No. 21-887

In the Supreme Court of the United States

MIGUEL LUNA PEREZ, PETITIONER

v.

STURGIS PUBLIC SCHOOLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 20 U.S.C. § 1415(*l*) requires plaintiffs to exhaust the Individuals with Disabilities Education Act's (IDEA) administrative process before bringing a claim under the Americans with Disabilities Act (ADA) premised on the denial of a free appropriate public education but seeking money damages for emotional distress not available under the IDEA (or under the ADA).

2. Whether § 1415(*l*) includes a futility exception that excuses failure to exhaust non-IDEA claims when plaintiffs settle their IDEA claims with the school district, even though exhaustion would have developed an administrative record that would improve the accuracy and efficiency of judicial proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case arises from Petitioner's attempt to pursue a claim for emotional distress damages under the Americans with Disabilities Act (ADA) without satisfying the IDEA's exhaustion requirement. Petitioner does not dispute that, as the Sixth Circuit held, his ADA claim sought relief for the denial of a free appropriate public education (FAPE). So the Sixth Circuit, adhering to the plain language of 20 U.S.C. § 1415(*l*), held that Petitioner was required to exhaust his ADA claim "to the same extent as would be required had the action been brought under [the IDEA]." The court rejected Petitioner's argument that he could bypass exhaustion just because he sought damages not available under the ADA. It also held that there is no futility exception to § 1415(*l*), and that even if there is one, Petitioner cannot satisfy it. The Sixth Circuit's holding is correct, and neither of Petitioner's questions presented warrants further review.

1. As an initial matter, this Court's intervening decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 2022 WL 1243658 (U.S. Apr. 28, 2022), has made Petitioner's questions presented entirely academic. Petitioner premised his complaint and cert petition on a request for emotional distress damages. But *Cummings* held that "emotional distress damages are not recoverable" under the Rehabilitation Act of 1973, 29 U.S.C. §§ 794(a), 794a(a)(2). 2022 WL 1243658 at *3-4, 10. Because the remedies under the Rehabilitation Act and Title II of the ADA "are coextensive," *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *see* 42 U.S.C. § 12133, Petitioner cannot recover emotional distress damages under the

ADA, and his case fails no matter the answers to his questions presented.

2. In any event, Petitioner's questions presented aren't certworthy even leaving *Cummings* aside. Petitioner's "logically antecedent" contention, Pet. 30, is that the Court should resolve the question it reserved in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 n.4 (2017): whether "exhaustion [is] required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award." But the circuits uniformly agree that a damages claim does not entitle a plaintiff to bypass the IDEA's administrative process, and recent decisions have found that *Fry* supports that consensus. *See, e.g.*, *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2803 (2020) (No. 19-972); *D.D. ex rel. Ingram v. Los Angeles Unified Sch. Dist.*, 18 F.4th 1043, 1056-57 (9th Cir. 2021) (en banc). The Court has twice denied cert on this question since *Fry*, and it's even less certworthy today. The en banc Ninth Circuit recently made clear that it agrees with all the other circuits, *D.D.*, 18 F.4th at 1056-57, eliminating the purported outlier identified in *McMillen*, 939 F.3d at 647.

3. a. Petitioner next claims that the Sixth Circuit here split with nearly every other court of appeals in refusing to recognize a futility exception to § 1415(*l*)'s exhaustion requirement. But he doesn't identify which circuits have squarely *held* that there is a futility exception since this Court warned against "add[ing] unwritten limits" to statutory exhaustion requirements in *Ross v. Blake*, 578 U.S. 632, 638-39 (2016). More importantly, Petitioner ultimately

concedes that the Sixth Circuit held that his "circumstances do not establish futility even if such an exception existed." Pet. 17.

b. Petitioner thus reframes his argument, claiming a 4–1 split on a narrower question: whether § 1415(*l*) excuses exhaustion when plaintiffs settle their IDEA claims before or during the administrative process. Pet. 19-20. But this case doesn't implicate any certworthy conflict on that question either. Petitioner's Ninth Circuit decision wasn't a futility case. His First and Third Circuit decisions found futility based on extensively developed administrative records, but Petitioner developed no such record here, so he can't establish futility under those decisions. And Petitioner's Tenth Circuit decision says little about what that court would do if confronted with Petitioner's case, especially in light of *Ross v. Blake* and more recent Tenth Circuit precedent.

Petitioner's narrow question also isn't an important or recurring one, as Petitioner's alleged split—cobbled together from just four cases over twenty-five years—shows. Petitioner has not shown that exhausting the IDEA's administrative process is costly or time-consuming. Nor has he shown that it would have been futile here. Petitioner could have built a record that would have improved the accuracy and efficiency of judicial review, as the Sixth Circuit found. Alternatively, Petitioner could have sought compensation for his ADA claim as part of the settlement. Or he could have exhausted the required administrative procedures and sought relief and attorney's fees for both his IDEA claim and his ADA claim in federal court.

The Sixth Circuit got it right. Section 1415(*l*) requires exhaustion and contains no futility exception. Nothing in this Court's precedents says otherwise.

The Court should deny review.

STATEMENT

A. Legal background

1. The IDEA guarantees children with special needs a free appropriate public education. The "core of the statute" is the "cooperative process" through which parents and schools craft a child's "individualized education program." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51, 53 (2005). This "personalized plan" is the "primary vehicle" for ensuring a FAPE. *Fry*, 137 S. Ct. at 749 (citations and quotation marks omitted).

The IDEA spells out "elaborate and highly specific" procedures for addressing children's needs and resolving disputes in 20 U.S.C. § 1415. *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982). As relevant here, § 1415 channels all disputes about a child's education into a three-step process.

