No. _________

IN THE SUPREME COURT OF THE UNITED STATES

LA DELL GRIZZELL; JOHN DOE #1; JANE DOE; JOHN DOE #2,

Applicants,

v.

SAN ELIJO ELEMENTARY SCHOOL; SAN MARCOS UNIFIED SCHOOL DISTRICT,

Respondents.

APPLICATION TO THE HON. ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), La Dell Grizzell and her three minor children (collectively, "Applicants") hereby move for an extension of time of 30 days, to and including January 29, 2025, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be December 30, 2024.

In support of this request, Applicants state as follows:

1. The United States Court of Appeals for the Ninth Circuit rendered its decision on August 7, 2024 (Exhibit A), and denied a timely petition for rehearing on October 1, 2024 (Exhibit B). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case involves one of the basic rights of a free people: the right of *pro se* access to the courts. *See Faretta v. California*, 422 U.S. 806, 830 n.39 (1975). The First Congress enshrined the right to proceed *pro se* in federal civil actions in the

Judiciary Act of 1789, 1 Stat. 73, 92, and today that right is codified in 28 U.S.C. §1654. *See Iannaccone v. Law*, 142 F.3d 553, 556-58 (2d Cir. 1998). Section 1654 provides, in relevant part, that "[i]n all courts of the United States the parties may plead and conduct their own cases *personally* or by counsel" (emphasis added).

3. Of course, "children usually lack the capacity" to "decide how best to protect [their] interests," so they are "ordinarily represented in litigation by parents or guardians." *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977); *see* Fed. R. Civ. P. 17(c). Parents make the initial decision about whether or not their minor children should pursue litigation, *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 67 (1st Cir. 2008), and "act on [the children's] behalf" by "mak[ing] all appropriate decisions in the course of specific litigation," *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986). In short, a parent has broad authority to wield (or waive) her minor children's constitutional and statutory rights when conducting a civil action on their behalf. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *In re Moore*, 209 U.S. 490, 499 (1908); *Thomas v. Nationwide Child.'s Hosp.*, 882 F.3d 608, 615 (6th Cir. 2018); *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773, 776-77 (8th Cir. 2006); *Callahan v. Woods*, 658 F.2d 679, 682 n.2 (9th Cir. 1981).

4. In May 2021, Applicant La Dell Grizzell attempted to vindicate the rights of her three minor children by filing suit against the California school district where they had been enrolled through a federal program for homeless youth. Ex. A at 3-4. The complaint alleges that each child was the only Black student in his or her

class; that they all suffered appalling, racist mistreatment at the hands of their fellow students; and that the school did little to nothing to prevent it. Ex. A at 4. Just ten days later, the District informed her of its decision to disenroll all three children over her objection. *See* Ex. A at 4. The District expressly declined to find that the Grizzell children no longer qualified under McKinney-Vento; instead, it unilaterally determined—despite a contrary statutory presumption—that "continued enrollment" was not "in [their] best interests." The Grizzells promptly amended their complaint to challenge the disenrollment. *See* Ex. A at 4.

5. The district court held a brief, initial hearing, in which it acknowledged that the Grizzells' allegations "are serious" and maintained that it was "not just ignoring them." The court explained, however, that the Ninth Circuit adheres to a categorical rule that "a parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer." *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997). The district court therefore dismissed the complaint solely "because of the lack of counsel," emphasizing that the dismissal had "nothing to do with the merits."

6. On appeal, the Ninth Circuit granted Ms. Grizzell *in forma pauperis* status and appointed undersigned *pro bono* counsel to represent Applicants for purposes of the appeal. After hearing oral argument, a Ninth Circuit panel unanimously recognized that the "counsel mandate" announced in *Johns* "unquestionably raises concerns with grave implications for children's access to justice." Ex. A at 8. "[B]ound by *Johns*," however, the panel had no choice but to

affirm the district court's dismissal of Applicants' claims. Ex. A at 8-9. Applicants timely filed a petition for rehearing en banc, which was denied on October 1, 2024. *See* Ex. B.

7. Applicants intend to file a petition for certiorari seeking review of the Ninth Circuit's decision. The Ninth Circuit's "counsel mandate" defies both statutory and constitutional law, with the practical effect of depriving the Grizzells and countless other indigent families of any realistic way to access the federal courts.

8. To begin, the counsel mandate "is inconsistent with" 28 U.S.C. §1654, which—as the Fifth Circuit recently held—expressly guarantees minors "a right to proceed *pro se*" in federal court. *Raskin v. Dall. Indep. Sch. Dist.*, 69 F.4th 280, 282, 285 n.5 (5th Cir. 2023). Well-established principles empower "a parent [to] vindicate that right for her children, just as she can vindicate her children's other rights." *Id.* at 287 (Oldham, J., dissenting in part and concurring in the judgment). Indeed, it is well established that children do not forfeit other rights that ordinarily must be asserted "personally" just because they cannot litigate independently. For example, "Fourth Amendment rights are personal rights that 'may not be vicariously asserted,'" *United States v. Baker*, 58 F.4th 1109, 1116 (9th Cir. 2023), yet children routinely bring Fourth Amendment claims through a parent. *See, e.g.*, *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356 (1990); *Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 n.6 (10th Cir. 1999). Simply put, "federal law gives [Ms. Grizzell's] minor children the unequivocal right to 'conduct their own cases personally,' 28 U.S.C. §1654," and Ms. Grizzell "can vindicate that right for her

children, just as she can vindicate her children's other rights." *Raskin*, 69 F.4th at 287, 293 (Oldham, J., dissenting in part and concurring in the judgment).

