pro se* motion" where doing so was necessary "'to protect the rights'" of a minor who otherwise would have no avenue into court. Pet.App.6 (quoting *Elustra v. Mineo*, 595 F.3d 699, 705-06 (7th Cir. 2010)). Respondents brush aside the Seventh Circuit's *Elustra* decision as a "minor atypical deviation" from what they call "the general rule." BIO.32. They miss the point. In the Ninth Circuit, *no* "deviation[s]" are permitted, even if—as here—minor children with potentially meritorious claims will be poured out of court just because their parent cannot afford a lawyer or secure *pro bono* representation. In the Seventh, by contrast, parents are not always put to that Hobson's choice. That is a "circuit split warranting review by this Court." *Contra* BIO.32.

And the split is deeper still. The Second Circuit followed an approach similar to the Seventh Circuit's in *Murphy v. Arlington Central School District Board of Education*, 297 F.3d 195 (2d Cir. 2002). There, the district court allowed non-lawyer parents to proceed *pro se* in an action in the name of their minor son. *Id.* at 196-97. The Second Circuit affirmed, recognizing that 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 [counsel] in order to re-secure a victory already obtained" by his parents *pro se*. *Id.* at 201. Respondents puzzlingly assert that the Second Circuit "found that it was error to allow the parent to represent their child *pro se*." BIO.31-32. The Second Circuit did no such thing. To the contrary, the court made crystal clear that "we do not find reversible error on these facts." *Murphy*, 297 F.3d at 201; *see also id.* ("[W]e affirm the district court's grant of injunctive relief.").

That respondents must resort to misrepresenting explicit holdings should tell this Court all it needs to know. The decision below squarely implicates an entrenched circuit split over the extent to which poor children have equal access to the courts. And, unfortunately, the Ninth Circuit is not alone on the wrong side of the split; five other circuits refuse to allow parents to proceed *pro se* on their children's behalf even when the alternative is that no lawsuit will be brought at all. *See* Pet.24. There is thus no need for further percolation; nearly every circuit has weighed in. This important and recurring question demands nationwide resolution by this Court.

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

The Ninth Circuit's unyielding counsel mandate violates federal statutory and constitutional law and implicates a clear and acknowledged circuit split. That state of affairs would justify plenary review in any situation. But it is difficult to overstate just how consequential this issue is for the Nation's children and the federal courts. In roughly half the circuits,

"federal 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." Martin, *supra*, at 833. To claim, as respondents do, that this issue "lacks immediate importance," BIO.32 (capitalization altered), is to deny reality. Indeed, even respondents admit that this problem frequently recurs across a wide array of contexts, from federal-benefits suits to civil-rights litigation. *See* BIO.32 ("[T]he question presented is not specific to claims against school districts.").

This case is an excellent vehicle to resolve the question presented. Respondents do not deny that it is relatively rare for this issue to reach this Court, given the nature of the counsel mandate. Nor do they deny that leaving the decision below in place will mean that, in large swathes of the country, thousands of indigent families will continue to be poured out of court, no matter how strong their claims, unless they win the *pro bono* lottery. Respondents instead resort to casting aspersions and embracing doublespeak. They claim that petitioner is not "sophisticated" enough to "competently represent her minor children's interests," and they fault her (albeit with no support for the accusation but their say-so) for purportedly not trying hard enough to find counsel.[2] BIO.33. That is

[2] Respondents also make much of the fact that the court of appeals appointed counsel to assist petitioner on appeal. BIO.10, 19-20. But the Ninth Circuit's conclusion that "appointment of pro bono counsel would benefit the court's review," CA9.Dkt.22, was simply a recognition of the complexity and importance of the question presented, not an indictment of petitioner's

both insulting and telling. Perhaps petitioner's children would be better off in a world where they were guaranteed trained legal counsel. But that is not this world. "[W]e already live on a *pro se* planet" precisely because there is not even trained legal representation to go around. *Raskin*, 69 F.4th at 286.

Given that reality, respondents' strident assertions that the counsel mandate "protects the country's most vulnerable," BIO.34, ring remarkably hollow. Tell that to petitioner's children and the thousands of others like them, for whom the mandate means having the courthouse doors slammed shut against them. Indeed, the only ones the decision below protects are defendants who are alleged to have engaged in serious misconduct that they would rather not have to defend in court. That is all the more reason to grant certiorari and reject the counsel mandate for good.

"competen[cy] … to represent her children pro se," BIO.10. If anything, the fact that petitioner's initial *pro se* appellate briefs managed to garner the Ninth Circuit's attention even though *Johns* is settled circuit precedent underscores that she *was* able to identify and present the most important question on appeal.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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