No. 20-402

In the Supreme Court of the United States

CHAD AND TONYA RICHARDSON, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF L, PETITIONERS

v.

OMAHA SCHOOL DISTRICT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the statute of limitations for an attorneys' fees action brought in Arkansas under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B)(i)(I), should be borrowed from Arkansas Code Ann. § 6-41-216 (Supp. 2019), which imposes a 90-day statute of limitations for judicial review of IDEA merits actions, instead of Arkansas Code Ann. § 16-56-105 (2005), which imposes a three-year statute of limitations for certain types of independent actions.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The Act is "frequently described as a model of cooperative federalism," leaving States with "the primary responsibility for developing and executing educational programs" for children with disabilities, but "impos[ing] significant requirements to be followed in the discharge of that responsibility." *Schaffer*

v. *West*, 546 U.S. 49, 52 (2005) (citations and internal quotation marks omitted).

Under the IDEA, States that receive federal funds must make a "free appropriate public education" available to every child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). States must also afford parents "general procedural safeguards" to "protect the[ir] informed involvement" in their child's education. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007). Thus, parents may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to [their] child." 20 U.S.C. 1415(b)(6)(A). The parties may attempt to resolve the complaint informally through mediation or a "[p]reliminary meeting," 20 U.S.C. 1415(f)(1)(B)(i), and if those efforts are unsuccessful, they may proceed to "an impartial due process hearing," 20 U.S.C. 1415(f)(1)(A). The administrative hearing is conducted by the "local educational agency, as determined by State law" or the "State educational agency," in accordance with certain basic federal requirements. *Ibid.*; see 20 U.S.C. 1415(g) (permitting appeal to State educational agency where local agency makes initial determination).

b. Since 1975, the IDEA has included a right to judicial review, although the contours of that right have changed over time. In the 1975 version of the statute, Congress provided for a cause of action for parties who were dissatisfied with the results of the administrative proceedings. See 20 U.S.C. 1415(e) (Supp. 1975); Education for All Handicapped Children Act of 1975, Pub L.

No. 94-142; §5(a); 89 Stat. 789.[1] Section 1415(e)(2) of the 1975 law stated that "[a]ny party aggrieved by the findings and decision made" by a hearing officer "shall have the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." And Section 1415(e)(4) reiterated that "[t]he district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy."

In 1986, Congress amended Section 1415(e)(4)'s jurisdictional grant to empower courts to "award reasonable attorneys' fees * * * to the parents or guardian" of a child who "is the prevailing party" in an "action or proceeding." Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796. Congress further specified some conditions on awards of attorneys' fees. For example, Congress provided that a court may not award fees to a parent who conclusively prevails in "an administrative proceeding" if she rejected a more favorable settlement offer "more than ten days before the proceedings beg[an]." *Ibid.*

In the wake of these amendments, courts have consistently recognized that the IDEA creates a cause of action not only for a party "aggrieved" by the hearing officer's decision on the merits, but also for a party who has "prevailed" at the administrative proceeding and seeks an award of attorneys' fees. See *D.G. ex rel. LaNisha T.* v. *New Caney Indep. Sch. Dist.*, 806 F.3d 310, 318 (5th Cir. 2015) (collecting cases). As the House Report accompanying the 1986 amendments explained,

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[1] The IDEA changed title several times before taking its current name in 1990. See Education of the Handicapped Act Amendments of 1990; Pub. L. No. 101-476, §901(a)(1), 104 Stat. 1141-1142.

