No. 24-2080

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. N., by and through his next friend, Cheryl Cisneros; E. O., by and through his next friend, Alisha Overstreet; J. V., by and through his next friend, Sarah Kaplansky; B. M., by and through his next friend, Traci Modugno; on behalf of themselves and all others similarly situated; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

OREGON DEPARTMENT OF EDUCATION; CHARLENE WILLIAMS, DR., in her official capacities as Director of Oregon Department of Education and Deputy Superintendent of Public Instruction for the State of Oregon; TINA KOTEK, in her official capacities as Governor and Superintendent of Public Instruction for the State of Oregon,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon, No. 6:19-cv-00096-AA, Hon. Ann L. Aiken

BRIEF OF *AMICI CURIAE* ADAM M. SAMAHA, ERWIN CHEMERINSKY, AND HELEN HERSHKOFF IN SUPPORT OF APPELLANTS

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August 27, 2024

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law who focus their research, scholarship, and teaching on federal courts, federalism, and the role of the federal judiciary in our legal system. Each agrees that, under well-established Article III principles, this case is not moot.

Amici[2] are:

- Adam M. Samaha, New York University School of Law
- Erwin Chemerinsky, University of California, Berkeley School of Law
- Helen Hershkoff, New York University School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court misapplied Article III mootness doctrine in holding that Oregon's enactment of Senate Bill ("S.B.") 819 mooted all of Plaintiffs' claims.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Amici* join this brief as individuals. Institutional affiliations are noted for informational purposes and do not indicate endorsement by institutional employers of the positions advocated herein.

As the district court acknowledged, Plaintiffs alleged in their complaint and continue to maintain that the Oregon Department of Education ("ODE") violates federal law by failing to ensure that children with disabilities can access the nondiscriminatory and free appropriate public education required by the Individuals with Disabilities Education Act ("IDEA"), Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act. They did not and do not challenge the lawfulness of any particular Oregon statute. They did not claim, for example, that S.B. 263, the law S.B. 819 replaced, was unconstitutional or preempted by federal law. Nor did they ask the district court to invalidate or enjoin the enforcement of S.B. 263 or any other Oregon law. Instead, Plaintiffs alleged and continue to allege that ODE's *practices* do not satisfy the federal requirements set out in the IDEA, the ADA, and Section 504; and they accordingly seek an injunction requiring Defendants to take a number of steps that they contend are mandated by federal law. AOB-26–27.

Whatever the ultimate merits of Plaintiffs' claims—on which *amici* take no position—the enactment of S.B. 819 did not entirely moot them. Under Article III, "a case becomes moot only when it is *impossible* for a

court to grant *any* effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added) (cleaned up). Defendants, seeking to dismiss the action as moot, failed to meet this burden: Effective relief is still possible because Plaintiffs claim that ODE's policies and practices fall short of federal requirements even after S.B. 819's enactment.

In holding otherwise, the district court relied on the "presum[ption] that the repeal, amendment, or expiration of legislation will render an action *challenging the legislation* moot." 1-ER-14 (emphasis added) (citing *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019)). But that presumption, which is well-founded as far as it goes, does not apply here because Plaintiffs are not "challenging the legislation" that S.B. 819 repealed. 1-ER-14. If all Plaintiffs had asked the district court to do was enjoin S.B. 263, then S.B. 819 may have given them everything they sought. But Plaintiffs are asking for more. What they seek is for Oregon to honor Plaintiffs' federal statutory right to a nondiscriminatory free public education in the least restrictive environment. And they contend that even if Oregon *tried* to satisfy their demands by enacting S.B. 819, it did not go far enough in

redressing the injuries Plaintiffs have suffered and will continue to suffer because of Defendants' ongoing violations of federal law. Among other things, Plaintiffs claim that federal law requires more than S.B. 819 or ODE's policies provide. AOB-28–40.

Plaintiffs thus seek an injunction requiring Defendants to take certain steps either that S.B. 819 does not require or that ODE is still not taking, but that are allegedly required by federal law. Whether Plaintiffs are *legally entitled* to that relief pursuant to the relevant federal statutes is an issue that Defendants may contest. But that merits question has no bearing on the district court's jurisdiction under Article III. To the extent that Defendants rely on their own voluntary actions to argue for mootness, they bear the burden of proof, and any contested issues of fact about their conduct should not be resolved in their favor. Because S.B. 819 does not grant Plaintiffs all the relief they seek in this lawsuit, and because Defendants have not established that they have delivered all the requested relief, the entire suit is not moot.

