No. 15-497

IN THE
# Supreme Court of the United States

STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,
*Petitioners*,
v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*,
*Respondents*.

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

## SUPPLEMENTAL BRIEF FOR RESPONDENTS


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## SUPPLEMENTAL BRIEF FOR RESPONDENTS

## INTRODUCTION

The United States has filed a brief recommending that this Court grant the petition and reverse the Sixth Circuit on a question that will ultimately have no impact on this case. That would be an imprudent use of the Court's time and resources. The court of appeals gave full effect to Congress' intent that plaintiffs claiming injuries based on schools officials' educational decisions avail themselves of the IDEA's administrative process before they sue in federal court. The petition should be denied.

The United States asserts that this case implicates a circuit split. U.S. Br. 18-22. But a look at the Sixth Circuit's reasoning dispels that claim. The

court of appeals affirmed the district court's dismissal of petitioners' complaint after concluding that their claims arose "as a result of a denial of a FAPE" and that they alleged injuries that were, "in essence a violation of IDEA standards." Pet. App. 20 (brackets and citation omitted). On that point, the circuits are unanimous. So even if there was some difference in the way courts have approached the exhaustion requirement, that difference would not affect the outcome of this case.

Without an outcome-determinative split, the United States leans heavily on its merits argument. U.S. Br. 11-18. But that argument is wrong. The IDEA does not give a plaintiff license to plead around exhaustion. Rather, section 1415(*l*) balances Congress' desire to give litigants access to the remedies available under the ADA and Rehabilitation Act with its considered decision to channel "the initial evaluation of whether a disabled student is receiving a free, appropriate public education" to "those with specialized knowledge," *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002), and thereby "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students," Pet. App. 9 (quoting *Payne* v. *Peninsula School District*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino* v. *Baca*, 747 F.3d 1162 (9th Cir. 2014)). The decision below respects that balance by requiring exhaustion where a "suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute." *Id*. at 10-11.

Finally, the United States claims that requiring exhaustion is unfair to plaintiffs who seek purely

retrospective relief. U.S. Br. 17-18. But petitioners here could have avoided many if not all of their alleged injuries through IDEA procedures. And exhaustion serves the valuable purpose of developing an expert record for judicial review. In those cases where exhaustion is improper, plaintiffs may of course assert the futility exception petitioners elected not to press.

Petitioners and the United States fail to make a persuasive case for certiorari. This Court does not normally review substantively correct decisions that would come out the same way in every other circuit that has considered the same question.

## ARGUMENT

### I. THE DECISION BELOW IS CONSISTENT WITH THE APPROACH OF EVERY CIRCUIT TO CONSIDER THE SCOPE OF THE EXHAUSTION REQUIREMENT.

The United States endorses petitioners' insistence that their case would not have been dismissed in the Ninth Circuit because "none of the relief [they] specifically requested was available under the IDEA." Pet. 17 (emphasis omitted). They are mistaken. Although the Ninth Circuit's decision in *Payne* contains language that appears helpful to petitioners, that court—and all six other circuits that have weighed in on the issue—would have reached the same result as the Sixth Circuit in this case.[1]

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[1] *See Frazier*, 276 F.3d at 57, 59 (1st Cir.) (suit under section 1983 alleging denial of a FAPE); *Cave* v. *East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247 (2d Cir. 2008) (ADA and Rehabilitation Act claims based on denial

*Payne* made clear that exhaustion is required where "'both the genesis and the manifestations of the problem are educational,'" including where a plaintiff "seek[s] to enforce rights that arise as a result of a denial of a free appropriate public education." 653 F.3d at 875 (brackets and citation omitted); *see* Pet. App. 20; *see also Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 278 (3d Cir. 2014); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002). That is the case here.