Congress envisioned that the parties would reach an agreement with respect to attorneys' fees "if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision)." H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985). But "[i]f no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs, and expenses." *Ibid.*[2]

In 2004, Congress made further amendments to the IDEA that altered both the attorneys' fees provision and the merits cause of action. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Tit. I, § 101, 118 Stat. 2724. Specifically, Congress amended 20 U.S.C. 1415(i)(3)(B)(i)—formerly Section 1415(e)(4)—to allow not only prevailing parents but also prevailing school districts to recover fees in certain circumstances. And Congress amended the merits cause of action to include an express statute of limitations, providing that a party "shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time

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[2] In this respect, the IDEA is distinct from other civil rights statutes, which permit courts to award fees only after judicial review of the merits of the administrative decision. See *North Carolina Dep't of Transp.* v. *Crest St. Cmty. Council, Inc.*, 479 U.S. 6 (1986) (independent attorneys' fees actions are not available under 42 U.S.C. 1988); *Chris* v. *Tenet*, 221 F.3d 648, 651-655 (4th Cir. 2000), cert. denied, 531 U.S. 1191 (2001) (same for Title VII); but see *Porter* v. *Winter*, 603 F.3d 1113, 1116-1118 (9th Cir. 2010) (concluding that independent Title VII fees actions are available). In contrast to the IDEA, the fees provisions in Section 1988 and Title VII lack the independent jurisdictional grant that accompanies the IDEA's fees provision and also do not include the IDEA's specific provisions governing when courts may award fees to parties who have prevailed in administrative proceedings.

limitation for bringing such action under this subchapter, in such time as the State law allows." 20 U.S.C. 1415(i)(3)(B).

2. a. Petitioners are parents who asserted that the respondent school district denied their child his right to a free appropriate public education under the IDEA. Pet. App. 2a. Petitioners filed a due process complaint under the IDEA with the Arkansas Department of Education raising four claims against respondent. *Ibid.* On April 14, 2017, the hearing officer issued a decision in favor of petitioners on two of those claims. *Ibid.* On July 13, 2017, petitioners filed a timely action as aggrieved parties seeking judicial review of the adverse findings on the other two claims. *Id.* at 44a. On November 8, 2017, the court dismissed the action for failure to serve the defendants. *Id.* at 45a.

b. On December 4, 2017, petitioners filed a new action seeking attorneys' fees for the work performed during the administrative proceedings with respect to the two claims on which they had prevailed. Pet. App. 46a. The district court dismissed the attorneys' fees claim as time-barred. *Id.* at 51a-54a. In doing so, the court recognized that Arkansas had enacted an express 90-day statute of limitations to govern suits for judicial review of IDEA administrative decisions, and it applied that same limitations period to petitioners' request for attorneys' fees. See *id.* at 51a (citations omitted); *id.* at 53a-54a. The court further concluded that the 90-day clock for filing a fees action began to run when the 90-day period to request merits review of the administrative decision had expired, on July 13, 2017. *Id* at 51a. Petitioners' claim for attorneys' fees was filed 144 days later, on December 4, 2017, and was therefore "too late." *Id.* at 54a.

c. The Eighth Circuit affirmed. Pet. App. 1a-17a. It first determined that no federal statute of limitations expressly applies to IDEA fees actions, *id.* at 4a-5a, and observed that "[w]hen a federal law has no statute of limitations, courts may borrow the most closely analogous state statute of limitations, unless doing so would frustrate the policy embodied in the federal law." *Id.* at 4a (citation omitted).

The court of appeals then turned to petitioners' argument that the district court should have borrowed Arkansas's three-year statute of limitations for personal injury actions instead of Arkansas's 90-day statute of limitations for judicial review of IDEA administrative decisions. Pet. App. 6a-10a. The court acknowledged that petitioners' argument was "not without support" because the Ninth and Eleventh Circuits had "borrowed similar, years-long statutes of limitations" for IDEA fees actions. *Id.* at 6a (citing *Meridian Joint Sch. Dist. No. 2* v. *D.A.*, 792 F.3d 1054, 1064 (9th Cir. 2015); *Zipperer* v. *School Bd. of Seminole Cnty.*, 111 F.3d 847, 850-852 & n.9 (11th Cir. 1997)). And the court noted that the Ninth Circuit had expressed concern that a shorter statute of limitations might force litigants to sue for attorneys' fees before the time for filing a request for judicial review of the merits had expired. *Ibid.* The court of appeals observed, however, that both the Sixth and Seventh Circuits had borrowed shorter state limitations periods more akin to the one borrowed by the district court. *Id.* at 6a-8a (citing *King* v. *Floyd Cnty. Bd. of Educ.*, 228 F.3d 622, 624-627 (6th Cir. 2000); *Powers* v. *Indiana Dep't of Educ.*, 61 F.3d 552, 554-559 (7th Cir. 1995)).

Ultimately, the court of appeals was "persuaded by the reasoning in the Sixth and Seventh Circuit decisions" that suits for attorneys' fees are ancillary to the administrative process and should be governed by the same timelines as merits actions. Pet. App. 8a. The court further concluded that applying the 90-day limit would not "frustrate the policy embedded in" the IDEA. *Id.* at 9a. In particular, the court observed that the "Ninth Circuit's concern that the prevailing party would have to determine whether to file an action for attorneys' fees before knowing whether the losing party would seek judicial review" did not apply because circuit precedent dictated that the statute of limitations for fees actions begins to run only after the period for seeking merits review has expired. *Ibid.* (citing *Brittany O.* v. *Bentonville Sch. Dist.*, 683 Fed. Appx. 556, 558 (8th Cir. 2017) (per curiam)).

DISCUSSION

The court of appeals correctly determined that the statute of limitations for an attorneys' fees action brought in Arkansas under the IDEA, 20 U.S.C. 1415(i)(3)(B)(i)(I), should be borrowed from Ark. Code Ann. § 6-41-216 (Supp. 2019), which imposes a 90-day limitations period for judicial review of IDEA merits actions, instead of Ark. Code Ann. § 16-56-105 (2005), which imposes a three-year limitations period for certain types of independent actions. No further review of that determination is warranted.

While there is some disagreement in the circuits about whether fees actions under the IDEA are more analogous to actions for judicial review of administrative decisions or independent actions for damages, the question of which state statute is most analogous to a particular federal claim is "heavily contingent upon an

analysis of state law." *Runyon* v. *McCrary*, 427 U.S. 160, 181 (1976). Accordingly, this Court generally leaves such decisions to the "considered judgment" of the lower courts. *Ibid.* The Court should follow that course here because the issue has little practical effect.

In any event, this case is a poor vehicle for review because it does not afford the Court an opportunity to pass upon the interrelated questions of accrual and tolling that the Court would need to address to provide meaningful guidance as to when an IDEA fees suit is timely. The petition for a writ of certiorari therefore should be denied.

A. The Eighth Circuit's Decision Is Correct

Because federal law is silent as to the appropriate statute of limitations for an IDEA attorneys' fees action for prevailing parents, courts must "'borrow' the most closely analogous state limitations period." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 414 (2005). Here, the Eighth Circuit correctly concluded that the most analogous Arkansas limitations period is the one the State established for judicial review of IDEA administrative decisions.

1. "To determine the applicable statute of limitations for a cause of action created by a federal statute," a court "first ask[s] whether the statute expressly supplies a limitations period." *Graham Cnty.*, 545 U.S. at 414. If there is none, and the cause of action was created after 1990, the court must apply 28 U.S.C. 1658(a), a statute enacted in 1990 to establish a four-year default limitations period for newly created federal actions going forward. See *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). If, however, the cause of action was created before 1990, then the court will typically "apply

the most closely analogous statute of limitations under state law." *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983).

Federal courts have been borrowing state limitations periods for federal causes of action for well over two centuries. *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 161-163 (1987) (Scalia, J. concurring in the judgment); see *Graham Cnty.*, 545 U.S. at 414. The practice likely began as an extension of preemption doctrine. *Malley-Duff*, 483 U.S. at 161-163 (Scalia, J., concurring in the judgment). Courts in the 19th Century would apply a relevant state limitations period to both state and federal causes of action alike, so long as—in the case of a federal action—the state limitation was not preempted by the federal law. *Ibid.* Over time, however, this "Court adopted the view that [it] borrow[s] the 'appropriate' state statute of limitations * * * because that is Congress' directive, implied by its silence on the subject." *Id.* at 164; see *id.* at 164-165 (observing that courts have borrowed state limitations periods for so long that "it is reasonable to say that such a result is what Congress must expect, and hence intend, by its silence").

