No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

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

REPLY BRIEF

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REPLY BRIEF

T.A. does not deny that a circuit split exists on the question "whether 20 U.S.C. § 1412(a)(10)(C) creates a categorical bar to reimbursement of private school tuition for students who have not 'previously received special education and related services.'" Pet. App. 8a. Nor does T.A. dispute that the decision below, which sides with the Second and Eleventh Circuits and against the First Circuit in holding that there is no such categorical bar, deepened the conflict this Court granted certiorari to resolve in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 127 S. Ct. 1393 (2007). See Pet. 11-13. Finally, T.A. does not contest the submission of *amici* National School Boards Association, et al., that the question presented is extremely important to school districts across the Nation. See NSBA Br. 17-25.

T.A. contends, however, that "[t]his case is the wrong vehicle to address the question." Opp. 1. As shown below, each of the three grounds T.A. offers to support his contention is without merit. This case squarely presents the question left unresolved in *Tom F.*, and the need for this Court's review has not diminished over the past year. Accordingly, certiorari should be granted.

I. AS IN *TOM F.*, THE INTERLOCUTORY POSTURE OF THIS CASE PROVIDES NO BASIS TO DENY REVIEW.

T.A. first contends that review should be denied because the judgment below is interlocutory. Opp. 14-17. Quoting the Gressman treatise, T.A. asserts that "when a case is in * * * an interlocutory posture," this Court should not grant review "'unless it is necessary to prevent extraordinary inconvenience

and embarrassment in the conduct of the cause.'" *Id.* at 16 (quoting Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007)).

T.A. is wrong. Two pages following the one T.A. quotes, the treatise notes that a case's interlocutory posture is "no impediment" to this Court's review where "the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Gressman, *supra*, § 4.18, at 282 (citing *F. Hoffman-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155 (2004); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)). This Court regularly reviews interlocutory judgments to resolve important issues of law fundamental or potentially dispositive to the case. See, *e.g.*, *Altria Group, Inc.* v. *Good*, No. 07-562, 555 U.S. ___ (Dec. 15, 2008); *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 128 S. Ct. 2531 (2008); *Ky. Ret. Sys.* v. *EEOC*, 128 S. Ct. 2361 (2008); *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Fed. Express Corp.* v. *Holowecki*, 128 S. Ct. 1147 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

That is, in fact, precisely what happened in *Tom F.* The district court there, like the district court below, held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred tuition reimbursement because the student, at the time he was unilaterally placed in private school, had not previously received special education services under the authority of a public agency. See *Bd. of Educ.* v. *Tom F. ex rel. Gilbert F.*, No. 01-6845, 2005 WL 22866, at *1, *4 (S.D.N.Y. Jan. 4, 2005). The Second Circuit, like the Ninth Circuit here, reversed and

remanded for further proceedings on the ground that § 1412(a)(10)(C)(ii) imposed no such bar. See 193 F. App'x 26 (2d Cir. 2006). Consistent with the above-cited cases, this Court granted certiorari despite the interlocutory posture of the Second Circuit's judgment. See 127 S. Ct. 1393 (2007).

The Court should do the same here. The Ninth Circuit reversed and remanded the district court's judgment on the ground that § 1412(a)(10)(C)(ii) does not deprive hearing officers and district courts of the equitable discretion under 20 U.S.C. § 1415(i)(2)(C) to award tuition reimbursement to T.A. and similarly situated students. Pet. App. 8a, 11a, 16a-18a. This litigation will terminate if this Court grants certiorari and takes the contrary view.[1] Given the importance of the question presented to this case and to IDEA litigation generally, see NSBA Br. 2-6, 17-25, the Court should grant review.

II. THE FACTS OF THIS CASE DIRECTLY IMPLICATE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

It is beyond dispute that the circuits have split over whether 20 U.S.C. § 1412(a)(10)(C)(ii) categorically bars tuition reimbursement for students who, prior to their unilateral placement in private school, had not previously received special education services from a public agency. Pet. 11-13. In *Greenland School District* v. *Amy N.*, 358 F.3d 150, 159-60 (1st Cir.

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[1] T.A.'s suggestion that the District is currently "pressing" alternative arguments in the district court (Opp. 14; *see also id.* at 1, 15) is incomplete to the point of being misleading. On remand from the Ninth Circuit, the District moved to stay proceedings pending this Court's disposition of the instant matter, but the motion was denied. *See* 3:04-cv-00331-MO (D. Or. Sept. 11, 2008) (Doc. No. 48).

2004), the First Circuit held that § 1412(a)(10)(C)(ii) imposes such a categorical bar. The Second and Eleventh Circuits have held otherwise. See *Frank G.* v. *Bd. of Educ.*, 459 F.3d 356, 367-76 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007); *M.M. ex rel. C.M.* v. *Sch. Bd.*, 437 F.3d 1085, 1098-99 (11th Cir. 2006) (per curiam).

