No. 07-825

In The Supreme Court of the United States

CHERYL BLANCHARD,

Petitioner,

v.

MORTON SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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I. THE EXISTENCE OF AN INTER-CIRCUIT CONFLICT REGARDING THE QUESTION PRESENTED IS NOT DISPUTED.

The Question Presented is whether 42 U.S.C. § 1983 provides a cause of action to enforce the rights in the IDEA. Respondents acknowledge that several courts of appeals hold § 1983 does create such a cause of action. "Circuit courts deciding that § 1983 provides a remedy for a violation of the IDEA are in the clear minority." Brief in Opposition ("Opp'n") 19. Respondents correctly note that currently a majority of the circuits to reach this issue have concluded, to the contrary, that § 1983 does not provide such a cause of action. *Id.* at 18, 20.

Respondents nonetheless suggest that this Court should deny review because "[t]he clear trend in the lower federal courts is to adopt the majority view." *Id.* at 18. "Clear trend" is something of an overstatement. Before 2007 a majority of the nine courts of appeals that had reached the issue held that § 1983 does provide a cause of action to enforce the IDEA.[1] Only

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[1] Such actions were then upheld in the Second, Third, Fifth, Sixth, and Seventh Circuits, but barred in the First, Fourth, Eighth, and Tenth Circuits. *Compare Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *W.B. ex rel. E.J. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995), *abrogated by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (en banc); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990); *Gean v. Hattaway*, 330 F.3d 758, 773–74 (6th Cir. 2003); *Marie O. v. Edgar*, 131 F.3d 610, 621–22 (7th Cir. 1997) *with Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006); *Sellers ex rel. Sellers*

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in 2007 has the Ninth Circuit's position here commanded a narrow majority.[2] Where, as here, a decided conflict exists regarding an important issue of federal law, a grant of certiorari is warranted regardless of whether the decision below is in line with, or contrary to, the position of the larger number of the divided courts of appeals.

Respondents object that, despite the conflict regarding the availability of a § 1983 cause of action, "[a]ll circuit courts deciding the issue conclude that the IDEA does not provide a damages remedy." Opp'n 13. But whether the IDEA itself creates a damages remedy is not the question presented. The question presented concerns the meaning of § 1983. The assumed absence of a damages remedy in the IDEA is one of the reasons why the actual question presented is an important issue.

Respondents argue that the decisions of several of the courts of appeals recognizing a cause of action under § 1983 to enforce the IDEA are distinguishable because those cases involved only equitable relief. Opp'n 19, 21. Respondents do not claim that all of the

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v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Padilla ex rel. Padilla v. Sch. Dist. No. 1, Denver*, 233 F.3d 1268, 1273–74 (10th Cir. 2000).

[2] This only became the majority position after the Ninth Circuit's decision in *Blanchard v. Morton School District*, 509 F.3d 934 (9th Cir. 2007) ("*Blanchard II*"), and the Third Circuit's decision in *A.W.*, 486 F.3d at 802–03.

cases recognizing such a § 1983 cause of action involved only equitable relief. For example, the Second Circuit's decision in *Weixel v. Board of Education of New York*, 287 F.3d 138 (2d Cir. 2002), upheld a § 1983 claim for damages based on a violation of the IDEA. *Id.* at 151.

Moreover, circuit court decisions recognizing a § 1983 claim for injunctive relief cannot on that ground be distinguished from the decision below. The Ninth Circuit below held that § 1983 can *never* be used to enforce the IDEA. Pet. App. 8. Respondents specifically urged the Ninth Circuit to adopt that per se rule.[3] In this Court, although respondents assert that § 1983 cases seeking equitable relief are distinguishable from § 1983 cases seeking damages, Opp'n 19, 21, they simultaneously argue that *all* § 1983 actions to enforce the IDEA are precluded, Opp'n 8.[4]

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[3] In the courts below respondents consistently insisted that there is no cause of action at all under § 1983 to enforce the IDEA, an argument that applied with equal force regardless of the relief sought. *E.g.*, Brief of Appelles [sic] at 6–7, *Blanchard II*, 509 F.3d 934 (No. 06-35388) ("Violations of the IDEA, which provides a comprehensive enforcement scheme to remedy violations of its provisions, cannot be remedied through § 1983."); Defendants' Motion for Summary Judgment ("Motion"), *Blanchard v. Morton School Dist.*, No. CV 02-5101 FDB (W.D. Wash.) ("*Blanchard III*") at 11 ("IDEA based claims are [not] enforceable under § 1983.").

[4] Respondents assert in their "counterstatement of question presented" that the issue in this case is whether § 1983 provides "a cause of action for damages" for a violation of the IDEA. *Id.* at i. But in the body of their brief, as they did in the courts below,

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Respondents' position below and before this Court that § 1983 is never available to remedy IDEA violations is consistent with circuits rejecting a § 1983 cause of action. Those circuits have repeatedly held that the IDEA precludes *all* claims under § 1983, regardless of the remedy requested.[5]

The resolution of the question presented turns on the meaning of § 1415(*l*), which respondents acknowledge was enacted to overturn *Smith v. Robinson*, 468 U.S. 992 (1984). Opp'n 11. Respondents insist that § 1415(*l*) does not permit *any* § 1983 cause of action, Opp'n 11, but suggest no reading of § 1415(*l*) under which the availability of a § 1983 claim would depend on what type of relief was sought. Thus, respondents acknowledge that the circuits are split as to the actual question presented and their attempt to distinguish some of the decisions of the circuits based on the type of damages sought is supported neither by the holdings of those cases nor by any proposed reading of § 1415(*l*) nor even by respondents' own position before this Court and below.

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respondents advance only the broader argument that § 1983 does not provide a cause of action to enforce the IDEA. *Id.* at 8.

[5] *Blanchard II*, Pet. App. 8; *A.W.*, 486 F.3d at 803 ("Congress did not intend § 1983 to be available to remedy violations of the IDEA."); *Padilla*, 233 F.3d at 1274 ("[Section] 1983 may not be used to remedy IDEA violations."); *Sellers*, 141 F.3d at 530 ("[S]ection 1415([*l*]) does not permit plaintiffs to sue under section 1983 for an IDEA violation.").

II. THIS INTER-CIRCUIT CONFLICT IS WELL ENTRENCHED.

Respondents argue that the existing inter-circuit conflict assuredly will disappear because the minority rule is wrong, and thus inevitably will be repudiated by the four circuits that now apply it. Opp'n 12, 19, 23. But in practice, inter-circuit conflicts do not invariably dissipate simply because the mistaken circuits sooner or later realize that they have erred. This Court grants review to address such conflicts because action by this Court is usually necessary to resolve such disagreements.

The conflict at issue in this case is a persistent one. The circuit split has existed since 1996, when the Eighth Circuit held that § 1983 cannot be used to enforce the IDEA, *Heidemann*, 84 F.3d at 1033, thus disagreeing with the Second Circuit's holding in *Mrs. W.*, 832 F.2d at 755.

Far from disappearing, in the last twelve years the conflict has widened. Since 1996, the Eighth Circuit has been joined by the First, Third, Fourth, Ninth, and Tenth Circuits,[6] while the Second Circuit has been joined by the Fifth, Sixth, and Seventh Circuits.[7]

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[6] *Diaz-Fonseca*, 451 F.3d at 28; *A.W.*, 486 F.3d at 802–03; *Sellers*, 141 F.3d at 529–31; *Blanchard II*, Pet. App. 7–8; *Padilla*, 233 F.3d at 1273–74.

[7] *Angela L.*, 918 F.2d at 1193 n.3; *Gean*, 330 F.3d at 773–74; *Marie O.*, 131 F.3d at 621–22. Respondent likewise suggests that

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In arguing that the minority view is incorrect, and thus inevitably will be abandoned, respondents repeatedly rely on this Court's decision in *Smith*. Opp'n 9–11, 17. Because *Smith* provides such "clear guidance," respondents insist, the minority view manifestly is incorrect and the circuit split is therefore "illusory." Opp'n 9. The Ninth Circuit below correctly recognized the existence of a circuit conflict regarding the question presented. Pet. App. 6–7. A circuit split is no less real merely because the decisions on one side may be wrong, or even clearly wrong. Indeed, the existence of an inter-circuit conflict necessarily means that one or more of the courts of appeals has adopted an incorrect interpretation of the law.

