NO. 05-983

IN THE
Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

As the petition, supplemental brief, and *amicus* briefs demonstrate, the question presented is exceedingly important to the effective enforcement of the Individuals with Disabilities in Education Act ("IDEA"). The IDEA's promise of a free appropriate public education ("FAPE") will be stripped of its vitality if parents of disabled children who cannot afford a lawyer, or who cannot locate a willing lawyer, are not allowed to prosecute an IDEA case *pro se* in federal court. Respondent has not, and cannot, contest the overriding importance of the question presented to the millions of disabled children requiring special education services – more than 66% of whom live in families earning $50,000 or less. *See* Pet. at 15. The importance of the question presented alone, even apart from the circuit split over it, warrants this Court's review.

While acknowledging the circuit split, *see* BIO at 19, 23, respondent attempts to down-play it by manipulating the Sixth Circuit's decision below and its prior decision in *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753 (CA6 2005) ("*Cavanaugh I*"). *See* BIO at 19-22. Respondent also argues that Congress' recent rejection of an amendment that would resolve the circuit split demonstrates that the First Circuit's decision in *Maroni v. Pemi-Barker Regional School District*, 346 F.3d 247 (CA1 2003), was an erroneous outlier that the First Circuit will soon correct on its own, *see* BIO at 23-24. As we show below, respondent's attempts to limit *Cavanaugh I* and the decision below are belied by their clear holdings, by the Sixth Circuit's subsequent applications of *Cavanaugh I*, and by *Cavanaugh I*'s underlying record. Respondent's speculation that the First Circuit may revisit *Maroni* in light of Congress' recent inaction ignores the minuscule odds that any issue will be revisited by that court, the minuscule odds that the *pro se* issue will be presented to that court again, and this Court's oft-repeated maxim that legislative inaction is no indicator of statutory meaning or legislative intent.

Respondent also attempts to characterize this case as an improper vehicle for deciding the question presented. But none of its assertions, even if factually correct, establishes that there are any impediments to this Court conclusively deciding the important question of federal law presented that continues to divide the lower federal courts.

A. The Three-Way 1-4-1 Split Among the Circuits Is Real, Intractable, and Warrants Immediate Intervention

As noted in the petition, six courts of appeals have aligned themselves in a three-way 1-4-1 split over the question presented: The First Circuit places no restrictions on a parent's right to prosecute an IDEA case *pro se*; the Second, Third, Seventh, and Eleventh Circuits allow a *pro se* parent to prosecute only their own procedural IDEA claims; and the Sixth Circuit – in *Cavanaugh I* and the order below – have imposed an absolute bar on parents appearing *pro se*. *See* Pet. at 11-13. Respondent attempts to recast the split from a three-way 1-4-1 split to a two-way 1-5 split by limiting *Cavanaugh I* and the order below and aligning them with the position taken by the Second, Third, Seventh, and Eleventh Circuits. *See* BIO at 19-22. Respondent's attempt to manipulate *Cavanaugh I* and the decision below is unavailing.

Cavanaugh I could not be clearer in its holding that "*any* right on which [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon the [parents'] proceeding through counsel, with their appeal on [their child's] behalf." 409 F.3d at 757 (emphasis added). The *Cavanaugh* panel reached this holding after expressly acknowledging "that the IDEA does grant parents of disabled students a narrow set of procedural rights." *Id.* Nonetheless, it held that these rights are "derivative" of the

child's right to a FAPE and, therefore, incapable of being litigated by a *pro se* parent in federal court.[1] *See id.*

Additionally, contrary to respondent's suggestion that no court has applied *Cavanaugh I* to impose an absolute bar to *pro se* representation, *see* BIO at 22 & n.19, the Sixth Circuit has done so twice: first, when the same panel that issued the *Cavanaugh I* opinion applied it in the panel's subsequent decision on the merits of the *Cavanaugh* appeal;[2] and second,

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[1] The fact that the Sixth Circuit noted the IDEA's provision of procedural rights to parents is not surprising, given that, contrary to respondent's assertion, *see* BIO at 19 ("In *Cavanaugh*, no procedural violations were at issue."), the Cavanaughs' procedural IDEA claims were before the Sixth Circuit when it issued its opinion.

The Cavanaughs' merits briefs, which, as we show in the following paragraph, were before the panel when it issued its *Cavanaugh I* opinion, are littered with allegations that the school district violated their own procedural IDEA rights as parents. Among other procedural violations of the IDEA, the Cavanaughs argued that the school did "not inform[] the parents of their rights to an Independent Evaluation * * * and more importantly [did] not invit[e] the parents to an administrative review," and that the school conducted "evaluations and meetings that excluded the input of the parents." Opening Br. at 1-2, *Cavanaugh v. Cardinal Local Sch. Dist.*, No. 03-4231 (CA6 Dec. 3, 2003); *see also id.* at 4 n.7, 5, 11, 18, 21-22, 25; Reply Br. at iv, v, xi, 3 & n.1, 4, 5, 7, 8, 9, 11, 16, 20, *Cavanaugh v. Cardinal Local Sch. Dist.*, No. 03-4231 (CA6 Aug. 13, 2004). [Pursuant to Supreme Court Rule 32.3, on April 18, 2006, we submitted to the Clerk a letter requesting permission to lodge these briefs with the Court. Although permission had not been granted as of the printing of this brief, it is our hope that permission is granted by the time the Court considers the petition.]

The school district's motion to dismiss the Cavanaughs' appeal was referred to the merits panel on June 21, 2004. Briefing of the merits was completed on August 12, 2004. Over eight months later, on April 29, 2005, the case was submitted for decision. The panel issued its *Cavanaugh I* opinion on May 18, 2005, choosing to dismiss the appeal *in its entirety* rather than adjudicate the merits or allow the Cavanaughs to press their own procedural claims. As these dates demonstrate, both the Cavanaughs' procedural IDEA rights and Kyle's substantive IDEA rights were before the panel when it issued its opinion.

[2] In response to the Sixth Circuit's opinion, on June 17, 2005, the

(continued...)

when a different panel applied it in the order on which certiorari is presently sought.

Respondent asserts that the order below applied *Cavanaugh I* only to "preclude[] [the Winkelmans] from pursuing their own substantive IDEA claims – not their procedural claims."[3] BIO at 22. Critically, however, in dismissing petitioners' *entire* appeal, *see* Pet. App. at 2a, and as respondent acknowledges, the court of appeals "made no mention of any procedural rights being asserted by Petitioners," BIO at 21. Rather, just as it held in *Cavanaugh I* that "*any* right on which [parents] could proceed on

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(...continued)
Cavanaughs obtained counsel for their son Kyle but not for themselves. Shortly thereafter, they learned that the school district had "violated [additional] procedural requirements of the IDEA by withholding some of Kyle's scholastic records," *Cavanaugh v. Cardinal Local Sch. Dist.*, 150 Fed. Appx. 386, 387 (CA6 2005) ("*Cavanaugh II*") – a procedural violation for which the Cavanaughs indisputably had their own claim, *see* 20 U.S.C. § 1415(b)(1) (guaranteeing as a "procedural safeguard" the "opportunity for the parents of a child with a disability to examine all records relating to such child"). In an attempt to bring this newly-discovered claim before the district court, the Cavanaughs filed a *pro se* motion with the Sixth Circuit, seeking a stay of appellate proceedings while they attempted to supplement the record in the district court and obtain Federal Rule of Civil Procedure 60(b) relief from the district court's judgment. *See Cavanaugh II*, 150 Fed. Appx. at 388 & n.1. Even though the stay motion plainly related to the Cavanaughs' own procedural claim, the Sixth Circuit construed the motion as being on behalf of Kyle (or derivative of his right to a FAPE), cited to its prior opinion, and "decline[d] to consider" it. *Id.* (citing *Cavanaugh I*, 409 F.3d at 756). Under respondent's erroneous reading of *Cavanaugh I*, this would not have been possible.

[3] Notably, respondent asserts that the difference between allowing only a parent's procedural claims to go forward and dismissing an IDEA case in its entirety would be "of no practical consequence as parents alleging procedural violations may only recover under the IDEA if they show the procedural violation deprived the child of the substantive right to a FAPE." BIO at 22 n.18. This assertion is inconsistent with respondent's attempt to limit *Cavanaugh I* and the decision below. Indeed, it is this precise logic on which the Sixth Circuit based its holdings in *Cavanaugh I* and the decision below that parents may not prosecute their own procedural IDEA claims *pro se* in federal court.

their own behalf" is barred, 409 F.3d at 757 (emphasis added), the court of appeals unequivocally held below that the Winkelmans "are not permitted to represent their child in this court *nor can they pursue their own claims* pro se," Pet. App. at 2a (emphasis added). Nor is it of any moment that the court of appeals failed to make such a distinction because, when *Cavanaugh I* is read properly, it requires dismissal of the entire case – not just a child's substantive claims. Accordingly, the court of appeals' reliance on *Cavanaugh I* to order dismissal of petitioners' entire appeal was simply an act of faithful application to prior settled circuit precedent – precedent which created a three-way 1-4-1 split.