Faced with this circuit conflict, the Ninth Circuit deferred its submission of this case pending this Court's disposition of *Frank G.* and *Tom F.* Pet. App. 7a. After *Frank G.* and *Tom F.* were disposed of without resolving the conflict, the Ninth Circuit proceeded to decision, "reject[ing] *Greenland* in favor of the Second Circuit's approach." Pet. App. 18a; see also *id.* at 13a ("adopt[ing] the analysis and conclusion of the Second Circuit").

T.A. does not deny that the circuits have interpreted § 1412(a)(10)(C)(ii) differently. He instead contends that the facts of this case do not implicate the split (Opp. 17-22), fastening upon a dictum from *Greenland* suggesting that tuition reimbursement would "perhaps" be available to a child who, while never having received special education services from a public agency, "at least timely requested such services while the child [wa]s in public school." 358 F.3d at 159-60. T.A. does not and could not assert that this dictum pertains to T.A.'s *2003* request for special education services, which occurred nearly a month after his unilateral enrollment in private school. Pet. App. 5a. T.A. maintains, however, that he requested a special education evaluation in 2001, while still in public school, and that the District improperly denied him special education services at that time. Opp. 20. From this premise, T.A. concludes that the First Circuit's interpretation of § 1412(a)(10)(C)(ii) in *Greenland* would not categori-

cally bar him from obtaining tuition reimbursement, and therefore that this case does not actually implicate the conflict identified and joined by the Ninth Circuit.

The Ninth Circuit, of course, took a different view of this case. After all, if the Ninth Circuit believed *Greenland* did not bar T.A. from obtaining tuition reimbursement, it would not have expressly rejected *Greenland*, and would not have deferred submission of the case pending this Court's review of two Second Circuit cases (*Frank G.* and *Tom F.*) that conflicted with *Greenland*. On the question whether its own decision can be reconciled with *Greenland*, the Ninth Circuit is right and T.A. is wrong. The reason is that the District's 2001 denial of special education services is not relevant to the question presented by this case.

This is clear from the record. As the courts below and the hearing officer found, T.A.'s parents never challenged, and T.A.'s mother agreed with, the District's 2001 determination that T.A. was ineligible for special education services. Pet. App. 3a, 27a, 39a n.3, 49a, 51a, 72a; see generally Or. Rev. Stat. § 343.165(1)(a) ("[a] hearing shall be conducted * * * if: The parent requests a hearing to contest the determination of the school district"); 20 U.S.C. § 1415(b). T.A. thus long ago forfeited any claims arising from the 2001 determination. Pet. App. 39a n.3 (district court noting that the "2001 evaluation was not an appropriate subject for the 2003 due process hearing"). Indeed, T.A. admitted below that the statute of limitations bars him from bringing any claims based on the 2001 determination. See Appellant's Opening Br. at *28-29, No. 05-35641, 2005 WL 4238965 (filed 9th Cir. Oct. 31, 2005).

T.A.'s parents did not pursue or request any other special education evaluation while T.A. remained in

public school. Pet. App. 27a-28a, 49a. Given this, the district court found that "[t]here was no notice to the school system prior to T.A.'s removal from Forest Grove High School in 2003 that T.A.'s parents felt that T.A. was in need of special education. The District had no opportunity to address special education issues within the public school setting." *Id.* at 49a; see also *id.* at 51a ("T.A.'s parents did not inform the District that special education services were at issue prior to T.A.'s parents withdrawing him from public school"). T.A. challenged this finding on appeal, suggesting that the 2001 evaluation provided such notice to the District prior to his unilateral withdrawal from public school, see Appellant's Br., *supra*, at *27, but the Ninth Circuit did not disturb the finding. Pet. App. 19a ("In this case, T.A.'s parents did not notify the School District before removing T.A. from public school."). Thus, the Ninth Circuit's holding that § 1412(a)(10)(C)(ii) does not categorically bar T.A. from receiving tuition reimbursement clearly conflicts with the First Circuit's holding that "*before* parents place their child in private school, they must at least give notice to the school that special education is at issue." *Greenland*, 358 F.3d at 160.

As this case comes to the Court, then, the only relevant special education evaluation — the only evaluation resulting in a denial of special education services that T.A.'s parents challenged under the procedures available under Oregon law and IDEA — took place in 2003, after T.A. unilaterally enrolled in private school. T.A. may not question here this common premise of both the district court's and the Ninth Circuit's opinions. See *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). It necessarily follows that the facts of this case do not bring

T.A. within the *Greenland* dictum, and therefore that the Ninth Circuit correctly understood that its decision could not be reconciled with *Greenland*. The dispositive issue in both cases, which the courts resolved differently, is whether § 1412(a)(10)(C)(ii) bars tuition reimbursement for students who did not receive special education services from a public agency prior to being unilaterally placed in private school.

III. THE DISTRICT DID NOT FORFEIT ITS CONTENTION THAT THIS COURT'S SPENDING CLAUSE JURISPRUDENCE SUPPORTS ITS INTERPRETATION OF IDEA.

A. In addition to noting a split on the question presented, the District demonstrated that its interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) finds support from *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), which held that IDEA is a Spending Clause statute and therefore subject to the "clear notice" rule. Pet. 14-20. T.A. maintains that the District "waived" — the proper term is "forfeited," see *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004) — its Spending Clause argument by not raising it in the Ninth Circuit. Opp. 28. But forfeiture applies to issue and claims, not to arguments made in support of issues and claims. "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (internal quotation marks omitted); see also *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000).

Both here and below, the District has advanced the same claim: § 1412(a)(10)(C)(ii) categorically bars

tuition reimbursement to students like T.A. Pet. App. 11a-18a, 44a. Settled precedent permits the District to present new arguments and case law, including its Spending Clause argument and *Arlington*, to support that claim in this Court. See *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here").

B. T.A. also contends that the District's interpretation of § 1412(a)(10)(C)(ii) is mistaken. See Opp. 23-30. Because this case implicates the circuit conflict on the question presented, T.A.'s merits arguments provide no basis to deny review. It nonetheless bears mention that his arguments are flawed.

T.A. maintains that the District's Spending Clause argument cannot be reconciled with *Winkelman ex rel. Winkelman* v. *Parma City School District*, 127 S. Ct. 1994, 2006 (2007), which holds that the "clear notice" rule applies only to statutes that impose a "substantive condition or obligation on States." See Opp. 28-29. But § 1412(a)(10)(C) *does* impose a substantive condition on the States — a tuition reimbursement obligation under defined circumstances — and is included among "the * * * conditions" that States must satisfy to obtain federal funds. 20 U.S.C. § 1412(a). Section 1412(a)(10)(C) therefore is unlike the IDEA provision examined in *Winkelman*, which afforded parents the right to appeal unrepresented by counsel. The provision in *Winkelman* did not

"expand[]" the "basic measure of monetary recovery," 127 S. Ct. at 2006, while § 1412(a)(10)(C) plainly does.

T.A. also argues that the Department of Education's 1999 and 2006 interpretations of § 1412(a)(10)(C) warrant deference. See Opp. 24-25. But deference does not apply where, as here, governing interpretive principles leave only one permissible way to interpret a statute. See *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Under Spending Clause cases like *Arlington*, a statute that does not clearly notify a State of a condition for receiving federal funds cannot be interpreted to impose such a condition. 548 U.S. at 296. Following enactment of § 1412(a)(10)(C) in 1997, IDEA cannot be said to clearly notify state and local school authorities of the need to provide tuition reimbursement to students who do not receive special education services from a public agency prior to their unilateral placement in private school. Pet. 15-16. Given this, there is only one permissible way to interpret § 1412(a)(10)(C) — to prohibit tuition reimbursement under those circumstances. It follows that the Department's contrary interpretation deserves no deference.

The Department's interpretation of IDEA suffers from a further embarrassment. According to the Department, after Congress's enactment of § 1412(a)(10)(C) in 1997, "*hearing officers* * * * retain[ed] their authority * * * to award * * * reimbursement and compensatory services" under § 1415(i)(2)(C) where "the child has not yet received special education and related services." 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999) (emphasis added), *quoted in* Pet. App. 14a-15a n.9. The trouble with the Department's interpretation is that § 1415(i)(2)(C)

provides "the court" — not the hearing officer — with authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). Section 1412(a)(10)(C)(ii), by contrast, speaks to the authority of "a court *or* hearing officer" to order tuition reimbursement. *Id.* § 1412(a)(10)(C)(ii) (emphasis added). Accordingly, even if § 1415(i)(2)(C) was properly understood before 1997 to grant hearing officers the authority to order tuition reimbursement to students like T.A., it could no longer be so understood after Congress enacted § 1412(a)(10)(C).

Finally, T.A. belittles IDEA's procedural protections in an effort to show that the Department's interpretation of § 1412(a)(10)(C) is absurd. Opp. 26-27. T.A.'s complaint about the length of the review process rings hollow given his *post hoc* request for special education services in 2003 and failure to pursue review of the District's denial of such services in 2001. Moreover, as *amici* note, IDEA establishes tight deadlines to ensure prompt resolution of disputes between parents and school districts. NSBA Br. 15-17. For instance, the district must schedule a resolution meeting within 15 days of any complaint, 34 C.F.R. § 300.510(a), and a hearing must occur within 30 days if there is no resolution, *id.* § 300.510(b). An administrative law judge must then issue a decision within 45 days of the expiration of the 30-day time period, unless that deadline is waived. *Id.* §§ 300.515(a), 300.510(c). That tuition reimbursement is barred during that timeframe for students who unilaterally withdraw from public school reflects the balance Congress crafted between

the costs and benefits of IDEA, and can hardly be deemed absurd.[2]

CONCLUSION

For the foregoing reasons and those stated in this petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Indeed, even though T.A. waived the 45-day deadline for an ALJ determination, T.A.'s due process hearing commenced within one month, and concluded within six months, of his parents' 2003 request for a special education evaluation. Pet. App. 56a-57a. After the hearing officer declared T.A. eligible for special education services, T.A.'s private school became the "stay-put" placement, which had the effect of obligating the District to pay T.A.'s tuition from that point through his high school graduation. *See generally* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518.