No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

SUPPLEMENTAL BRIEF FOR PETITIONERS

As the Solicitor General explained in his brief filed at this Court's invitation, this case presents an important and recurring question that has persistently divided the circuits, and the Sixth Circuit's resolution of that question flies in the face of the clear statutory text. Nothing in Respondents' supplemental brief undermines the conclusion that this Court should grant *certiorari*.

1. As we explained in our petition and reply brief, the circuits are persistently split over the question presented. Although the Sixth Circuit's decision here is consistent with decisions from six other circuits, it directly conflicts with the Ninth Circuit's *en banc* decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011), cert. denied, 132 S. Ct. 1540 (2012). See Pet. 12-18; Reply to BIO 2-7. The Solicitor General agrees that this case implicates an entrenched circuit conflict. See U.S. Br. 18-23.

In their supplemental brief, Respondents insist that any circuit conflict was not outcome determinative, because the Ninth Circuit "would have reached the same result as the Sixth Circuit in this case." Resp. Supp. Br. 3. That is incorrect. Respondents note the Ninth Circuit's statement that exhaustion would be required "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education." *Payne*, 653 F.3d at 875. But although the Sixth Circuit invoked that language in rejecting Petitioners' claims, Pet. App. 20, the Ninth Circuit would not have held that those claims arose as a result of a denial of a free appropriate public education.

The Ninth Circuit defined the class of cases that "arise as a result of a denial of a free appropriate public education" as those "that rel[y] on the denial of a FAPE to provide the basis for the cause of action." *Payne*, 653 F.3d at 875. The court gave two examples: (1) cases "directly" alleging a violation of the IDEA itself, *id.*, such as the *Payne* plaintiff's request for damages under 42 U.S.C. § 1983 for a violation of "D.P.'s 'statutory rights under the IDEA,'" *id.* at 883;[*] and (2) cases seeking damages under Section 504 of the Rehabilitation Act, in which the "§ 504 claim is premised on a violation of the IDEA." *Id.* at 875. (Under the Department of Education's regulations, one way to establish a violation of Section 504 is to demonstrate that a school failed to provide a qualified child with a disability "a free appropriate public education." 34 C.F.R. § 104.33(a).) The cases identified by the Ninth Circuit are not those in which conduct that violates the ADA or Rehabilitation Act also might happen to violate the IDEA. Rather, they are cases in which the plaintiff must prove an IDEA violation as an element of establishing her statutory claim—that is, cases in which "the denial of a FAPE . . . provide[s] the basis for the cause of action." *Payne*, 653 F.3d at 875.

That is emphatically not the rule applied by the Sixth Circuit here. Nothing in Petitioners' ADA and Rehabilitation Act claims requires proof that the refusal to allow the service dog denied E.F. a free appropriate public education. Indeed, nothing in those claims requires proof of any effect on E.F.'s education at all. Petitioners' claims rest on Respondents' failure

---

[*] That was the only claim on which the *Payne* court affirmed the dismissal for failure to exhaust. See *Payne*, 653 F.3d at 883.

to adhere to their statutory obligation to permit the use of a service dog. As operators of a public facility, Respondents would owe that obligation to any invitee on their premises, whether or not that invitee was a student. See 28 C.F.R. § 35.136(g). And contrary to Respondents' suggestion (Supp. Br. 5), the social and emotional harms E.F. experienced do not rest on the denial of an adequate education.

The Sixth Circuit held that exhaustion was required, not because Petitioners would have to establish a denial of a FAPE in order to prove their ADA and Rehabilitation Act claims, but because the injuries the Fry family alleged overlapped with injuries that might also have been redressed under the IDEA. See Pet. App. 10-14. That is precisely the "'injury-centered' approach" to exhaustion that the Ninth Circuit specifically "reject[ed]" in *Payne*, 653 F.3d at 874. Indeed, in *Payne* itself IDEA proceedings might have provided some redress for the injuries the plaintiff alleged, but the Ninth Circuit reversed the district court's judgment requiring exhaustion. See Rep. to BIO 3. The entrenched circuit split thus determined the outcome here.

2. Respondents argue that the Sixth Circuit's decision was correct. Supp. Br. 6-8. Although Respondents say that "[t]he [d]ecision [b]elow [r]espects [c]ongressional [i]ntent," *id.* at 6, their supplemental brief curiously avoids discussing the most important index of congressional intent—the statutory text. That text requires exhaustion of non-IDEA claims only when the plaintiffs actually "seek[] relief that is also available under" the IDEA. 42 U.S.C. § 1415(*l*).

In interpreting the IDEA, this Court has emphasized that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted). Honoring the choices Congress expressed in the statutory text is especially important in determining rules for exhaustion of administrative remedies. See Pet. 20-24; Reply to BIO 8-10. Exhaustion rules reflect a balance between two important considerations: the imperative to avoid undue obstacles in access to justice, and the policy of promoting the efficiency and authority of administrative proceedings. Congress balances these considerations differently in different contexts. This Court has recognized that exhaustion is typically not required when the agency "lack[s] authority to grant the type of relief requested." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992); see also *id.* at 156 (Rehnquist, C.J., concurring in the judgment) (exhaustion of prison grievance procedures not required "where prisoners seek monetary relief" and the grievance process "does not provide for any award of monetary damages"). Sometimes, however, Congress requires exhaustion if the administrative procedures can provide *any* form of relief, even if it is not the relief sought by the plaintiffs. See, *e.g.*, *Booth v. Churner*, 532 U.S. 731 (2001) (Prison Litigation Reform Act).

When it enacted the Handicapped Children's Protection Act, Congress adopted text that made clear that it intended to follow the typical practice of requiring exhaustion only when plaintiffs "seek[] relief that is also available" in the administrative proceedings. 42 U.S.C. § 1415(*l*). The Sixth Circuit

was wrong to displace that decision with its own balancing of the relevant policy concerns.

3. Respondents suggest (Supp. Br. 9-10) that the futility exception to the exhaustion requirement provides an appropriate safety valve for cases in which IDEA proceedings cannot grant plaintiffs the relief they seek. But the hypothesis that Petitioners might have invoked the extra-textual futility exception does not detract from the need to review the Sixth Circuit's actual refusal to apply the limits to exhaustion that appear in the statutory text. For one thing, the HCPA's text is plausibly read as codifying and delimiting an aspect of the futility doctrine. Where a plaintiff claims that resort to the IDEA process is futile because that process cannot provide the remedy she seeks, respect for Congress requires courts to look to the explicit statutory provision that addresses the question.

More to the point, the Sixth Circuit suggested that Petitioners could not invoke the futility doctrine here, because it was the Fry family's decision to move E.F. to a new school district that rendered the IDEA proceedings inadequate. See Pet. App. 17-18. As we have shown, the family's decision reflected an entirely appropriate effort to ensure that E.F. could most quickly and efficaciously vindicate her right to attend school with her service dog. See Reply to BIO 10-12. Whether or not the Sixth Circuit was correct in interpreting the judge-made futility doctrine, however, the explicit statutory text excused Petitioners from exhaustion. Their action did not "seek[] relief that is also available under" the IDEA. 42 U.S.C. § 1415(*l*). The Sixth Circuit's refusal to heed that language, and

the persistent conflict in the circuits over that language—a conflict that determined the outcome here—demand this Court's review.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners