No. 13-1547

In The Supreme Court of the United States

RIDLEY SCHOOL DISTRICT,

Petitioner,

v.

M.R.; J.R., PARENTS OF MINOR CHILD E.R.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

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The Government agrees (Br. 21) that the "proper interpretation of [the stay-put] provision *** involves an important issue of federal law" over which there is a "split of authority among the courts of appeals," deepened by the decision below. And nowhere does the Government dispute that the Petition presents an ideal vehicle for resolving the question presented. The Government nevertheless contends that the Petition does not merit review because (1) the decision below is correct on the merits, and (2) the circuit conflict might resolve itself. Neither ground survives scrutiny.

I. THE GOVERNMENT IS WRONG ON THE MERITS

1. Agreeing with the decision below, the Government asserts (Br. 11) that "the appeal of an adverse decision in a 'civil action' brought under Section 1415(*i*)(2) is itself part of that action," and thus qualifies as a Section 1415 proceeding that triggers the stay-put provision of the Individuals with Disabilities Education Act (IDEA). But the bare fact that an aggrieved party can usually appeal a final trial court judgment does not *ipso facto* make that appeal a "civil action"—let alone one "brought in any State court of competent jurisdiction or in a district court of the United States" and one "conducted pursuant to [Section 1415]." 20 U.S.C. §§ 1415(*i*)(2)(A) & (j).

The Government's reasoning (Br. 10) that "pursuant to" means "authorized by" refutes, rather than supports, its interpretation. To be sure, a "civil action" is "authorized by Section 1415," as the Government's citation to Section 1415(*i*)(2) establishes. The Government's citation for the authorization of an appeal from that civil action, however, is *not* any provision of Section 1415, as the stay-put provision requires. Instead, the Government points to 28 U.S.C. § 1291—*i.e.*, the jurisdictional provision of the U.S. Code that "authorizes appeals" to federal courts of appeals generally. *United States v. Jose*, 519 U.S. 54, 55 (1996).

The Government further suggests (Br. 11) that "[n]o one would say that a civil action has been definitely *resolved* or *concluded* when a district

court's decision in that action is still in the process of being appealed." Not so. Regardless of how this Court may have "describ[ed] cases pending before it," *id.* at 11 & n.3, this Court has *held* that a district court's remand judgment to an agency, which "*terminated* the civil action," was appealable, *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (emphasis added); *see Forney v. Apfel*, 524 U.S. 266, 270 (1998) (quoting decision below that remand judgment "*ended* the 'civil action'") (emphasis added).

The distinction between "civil actions" and "appeals" appears throughout federal statutes. *See, e.g.*, 15 U.S.C. § 56(a)(1) ("Commission may commence, defend, or intervene in, and supervise the litigation of, [a civil] action *and* any appeal of such action[.]") (emphasis added); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 91-97 (1994) (agency authorized to "initiate" and "appeal" a "civil action").

Even though the original *in forma pauperis* statute excused indigent litigants from paying fees associated with "commenc[ing] any suit or action in any court of the United States *** to conclusion," this Court held that the statute "on its face, does not apply to appellate proceedings." *Bradford v. Southern Ry. Co.*, 195 U.S. 243, 250 (1904). The Court explained: (i) "[t]he words 'action' and 'cause of action' are not ordinarily applicable to [appellate] writs of error *** whether a writ of error be considered a new proceeding or a continuation of the original proceeding"; (ii) "no book holds the word 'action,' or words 'cause of action' to be identical with a writ of error or cause of a writ of error"; (iii) the phrase "prosecute to conclusion" could only mean "termination of the suit or action in the court where

it is commenced"; and (iv) two of the five sections of the Act "obviously relate to the Trial or hearing." *Id.* at 247-250.[1] Years later, Congress amended the statute to include references to appeals following the "*conclusion* [of] any suit or action" in district court. Act of June 25, 1910, ch. 435, 36 Stat. 866 (emphasis added).