Nor is it true, as respondents suggest, that the circuits that follow the minority rule "have not yet had the opportunity to apply th[e] methodology" in *Smith*. Opp'n 23. All of the circuit court opinions adopting the minority rule were handed down after *Smith*, and most discuss that decision.[8] These circuits

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district courts in the Fifth Circuit have recently rejected *Angela L.* Opp'n 18, 22–23 (citing *D.B. ex rel. C.B. v. Houston Indep. Sch. Dist.*, No. Civ.A H-06-354, 2007 WL 2947443, at *11 (S.D. Tex. Sept. 29, 2007)). However, the *D.B.* court failed to cite or discuss *Angela L.* and appears to have been unaware of the district courts that have concluded that the availability of § 1983 actions is "well settled" in that circuit. Cert. Petition at 14–15 & n.4.

[8] *Marie O.*, 131 F.3d at 621–22 (citing *Smith*); *Angela L.*, 918 F.2d at 1193 n.3 (same); *Mrs. W.*, 832 F.2d at 754–55 (same).

had every opportunity to consider *Smith*; they simply disagreed with respondents' contention that, even after the enactment of § 1415(*l*), *Smith* bars § 1983 actions to enforce the IDEA.

Respondents also suggest that the circuit courts adhering to the minority view will now abandon that position in light of *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Opp'n 23. But although suggesting that *Rancho* somehow "refined" *Smith*'s holding, Opp'n 20, 23, respondents do not explain how *Rancho* added in any way to the rule or methodology in *Smith*. To the contrary, the *Rancho* opinion repeatedly insisted it was only applying well-established precedent, including the then twenty-one year old decision in *Smith*.[9] Respondents suggest that the critical holding in *Rancho* was that the existence of a comprehensive statutory enforcement mechanism indicates that Congress intended that mechanism to be the exclusive means by which the statutory rights could be implemented. Opp'n 22. But that principle was not first announced in *Rancho*. Indeed, *Rancho* expressly noted that the rule had been established law since the 1981 decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981). 544 U.S. at 121.

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[9] *E.g.*, 544 U.S. at 119 ("[o]ur [post-1980] cases have made clear"); *id.* at 120 ("in *all* of the cases . . . we have emphasized" (emphasis in original)).

Rancho did not hold that the existence of a judicial remedy under one statute (here the IDEA) necessarily precludes use of § 1983 to enforce that statute. Instead, the Court expressly rejected any such rigid rule:

> The Government . . . urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief. We decline to do so. The ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by *textual indication*, express or implicit, that the remedy is to complement, rather than supplant, § 1983.

Id. at 122 (emphasis added, citation omitted).

The issue at the core of the question presented in the instant case, and underlying the division among the circuit courts, is whether § 1415(*l*) provides just such a "textual indication" that the IDEA does not supplant a § 1983 cause of action. Nothing in *Rancho* purported to interpret or even mention § 1415(*l*). The decision turned in large measure on the meaning of § 601(c)(1) of the Telecommunications Act, 544 U.S. at 126–27, which bears no resemblance whatever to the terms of § 1415(*l*).

In *Weixel*, the Second Circuit expressly held that § 1983 could be used to obtain damages for an IDEA violation. 287 F.3d at 151. Respondents argue that the Second Circuit is now certain to abandon *Weixel* because, one month later, that circuit held that

damages are not available under the IDEA itself. Opp'n 19–20 (citing *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002)).[10] But *Polera* itself expressly reiterated the established Second Circuit rule that such damages are available in a § 1983 action; the plaintiff in *Polera* was denied damages only because she had abandoned her § 1983 claim.[11]

Moreover, respondents ignore the fact that the Second Circuit has adhered to its holding in *Mrs. W.*, despite the later decisions in *Rancho* and *Polera*. Indeed, in *Smith v. Guilford Board of Education*, No. 06-1094-cv, 2007 WL 1725512 (2d Cir. June 14, 2007), the Second Circuit stated that "[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to § 1983

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[10] Respondents assert that the action in *Weixel* was "surely" dismissed on remand in light of *Polera*. Opp'n 20. The district court proceedings in *Weixel*, available on PACER, reveal that the litigation continued for four years after *Polera*, and that the plaintiffs ultimately accepted a substantial monetary settlement offer from the defendants.