That process begins with an informal resolution period. When parents file a complaint, the school district must hold a "[r]esolution session" at which the parents "discuss their complaint" and the district has "the opportunity to resolve the complaint." 20 U.S.C. § 1415(f)(1)(B). The parents may also request mediation. *See id.* § 1415(e)(2)(B). But Congress designed this process to move fast, so if the district has not resolved the parents' concerns "within 30 days," parents have the "opportunity for an impartial due process hearing." *Id.* § 1415(f)(1)(A), (B)(ii).

The hearing, conducted by an education expert, gives parents the chance to build an administrative record. *See* 34 C.F.R. § 300.511. Before the hearing, the district must disclose "all evaluations … and recommendations based on [those] evaluations" that it plans to rely on. *Id.* § 300.512(b)(1). Then, at the hearing, parents may "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses." *Id.* After the parties have offered evidence, the hearing officer must issue a decision on "substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i). That "final decision" must come "not later than 45 days" after the resolution period ends. 34 C.F.R. § 300.515(a).

"[T]hen (and only then)," after exhausting the IDEA's administrative procedures, may parents "'bring a civil action' in federal court." *A.F. ex rel. Christine B. v. Española Pub. Schs.*, 801 F.3d 1245, 1246 (10th Cir. 2015) (Gorsuch, J.) (quoting 20 U.S.C. § 1415(i)(2)(A)). As relevant here, the "right to bring a civil action" extends to "any party aggrieved by" the administrative "findings and decision made under" § 1415(f)—the subsection governing due process hearings. In other words, the right to judicial review arises only after a hearing officer has issued "findings," 20 U.S.C. § 1415(i)(2)(A), and a "decision … made on substantive grounds based on a determination of whether the child received a free appropriate public education," *id.* § 1415(f)(3)(E)(i).

These same exhaustion requirements also apply when parents bring FAPE-related claims under antidiscrimination statutes like the ADA. Before filing "a civil action under such laws seeking relief that is also available under [the IDEA]," parents must exhaust

the IDEA's administrative procedures "to the same extent as would be required had the action been brought under [the IDEA]." *Id.* § 1415(*l*). As this Court clarified in *Fry*, § 1415(*l*)'s exhaustion requirement "hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education." 137 S. Ct. at 754. If so, "the plaintiff cannot escape § 1415(*l*) merely by bringing her suit under a statute other than the IDEA." *Id.* Instead, she must "first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises." *Id.*

2. On April 28, 2022, this Court held that "emotional distress damages are not recoverable" under the Rehabilitation Act of 1973, 29 U.S.C. §§ 794(a), 794a(a)(2). *Cummings*, 2022 WL 1243658, at *3-4, 10. As a result, emotional distress damages aren't available under Title II of the ADA, either, because "[t]he remedies, procedures, and rights set forth in section 794a of title 29"—*i.e.*, the Rehabilitation Act—"shall be the remedies, procedures, and rights" under Title II of the ADA. 42 U.S.C. § 12133; *accord Barnes*, 536 U.S. at 185 (remedies "are coextensive").

B. Factual and procedural background

1. In December 2017, Petitioner filed a complaint with the Michigan Department of Education alleging that Sturgis had violated the IDEA and Michigan's analogue by depriving him of a FAPE. D. Ct. Doc. 10, at 11. The complaint also alleged claims under the Rehabilitation Act, the ADA, and a Michigan civil-rights statute. *See* Pet. App. 2a. After the resolution period, a hearing officer dismissed the latter three claims for lack of jurisdiction, leaving only the IDEA claim and the Michigan analogue. The officer

then scheduled a due process hearing for June 25, 2018. Pet. App. 38a.

Before the hearing, Sturgis offered to settle. Petitioner, represented by counsel, agreed, and the parties resolved the IDEA and state-analogue claims. Sturgis "agreed to pay for [Petitioner] to attend the Michigan School for the Deaf, for any 'post-secondary compensatory education,' and for sign language instruction for [him] and his family. It also paid the family's attorney's fees." Pet. App. 2a. As a result, Petitioner "obtained the full relief he sought for his IDEA claim." Pet. 11. The settlement didn't include compensation for Petitioners' antidiscrimination claims, although it "could have." Pet. App. 5a.

2. In October 2018, Petitioner sued in federal court, pleading claims under Title II of the ADA, 42 U.S.C. § 12132, and the Michigan civil-rights statute and seeking damages for emotional distress. D. Ct. Doc 10, at 3, 13. Sturgis moved to dismiss, arguing that Petitioner had not exhausted the administrative process. The district court agreed and dismissed the complaint in December 2019. Pet. App. 45a-55a.

3. a. The Sixth Circuit affirmed. Pet. App. 1a-14a. In an opinion by Judge Thapar, the court first held that § 1415(*l*)'s exhaustion requirement applied. The "crux of [Petitioner's] complaint is that he was denied an adequate education." *Id.* at 5a. So under *Fry*, he had to exhaust the IDEA's administrative process before suing in federal court. *Id.* at 5a-7a.

It didn't matter, the court of appeals explained, that Petitioner sought compensatory damages for emotional distress, a remedy "unavailable under the IDEA." *Id.* at 7a. Section 1415(*l*) requires exhaustion whenever a lawsuit seeks "relief that is also available

under [the IDEA]." *Id.* (quoting 20 U.S.C. § 1415(*l*)). That means "relief for the wrong that the IDEA was enacted to address"—*i.e.*, "relief for the denial of an appropriate education." *Id.* In other words, what matters is "the kind of harm [a plaintiff] wants relief from." *Id.* at 8a. Petitioner's "core complaint" was that "the school denied him an appropriate education," so his suit sought "relief that is also available under [the IDEA]." *Id.*

Next, the court of appeals found that Petitioner had not exhausted the administrative process. Under § 1415(*l*), plaintiffs bringing FAPE-related antidiscrimination claims must "exhaust the IDEA's administrative procedures 'to the same extent as would be required had the [lawsuit] been brought under the IDEA.'" *Id.* at 8a-9a (quoting 20 U.S.C. § 1415(*l*); emphasis and brackets omitted). That means plaintiffs must be "aggrieved by the findings and decision rendered" after an administrative hearing. *Id.* at 9a (quoting 20 U.S.C. § 1415(i)(2)(A)). Here, however, Petitioner "settled his IDEA claim rather than continue to litigate it in the administrative forum." *Id.* at 8a. That choice involved "tradeoffs"—including that "Michigan never determined whether [he] received an appropriate education." *Id.* at 9a.