Precedent and practice have established some guidelines as to how the borrowing analysis should be performed. A court will generally examine the nature of the federal claim and then look to state law in the relevant forum to determine which "state law of limitations" would govern an "analogous" state-law "cause of action." *Board of Regents of the Univ. of the State of N.Y.* v. *Tomanio*, 446 U.S. 478, 483-484 (1980). Once the court has identified the most analogous state-law limitations period, it must then confirm "that the importa-

tion of state law" will not "be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. of California* v. *EEOC*, 432 U.S. 355, 367 (1977). If federal policies will be frustrated, the court may apply a "closely circumscribed exception" to the state borrowing rule, under which the "desirability of a uniform federal statute of limitations" permits borrowing from a federal rather than a state source. *Malley-Duff*, 483 U.S. at 154; see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 355 (1991).

2. In this case, the court of appeals correctly determined that Arkansas's 90-day statute of limitations for judicial review of IDEA administrative decisions should apply to petitioners' fees action. At the outset, as the court observed, federal law is silent as to the statute of limitations for IDEA attorneys' fees actions brought by prevailing parents. Pet. App. 4a. Since 2004, the IDEA has included a limitations period for merits actions, providing that "such action[s]" must be brought within 90 days of a hearing officer's decision unless the State has enacted its own express limitations period, in which case the state limit applies. 20 U.SC. 1415(i)(2)(A)-(B). But, by its terms, that statute of limitations applies "only to actions brought by aggrieved parties seeking judicial review of adverse administrative decisions, and not to actions brought by prevailing parties seeking attorneys' fees." *D.G. ex rel. LaNisha T.* v. *New Caney Indep. Sch. Dist.*, 806 F.3d 310, 318 (5th Cir. 2015); see Pet. App. 4a.

The general four-year default limitations period for post-1990 federal causes of action, 28 U.S.C. 1658(a), is similarly inapplicable because the "IDEA provided for a prevailing parent's right to attorneys' fees in 1986."

Pet. App. 5a.[3] And no party has suggested that this is a "rare case" in which courts should borrow a federal, rather than a state, statute of limitations. *Graham Cnty.*, 545 U.S. at 415. Far from establishing the sort of preference for "uniform[ity]" that sometimes requires borrowing a federal limitations period, *Lampf*, 501 U.S. at 355, the IDEA expresses a preference for variation across the States, with even its express statute of limitations for merits actions phrased to ensure that a State may supply its own timeline if it chooses. 20 U.SC. 1415(i)(2)(B).[4]

Turning to the question of the most closely analogous statute of limitations under state law, the court of appeals correctly determined that Arkansas's 90-day period for judicial review of IDEA administrative decisions should govern here. In rejecting petitioners' argument that the three-year statute of limitations for

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[3] Courts have observed that the default limitations period in 28 U.S.C. 1658(a) would apply to fees actions brought by prevailing school districts because school districts did not obtain the right to sue for fees until 2004. See, *e.g.*, Pet. App. 5a; *D.G.*, 806 F.3d at 318. While the application of disparate limitations periods to actions brought under a single statutory provision may appear anomalous, this Court has held that it is the straightforward consequence of Congress's decision not to make 28 U.S.C. 1658(a) retroactive. See *Jones*, 541 U.S. at 378.

[4] The analysis would likely be different, however, for suits involving federal schools operated by the Department of Defense (DOD) or other federal entities. The IDEA applies to DOD through separate statutory provisions and DOD implementing regulations that apply uniformly to DOD-operated schools throughout the United States and overseas and that do not invoke state limitations periods. See 10 U.S.C. 2164(f); 20 U.S.C. 921(b); and 32 C.F.R. Pt. 57. Moreover, IDEA actions that arise in connection with DOD-operated schools raise questions regarding federal sovereign immunity not implicated by this case.

personal injury actions should apply instead, the court reasonably concluded that an IDEA fees action is more analogous to an action for judicial review of an IDEA merits decision than an independent tort suit. That makes sense because petitioners' fees action indisputably arose from and was dependent on the IDEA administrative proceedings in which petitioners incurred the attorneys' fees.