In a further attempt to down-play the split among the circuits, respondent argues that "the First Circuit may reconsider its position in a future case" in light of Congress' rejection of the proposed amendment to codify a parent's right to *pro se* representation. BIO at 23; *see also id.* at 14-15, 24. For two reasons, this argument is unavailing.

First, to overrule *Maroni*, a majority of the First Circuit's active judges would have to agree to hear a case raising the issue while sitting *en banc*. *See, e.g., Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 n.5 (CA1 2005). *En banc* review is rare nationally; it is particularly rare in the First Circuit, where in 2004, for example, only *one* of the First Circuit's 683 appeals was resolved *en banc*. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2004*, Supp. Tbl. S-1, *available at* http://www.uscourts.gov/judbus2004/tables/s1.pdf; *see also generally* Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29 (2001). Moreover, the *pro se* issue will likely never come before the First Circuit again unless an educational agency determined to see *Maroni* overruled, moves for dismissal in the district court knowing that the motion will be denied, loses the case on the merits, appeals to the First Circuit

knowing that the panel will be bound by *Maroni*, and then seeks rehearing *en banc*.[4]

Second, respondents' suggestion that the First Circuit would revisit *Maroni* in light of Congress' inaction on the proposed 2004 IDEA amendment that would have expressly conferred a right to *pro se* representation is entirely misplaced. *See* BIO at 23-24; *see also id.* at 15-16. This Court has repeatedly refused to divine Congressional intent from such inchoate legislative acts because "'[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 126 S.Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)); *see also, e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("'[M]ute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence").

Finally, respondent's repeated attempts to cast the First Circuit's decision as an outlier that is soon to be repudiated, *see* BIO at 23-24, is belied by the fact that the most recent federal decision on the question presented expressly follows it, *see D.K. v. Huntington Beach Union High Sch. Dist.*, Slip Op. at 8, Case No. SACV 05-341-CJC (RNBx) (C.D. Cal. Mar. 22, 2006) ("The

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[4] Respondent's reliance on the fact that *Maroni* has not been applied subsequently by the First Circuit, *see* BIO at 23, is similarly misplaced. Educational agencies within the First Circuit certainly have had more pressing needs for their limited resources than paying their lawyers to set out on a time-consuming and costly expedition through the federal courts just to *try* to get *Maroni* overturned. As noted above, absent such an effort, there would have been no occasion for the First Circuit to apply *Maroni*.

Court is persuaded by the well-reasoned holding in *Maroni*, and rejects the reasoning of *Collingsgru* and *Cavanaugh*.").[5]

B. Nothing About this Case Would Result in a Fact-Bound Decision from the Court or Prohibit It from Deciding the Question Presented

A case will typically make a poor vehicle for deciding a legal issue when the issue is fact-bound, *see* Robert L. Stern et al., Supreme Court Practice 455 (8th ed. 2002) (suggesting that certiorari is unlikely when "the decision below turns upon its own facts" and, as a result, "will affect few others besides the litigants"); *accord, id.* at 459, or when other grounds for affirmance may preclude the Court from reaching the question presented, *see id.* at 455. Neither concern is present here.

First, respondent's arguments that this case is "a poor vehicle to resolve the *pro se* question because Petitioners have not been *pro se* throughout all the proceedings," BIO at 24, is irrelevant. This Court reviews only the decision of the court of appeals except in rare cases where the court of appeals is bypassed and review of the district court's judgment is sought. *See* 28 U.S.C. § 1254(1). As explained in the petition, this case did not bypass the court of appeals, *see* Pet. at 20-22, and this Court's review will be limited to the court of appeals' November 4, 2005, order dismissing this case because of petitioners' *pro se* status. Accordingly, the fact that petitioners were represented by counsel through most of the district court proceedings and at the conclusion of their related appeal has no bearing on this Court's ability to review the discrete legal question presented.

For the same reason, respondent's argument that "other less procedurally complex and factually complex cases would be more appropriate for certiorari" is unavailing. BIO at 25.

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[5] At the time this brief was printed, the *D.K.* decision had not yet appeared on Westlaw or Lexis. In the meantime, it is available on the Central District of California's Case Management/Electronic Case Filing website, https://ecf.cacd.uscourts.gov/.