Finally, the court rejected Petitioner's attempt to bypass exhaustion on futility grounds. *Id.* at 10a. Pointing to this Court's recent instruction in *Ross v. Blake* "not to create exceptions to statutory exhaustion requirements," the court of appeals explained that § 1415(*l*) "does not come with a 'futility' exception." *Id.* (citing *Ross*, 578 U.S. at 639).

Nor did this Court's precedent hold otherwise. *Smith v. Robinson*, 468 U.S. 992 (1984), could not

have "announce[d] a futility exception" to § 1415(*l*), because that provision didn't exist when *Smith* was decided. Pet. App. 11a. And *Honig v. Doe*, 484 U.S. 305 (1988), mentioned futility only in dictum, while discussing "policy consequences" related to a different IDEA provision. Pet App. 11a. In all events, Petitioner sought an "extended" exception, "beyond anything *Honig* or *Smith* might have recognized." *Id.* That exception would excuse exhaustion for "any student seeking money damages"—leaving § 1415(*l*) with "no force." *Id.* at 13a.

The court of appeals also held that Petitioner couldn't satisfy a futility exception even if there were one because exhaustion would not have been an "empty bureaucratic exercise" in his case. *Id.* For one thing, a hearing officer "could have made findings supporting [Petitioner's] version of the facts, which would have certainly aided [his] follow-on suit under the ADA." *Id.* at 13a-14a. For another, an administrative record "would have improved the accuracy and efficiency of judicial proceedings." *Id.* at 13a.

b. Judge Stranch dissented. She agreed that "[a] request for money damages for emotional distress does not, on its own, allow a plaintiff to evade the exhaustion requirement." *Id.* at 24a. But she disagreed with the majority on futility. Pointing to *Smith*, *Honig*, legislative history, and appellate decisions, Judge Stranch argued that § 1415(*l*) includes a futility exception. *Id.* She then concluded that Petitioner should be "excused" from complying with § 1415(*l*) because exhaustion "would be futile." *Id.* at 15a.

c. The Sixth Circuit denied en banc review. Judge Stranch noted that she would have granted rehearing. *Id.* at 56a.

REASONS FOR DENYING THE PETITION

I. This Court's intervening decision in *Cummings v. Premier Rehab Keller* forecloses Petitioner's claim on the merits.

Petitioner's complaint and his cert petition both turn on his request for emotional distress damages. *See* Pet. 30; Pet. App. 7a; D. Ct. Doc 10, at 11, 13. After Petitioner filed his cert petition, however, the Court held in *Cummings* that emotional distress damages aren't recoverable under the Rehabilitation Act. Because Title II of the ADA incorporates the Rehabilitation Act's remedies, *supra* p. 6; *see also, e.g.*, Br. for Pet'r 6, 40, *Cummings*; Br. for Resp. 5, *Cummings*; Br. for United States 4-5, *Cummings*, Petitioner cannot recover emotional distress damages under the ADA. Petitioner's questions presented are therefore entirely academic, even setting aside the other reasons, discussed below, that this case isn't certworthy.

II. *Cummings* aside, review is not warranted to address whether § 1415(*l*) requires exhaustion when plaintiffs seek damages for the denial of a free appropriate public education.

Petitioner asks the Court to grant cert on a question *Fry* "d[id] not address": whether § 1415(*l*) requires exhaustion when a plaintiff "complains of the denial of a FAPE" but seeks a remedy—like damages—that "an IDEA hearing officer may [not] award." 137 S. Ct. at 752 n.4, 754 n.8. But that question doesn't warrant review. The circuits uniformly agree that the answer is "yes," and *Fry* itself supports that conclusion. Since *Fry*, the Court has twice denied petitions presenting the issue, *see McMillen v. New*

Caney Indep. Sch. Dist., 140 S. Ct. 2803 (No. 19-972); *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 140 S. Ct. 2672 (2020) (No. 19-1043), and nothing has changed that would call for a different result here.

A. The courts of appeals uniformly agree that plaintiffs seeking damages must exhaust the administrative process.

1. Petitioner doesn't dispute that the courts of appeals agree that a plaintiff cannot circumvent § 1415(*l*)'s exhaustion requirement by seeking damages. And the question is even less certworthy now than it was when the Court denied review in *McMillen*. In *McMillen*, the petitioners alleged a 9–1 circuit split. *See* Pet. for Writ of Cert. 16-17, *McMillen*, No. 19-972. All circuits but the Ninth held that "the IDEA requires plaintiffs who were denied a free appropriate public education to exhaust regardless of the remedy they seek." *McMillen*, 939 F.3d at 647 (collecting cases). The Ninth Circuit alone appeared to think "that § 1415(*l*) does not require exhaustion" when a complaint seeks relief "[un]available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). The Court denied review in *McMillen* and then again in *Paul G.*

Since *McMillen*, as Petitioner concedes, the Ninth Circuit has "adopt[ed] the majority position." Pet. 33. In *D.D.*, the en banc Ninth Circuit held that a plaintiff who sought "compensatory damages for emotional distress" under the ADA needed to exhaust the IDEA administrative process. 18 F.4th at 1056. The court clarified that "a plea for damages alone" does not "vitiate[] the exhaustion requirement." *Id.*; *see also id.* at

1062 n.2 (Bumatay, J., dissenting in part) (noting that the majority "align[ed] us with the[] other circuits."). In sum, there is no circuit disagreement for this Court to resolve, and the question is even less certworthy now than when the Court denied review in *McMillen* and *Paul G.*

2. Left with no split, Petitioner emphasizes that the Fifth Circuit has called the question "close[]," Pet. 33 (quoting *McMillen*, 939 F.3d at 647), and that the First Circuit has voiced "some hesitation," *id.* (citing *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 31 (1st Cir. 2019)). But both the First and Fifth Circuits have *held* that § 1415(*l*)'s exhaustion requirement "applies to plaintiffs who seek damages for the denial of a free appropriate public education." *McMillen*, 939 F.3d at 648; *see Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002).