ARGUMENT

Mootness doctrine helps specify the limits of the Constitution's grant of "federal court[] jurisdiction to decide 'Cases' or 'Controversies.'"

FBI v. Fikre, 601 U.S. 234, 240 (2024) (quoting U.S. Const. art. III, §§ 1, 2). The doctrine ensures that federal courts do not "take up hypothetical questions" after "a complaining party manages to secure outside of litigation all the relief he might have won in it." *Id.* at 240–41. But, conversely, "[a] court with jurisdiction has a 'virtually unflagging obligation' to hear and resolve questions properly before it." *Id.* at 240 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). A federal court, therefore, may *neither* "pronounce on past actions that do not have any continuing effect in the world" *nor* "shirk decision on those that do." *Id.* at 241 (cleaned up).

So, while mootness doctrine is important to Article III's limits, the doctrine itself is carefully limited to preserve live controversies that must be adjudicated: "[A] case becomes moot only when it is impossible for a court to grant *any effectual relief whatever* to the prevailing party. As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Chafin*, 568 U.S. at 172 (emphasis added) (cleaned up). The district court misapplied this test by holding that the mere enactment of S.B. 819 moots all of Plaintiffs' claims. Plaintiffs seek at least some relief that S.B. 819 does not provide on its

face and that Defendants allegedly have not provided. That is all Article III requires at this stage.

I. The District Court Erred by Presuming Mootness from S.B. 819.

The district court began by applying the wrong doctrinal framework for its mootness analysis. It invoked the "presum[ption] that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provisions or one similar to it." 1-ER-14 (citing *Chambers*, 941 F.3d at 1199). That presumption, however, does not apply here, where Plaintiffs did not "challeng[e] the legislation" that S.B. 819 repealed. 1-ER-14. The district court thus erred by presuming that the mere enactment of S.B. 819 mooted Plaintiffs' claims.

As some of *amici* have previously argued, the presumption of mootness from repealed legislation makes good sense when a plaintiff challenges the lawfulness of the repealed statute itself. *See* Brief for Federal Courts Scholars as Amici Curiae at 10–16, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336 (2020) (per curiam) (No. 18-280), 2019 WL 3814389. In such a case, the repeal of the statute typically

accomplishes everything the plaintiff could ask for—it invalidates the very statute the plaintiff is asking the court to invalidate. Provided there is no reasonable expectation that the invalidated provision would be reenacted, a presumption of mootness is appropriate. *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (holding repeal of ordinance did not moot challenge to that ordinance when city indicated it would "reenact[] precisely the same provision if the District Court's judgment were vacated").

The same logic does not apply, however, when a plaintiff challenges state *conduct* that also happens to be regulated by a state statute. In such a case, repealing or amending the state statute *might* give the plaintiff all of her requested relief—by, for example, stopping all the conduct the plaintiff claims violate federal law—but it might not. If the repeal does not eliminate all the challenged conduct, then the plaintiff's federal challenge to even a small portion of that conduct remains live. Unlike when the plaintiff challenges the repealed statute itself, there is no basis to presume from the mere fact of repeal that the plaintiff has already received everything she seeks through litigation. When the plaintiff has not challenged a state statute that ends up repealed or amended after

suit was filed, the court may not dismiss the entire suit as moot based on a presumption. Instead, the court must conduct a case- and fact-specific analysis of whether the state has "establish[ed] with . . . clarity" that its *conduct* will change in such a way as to "fully address Plaintiffs' allegations." *Bell v. City of Boise*, 709 F.3d 890, 900–01 (9th Cir. 2013).[3]

The Supreme Court's decision in *North Carolina v. Covington*, 585 U.S. 969 (2018) (per curiam), illustrates this point. In that case, North Carolina enacted a new legislative redistricting plan "and repealed the old plan[]" in response to a district court's finding of racial gerrymandering.