[11] As the *Polera* court explained: "We have held that monetary damages are available in claims brought pursuant to [§ 1983] . . . under the IDEA's predecessor statute, the EHA." 288 F.3d at 483 n.5 (citing *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983)). "District courts . . . have followed *Quackenbush*, holding that damages are available on claims brought under Section 1983 for violations of the IDEA. However, . . . Polera's Section 1983 claims were dismissed . . . and she has not appealed the decision." *Id.* (citation omitted). Thus, the *Polera* court concluded that "*Quackenbush* and its progeny do not dictate the outcome of this appeal." *Id.*

to enforce its provisions . . . and to obtain damages." *Id.* at **4. The *Guilford* court was surely aware of its own decision in *Polera*: in fact, it cited *Polera* for an unrelated point. *Id.* at **5. Thus, respondents' belief that the Second Circuit will abandon its long-established position is belied by the Second Circuit's explicit analysis.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case presents an appropriate vehicle for resolving the question presented. The litigation below turned directly on whether § 1983 provides a cause of action to enforce the IDEA. That issue was squarely presented by the parties and expressly decided by the court of appeals and the district court. Pet. App. 8; *id.* at 16 n.2.

Even if § 1983 does provide a cause of action to enforce the IDEA, respondents contend that Ms. Blanchard's claim should be rejected because it is a "[counsel] fee request, disguised as a request for damages." Opp'n 5. Respondents suggest that the only damage Ms. Blanchard will be able to prove is the expenditure of time and effort in the IDEA administrative process, giving rise merely to a claim for "compensation based on *pro se* representation." *Id.* at 8. Such a quantum meruit claim, respondents note, would be barred by the rule that counsel fees are not awarded to *pro se* litigants. *Id.* at 6.

As respondents acknowledge, however, Ms. Blanchard's complaint did not seek compensation for effort devoted to the administrative process. Opp'n 1. Rather, the complaint asserted that she had sustained a "loss of profits."[12] The magnitude of actual lost business profits would be entirely different from a claim for *pro se* counsel fees, which would reflect the market value of time and effort expended in the administrative process.

In sworn statements, Ms. Blanchard explained that for more than ten years she had operated a home-based floral manufacturing business,[13] and that the time required to obtain compliance with the IDEA had severely curtailed her ability to operate that business. Ms. Blanchard stated that she had "lost my many long term customers during this time"[14] and sustained $25,000 in lost profits.[15] Ms. Blanchard provided respondents with financial records of her business for the relevant years.[16] In the district court, respondents did not dispute the truth of these assertions; rather, they maintained that "[a]ssuming as true Ms. Blanchard's statements . . . that she lost . . .

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[12] Complaint, *Blanchard III* at 8, 9.

[13] District's First Interrogatories and Request for Production, *Blanchard III* at 6 ("Interrogatories").

[14] Plaintiff's Declaration Opposing Motion for Summary Judgment, *Blanchard III* at 22.

[15] Interrogatories at 6.

[16] *Id.* at 7.

profits[,] . . . these are consequential damages which are not recoverable."[17]

At a subsequent stage of this litigation, of course, respondents would be entitled to dispute Ms. Blanchard's claim that she actually suffered lost business profits. On an appropriate showing they might even seek summary judgment on that issue. But in the proceedings below, respondents did not challenge the veracity of Ms. Blanchard's statements, and they failed to proffer evidence tending to show that the asserted loss of profits did not occur. At this juncture in the litigation, the record provides no basis for sustaining respondents' contention that the only factual support for any damage claim would be based on Ms. Blanchard's efforts in the administrative process rather than lost profits.

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[17] Defendants' Reply Brief in Support of Motion for Summary Judgment, *Blanchard III* at 11.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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