B. The circuit consensus is correct.

1. Aligning with the circuit consensus, the Sixth Circuit correctly held that § 1415(*l*) requires exhaustion whenever a plaintiff's non-IDEA claims "seek[] relief that is also available" under the IDEA. That "test for exhaustion—whether the lawsuit seeks a free appropriate public education—comports with reading 'relief' to focus on conduct the plaintiff complains about." *McMillen*, 939 F.3d at 648. And it accords with *Fry*'s holding that plaintiffs "trigger § 1415(*l*)'s exhaustion rule" when they seek "relief for the denial of a FAPE." 137 S. Ct. at 753. As the Sixth Circuit put it, "[t]he focus of the analysis is not the kind of relief the plaintiff wants, but the kind of harm he wants relief from." Pet. App. 8a.

That reading makes sense. As Judge Thapar explained, "we say that people come to court for relief

when they have been wronged. The court's goal is to rectify that wrong—to provide relief." Pet. App. 7a. So a "lawsuit that seeks relief for the denial of an appropriate education is subject to section 1415(*l*), even if it requests a *remedy* the IDEA does not allow." *Id.* (emphasis added).

2. Petitioner nonetheless claims that when damages are "not 'available' under the IDEA[]," a plaintiff seeking damages under the ADA need not exhaust. Pet. 31. That's true, according to Petitioner, even if the plaintiff wants relief for the denial of a FAPE.

Petitioner's argument lacks merit. Section 1415(*l*) "ensure[s] that non-IDEA claims predicated on the denial of a FAPE [can] proceed, but only *after* parents directly engage with the experts to seek resolution without litigation." *D.D.*, 18 F.4th at 1057. "[I]f a request for damages could excuse the failure to exhaust, then any student seeking money damages could skip the administrative process," and § 1415(*l*) "would have no force." Pet. App. 13a. "Allowing a plaintiff complaining about the denial of a free appropriate public education to avoid exhaustion" by requesting damages would "subvert the procedures Congress designed for prompt resolution of these disputes." *McMillen*, 939 F.3d at 648 (citation omitted).

III. *Cummings* aside, review is not warranted to address whether § 1415(*l*) includes a futility exception.

With no split on the "logically antecedent" exhaustion question, Pet. 30, Petitioner spends most of his petition on the futility question, framing two supposed splits. But this case doesn't implicate any certworthy circuit conflict. This Court's review is unwarranted.

Petitioner first claims a split over whether § 1415(*l*) "contain[s] *any kind* of a futility exception." Pet. 14 (emphasis added). But Petitioner doesn't claim that this case implicates any such split. Instead, as Petitioner ultimately acknowledges, the Sixth Circuit held that his "circumstances do not establish futility even if such an exception existed." Pet. 17; *see* Pet. App. 11a ("Even assuming that a general futility exception exists for IDEA claims, it would be of no use" to Petitioner.). What's more, Petitioner doesn't bother to identify which courts have *held* since *Ross v. Blake* (rather than just noted in passing) that § 1415(*l*) has *some* kind of futility exception.

So Petitioner ultimately abandons that framing, focusing on a narrower question on which he claims he would have prevailed in four circuits: whether § 1415(*l*) excuses failure to exhaust non-IDEA claims when plaintiffs settle their IDEA claims before or during the administrative process. Pet. 19-20. But this case doesn't implicate any certworthy split on that question either. Although Congress enacted § 1415(*l*) thirty-six years ago, Petitioner can find only three other appellate decisions, from the First, Third, and Tenth Circuits, that he thinks resemble his (his Ninth Circuit case isn't a futility case). But the First and Third Circuit decisions found futility based on a developed administrative record, which is missing here. This case would thus be a poor vehicle because exhaustion would not have been futile here. And the Tenth Circuit's decision (which, like the Third's, predates *Ross*) says little about what that court would do if confronted with Petitioner's case. In all events, the Sixth Circuit's decision aligns with this Court's precedent and faithful to the IDEA's language, so there is no error to correct. This Court should deny review.

A. This case does not implicate any circuit split over whether § 1415(*l*) contains "any kind of a futility exception."

Petitioner first insists that the Sixth Circuit broke with "[e]very other federal court of appeals" over whether § 1415(*l*) "contain[s] any kind of a futility exception." Pet. 14. But leaving aside the handful of decisions Petitioner claims create a split in the settlement context, *see infra* pp. 17-25, Petitioner does not analyze any of the decisions he cites or claim that they would excuse his failure to exhaust.