[3] *See also Styczinski v. Arnold*, 46 F. 4th 907, 912 (8th Cir. 2022) (amendment of state statute did not moot case because amendment "did not materially change the conduct about which [plaintiffs] complain"); *Petrella v. Brownback*, 787 F.3d 1242, 1256 (10th Cir. 2015) (amendments to state school financing system did not moot federal constitutional challenge to funding cap because plaintiffs challenged amended cap); *Catanzano v. Wing*, 277 F.3d 99, 108–09 (2d Cir. 2001) (expiration of state laws did not moot plaintiffs' claim where "one of the factual bases for the claim" had "nothing to do with the [expired] laws"); Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1678 (1970) ("When the intervening and possibly mooting event is a change in controlling law, . . . [t]he process involves a reasoned examination of the points of contention and the new law to determine whether the issues raised in litigating the validity of activities under the old provision are still presented. . . . The relevant issue should be whether the principle contended for by the challenging party is satisfied by the new law. If it is, the case is moot; if not, the challenging party's present interest in the litigation is not destroyed simply by the amendment.").

Id. at 975. North Carolina argued that the repeal mooted the plaintiffs' gerrymandering claims under the principle that when "a lawsuit challenges the validity of a statute, the case becomes moot when the statute is repealed." *Id.* (cleaned up). The Supreme Court held that this argument "misunderst[ood] the nature of the plaintiffs' claims." *Id.* As the Court explained, "it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims." *Id.* at 976. Therefore, "the plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because [North Carolina] drew new district lines around them." *Id.* Rather, "their claims remained the subject of a live dispute" over whether the new districts adequately remedied the "old, gerrymandered districts." *Id.*

Here, too, Plaintiffs do not claim the now-repealed S.B. 263 or any other Oregon statute is unlawful. They challenge ODE's *conduct*, which they contend violates "federal law through its incomplete and ineffective regulation of shortened school days." AOB-4. And as a remedy for those alleged violations of federal law, Plaintiffs seek not to invalidate a state statute, but to require ODE to modify its injurious conduct. AOB-26–27.

In these circumstances, as in *Covington*, potential mootness based on a statutory change turns not on the mere repeal of a state law but on whether the new law—S.B. 819—requires ODE to take *all* of the actions that Plaintiffs claim are required to satisfy the multiple federal statutes that underlie their claims. As long as there is any gap between what S.B. 819 provides—or what Defendants are doing in practice—and what Plaintiffs contend federal law requires, the court may still grant them some "effectual relief." *Chafin*, 568 U.S. at 172 (quotation marks omitted). "[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot." *Id.* at 177 (cleaned up).

II. The District Court Erred When Finding That S.B. 819 Grants Plaintiffs All of Their Requested Relief.

The district court, perhaps influenced by its erroneous reliance on a presumption of mootness, also erred in concluding that S.B. 819 eliminates any possibility of effective relief for Plaintiffs. Although the court's reasoning is not perfectly clear, it seems to have concluded that because (1) Plaintiffs sought to "enjoin[] defendants from subjecting [P]laintiffs to policies and practices that violate their rights," and (2) S.B. 819 was "derived specifically from [P]laintiffs' allegations" and aimed at remedying those violations, then (3) S.B. 819 gave Plaintiffs

everything they wanted. 1-ER-18–19 (cleaned up). That reasoning is insufficient because it does not establish that "effectual relief" is "impossible." *Chafin*, 568 U.S. at 172 (quotation marks omitted).

Even if Oregon intended S.B. 819 to cure the violations of federal law alleged by Plaintiffs, that does not mean it succeeded. Plaintiffs argue that S.B. 819, while well-intentioned, does not completely cure ODE's violations of various requirements under several federal statutes. AOB-28–40. Defendants presumably disagree with Plaintiffs' position on what federal law requires of them. *Amici* do not take a position on any such dispute over federal law, which is irrelevant to whether the case is moot. What matters is that Plaintiffs' "claims remain[] the subject of a live dispute" because they seek relief that Defendants oppose. *Covington*, 585 U.S. at 976. That dispute gives the parties a "concrete interest" in Plaintiffs' claims, "and is enough to save this case from mootness." *Chafin*, 568 U.S. at 176.