Moreover, the choice of the correct state law to borrow is "essentially a practical inquiry," *Owens* v. *Okure*, 488 U.S. 235, 242 (1989), and—as a practical matter—a plaintiff seeking fees is in a very different position from a plaintiff who must file a personal injury action from scratch. Unlike a personal injury plaintiff, a party seeking fees is not newly engaging with a dispute resolution process; at a minimum, she will already have both a lawyer and a (winning) administrative record. And while the administrative record generally will not contain a fees decision for the court to review, but see p. 13, *infra*, it will provide the basis for many of the determinations the court reviewing the request for attorneys' fees must make. For example, a court must look to the administrative record to determine if the parents "prevail[ed]," and if they rejected a settlement offer that was better than the final outcome. 20 U.S.C. 1415(i)(3)(B)(i)(I) and (D)-(E). And courts also must look to the record to determine if either party unreasonably protracted the final resolution of the action and if the time spent "[was] excessive considering the nature of the action or proceeding." See 20 U.S.C. 1415(i)(3)(F)(iii).

Nor does the application of the 90-day limitations period "frustrate the policy embedded in the federal law." Pet. App. 9a. While the IDEA evinces a congressional

intent to establish procedural safeguards and encourage parental involvement, see p. 2, *supra*, those policy goals generally are not implicated by the statute of limitations for pursuing attorneys' fees. By the time of the fees action, a parent will already have obtained an attorney to assist in vindicating her child's rights and will have prevailed on the merits. And a multi-year limitations period is not necessary to advance the statutory policy of making attorneys' fees available because lawyers generally have a strong incentive to file quickly to facilitate their prompt payment.

3. Petitioners' arguments in favor of the three-year statute of limitations are unavailing. Petitioners primarily contend (Pet. 25-26) that a longer limitations period is appropriate because the IDEA prevents hearing officers from awarding attorneys' fees themselves, such that a fees action is more akin to a "new proceeding" than an action for review of an administrative decision. But that argument minimizes the extent to which the attorneys' fees action will nonetheless be based on the administrative record and overlooks the dissimilarities between a party seeking fees in connection with an administrative victory and a personal injury plaintiff who must build a case from square one. See pp. 11-12, *supra*. Nor is it clear that petitioners' premise regarding the authority of hearing officers is correct. While no State currently authorizes its hearing officers to award fees, the Department of Education has previously determined that States may do so if they choose. See Office of Special Education Programs, U.S. Dep't of Education, *Letter to Anonymous*, 19 IDELR 277 (July 6, 1992); see also 64 Fed. Reg. 12, 406, 12,614-12,615; *id.* at 12,671 (Attachment 3, Subpart E (proposed note to 34 C.F.R. 300.513)).

Petitioners also suggest (Pet. 26) that borrowing Arkansas's 90-day statute of limitations for judicial review of administrative decisions is at odds with Congress's decision to provide an express limitations period for IDEA merits actions but not attorneys' fees claims. But the court of appeals did not apply the federal statute of limitations for merits actions. Instead, the court borrowed the most analogous *state* statute of limitations. In petitioners' view, that amounts to the same thing because the express IDEA statute of limitations invites States to enact applicable limitations periods for merits actions, and—in this case—the Eighth Circuit found that the 90-day statute of limitations that Arkansas enacted for that purpose was also the most appropriate limitations period for fees actions. The borrowing analysis, however, will not always result in the same statute of limitations applying to both merits and fees actions. For example, in a State that has not enacted a limitations statute for IDEA merits cases, the federal 90-day period would apply to a merits suit, but courts would likely look to an analogous state statute providing for judicial review of administrative proceedings to borrow the statute of limitations for the fees action.