1. Most of the decisions Petitioner cites *declined* to excuse exhaustion on futility grounds, often while noting that the unavailability of damages did not make exhaustion futile. To be sure, some of those decisions stated that there is *some* futility exception to § 1415(*l*)'s exhaustion requirement. But Petitioner cannot (and does not) claim that he would be entitled to any futility exception under those decisions.

a. Several of the decisions Petitioner cites establish that a claim for damages doesn't make exhaustion futile. *J.M. ex rel. McCauley v. Francis Howell School District*, 850 F.3d 944 (8th Cir. 2017), is typical. The court rejected the argument that exhaustion would be futile because "the administrative process cannot provide … damages." *Id.* at 951. The court explained that exhaustion "remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought" or can "address[] all [of the plaintiff's] claims." *Id.* (citation omitted). Exhaustion would still "allow the agency to develop the record for judicial review and apply its expertise to the plaintiff's claims." *Id.* (citation and quotation marks omitted). *See also Z.G. ex rel. C.G. v.*

Pamlico Cnty. Pub. Schs. Bd. of Educ., 744 F. App'x 769, 777 n.14 (4th Cir. 2018) (similar); *Heston ex rel. A.H. v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 983-84 (5th Cir. 2020) (per curiam); *C.T. ex rel Trevorrow v. Necedah Area Sch. Dist.*, 39 F. App'x 420, 423 (7th Cir. 2002); *N.B. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (per curiam).

b. Some of Petitioner's cases reject futility arguments for other reasons, but Petitioner doesn't claim that their reasoning would warrant a different outcome here. In *Durbrow v. Cobb County School District*, 887 F.3d 1182 (11th Cir. 2018), for example, the parents withdrew their Rehabilitation Act claim without receiving an administrative decision. The Eleventh Circuit rejected their futility argument because "a parent's unilateral act cannot create the purported futility." *Id.* at 1191. Meanwhile, in *Student A. ex rel. Parent A. v. San Francisco Unified School District*, 9 F.4th 1079, 1084 (9th Cir. 2021), the plaintiffs argued that exhaustion would be futile because they were challenging "district-wide policies." The Ninth Circuit disagreed, finding that the plaintiffs had "not identified any policy … that the administrative process could not address." *Id.* And *Cox v. Jenkins*, 878 F.2d 414, 419 (D.C. Cir. 1989), refused to excuse exhaustion because there was "no evidence whatsoever that it would have been futile for the [parents] to challenge the [district] through the administrative process." Finally, two other decisions didn't find futility either. *See M.M. ex rel. D.M. v. School Dist.*, 303 F.3d 523, 536 (4th Cir. 2002); *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 135-36 (3d Cir. 2017) (settlement released claims).

2. Just one of Petitioner's non-settlement cases (*see infra* pp. 17-25) excused exhaustion: *B.C. ex rel.*

J.C. v. Mount Vernon School District, 837 F.3d 152 (2d Cir. 2016). But *B.C.* does not suggest that the Second Circuit would excuse exhaustion here, and Petitioner doesn't claim otherwise. The parents in *B.C.* bypassed the administrative process and sued the school district in federal court, alleging IDEA, ADA, and other claims. Because the parents were challenging a "district-wide policy of discrimination," the district court excused exhaustion as futile, and the Second Circuit summarily affirmed. *Id.* at 157 & n.3 (citation omitted). But Petitioner isn't challenging a district-wide policy, so even if the Second Circuit would excuse exhaustion in some cases, *B.C.* does not suggest that it would do so here.

B. There is no certworthy circuit split over whether § 1415(*l*) excuses exhaustion when plaintiffs settle their IDEA claims.

Narrowing his focus, Petitioner claims that the First, Third, Ninth, and Tenth Circuits would have excused his failure to exhaust because those courts recognize a futility exception for non-IDEA claims when a "student has obtained IDEA relief via settlement." Pet. 17. Not so. None of the decisions creates certworthy conflict, and only the First Circuit's decision post-dates *Ross v. Blake*.

The Ninth Circuit recently confirmed that it has not addressed whether § 1415(*l*) excuses exhaustion as futile when a plaintiff settles IDEA claims. The First and Third Circuits have applied a futility exception only where the administrative process would provide negligible benefit, and thus only where efforts to exhaust have produced an extensive administrative record. Indeed, the First Circuit held in the alternative that the plaintiffs *had* exhausted. But the Sixth

Circuit's decision establishes that Petitioner cannot meet that test because administrative factfinding *would have* "improved the accuracy and efficiency of judicial proceedings." Pet. App. 13a.

Finally, although the Tenth Circuit excused exhaustion as futile even when there was no administrative record in its pre-*Ross* decision in *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 786 (10th Cir. 2013), *Muskrat* doesn't create cert-worthy conflict either. *Muskrat* is distinguishable because it never suggested that further efforts to exhaust could have produced a helpful record. And in any event, more recent Tenth Circuit authority (not to mention *Ross*) has undermined *Muskrat*'s logic.

1. The Ninth Circuit has not addressed whether an IDEA settlement excuses exhaustion.

a. As Petitioner admits, *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999), did not mention—let alone apply—a futility exception to § 1415(*l*)'s exhaustion requirement. *See* Pet. 19 n.4. Instead, *Witte* turned on the antecedent ground that "exhaustion of administrative remedies [was] not required." *Witte*, 197 F.3d at 1275. What's more, the court reached that conclusion because it thought that when a plaintiff "seeks only monetary damages," "exhaustion of administrative remedies is not required." *Id.* As noted above (at 11-12), however, the en banc Ninth Circuit recently rejected that view in *D.D.*, aligning with the circuit consensus. *See* 18 F.4th at 1056. And more generally, *Witte* is a poor indicator of how the Ninth Circuit would approach a similar case today. The plaintiff there sought damages for "past physical injuries" resulting from "physical abuse and

injury," like being forcibly fed, strangled, and choked. *Witte*, 197 F.3d at 1273, 1276. Today a court likely would find under *Fry* that the gravamen of the complaint was not the denial of a FAPE.