A. The District Court Analyzed Plaintiffs' Requested Relief in the Abstract, Without Adequate Specificity.

By characterizing Plaintiffs' requested relief broadly and vaguely as an injunction against "policies and practices that violate their rights," 1-ER-18 (cleaned up), the district court failed to adequately "review

mootness" separately "for each claim raised." *Summit Lake Paiute Tribe v. U.S. Bureau of Land Mgmt.*, 496 F. App'x 712, 714 (9th Cir. 2012); *see Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs*, 479 F. Supp. 3d 1003, 1024 (D. Or. 2020) ("Mootness is determined on a claim by claim basis."). Plaintiffs did not merely seek to enjoin the abstract "policies" that existed when they filed suit. 1-ER-18–19. They have identified specific alleged deficiencies in ODE's conduct, and they seek a court order requiring ODE to take specific additional actions that they contend federal law requires. *See* AOB-16, 19, 28–30. If S.B. 819 does not require each and every one of those additional actions, it clearly does not moot Plaintiffs' claims. *Bell*, 709 F.3d at 901.

It is of no moment that Plaintiffs' complaint described their requested relief in general terms. *Cf.* 1-ER-18 (quoting complaint's prayer for relief). Under Article III, mootness must be analyzed "at all stages of review, not merely at the time the complaint is filed." *Meland v. Weber*, 2 F.4th 838, 848 (9th Cir. 2021) (cleaned up). Thus, "the question is not whether the precise relief sought at the time the case was filed is still available. The question is whether there *can be* any effective relief." *Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018) (emphasis added)

(cleaned up). Even the district court previously recognized that "the precise policies and practices" Plaintiffs seek to require, prohibit, or modify could "be given greater specificity at later stages of litigation." 3-ER-507.

Therefore, even if it were true that, due to S.B. 819, "Plaintiffs are no longer subject to the policies they initially challenged," 1-ER-18–19,[4] effectual relief remains available as long as the policies in place under S.B. 819 *still* do not conform to what Plaintiffs claim federal law requires and to the relief they seek. As the Supreme Court has held, a change to state law only moots a case when the new law brings complete relief, not just when it "disadvantages [plaintiffs] to a lesser degree than the old one." *Ne. Fla. Ch. of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993). The district court thus erred by resting its finding of mootness on its belief that S.B. 819 was *intended* to "fill the gaps [P]laintiffs successfully identified in this case." 1-ER-16. Even if we

[4] It is not clear that this is true, since Plaintiffs contend that S.B. 819 maintains or duplicates at least some of the practices they challenged in their complaint. AOB-28–30; *see Covington*, 585 U.S. at 976 (holding adoption of new legislative districts did not moot gerrymandering claim when plaintiffs argued "some of the new districts were mere continuations of the old, gerrymandered districts").

could be certain that legislators or others intended or expected S.B. 819 to completely "remediate the harm to the class," Plaintiffs identify multiple ways in which they claim S.B. 819 failed to do so—both because the new statute does not address all of what Plaintiffs demand, and because, whatever S.B. 819 provides, Defendants are not *delivering* all of what Plaintiffs demand. AOB-27–30.

The Supreme Court considered a similar situation in *Knox v. SEIU, Local 1000*, 567 U.S. 298, 306–07 (2012), where the plaintiffs challenged a public union's procedure for adopting a fee increase intended to fund political activities. After the plaintiffs sued, the union "sent out a notice offering a full refund to all class members," which it argued mooted the case. *Id.* at 307. The Supreme Court rejected that argument because the plaintiffs "argue[d] that the notice that the [union] sent was improper because it includes a host of conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund." *Id.* at 307–08 (cleaned up). That "live controversy as to the adequacy of the [union's] refund notice" precluded a finding of mootness. *Id.* Similarly, this Court held in *Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019), that amendments to a

challenged permit requirement did not moot the plaintiff's claims when they "lessen[ed] the asserted harm caused by the permit requirement" but "d[id] not eliminate it."

Here, too, Plaintiffs claim that while S.B. 819 "may ultimately improve upon some of the harm[s] raised in the Complaint," many harms still remain. AOB-30 (emphasis omitted). That ongoing challenge to ODE's policies under S.B. 819 preserves a live dispute under Article III.

B. The District Court May Have Neglected Disputed Fact Issues Involving Defendants' Conduct and Skipped to the Merits of Plaintiffs' Claims.

Mootness doctrine requires a court to understand what a plaintiff is requesting and what a defendant has delivered. As explained above, the district court did not develop an adequately concrete understanding of the relief requested in this case to confidently resolve the mootness issues. Understanding Plaintiffs' requested relief, however, is not sufficient on its own. Nor is it necessarily enough to examine S.B. 819 on its face and estimate what it might accomplish without evidence. Fully resolving the mootness questions in this case might well depend on what Defendants have actually *done* since S.B. 819 was enacted.