That textual dichotomy remains meaningful today. In the Government's words from this Term, the current *in forma pauperis* "statute makes clear in multiple ways that the trial and appellate stages are to be treated as distinct, not as a single unit." U.S. Amicus Br. 18, *Coleman v. Tollefson*, No. 13-1333 (U.S. Jan. 21, 2015); *see, e.g.*, 28 U.S.C. § 1915(a)(2) (allowing a prisoner to "bring a civil action or appeal a judgment in a civil action"); *id.* § 1915(e)(2)(B) ("action or appeal"); *id.* § 1915(g) ("brought an action or appeal"). And "[w]hen Congress wishes to delay

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[1] *Bradford* thus undermines the Government's argument (Br. 16 n.8) that "Congress's specificity with respect to [Section 1415's trial-court-specific] rules is not a reason to conclude that the stay-put provision does not apply during the pendency of an appeal." Moreover, contrary to the Government's suggestion (*id.*), Section 1415's fee-shifting provision is not implicated here. Unlike the stay-put provision, which refers to a "proceeding *conducted pursuant to* this section," 20 U.S.C. § 1415(j) (emphasis added), the fee-shifting provision covers "any action or proceeding *brought under* this section" until "final resolution of the *controversy*," *id.* § 1415(*i*)(3)(B)(i) & (F)(i) (emphasis added). On its face, the "conducted pursuant to" language is narrower because it contemplates particular "proceedings"—*i.e.*, following one or more administrative hearings, a "civil action *** brought *in*" a trial court, *id.* § 1415(*i*)(2)(A) (emphasis added), and litigated according to trial-court-specific procedures, *id.* § 1415(*i*)(2)(C); *see* Pet. 17.

the effect of a judgment until completion of the appeals process, *** it says so explicitly." U.S. Amicus Br. 9; *see also* Pet. 26. Congress's scheme would make little sense if, as the Government now insists (Br. 11), "ordinary speech" dictates that an appeal of a final district court judgment is "part of the same 'civil action.'"

2. The Government maintains (Br. 12) that interpreting "civil action" to encompass appeals "advances the IDEA's core objectives." But the Government endorses only one objective—stability—in contravention of this Court's understanding that the IDEA strikes a "careful balance" of policies. *Smith v. Robinson*, 468 U.S. 992, 1021 (1984); *see* Reply Br. 12 (describing competing statutory purposes).

In any event, the Government overstates the significance of stability in the regulatory scheme. If Congress's end-game was to maintain a child's educational placement at all costs, the IDEA would not countenance changing that placement mid-dispute when "the State or local educational agency and the parents otherwise agree," 20 U.S.C. § 1415(j), including upon an administrative ruling in favor of the child's parents that may be reversed. SG Br. 4-5; Reply Br. 12. Notably, the Government does not deny that the pre-district-court-judgment *status quo* can be preserved where warranted under traditional equitable principles. *Cf. Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 119-120 (D.D.C. 2013) (granting preliminary injunction under "usual grounds for such relief" because *Andersen* "determined that a child is entitled to an injunction

only outside the stay-put provision") (citation and quotation marks omitted); Reply Br. 6-7, 12-13.

The Government also skips past the fact that parents' purportedly "untenable choice" (Br. 12)—removing a child from a placement that might be validated on appeal, or maintaining that placement and risking payment—is not all that "untenable" in reality. Judgments in Section 1415 civil actions are highly likely to be affirmed on appeal, *see* National School Boards Ass'n Amicus Br. 13, and in the atypical situation where the district court's judgment is reversed, parents are entitled to reimbursement, *see* 20 U.S.C. § 1415(*i*)(2)(C)(iii); Pet. 6 n.1. Given that parents' claims have been tested in full-fledged administrative and trial-court proceedings, the risk parents face pending appeal is better informed, and no more "untenable," than the one they already confront when they unilaterally send their children to private school in the first place. *See School Comm. of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 373-374 (1985) ("[P]arents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk."); Pet. 20-21.

3. The Government's invocation (Br. 13-15) of *Chevron* deference also misses the mark. Even if the stay-put provision were ambiguous—despite the fact that Section 1415 nowhere mentions appeals—the clear-statement rule precludes the Department of Education from saddling school districts with obligations not stated "unambiguously" in the IDEA itself. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

"Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for *only* when the devices of judicial construction have been tried[.]" *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (emphasis added). The Government does not dispute that the clear-statement rule, like the canon of constitutional avoidance, is such a device. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text").