Contrary to Petitioner's argument, *see* Pet. 19 n.4, *D.D.* did not recast *Witte* as a case about futility. In fact, *D.D.* confirmed that the Ninth Circuit has *not* decided whether settlement excuses exhaustion. *D.D.* left "for another day" whether the student's "settlement rendered further exhaustion futile," 18 F.4th at 1058—a statement that would make little sense if *Witte* had supplied the answer. The actual question in *D.D.* was whether "the gravamen of [the] complaint [was] the failure to offer a FAPE." *Id.* at 1048. The Ninth Circuit found that it was, so exhaustion was required. *See id.* at 1055. At the end of its opinion, the court noted that D.D. had "relie[d] on *Witte*" to argue that exhaustion was not required. *Id.* at 1058 n.7. The court explained that "[t]he problem with this argument—which in any event strikes us as a species of futility—is that D.D. claimed a one-to-one aide was necessary to provide him with a FAPE and settled without obtaining that aide." *Id.* at 1058 n.7. What struck the court as "a species of futility" was the student's "argument," not *Witte*.

b. Petitioner also claims that *Porter v. Board of Trustees*, 307 F.3d 1064, 1074 (9th Cir. 2002), "cited *Witte* for the proposition that exhaustion may be 'futile'" in cases like this. Pet. 19 n.4. But *Porter* doesn't get Petitioner anywhere either. *Porter* addressed California's "complaint resolution procedure" (CRP), a state administrative mechanism "[d]istinct from the IDEA's due process requirements." 307 F.3d at 1067. In dicta citing *Witte*, the court ventured that

"[e]xhaustion of a CRP may also render the due process hearing futile where all the educational issues are resolved, leaving only issues for which there is no adequate administrative remedy." *Id.* at 1074. But that passing statement doesn't recast *Witte*'s holding, which wasn't about about futility. And Petitioner doesn't claim *Porter* helps him on its own terms.

2. The First and Third Circuits do not excuse exhaustion when—as here—there is no administrative record.

Petitioner insists that the Sixth Circuit's decision conflicts with decisions from both the First and Third Circuits. Pet. 17-19. But those circuits apply a futility exception only when "the administrative process would provide negligible benefit to the adjudicating court." *Doucette*, 936 F.3d at 31; *see also W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995), *abrogated on other grounds*, *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007). And the futility holdings in those cases turned on the plaintiffs' extensive use of the administrative process. Here, in contrast, the Sixth Circuit found that "an administrative record would have improved the accuracy and efficiency of judicial proceedings." Pet. App. 13a. So whatever the merits of the First and Third Circuits' approach, it would not have produced a different outcome in this case.

a. Start with the First Circuit's decision in *Doucette*. The Doucettes requested an IDEA hearing in 2010, seeking to have their son, B.D., placed in a different school. *Doucette*, 936 F.3d at 20. After administrative factfinding, the hearing officer denied the request. *See id.* at 20, 32. As the First Circuit observed, the plaintiffs thus "went through the entire administrative process unsuccessfully." *Id.* at 30.

Then, in 2012, the Doucettes renewed their request after B.D. had a series of seizures. *See id.* at 21. The district at first refused but eventually relented. *Id.* at 21-22. The Doucettes later sued under 42 U.S.C. § 1983, arguing that the district's initial refusal violated B.D.'s due process rights. The First Circuit held that the Doucettes "met the exhaustion requirement" by going through "the entire administrative process" in 2010 and then renewing their request in 2012. *Id.* at 29-30.

In the alternative, the court found exhaustion "unnecessary" because "additional proceedings" would be "futil[e]." *Id.* at 31. As the court explained, exhaustion is futile when "(1) the plaintiff's injuries are not redressable through the administrative process" and "(2) the administrative process would provide negligible benefit to the adjudicating court." *Id.* (citations omitted). The court noted reasoned that the Doucettes sought damages, "which the IDEA does not allow." *Id.* at 32 (citation omitted). And because "an adjudicating court already ha[d] the benefit of the administrative record developed during the 2010 due process hearing," "further administrative decisionmaking" would offer "negligible" benefits. *Id.* at 32 & n.22.

Applying that rule, the First Circuit would not have excused exhaustion here. Unlike the Doucettes, Petitioner has not gone through a hearing, much less "the entire administrative process." *Id.* at 30. As a result, the courts below lacked "the benefit of [an] administrative record." *Id.* at 32. And creating such a record "would not have been an empty bureaucratic exercise." Pet. App. 13a. In *Doucette*, the only open questions involved "issues of medical causation" related to B.D.'s seizures—hardly a hearing officer's "area of expertise." 936 F.3d at 32. Here, by contrast,

the Sixth Circuit reasoned that administrative factfinding would have "improved the accuracy and efficiency of judicial proceedings." Pet. App. 13a. In short, if Petitioner's case arose in the First Circuit, it would fail *Doucette*'s futility test because administrative factfinding would have offered real benefits.

b. Nor can Petitioner create a split with the Third Circuit's decision in *W.B.*, which likewise involved "extensive administrative proceedings." 67 F.3d at 488. The school district there repeatedly denied the parent's "meritorious requests," leaving her "no alternative to an enormously burdensome struggle." *Id.* at 490. As a result, the parent filed at least nine due process complaints over an eighteen-month period, several of which settled. *See id.* at 490-91 & nn.3-4. She later sued the district under the IDEA, Rehabilitation Act, and § 1983, seeking "damages for the persistent refusal … to evaluate, classify and provide necessary educational services." *Id.* at 487. Reasoning that "further recourse to administrative proceedings would be futile," the Third Circuit held that "any exhaustion requirement [was] excused." *Id.* at 496.

