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

REPLY BRIEF FOR PETITIONERS

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Respondents say that the Handicapped Children's Protection Act ("HCPA") bars disabled children and their parents from proceeding immediately to court on an Americans with Disabilities Act or Rehabilitation Act claim "if some form of remedy can also be provided by the IDEA, regardless of the type of relief specifically sought" (Brief In Opposition ("BIO"), p. 23; accord *id.* at 1, 6, 16, 21)—or, more broadly, "where both the genesis and the manifestations of the problem are educational" (*id.* at 17). That is not the rule the HCPA adopts.

The statute adopts a straightforward rule: Plaintiffs must exhaust IDEA remedies before filing a lawsuit under another federal statute only if their lawsuit is one "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). As the Ninth Circuit explained, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (*en banc*) (Bybee, J.), cert. denied, 132 S. Ct. 1540 (2012) (emphasis in original).

Respondents acknowledge that the Sixth Circuit, along with six other circuits, requires exhaustion if IDEA proceedings could provide any form of relief to the plaintiffs—even if it is not the relief the plaintiffs are "seeking" in their suit. (BIO 20-24). Contrary to Respondents' assertions, the Ninth Circuit's decision in *Payne* expressly disagreed with that interpretation. And the Ninth Circuit would not have dismissed this case for failure to exhaust.

There is an entrenched split in the circuits, that split determined the outcome, and the Sixth Circuit

interpreted the statute in conflict with its plain text. This Court should grant *certiorari*.

A. There is a Persistent Conflict in the Circuits

Respondents assert that the rule adopted by the Ninth Circuit "is no different in substance than [that adopted by] the other circuits." (BIO 24) *Payne* decisively refutes that assertion. The Ninth Circuit explained that other circuits had adopted an "injury-centered" approach, under which "the IDEA's exhaustion requirement applied to any case in which a plaintiff alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Payne*, 653 F.3d at 873-874 (emphasis added). *Payne* specifically "reject[ed] th[at] 'injury-centered' approach." *Id.* at 874. Instead, it adopted "a 'relief-centered' approach" under which "what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.* at 874-875 (emphasis in original).

The Ninth Circuit thus recognized that its decision created a conflict. In the post-*Payne* case of *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Central School District*, 496 F. App'x 131, 134 (2d Cir. 2012), the Second Circuit noted the conflict. But the Second Circuit declined to abandon its earlier cases adopting an injury-centered approach, because it considered itself "'bound by the decisions of prior panels until . . . they are overruled either by an en banc panel of our Court or by the Supreme Court.'" *Id.* (quoting *In re Zarnel,* 619 F.3d 156, 168 (2d Cir.2010)).

Contrary to Respondents' assertion (BIO 24 n.5), *Payne* would have come out differently under the rule

adopted by the Sixth Circuit. The plaintiffs sued under 42 U.S.C. § 1983 to challenge a teacher's actions in repeatedly placing the plaintiff child into a locked "time-out room or 'safe room' for students who became 'overly stimulated.'" *Payne*, 653 F.3d at 865. Use of the "safe room" was specifically discussed at the child's Individualized Education Program meeting, see *id.* at 865-866; the parents ultimately responded to the school's actions by removing the child from the district, see *id.* at 866; and plaintiffs "sought damages for the past and ongoing academic and psychological *after-effects* of [the child's] claimed mistreatment," *id.* at 889 (Bea, J., dissenting) (emphasis in original).

In *Payne*, "both the genesis and the manifestations of the problem [were] educational." Cf. BIO 17. Because, as here, the parents removed the child from the school, the district's actions "ultimately denied [him] an education in that school building." Cf. *id.* at 29. And the IDEA could have provided "some form of remedy" (cf. *id.* at 23), in the form of compensatory education and counseling to overcome the academic and psychological effects of the teacher's conduct. Had it applied the Sixth Circuit's rule, *Payne* would thus have affirmed the dismissal of the Section 1983 claim for failure to exhaust.

Respondents suggest that the Ninth Circuit subsequently "overrul[ed] [*Payne*] in substantial part." BIO 35. But the Ninth Circuit has not retreated from *Payne*'s IDEA holding. In *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.) (*en banc*), cert. denied, 135 S. Ct. 403 (2014), the court overturned its earlier practice—applied in *Payne* but also in many other statutory contexts—of allowing defendants to raise

exhaustion through "unenumerated Rule 12(b) motions." Rather, the court held, the proper procedural vehicle for raising exhaustion is a motion for summary judgment. See *id.*[1] *Albino* was a jail conditions case involving the Prison Litigation Reform Act, not an education case involving the IDEA. The *Albino* opinion does not purport to interpret the IDEA or the HCPA. Even after *Albino*, the Ninth Circuit has specifically reaffirmed *Payne*'s holding "that the IDEA's exhaustion provision applies only in cases where *the relief sought* is available under the IDEA." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014) (emphasis added).

B. This Case Directly Implicates the Circuit Conflict

Respondents assert that exhaustion would have been required even under *Payne* (BIO 28-30). That is incorrect. *Payne* "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent"; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student"; and (3) "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. None applies here.