There is also no reason to believe that Congress would have been opposed to applying a State's limitations period for IDEA merits actions to attorneys' fees suits. When Congress established the express default statute of limitations for IDEA merits actions, it did so against a backdrop in which courts of appeals were borrowing state statutes of limitations for both merits and attorneys' fees suits. See *King* v. *Floyd Cnty. Bd. of Educ.*, 228 F.3d 622, 624-627 (6th Cir. 2000); *Powers* v. *Indiana Dep't of Educ.*, 61 F.3d 552, 554-559 (7th Cir. 1995); *Zipperer* v. *School Bd. of Seminole Cnty.*, 111

F.3d 847, 850-852 (11th Cir. 1997). If anything, Congress's decision to establish an express statute of limitations for merits, but not fees, actions signals that it was content for courts to continue borrowing the most analogous state limitations periods for fees actions. And Congress could reasonably have expected that where a State enacted an IDEA-specific statute of limitations for merits suits, that state limitations period would be the most analogous limitations period for fees suits, such that it would apply to those actions as well.

B. The Question Presented Does Not Warrant Review

Petitioners assert (Pet. 22-23) that review is warranted because the circuits disagree as to which type of state statute of limitations courts should borrow for IDEA attorneys' fees suits. While there is some disagreement on that issue, this Court does not generally intervene to decide the state-law-dependent question of which state statute is most analogous to a federal cause of action. Nor would it make sense for the Court to do so here, where the timing question is of little practical importance.

1. As the Eighth Circuit recognized, the courts of appeals have reached different conclusions as to how best to characterize an IDEA action for attorneys' fees and which kind of state limitations period to borrow. Pet. App. 6a-8a. The Sixth and Seventh Circuits, joined by the Eighth Circuit in the decision below, have concluded that attorneys' fees actions are best characterized as "ancillary and inherently related to the underlying [merits] dispute." *Id.* at 9a; see *King*, 228 F.3d at 624-627; *Powers*, 61 F.3d at 554-559. Accordingly, they have borrowed relatively short state statutes of limitations for judicial review of administrative decisions. *Ibid.*

The Ninth and Eleventh Circuits, on the other hand, have characterized a fees action as "independent" from the merits action and borrowed longer statutes of limitations for tort actions or statutory liability. See *Meridian Joint Sch. Dist. No. 2* v. *D.A.*, 792 F.3d 1054, 1061-1064 (9th Cir. 2015); *Zipperer*, 111 F.3d at 850-852. Those courts have reasoned that, because a hearing officer generally does not award fees herself, the attorneys' fees action cannot be viewed as "analogous to the appeal of an administrative hearing." *Zipperer*, 111 F.3d at 851.

2. a. The disagreement in the circuits does not warrant this Court's review. The determination of the appropriate state statute of limitations is "heavily contingent upon an analysis of state law." *Runyon*, 427 U.S. at 181. In order to decide which state statute of limitations to borrow, courts must assess what kinds of limitations periods the particular State has enacted, how those state limitations periods are generally applied, and whether they are compatible with the policies of the relevant federal law. That analysis is inevitably highly state specific, as different state legislatures will have enacted different state limitations periods to address the State's own unique range of causes of action. Accordingly, this Court is not generally "disposed to displace the considered judgment of the Court of Appeals" as to the appropriate state statute of limitations to borrow. *Ibid.*

Petitioners contend that the Court could at least provide useful guidance as to which type of state limitations period should apply. Reply Br. 4-6. They suggest that the Court has often granted review to provide high-level guidance of this sort. But in the two examples they cite from the last thirty years, the Court considered only

whether federal law required courts to borrow *some* state statute of limitations—a question of federal statutory interpretation for which the Court is well suited—and not which *type* of state limitations period should be borrowed. *Id.* at 2-3; see *id.* at 3 (citing *Graham Cnty.*, 545 U.S. at 411, 419 n.3 (determining that borrowing was necessary because the statute's express federal limitations period did not apply, but declining to decide which state limitations period to borrow), and *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 32 (1995) (deciding courts should borrow state, rather than federal, limitations period for claims under 29 U.S.C. 2101 *et seq.*, and recognizing that, as a result, courts may apply "different limitations periods in different States")).