The Government instead contends (Br. 19 n.9) that the Department, rather than Congress, may provide the requisite notice to school districts. But that view cannot be squared with this Court's "insist[ence] that *Congress* speak with a clear voice" when it imposes conditions through Spending Clause legislation. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). That is because the clear-statement rule ensures the "legitimacy of *Congress'* power to legislate." *Id.* (emphasis added). Accordingly, an agency's regulation, even if clear, would not remedy Congress's failure to enact legislation consistent with the requirements of the Spending Clause.

But here the Department's regulation is *not* clear, and this case well illustrates the hazards of relying on an agency to provide the requisite notice through such a regulation and further elaboration. *See* SG Br. 15 & n.7 (citing policy letters). Like Section 1415, the regulation does not (and has never) referred to an appellate court proceeding, and its reference to "any administrative or judicial

proceeding" does not resolve the question presented. 34 C.F.R. § 300.518(a). That language—consistent with the Department's intent merely to parrot the statutory language, *see* Pet. 21 n.5—readily refers to the due process hearing, administrative appeal, and state or federal trial court proceedings provided for in the statute—and nothing more. For two decades, including at the time the Respondents filed their due process complaint, the D.C. Circuit stood unrebutted among the circuits in *rejecting* an argument that the same phrase appearing in the regulation allowed the stay-put provision to cover judicial appeals. *See Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1023 (D.C. Cir. 1989); Reply Br. 4; pp. 10-11, *infra*.

Despite the fact that the Department has never confronted *Andersen* in any rulemaking or policy letter, the Government maintains (Br. 19) that the regulation has always supplied "unambiguous notice" of the very stay-put obligation that the D.C. Circuit expressly rejected. Allowing clear notice to be established through the Department's interpretation of an ambiguous implementing regulation leaves the clear-statement rule an empty shell—especially given that the Department may alter its stance either through an amended regulation or without any warning through a different interpretation of the existing one, *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).[2]

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[2] For similar reasons, the Government's footnote citations (at 19 n.9) to *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Davis v. Monroe County Board of Education*,

II. THE UNDISPUTED CIRCUIT CONFLICT ON A CONCEDEDLY IMPORTANT FEDERAL ISSUE WARRANTS REVIEW

1. The Government asserts that the acknowledged "division of authority on the question presented" need not be resolved by this Court because "*only* three *federal courts of appeals* have addressed the question presented in *precedential* decisions." SG Br. 9, 20 (emphasis added). But that entrenched and binary circuit conflict over an admittedly "important" issue of federal law (*id.* at 21) is alone a sufficient basis for granting certiorari. *See* Reply Br. 8-10 (discussing impact on school districts and children). Indeed, if the Government were correct that the D.C. Circuit's decision in *Andersen* creates an "untenable choice" for parents (*contra* p. 6, *supra*), that would make review of this Petition—free of any vehicle concerns—all the more essential.

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526 U.S. 629 (1999), are inapt. In *Jackson*, the Court explained that the conduct at issue "'violate[d] the clear terms of the statute,' *Davis*, 526 U.S., at 642, and that Title IX itself therefore supplied sufficient notice." 544 U.S. at 183. The Court emphasized the backdrop against which Title IX was enacted and a quarter-century of precedent (including *Davis*) that "relied on the text" to "define[] the contours of [its] right of action." *Id.* at 173-177, 182-183. The regulatory scheme implementing Title IX at most buttressed—but did not substitute for—the ample statutory notice. *See id.* at 183-184; *Davis*, 526 U.S. at 643-644. Here, by contrast, the only federal circuit court precedent available to Petitioner at the time Respondents filed their due process complaint concluded that the stay-put provision's text, as well as the same language that appears in the implementation regulation, could not support the interpretation the Department now advances.