However complex the overall factual and procedural history of this case may be, the procedural and factual history relevant to the question presented is discrete and simple. The only fact germane to the legal issue presented here is that the court of appeals dismissed the underlying appeal because the Winkelmans attempted to appeal *pro se* the district court's denial of their own procedural IDEA claims and Jacob's substantive IDEA claims. Similarly, the only part of the record developed below that this Court need review is the court of appeals' two-page November 4, 2005, order dismissing petitioners' appeal. *See* Pet. App. at 1a-2a. All other underlying facts and all other documents from the record below, although providing context to the greater dispute between the parties, are legally irrelevant background noise.[6]

Respondent argues that either *Russell v. Dep't of Educ.*, No. 04-15482 (CA9 docketed Mar. 12, 2005), or *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. filed Oct. 16, 2003), "would be a better vehicle for certiorari" than this case. BIO at 26. *Russell* would not be a better vehicle than this case for deciding the question presented. Respondent claims that *Russell* would be preferable to this case because "the *pro se* question is the sole question on appeal." *Id.* But the same is true with

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[6] Nor is respondent's suggestion that petitioners are unlikely to prevail on the merits before the Sixth Circuit any reason to deny review. *See* BIO at 29-30. Not only is respondent's suggestion speculative, but the underlying merits of the parties' dispute have nothing whatsoever to do with the question presented. The issue before the Court is "separable from, and collateral to, [the] rights asserted in the action." *Will v. Harlock*, 126 S.Ct. 952, 957 (2006) (quotations and citations omitted). To this end, even if respondent is correct that petitioners would not technically moot the *pro se* issue if they comply with the court of appeals' order and somehow obtain a lawyer to handle the merits of their appeal, *see* BIO at 29, the court of appeals' order is effectively final because it "conclusively resolv[es]" the *pro se* issue. *Will*, 126 S.Ct. at 957. If the court of appeals' order is allowed to stand, the damage to petitioners of either having their appeal dismissed or struggling to find money for a lawyer will be irremediable. If petitioners and other similarly situated parents of disabled children must face that Hobson's choice, it should only be after a decree from this Court on the merits of the *pro se* issue.

respect to this case as it case presently stands. The only question presently before the Court in this case is the *pro se* question.[7]

Respondent also suggests that the fact that the district court in *Russell* passed on the question, whereas the district court here did not, makes *Russell* a preferable vehicle. *See id.* As noted above, district court proceedings, aside from providing context, are irrelevant to this Court's review. Moreover, the *Russell* district court's two-page minute order dismissing the case and citing only two other cases, *see generally Russell v. Dep't of Educ.*, Minutes, No. CV 03-654 HG-BMK (D. Haw. Jan. 28, 2004), hardly makes *Russell* a better vehicle.

Respondent's assertion that *Sand* is a better vehicle is disingenuous. *See* BIO at 26. Although the *pro se* question is presented in *Sand*, it is implicated as one of four alternative grounds on which the defendants seek summary judgment. *See* Def. Mot. S.J. at 11-20, *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005), *available at* 2005 WL 2979427. There is no guarantee that, when the district court rules on the motion for summary judgment in *Sands*, it will dispose of the case on that ground or that the court of appeals – if the case even makes it that far – will pass upon the question.

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[7] Indeed, *Russell* may be an inferior vehicle for deciding the question presented because, without the benefit of a decision from the Ninth Circuit, it is presently unclear whether that case presents both substantive and procedural claims. As explained by the Russells – who live in a remote corner of the "Big Island" of Hawai'i – the underlying dispute arose when the Hawai'i Department of Education (DOE) refused to reimburse them for the cost of transporting their disabled son to and from school, notwithstanding an agreement between the parties that the DOE would do so. *See* Opening Br. at 11, *Russell v. Dep't of Educ.*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965. The due process hearing officer found that the DOE's refusal to reimburse the Russells was appropriate because the Russells allowed their car insurance to lapse. *See id.* at 11-12. The Russells appealed to federal court. *See id.* at 12. Although the Russells' right to reimbursement is quintessentially intertwined with their son's right to be transported to and from school at no cost to his parents, it does not appear that the Russells, unlike the Winkelmans, have their own procedural claims.

In sum, not only is respondent's claim that *Russell* and *Sand* are better vehicles factually wrong, it is entirely speculative: No one knows when, if at all, those cases will be presented to this Court for review. In the situation presented here – where a fully mature conflict in the circuits is squarely presented, and there is no chance that the issue as it affects the parties before the Court will be resolved without the Court's intervention – there is no reason to put off review for another day.

C. Respondent's Merits-Based Arguments Only Highlight the Need for This Court's Prompt Intervention

Respondent offers various merits-based arguments with which we disagree and to which there will be sufficient time to respond if this Court grants review. *See* BIO at 9-19. For present purposes, however, the significance of these arguments and their responses is that they replicate the fundamental differences among the lower federal courts that call out for this Court's prompt consideration and resolution. The time for that consideration and resolution is now.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the supplemental brief, the petition should be granted.

Respectfully submitted,

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April 18, 2006