None of the relief specifically requested in the complaint is available under the IDEA, nor is it the functional equivalent of an IDEA remedy. See Pet. 18-

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[1] *Nothing in Albino* overrules *Payne*'s holding that the failure to exhaust IDEA remedies is a nonjurisdictional claim-processing rule. See *Payne*, 653 F.3d at 867-871. Cf. BIO 35-36.

20. Petitioners sought damages for the social and emotional harm of denying E.F. the use of her service dog at school. Respondents acknowledge that those damages are not available under the IDEA, because "the IDEA does not allow for an award of general money damages." BIO 6, 20.

Nor did Petitioners seek prospective injunctive relief to alter E.F.'s IEP or her educational placement. Because E.F. no longer attends school in Respondents' district, and her parents have no intention of returning her there, it is doubtful that Petitioners could obtain prospective relief even if sought. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Cf. BIO 30 (stating that "*should E.F. return to Respondents' schools*," Petitioners might be entitled to injunctive relief "ordering Respondents to accept the dog") (emphasis added).

Respondents argue that Petitioners' claim "arises only as a result of a denial of a FAPE." BIO 28 (internal quotation marks omitted). That is wrong. In *some* circumstances, the refusal to permit a child with a disability to use a service animal at school can deny a free appropriate public education. In particular, the IDEA may require schools to permit the use of a service dog as a "related service[]"—but only where that is "required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). Respondents refused to permit E.F. to bring her service animal to school precisely because they did not believe that use of the dog was necessary for her to benefit from her education; they thought the human aide provided in her IEP was sufficient. See Pet. 4; BIO 3.

Petitioners' ADA and Rehabilitation Act claim does not contest that point. The claim is entirely independent of any possible claim of an IDEA violation. Cf. *Payne*, 653 F.3d at 880 (claim that teacher violated Fourth Amendment arises from an independent cause of action and thus is not premised on denial of a FAPE, even though "the alleged excessive punishment took place in a special education classroom" and "might interfere with a student enjoying the fruits of a FAPE"). Even if it was not necessary to enable her to benefit from her education, E.F. had an independent right under the ADA and the Rehabilitation Act to have Wonder accompany her to school—just as she would be entitled to have the dog accompany her to any public facility to which she was invited. See Pet. 5-6.[2] To prevail on their ADA and Rehabilitation Act claim, then, Petitioners would not have been required to establish a denial of a FAPE.

Respondents argue that Petitioners could still obtain compensatory education, reimbursement of the costs of attending a different school, or other IDEA remedies. (BIO 32-33) But whether or not Petitioners *could have* obtained these remedies, they *did not* seek them here. Under *Payne*, that would have been

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[2] Nor would Petitioners have to show that allowing Wonder to attend school with E.F. would have been a necessary form of mobility or "travel training" (BIO 10). E.F.'s claim is not that the exclusion of her dog denied her "instruction . . . to enable [her] to learn the skills necessary to move effectively and safely from place to place." 34 C.F.R. § 300.39(b)(4)(ii). Nor does she claim that Respondents were required to "teach[]" her "to use a service animal." BIO 12 (internal quotation marks omitted). She argues only that Respondents, like anyone else who runs a public facility, were required to allow her to bring her service animal with her.

dispositive. See *Payne*, 653 F.3d at 875 ("whether a plaintiff *could have* sought relief available under the IDEA is irrelevant") (emphasis in original). Respondents note the complaint's boilerplate request for "'***any***' relief the Court determines appropriate"—a request they read as "necessarily encompass[ing] all available relief under the IDEA." BIO 30 (emphasis in the BIO). But it is far from clear that the IDEA remedies Respondents identify would in fact have been available to Petitioners. Petitioners did not claim that the refusal to permit Wonder to accompany E.F. denied her a FAPE—the showing that would be necessary to make tuition reimbursement appropriate. Nor did Petitioners claim that the refusal has caused continuing educational harm—the showing that would be necessary to make compensatory education appropriate.

Payne expressly refused to require exhaustion based on "speculation" about what IDEA remedies children with disabilities might seek. *Payne*, 653 F.3d at 876-877. Had the Sixth Circuit applied *Payne* here, it could not have affirmed the dismissal of Petitioners' suit for failure to exhaust.[3] The circuit conflict thus determined the outcome.

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[3] Even if the Sixth Circuit had concluded that *some* aspects of the relief Petitioners sought required exhaustion, it would not have dismissed the entire lawsuit if it had followed *Payne*. The Ninth Circuit held that a court should "dismiss any claims that are governed by the exhaustion requirement, but it should not dismiss any remaining claims." *Payne*, 653 F.3d at 883. Endorsing standard exhaustion principles, see Pet. 19 n.9, the court refused to adopt "a 'total exhaustion rule.'" *Payne*, 653 F.3d at 883 n.7.