The disagreement among lower courts, moreover, reaches beyond "three federal courts of appeals." The Government all but ignores the numerous other federal and state courts—published and unpublished, at both the trial and appellate levels—that have confronted the issue. *See* Pet. 14, 15 n.3; Reply Br. 7-8. And while the Government is keen to stress (Br. 9) that *Andersen* was decided "25 years ago," most reported judicial decisions on the question presented since then—including several of those issued recently—explicitly adopt or reject *Andersen*. *See, e.g.*, Reply Br. 7-8 & nn.3-4 (cataloguing district court opinions in Seventh Circuit that have adopted *Andersen*, and noting intra-circuit split in authority over *Andersen* resolved by the decision below). Accordingly, *Andersen* remains at the center of an active circuit conflict.

2. Faced with a direct and persistent conflict over an important federal issue, the Government resorts to arguing (Br. 9, 20-21) that the Department's regulation—which refers to "any *** judicial proceeding," 34 C.F.R. § 300.518(a)—"might" cause the D.C. Circuit to change its mind and overrule *Andersen* after 25 years. That sort of wishful speculation is not a basis to avoid this Court's review.

First, the D.C. Circuit would not confront the language of the regulation "for the first time." SG Br. 20. *Andersen* itself rebuffed the idea that the phrase "any *** judicial proceeding" should be read to encompass judicial appeals:

> Plaintiffs quote a remark of Senator Williams, a sponsor of the [statute], that an injunction would be available "during

> the pendency of *any* administrative or *judicial proceedings* regarding a complaint," 121 CONG. REC. 37,416 (Nov. 19, 1975). This does nothing to establish that the judicial proceedings contemplated extend beyond the trial court stage.

877 F.2d at 1023 (emphasis added). Because the Government's "new" argument simply repeats the same failed contention advanced in *Andersen*, *see* SG Br. 14 ("'any *** judicial proceeding' unambiguously encompasses an appeal") (alteration in original), the D.C. Circuit would be bound by *Andersen* in a subsequent case. *See* Reply Br. 4.

Invoking *Chevron* would not alter that conclusion. In addition to rejecting the plaintiffs' legislative history argument, the D.C. Circuit reasoned that their expansive reading of "any *** judicial proceedings" could not be "shoehorned into the literal language of" the stay-put provision. *Andersen*, 877 F.2d at 1023. Accordingly, the statutory text would be equally unreceptive to an argument based on the Department's regulation. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994); *cf. Leocal v. Ashcroft*, 543 U.S. 1, 11, 13 (2004) (refusing to "shoehorn[]" a policy concern into a statutory provision that "cannot be read" to bear the meaning urged).

Second, contrary to the Government's contention (Br. 20-21), the D.C. Circuit could not alter its existing interpretation of the stay-put provision by deferring to the Department under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Under *Brand X*, a

"prior court decision hold[ing] that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion" will "trump[] an agency construction otherwise entitled to *Chevron* deference." *Id.* at 982. That occurs even where a prior judicial interpretation labels the statute "not 'unambiguous'" but nonetheless makes clear that "there is no longer any different construction *** available for adoption by the agency." *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843-1844 (2012) (plurality opinion) (citation omitted).

Those principles mean that *Andersen*—holding that the plaintiffs' construction was "inconsistent with the statutory language," 877 F.2d at 1023—would "trump" the Department's interpretation of the stay-put provision. As such, *Andersen* leaves "no gap for the agency to fill," *Brand X*, 545 U.S. at 983, "[a]nd there being no gap to fill, the Government's gap-filling regulation cannot change [*Andersen*'s] interpretation of the statute," *Home Concrete & Supply*, 132 S. Ct. at 1844.

Third, the Government's own policy argument undercuts its wait-and-see approach. As discussed (p. 6, *supra*), the Government contends (Br. 12) that when the stay-put provision does not apply on appeal, parents face "untenable" pressure to "remov[e] their child[ren] from *** private school," lest they be "responsible for the cost of the private school for the duration of the appeal." If correct, then parent-litigants in the D.C. Circuit would be dissuaded from challenging *Andersen*: they would return their children to the original public-school placement,

thereby inhibiting D.C. Circuit review—and leaving *Andersen* binding on all parents, indefinitely.

* * * * *

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

Respectfully submitted.

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