Part of Defendants' and the district court's rationale for finding mootness rests on decisions made and conduct pursued by Defendants that are not required by the new statute. Aside from what S.B. 819 requires, the district court pointed to ODE's voluntary policy changes with respect to training and other issues. *See* 1-ER-22–27. To that extent, however, the voluntary cessation doctrine imposes an especially demanding test on Defendants. A defendant who argues that a suit is moot because it voluntarily ceased the challenged conduct "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Otherwise, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Plaintiffs argue that the district misapplied the voluntary cessation doctrine under this Court's precedent, AOB-41–46, but it appears that the district court erred at an even more fundamental level than how it balanced the factors discussed in *Rosebrock v. Mathis*, 745 F.3d 963, 972

(9th Cir. 2014).[5] That is because the parties disagree, as a matter of fact, about what Defendants have accomplished through their policy changes. Plaintiffs contend that, as with S.B. 819, Defendants' policy changes do not *in fact* fully satisfy federal law or provide all the relief Plaintiffs seek. AOB-41–45. Whether or not that is factually correct, questions about the "effect" of S.D. 819 and Defendants' policy changes "on the prospect of future violations is a disputed factual matter" that the district court should not have resolved in Defendants' favor at this stage of the case. *Laidlaw*, 528 U.S. at 193.

While the district court recognized that Plaintiffs "argue that SB 819 is 'critically deficient in numerous ways' and leaves students with disabilities vulnerable to harm in the same way that now-repealed legislation did," it found that "Plaintiffs do not point to evidence that SB 819 contains the same shortcomings as now-repealed legislation." 1-ER-16. Even if that were true, *but see* AOB-26–40, whether Plaintiffs can *prove* that Defendants continue to violate federal law after S.B. 819 "is a question that goes to the merits, not mootness." *Moore v. Johanknecht*,

[5] *Amici* do not address the application of those factors to the facts of this case. We do contend that the voluntary cessation doctrine applies to at least some of Defendants' conduct occurring after this suit was filed.

831 F. App'x 841, 842 (9th Cir. 2020) (mem.). Moreover, to the extent the district court required *Plaintiffs* to show that *Defendants' choices in implementing* S.B. 819 are falling short of Plaintiffs' demands, then the court misapplied the burden of proof imposed by the voluntary cessation doctrine. *Laidlaw*, 528 U.S. at 190.

The Supreme Court has long held that a plaintiff's "prospects of success are . . . not pertinent to the mootness inquiry." *Chafin*, 568 U.S. at 174 (discussing *Powell v. McCormack*, 395 U.S. 486, 500 (1969)); *accord, e.g.*, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 295–96 & n.4 (2023); *Santa Rosa Mem'l Hosp. v. Douglas*, 552 F. App'x 637, 639 n.2 (9th Cir. 2014). As long as a plaintiff's claim is not "so implausible that it is insufficient to preserve jurisdiction," it "is enough to save [a] case from mootness." *Chafin*, 568 U.S. at 174–76. Whatever the merits of Plaintiffs' challenges to S.B. 819, Defendants do not argue and the district court did not find that Plaintiffs' claims are so "frivolous" as to deprive the court of jurisdiction. *MOAC*, 598 U.S. at 296 n.4. Whether Plaintiffs ultimately succeed on those claims is "for lower courts at later stages of the litigation to decide." *Chafin*, 568 U.S. at 177.

At a minimum, if the district court had any doubts about whether or on what basis Plaintiffs continue to challenge Defendants' policies and conduct, the court should have allowed Plaintiffs to amend their complaint to clarify their claims. When a court finds mootness based on "a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously," the plaintiff should receive an opportunity to "amend their pleadings or develop the record more fully." *N.Y. State Rifle Ass'n v. City of New York*, 590 U.S. 336, 339 (2020) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482–83 (1990)). Therefore, even if this Court believed that Plaintiffs' claims were moot as currently pleaded, the Court should "remand the case to the [d]istrict [c]ourt with leave to [Plaintiffs] to amend their pleadings." *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972) (per curiam).

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's dismissal order and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 29(a)(5) and Ninth Circuit Rule 32-1, because it contains 4,076 words, excluding the items that may be excluded under Rule 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

Date: August 27, 2024

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