But *W.B.* did not—as Petitioner suggests (at 18-19)—excuse exhaustion just because the parties settled. To the contrary, *W.B.* involved a straightforward application of *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), which identified two factors excusing exhaustion. First, the administrative record in *Lester H.* was "fully-developed" and "no evidentiary disputes remain[ed]," leaving only "legal issues" for the court to decide. *Id.* at 869. And second, "[t]he administrative process could not have given" the plaintiffs the relief they sought. *Id.* at 870. Together, these factors convinced the court that the "administrative process need not be pursued." *Id.*

Both *Lester H.* factors were present in *W.B.* As to the record, the court found that the "extensive administrative proceedings" had built a factual record and "resolved" the student's "classification and placement." *W.B.*, 67 F.3d at 488, 496. Indeed, those proceedings included one string of "nearly ten days of hearings" producing a settlement that the administrative law judge (ALJ) endorsed as "consistent with the overwhelming weight of the evidence" and another set of "hearings for twenty-seven days" resulting in "a fifty-four page opinion" ordering relief. *Id.* at 490 (citation omitted). And as to remedy, "the relief sought by plaintiffs … was unavailable in IDEA administrative proceedings." *Id.* at 496. "In sum," the circumstances showed that "further recourse to administrative proceedings would be futile." *Id.*

Like the First Circuit, the Third Circuit would not have excused exhaustion here because there was no administrative hearing and no factual development. Indeed, in *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 280-81 (3d Cir. 2014), the Third Circuit refused to find futility where, unlike in *W.B.*, the plaintiffs had not "previously utilized the IDEA administrative process" and "the factual record is not developed and evidentiary issues are not resolved."

3. The Tenth Circuit's approach doesn't create certworthy conflict either.

The Tenth Circuit alone, in *Muskrat v. Deer Creek Public Schools*, has excused exhaustion as futile when, as here, there is no administrative record. *See* 715 F.3d at 786. But *Muskrat* does not create circuit conflict warranting this Court's review both because it is distinguishable and because the law is unsettled in the Tenth Circuit.

In *Muskrat*, school staff sent "disruptive" students to a "timeout room." *Id.* at 780. The Muskrats "became concerned about the use of the timeout room" and told the school that their son, J.M., "should not be placed there." *Id.* The school agreed, modifying J.M.'s individualized education program to "prohibit placing [him] in a timeout room." *Id.* Yet the school allegedly put J.M. in the timeout room anyway. *Id.* at 781. The Muskrats sued, claiming that the timeouts violated due process because they shocked the conscience, and the Tenth Circuit excused their failure to exhaust. *Id.* at 785-88. While they "did not formally request a due process hearing under the IDEA," the court noted that they "worked through administrative channels to obtain the relief they sought." *Id.* at 786. Given "the steps the Muskrats took and the relief they obtained," the court reasoned that it "would have been futile to then force them to request a formal due process hearing—which in any event cannot award damages." *Id.*

Muskrat doesn't create certworthy circuit conflict for two reasons. *First*, the Tenth Circuit never suggested that further efforts to exhaust could have produced a helpful record. To the contrary, the plaintiffs sought "only damages for the alleged continuing medical consequences" of timeouts that had ceased, and the court rejected the plaintiffs' due process claims *even accepting* the plaintiffs' version of the facts. *Id.* at 785; *see id.* at 787. Here, in contrast, the Sixth Circuit found that further exhaustion would have developed "an administrative record [that] would have improved the accuracy and efficiency of judicial proceedings." Pet. App. 13a. Here, an "ALJ could have made findings supporting [Petitioner's] version of the facts, which would have certainly aided [his] follow-on suit under the ADA." *Id.* at 13a-14a.

Second, *Muskrat* not only pre-dates *Ross v. Blake*, but more recent Tenth Circuit authority has undermined *Muskrat*'s logic as well. In *A.F. ex rel. Christine B. v. Española Public Schools*, then-Judge Gorsuch explained that a plaintiff seeking ADA damages for the denial of a FAPE "must be able to show that she's 'aggrieved by the findings and decision'" of a hearing officer. 801 F.3d at 1247 (quoting 20 U.S.C. § 1415(i)(2)(A)). And since a plaintiff "cannot bring an IDEA lawsuit … after choosing to settle her IDEA claims," an ADA lawsuit "seeking the same relief is also barred." *Id.* at 1248. True, *A.F.* did not confront the question presented here because the plaintiff forfeited any futility argument. But *A.F.*'s rationale still casts doubt on *Muskrat*'s logic. In particular, *Muskrat* failed to cite—let alone grapple with—§ 1415(i)(2)(A), which limits the "right to bring a civil action" to plaintiffs who have received "findings" and a "decision." Thus, the Tenth Circuit may well revisit these questions in an appropriate case in light of *Ross*, *A.F.*, and the Sixth Circuit's opinion below. Given the uncertain contours of any futility exception in the Tenth Circuit, there is no reason for this Court to intervene.

C. The futility question does not warrant this Court's intervention.

Petitioner calls the futility question "frequently recurring" and "exceptional[ly] importan[t]," but that is wrong on both counts. Pet. 2. As the dearth of similar cases proves—Petitioner reaches back a quarter century to cobble together his supposed split—this issue seldom arises, and only as a result of very particular settlement choices. Congress designed the IDEA administrative process to be fast and

inexpensive. The process works, and Petitioner doesn't show otherwise.

1. Congress enacted § 1415(*l*) thirty-six years ago. But Petitioner can muster only three appellate cases—*W.B.*, *Doucette*, and *Muskrat*—that he claims resemble his. That's unsurprising. As Petitioner and his amici explain, the IDEA "affirmatively *encourages* parties to settle their claims before the case gets to a full-blown hearing." Pet. 29. That's why "[n]early ninety percent of due-process complaints are withdrawn, dismissed, or resolved short of a hearing." Weber & Perlmutter Br. 6. Parents and school districts often settle *all* FAPE-related claims, leaving nothing else to litigate. *See, e.g.*, *Wellman*, 877 F.3d at 129 (releasing all IDEA and ADA claims); *Trost v. Dixon Unit Sch. Dist. 170*, No. 21-cv-50255, 2021 WL 3666940, at *2 (N.D. Ill. Aug. 18, 2021) (similar). Here, too, "the negotiations for [Petitioner's] settlement could have included compensation for … his [ADA] claims." Pet. App. 5a.