9. In addition, the counsel mandate tramples parents' "fundamental liberty interest[]" in "the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). That parental interest encompasses the right to decide whether—and on what terms—a minor child will exercise "[t]he right to sue," which "is one of the highest and most essential privileges of citizenship." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). The counsel mandate usurps this parental prerogative by imposing an irrebuttable presumption that it is *never* "in the interest of minors" to sue without "trained legal assistance." *Johns*, 114 F.3d at 876-77. The Constitution does not permit courts to "infringe on the fundamental right of parents to make child rearing decisions simply because a … judge believes a 'better' decision could be made." *Raskin*, 69 F.4th at 295 (Oldham, J., dissenting in part and concurring in the judgment) (quoting *Troxel*, 530 U.S. at 72-73 (plurality)).

10. What is more, the counsel mandate abridges indigent minors' constitutionally protected right to assert legal claims. It is well established that "the right of access to the courts" is a "basic constitutional guarantee[], infringements of which are subject to more searching judicial review." *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004). Applying that principle, this Court has repeatedly invalidated measures that limit "access to judicial processes" for indigent individuals "while leaving open avenues … for more affluent persons." *Mendoza v. Strickler*, 51 F.4th

346, 355 (9th Cir. 2022); *see, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (record-preparation fee for civil appeal); *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971) (divorce filing fees). The counsel mandate is precisely that type of unconstitutional policy: It "excludes indigent children from federal courts and deters parents from filing meritorious claims on their children's behalf," regardless of the nature of the indigent child's claim or whether it will expire before the child comes of age. Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 836 (2019).

11. Indeed, the Ninth Circuit's counsel mandate violates the constitutional rights of *all* minors and mentally incompetent persons. As this Court recognized in *Moore*, "deny[ing] to infants" a procedural right afforded to all "other litigants"—simply because infants "are unable to act for themselves"—creates a "serious" equal protection problem. 209 U.S. at 499. And the problem is especially acute here because the right at issue is no mere "application for a change of venue," *id.*, but "a basic right of a free people," *Faretta*, 422 U.S. at 830 n.39; *accord O'Reilly v. N.Y. Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982).

12. Neither *Johns* (which established the counsel mandate), nor the decision below (which enforced it) grapples with any of these statutory or constitutional issues. The Ninth Circuit's rule instead rests solely on a policy rationale—namely, "protection of a minor's legal rights in federal court." *Johns*, 114 F.3d at 876-77. Unfortunately, more than 27 years of experience has shown that the counsel mandate has the opposite effect: It "deprives children of access to justice" and "undermines

the viability of their legal claims." Martin, *supra*, at 855. The core premise of *Johns* is that when minors "have claims that require adjudication, they are *entitled* to trained legal assistance so their rights may be fully protected." 114 F.3d at 877 (emphasis added). That is a commendable aspiration, but it is not the law: Minors "ha[ve] no right to counsel in civil actions," and courts will not appoint counsel for an indigent minor absent "exceptional circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Consequently—as the unanimous decision below recognized, but was powerless to address—the counsel mandate "unquestionably raises concerns with grave implications for children's access to justice." Ex. A at 8.

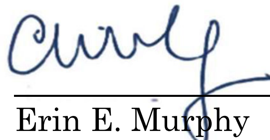
13. Applicants' counsel, Erin E. Murphy, requires additional time to prepare a petition that fully addresses the important issues raised by the decision below in a manner that will be most helpful to the Court. Ms. Murphy has substantial professional obligations between now and December 30, 2024 that would make it difficult to prepare an adequate petition in this case by the current deadline, including a summary-judgment brief in *American Health Care Association v. Becerra*, No. 2:24-cv-00114 (N.D. Tex.), due December 13, 2024; an opposition to the Ute Indian Tribe of the Uintah and Ouray Reservation's motion to intervene in *Utah v. United States*, No. 22O160 (U.S.), due December 16, 2024; oral argument on an emergency motion for stay pending appeal in *LSP Transmission Holdings II, LLC v. Huston*, Nos. 24-3248 & 24-3249 (7th Cir.), to be held on December 17, 2024; and an opposition to Commonwealth Edison of Indiana's motion to intervene in *LSP Transmission Holdings II, LLC v. Huston*, No. 1:24-cv-01722 (S.D. Ind.), due

December 20, 2024. Moreover, Applicants' current deadline falls between Christmas and New Year's Day, and Ms. Murphy has several long-planned personal commitments during the holiday season.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including January 29, 2025, be granted within which Applicants may file a petition for a writ of certiorari.

Date: December 13, 2024

Respectfully submitted,



Erin E. Murphy
Counsel of Record
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com