Petitioners also rely on two older cases in which this Court attempted to fashion rules for which state limitations statutes should be borrowed in suits under 42 U.S.C. 1981 and 1983. Reply Br. 2 (citing *Okure*, 488 U.S. at 236, and *Burnett* v. *Grattan*, 468 U.S. 42, 46 (1984)). Petitioners largely disregard, however, that the Court fashioned those rules only because it determined that the federal statutes were "fairly construed as a directive to select" one kind of state limitations period to apply to all actions in order to maximize the "federal interests in uniformity" and "certainty." *Wilson* v. *Garcia*, 471 U.S. 261, 274-275 (1985).[5] No court has sug-

[5] Petitioners ignore, moreover, that this Court encountered difficulty in establishing a uniform rule in this context. Just a few years after *Wilson* held that all Section 1983 claims should be governed by state statutes of limitations for personal injury actions, the Court found it necessary to grant certiorari in *Okure*, *supra*, to decide

gested that the IDEA—which generally affords substantial opportunities for variation across States—establishes a similar directive. See, *e.g.*, *King*, 228 F.3d at 624 ("With respect to the IDEA, the selection of an appropriate state statute of limitations is done on a case-by-case basis.").

b. In any event, petitioners oversimplify the state-law backdrop that the Court would confront in this case. They suggest that the Court need only choose between the "administrative review approach" and the "independent lawsuit approach," but they elide the important distinctions that exist even within those categories. Pet. App. 64a-76a. For example, several States have enacted "administrative review" statutes that directly address the timeline for filing IDEA fees actions. See 511 Ind. Admin. Code 7-45-11(a) (2021) (30 days); N.H. Rev. Stat. Ann. § 186-C:16-b.V (LexisNexis 2018) (120 days); N.M. Code R. § 6.31.2.13(I)(24)(b) (2020) (30 days); Utah Code Ann. § 53E-7-208 4(b) (Lexis Nexis Supp. 2000) (30 days). A court that was otherwise inclined towards the "independent lawsuit approach" might nonetheless conclude that it should borrow the statute of limitations the State enacted specifically for IDEA attorneys' fees actions. And, as respondent observes, petitioners similarly ignore the vast range of state statutes of limitations that might be covered by the "independent lawsuit approach." See Br. in Opp. 15 (observing that many States have multiple causes of action for independent suits).

Petitioners also overstate the extent to which IDEA attorneys' fees actions will be procedurally uniform

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what particular kind of state personal injury statute should be borrowed. See *Jones*, 541 U.S. 378 (recognizing that the Court's decisions "provoked dissent and further litigation").

across different States. Petitioners suggest (Pet. 28) that attorneys' fees actions are necessarily more akin to independent suits because hearing officers lack the authority to decide attorneys' fees issues. But several States have granted hearing officers the authority to make crucial decisions with respect to eligibility for attorneys' fees under the IDEA. For example, California, Connecticut, and Tennessee allow hearing officers to decide prevailing party status. Cal. Educ. Code § 56507(d) (West 2018); Conn. Agencies Regs. § 10-76h-16(b) (Nov. 21, 2015); Tenn. Code Ann. § 49-10-606(f) (2020). Texas permits hearing officers to determine if either party unreasonably protracted final resolution. 19 Tex. Admin. Code § 89.1185(m)(1) (2021). Other States could follow suit or go further. See p. 13, *supra*. Petitioners' argument that IDEA attorneys' fees actions should be treated as independent lawsuits across all States would not properly account for these variations.

3. Petitioners' question presented has little practical effect. While the *availability* of attorneys' fees is critically important to the proper functioning of the IDEA, the choice of limitations period does not carry the same importance. Parents seeking attorneys' fees are already represented by counsel, who are often familiar with the need to seek fees on a short timeline. Cf. Fed. R. Civ. P. 54(d)(2) (requiring parties to move for fees within 14 days of judgment unless a court order or statute provides otherwise). And attorneys have every incentive to file a fees action promptly to receive payment. Accordingly, the statute of limitations will rarely be dispositive.

Petitioners suggest (Pet. 22) that the question must be important because there are "thousands of IDEA due process hearings completed each year." Yet petitioners

point to only five decisions from the courts of appeals squarely deciding which limitations period applies—and three of those decisions are more than 20 years old. Indeed, even the Eleventh Circuit—which concluded that it was appropriate to borrow a longer limitations period—has acknowledged that the proper timing for an attorneys' fees action is "more likely to be resolved by the attorneys' interest in prompt payment than by a short period of limitations." *Zipperer*, 111 F.3d 851.

C. This Case Would Be A Poor Vehicle To Provide Guidance On The Limitations Period For IDEA Attorneys' Fees Actions

Even if the question presented otherwise warranted review, this case is a poor vehicle because the parties have not pressed questions with respect to accrual and tolling that this Court would need to address to provide meaningful guidance to the lower courts.

1. "[A]ny period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Yet the courts of appeals have not reached a consensus as to when the statute of limitations for IDEA fees actions accrues. The Seventh Circuit has determined that the clock does not start to run for a fees action until the merits proceedings are complete or the time for filing a merits action has expired, *McCartney C. ex rel. Sara S.* v. *Herrin Cmty. Unit Sch. Dist. No. 4*, 21 F.3d 173, 175-176 (7th Cir. 1994), and the Fifth and Eighth Circuits have expressed support for that position, *D.G.*, 806 F.3d at 320-321; *Brittany O.* v. *Bentonville Sch. Dist.*, 683 Fed. Appx. 556, 558 (8th Cir. 2017) (per curiam). The Ninth Circuit, however, has suggested that the limitations period for a fees action

begins to run at the same time as the merits action—that is, when the hearing officer issues a decision. *Meridian*, 792 F.3d at 1064.

The accrual issue is closely intertwined with the question of which state statute of limitations should apply. Indeed, both the Eighth and Ninth Circuits cited their disparate views of accrual in defending their disparate views of which state limitations period to apply. Pet. App. 9a; *Meridian*, 792 F.3d at 1064. To provide any meaningful guidance to lower courts, it therefore would make sense to consider both issues together. This case does not provide such an opportunity, however, because neither party has pressed or preserved the accrual issue.[6]

2. Likewise, a better vehicle for review of the question presented would also provide the Court with an opportunity to consider whether and to what extent equitable tolling might apply. The IDEA contains a robust parental notice requirement, and some courts have suggested that a school district's failure to inform a parent regarding the deadline for an attorneys' fees action might affect whether the action is considered timely. *D. G.*, 806 F.3d at 316 n.3; see *Abraham* v. *District of*

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[6] The district court below assumed that the clock began to run in July 2017, when the 90-day period for bringing a merits action expired. See p. 5, *supra*. On appeal, respondents did not argue for an earlier accrual point, and petitioners did not argue for a later one. Petitioners conceivably could have asserted that the clock did not begin to run until November 2017, when the district court dismissed their merits action challenging the administrative decision with respect to the claims on which they lost—which would have made their fees suit filed in December 2017 timely. *Ibid.* But petitioners "d[id] not contest" that their fees action was untimely if the shorter limitations period applied. Pet. App. 4a.

Columbia, 338 F. Supp. 2d 113, 122 (D.D.C. 2004) (tolling the statute of limitations because of the parties' "lack of notice" concerning the deadline to seek fees and the "unsettled" state of the law on the appropriate length of time); but see *Powers*, 61 F.3d at 559-560 (rejecting plaintiff's argument to apply equitable tolling for the same reasons). Such a rule might mitigate equitable concerns that have led courts to adopt the longer statute of limitations for fees actions. But, as with respect to accrual, the parties did not raise the question of whether or when a state statute of limitations might be tolled in an IDEA suit for attorneys' fees, making this case a less suitable vehicle to provide clarity in this area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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