The United States insists that "petitioners' Title II and Section 504 claims are not based on the denial of a FAPE," and so do not require exhaustion under *Payne*. U.S. Br. 21. But that is not what the Sixth Circuit found. Rather, the court found that "[t]he

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of service dog not "materially distinguishable from claims that could fall within the ambit of the IDEA"); *Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 273-275 (3d Cir. 2014) (ADA and Rehabilitation Act retaliation claims arising from dispute over provision of a FAPE); *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 990-991, 993 (7th Cir. 1996) (ADA and Rehabilitation Act claims based on teacher-led bullying had "educational source and an adverse educational consequence"); *Payne*, 653 F.3d at 875 (9th Cir.) (exhaustion required for actions "seeking to enforce rights that arise as a result of a denial of a [FAPE]"); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1067-68 (10th Cir. 2002) (Rehabilitation Act claims based on teacher selection, tardy provision of educational materials were "educational in nature"); *M.T.V.* v. *DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 1155 (11th Cir. 2006) (ADA, Rehabilitation Act, and First Amendment claims based on retaliation for parent's advocacy).

core harms that [petitioners] allege * * * relate to the specific educational purpose of the IDEA." Pet. App. 6. Indeed, the decision quoted *Payne* in concluding that exhaustion was required because petitioners' claims arose "'as a result of a denial of a [FAPE].'" *Id.* at 20 (quoting *Payne*, 653 F.3d at 875). The United States may disagree with the Sixth Circuit's characterization of petitioners' complaint, but it cannot fashion an outcome-determinative question by rewriting the decision on review.

For the same reason, petitioners are wrong to say that the Ninth Circuit would not have required them to exhaust because they "sought damages for emotional distress—a form of relief that is not available in IDEA proceedings." Pet. 17. That argument, adopted now by the United States (at 21), again ignores the fact that the Sixth Circuit found that "[t]he core harms that [petitioners] allege arise from the school's refusal to permit E.F. to attend school with [her dog] relate to the specific educational purpose of the IDEA." Pet. App. 6. The Ninth Circuit would have ruled the same way under the circumstances. Addressing the emotional distress claim pleaded in *Payne*, the Ninth Circuit explained that, if the plaintiff's "'emotional distress' *stems from* [the plaintiff's] concern that [her child] was not receiving an adequate education, then *exhaustion is required*." 653 F.3d at 883 (emphases added). That describes this case.

Whatever differences may exist among the circuits about the proper scope of the IDEA's exhaustion requirement, those differences simply are not implicated by this case. If this Court is interested in the question, it should await a case in which the answer would be outcome-determinative.

## II. THE DECISION BELOW WAS CORRECT.

If the IDEA's exhaustion requirement means anything, it means that plaintiffs may not circumvent the Act's administrative remedies "by taking claims that could have been brought under [the] IDEA and repackaging them as claims under some other statute." *Batchelor*, 759 F.3d at 272 (citation omitted). In enacting section 1415(*l*), Congress was clear that, "if [a] suit could have been filed under the" IDEA's predecessor statute, "then parents are required to exhaust * * * administrative remedies." *Payne*, 653 F.3d at 876 (quoting S. Rep. No. 99-112, at 15 (1985), 1986 U.S.C.C.A.N. 1798, 1805) (emphasis omitted). The Sixth Circuit faithfully followed that instruction.

### A. The Decision Below Respects Congressional Intent.

The United States contends that exhaustion is required only when a complaint's prayer for relief asks for some remedy available under the IDEA. U.S. Br. 12, 14-15. That reading of the statute privileges form over substance to the detriment of Congress' intent. The better view is that "[t]he nature of the claim and the governing law determine the relief no matter what the plaintiff demands." *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 992 (7th Cir. 1996); *see also, e.g.*, *Cave* v. *East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246 (2d Cir. 2008) ("[T]he theory behind the grievance may activate the IDEA process, even if the plaintiff wants a form of relief that the IDEA does not supply.") (citation and internal quotation marks omitted). *Cf. Montanile* v. *Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) ("[W]hether the remedy a plaintiff seeks

is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought.") (some alterations, internal quotation marks, and citation omitted).