C. The Sixth Circuit's Decision is Wrong

The Sixth Circuit's decision disregards the plain text of the HCPA. See Pet. 18-24. Respondents argue that because "[t]he statute does not require that '*the* relief requested' must also be available," nor "that '*all* relief requested' must also be available under the IDEA," the text is best read as "requir[ing] exhaustion if *some form* of relief is also available under the IDEA." (BIO 23) Respondents fail to account for the key word in the statute—"seeking." The statute requires exhaustion "before the filing of a civil action * * * *seeking relief* that is also available under this subchapter." 20 U.S.C. § 1415(*l*) (emphasis added). The most straightforward reading of this language is that exhaustion is required when the lawsuit actually "seek[s]" relief available under the IDEA—but not when IDEA relief is available but unsought.

Far from giving meaning to the word "seeking," Respondents treat that word as a nullity. See BIO 23 ("[T]he only reasonable interpretation of § 1415(*l*) is to require families to utilize IDEA administrative proceedings if some form of remedy can also be provided by the IDEA, *regardless of the type of relief specifically sought*.") (emphasis added). Respondents disregard three bedrock principles: (1) congressional intent is "[o]f paramount importance to any exhaustion inquiry," *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); (2) "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted); and (3) courts must "give effect, if possible, to every clause and word of a

statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Respondents point to legislative history that, they argue, shows that Congress intended to "require[] parents to 'exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." BIO 22 (quoting H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 7 (1985) (emphasis in BIO)). Even if a committee-report snippet could trump plain statutory text, Respondents rip the quoted statement out of context and thus distort its meaning. The report states that exhaustion is "[t]ypically" required for complaints that involve the enumerated matters, but that "there are certain situations in which it is not appropriate to require the use of [IDEA administrative procedures] before filing a law suit." H.R. Rep. No. 99-296, *supra*, at 7. Among those situations, the report notes, are cases in which "the [IDEA] hearing officer lacks the authority to grant the relief sought." *Id.* The legislative history thus underscores the reading that is apparent from the statute's plain text.

Respondents rely on asserted policy reasons supporting the Sixth Circuit's reading—notably the prospect of quicker relief in the IDEA administrative process (BIO 17-19). But of course policy considerations point in the other direction as well—notably the concern that disabled children and their parents should not be forced to waste their time litigating in tribunals that cannot grant the relief they are requesting. That concern is particularly salient in a case like this one, where IDEA proceedings would require the parties to

focus on an issue—the effect of the refusal to permit a service animal on the child's ability to benefit from education—that need play no role in an ADA or Rehabilitation Act suit.

Considerations like these balance differently in different contexts. Under some statutory schemes, litigants are excused from administrative exhaustion when the agency has no power to grant the relief they seek. See, *e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (Interstate Commerce Act). Under others, litigants must exhaust even in those circumstances. See, *e.g.*, *Booth v. Churner*, 532 U.S. 731 (2001) (Prison Litigation Reform Act). The HCPA's text makes clear that Congress required IDEA exhaustion only when the administrative process can provide the relief the plaintiff is actually "seeking." 20 U.S.C. § 1415(*l*). Congress's decision presumably reflects a determination that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled," *Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982)—and thus that they can be trusted not to bypass administrative processes that stand to benefit their children. That policy judgment was one for Congress to make. See Pet. 20-21. The Sixth Circuit disregarded the determination reflected in the HCPA's text.

Contrary to Respondents' insinuations (BIO 19, 29, 33-34), Petitioners moved quickly to vindicate E.F.'s rights. At the end of the 2009-2010 school year, Respondents announced that E.F. would not be allowed to bring her service dog to school in the fall. Cplt. ¶¶ 38-39. The next month, Petitioners filed a complaint with the Department of Education (USED)

under the ADA and the Rehabilitation Act. *Id.* Exh. A. While that complaint was pending, Petitioners enrolled E.F. in an online virtual academy and taught her at home. *Id.* ¶¶ 41-42. After USED concluded in May 2012 that Respondents had violated the ADA and Rehabilitation Act, E.F.'s father spoke with Respondent Barnes about returning E.F. to Respondents' schools. *Id.* ¶ 48. Based on that discussion, E.F.'s parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." *Id.* They decided to move E.F. to a different school after they "found a public school in Washtenaw County, where the principal and staff enthusiastically welcomed [E.F.] and Wonder." *Id.* ¶ 49.

These are hardly the actions of parents "simply cho[osing] not to pursue . . . relief" (BIO 34), or "singlehandedly rendering the dispute moot" (BIO 33). Had Petitioners simply wanted to file a lawsuit, they would not have filed an administrative complaint with USED—a step that is not a prerequisite to suit under ADA Title II and the Rehabilitation Act. Had Petitioners wished to maximize their monetary recovery, they would have pursued an IDEA claim for reimbursement of educational expenses alongside their other claims. Petitioners forwent IDEA remedies not because they wanted to rush to court, but because IDEA proceedings would focus on whether Wonder was necessary for E.F. to benefit from education (a matter Petitioners do not contest)—not whether Wonder would provide E.F. equal access to a public facility (the salient question under the ADA and Rehabilitation Act). E.F.'s parents wanted to vindicate her broader and independent rights under the ADA and Rehabilitation Act. Congress adopted the HCPA precisely to give

parents that option. See Pet. 3-6. But the Sixth Circuit denied Petitioners what Congress gave them.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted.

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