In this case, the Sixth Circuit found that petitioners' claims "seek[] redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP." Pet. App. 10. The court of appeals observed that petitioners' claims were predicated on the harms E.F. allegedly sustained because her dog was not available to assist her in "develop[ing] independence and confidence" and helping "her to bridge social barriers." Resp'ts' App. 7 (Compl. ¶ 28). Those are precisely "the sort[s] of interest[s] the IDEA protects." Pet. App. 11; *see, e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb) (IEP must address "educational needs that result from the child's disability"); 34 C.F.R. § 300.34(a) (identifying, among "[r]elated services" "psychological services, physical and occupational therapy, recreation, including therapeutic recreation, * * * counseling services, including rehabilitation counseling, orientation and mobility services").[2]

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[2] Petitioners insist that "they did not believe that the use of the dog was necessary for [E.F.] to benefit from her education; they thought the human aide provided in her IEP was sufficient." Pet. Reply Br. 5. But that cannot change the nature of their claims. As the Second Circuit explained in rejecting the same argument, allowing a child's service animal to accompany him to class "implicate[s]" his IEP "and would be best dealt with through the

The Sixth Circuit thus correctly held that petitioners sought "relief available" under the IDEA because "the legal injury alleged is in essence a violation of IDEA standards." Pet. App. 20; *see Charlie F.*, 98 F.3d at 992 (the "relief available" for a claim is the "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers"). Requiring exhaustion in such cases is consistent with Congress' "inten[t] to channel * * * into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Batchelor*, 759 F.3d at 275 (quoting *Polera* v. *Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002)).

### B. The United States' Prudential Concerns Are Unpersuasive.

The United States contends that forcing petitioners to exhaust would be unfair and a waste of time because E.F. is no longer enrolled at respondents' school and seeks purely retrospective relief. U.S. Br. 17-18. That is not a reason to revisit the decision here for three reasons.

First, the United States' fairness arguments ignore the fact that following IDEA procedures in this case might long ago have remedied or prevented the injuries petitioners allege by allowing E.F. to attend school with her dog. "Where, as here, a full remedy

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administrative process." *Cave*, 514 F.3d at 247-248. The same is true here. *See* Pet. App. 5 (noting that allowing the dog to attend school "would almost certainly" require modifications to E.F.'s IEP).

is available at the time of injury, a disabled student claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages." *Polera*, 288 F.3d at 488. Nor is there anything in the statute to suggest that retrospective claims are not subject to exhaustion. On the contrary, the default limitations period of two years suggests Congress intended to channel claims through those procedures even where the conduct alleged to violate the IDEA had long passed. *See* 20 U.S.C. § 1415(b)(6)(B).

Second, the United States misses a key point of the administrative process when it claims it would be a "waste [of] time" to force petitioners to exhaust when they "would have had to file exactly the same suit" afterward. U.S. Br. 18. Exhaustion would have furnished the court with a record that addressed the issue at the heart of petitioners' complaint, namely whether permitting E.F.'s dog to accompany her was "necessary to avoid discrimination on the basis of disability." Pet. App. 6 (quoting 28 C.F.R. § 35.130(b)(7)); *see Batchelor*, 759 F.3d at 275 (noting that a purpose of exhaustion is "developing the record for review on appeal"). And a record of that kind is just as valuable to a court considering a civil suit that "turns on the same questions" at issue in an IDEA proceeding, whether or not it seeks only retrospective relief. *Id.* at 10.

Finally, every court to have considered the scope of section 1415(*l*) has recognized an exception where exhaustion would be futile.[3] Perhaps for strategic

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[3] *See, e.g.*, *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 52 (1st Cir. 2000); *Cave*, 514 F.3d at 249 (2d Cir.); *Batch-*

reasons, petitioners chose not to raise futility in this case. In any event, nothing in section 1415(*l*) permits a plaintiff to "evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief." Pet. App. 18; *see id.* at 17. Certiorari is not the appropriate way forward for this case; exhaustion is.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 2016

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*elor*, 759 F.3d at 280 (3d. Cir.); *McCormick* v. *Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 568 (7th Cir. 2004); *J.B. ex rel. Bailey* v. *Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 594 (8th Cir. 2013); *Payne*, 653 F.3d at 888 n.3 (9th Cir.); *A.F. ex rel Christine B.* v. *Española Pub. Sch.*, 801 F.3d 1245, 1249 (10th Cir. 2015); *M.T.V.*, 446 F.3d at 1159 (11th Cir.); *see Honig* v. *Doe*, 484 U.S. 305, 327 (1988) (noting the availability of a futility exception under the former Education of the Handicapped Act).