2. Petitioner urges this Court to intervene, lest the Sixth Circuit's rule "inflict great harm" by requiring plaintiffs "either to forfeit their non-IDEA rights" by settling or to "give up the settlement" and exhaust the "lengthy and costly" IDEA administrative process. Pet. 5. Those concerns are unwarranted.

a. Petitioner claims "the Sixth Circuit's rule undercuts the ten-day offer provision" that bars parents from recovering post-offer fees and costs if they refuse a settlement offer and "the relief finally obtained … is not more favorable … than the offer." Pet. 29 (quoting 20 U.S.C. § 1415(i)(3)(D)(i)). Not so. *First*, if a plaintiff ultimately prevails in court on both the IDEA claim and, say, an ADA claim, then the relief will be "more

favorable" than an IDEA-only offer. The ten-day offer provision thus wouldn't limit the fee award. *Second*, the ADA itself provides for attorney's fees. 42 U.S.C. § 12205. *Finally*, Petitioner's argument that "Congress clearly wanted students to accept the deal," Pet. 29, doesn't get Petitioner anywhere. The IDEA *both* says that plaintiffs must exhaust non-IDEA claims *and* encourages settlement—*i.e.*, compromise. Plaintiffs can seek compensation for their non-IDEA claims in any settlement. And, of course, plaintiffs who accept settlements can still go to court without exhausting to pursue non-IDEA claim seeking relief for something other than denial of a FAPE.

b. Administrative review also isn't long and costly, as this case shows. Petitioner's due process hearing was scheduled to begin June 25, 2018. Federal regulations required the Michigan Department of Education to "ensure" that a "final decision [was] reached in the hearing" "not later than 45 days after" the resolution period ended. 34 C.F.R. § 300.515(a). That means that Petitioner should have been able to exhaust the administrative process by August 9, 2018, at the latest. Petitioner does not suggest that this would have delayed his enrollment at Michigan School for the Deaf or hindered his access to "post-secondary compensatory education." Pet. App. 2a. Nor would waiting 45 days for administrative factfinding and a decision have delayed Petitioner's federal lawsuit, which he filed in October 2018.

Neither Petitioner nor his amici offer any data to show that the IDEA hearing process is in fact "lengthy and costly." Pet. 5. Instead, Petitioner quotes a line from *Honig*, which said that "administrative *and judicial review*" was "often 'ponderous'" in 1988. 484 U.S. at 322 (emphasis added; citation omitted). But the

issue here is isn't the time for *judicial* resolution. And that dictum predates the 2006 federal regulation setting a 45-day hearing timeline. *See* § 300.515(a); *cf.* 131 Cong. Rec. H9964-02 (daily ed. Nov. 12, 1985) (Statement of Rep. Bartlett) ("The administrative due process system offers plaintiffs the same kinds of protections and results as the courts, but at greater speed and lower cost.").

Petitioner's other authority, a footnote from a law-review article, proves no more helpful. *See* Perry A. Zirkel, *Post*-Fry *Exhaustion Under the IDEA*, 381 Ed. L. Rep. 1, 3 n.21 (Westlaw 2020). That footnote says nothing about the cost of IDEA administrative hearings, and it doesn't analyze the average hearing-to-decision interval, the relevant metric here. Instead, the article concludes that the "average length … from *filing* to decision" is "often" longer than "the 75-day timeline that the IDEA regulations" envision. *Id.* (emphasis added). But that assertion doesn't account for the resolution period, which parties may voluntarily extend to "continue … mediation at the end of the 30-day" statutory timeframe. 34 C.F.R. § 300.510(c)(3).

In all events, plaintiffs have options if the hearing process stretches beyond 45 days. Parents and students can move for expedited review if the hearing officer misses the federal deadline. If that fails, they may petition the state educational agency responsible for "ensur[ing]" a timely decision. *Id.* § 300.515(a). Still more, state agencies may hold their hearing officers to stricter deadlines than those in the federal regulations.

D. This case is a poor vehicle because exhaustion would not have been futile.

Even putting aside the dispositive holding in *Cummings*, *see supra* pp. 1-2, 6, 10, this case is a poor vehicle for addressing the supposed circuit split because exhaustion would not have been futile. Had Petitioner exhausted the administrative process, the hearing officer "could have made findings supporting [his] version of the facts." Pet. App. 13a-14a. And exhaustion would have helped the district court—"improv[ing] the accuracy and efficiency of judicial proceedings, especially because [hearing officers] have experience with special-education cases." *Id.* at 13a. As the court put it, administrative factfinding "would have certainly aided [Petitioner's] follow-on suit under the ADA." Pet. App. 14a.

Petitioner claims the administrative record "would not have addressed whether the ADA was violated." Pet. 27. But the IDEA "overlap[s]" with the ADA, such that "[t]he same conduct might violate" both statutes. *Fry*, 137 S. Ct. at 756. In fact, in many cases there may be "few differences, if any, between IDEA's affirmative duty" and the "negative prohibition" imposed by federal antidiscrimination law. *W.B.*, 67 F.3d at 492-93. (While *W.B.* was discussing the Rehabilitation Act, that statute and the ADA "impose identical requirements." *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999).)

As a result, plaintiffs can—and do—use the record from an IDEA hearing to win summary judgment on ADA claims. Take *Rogich v. Clark County School District*, No. 2:17-cv-01541, 2021 WL 4781515 (D. Nev. Oct. 12, 2021). The plaintiffs there exhausted the administrative process and then sued the school district,

appealing an unfavorable IDEA decision and alleging new claims under the Rehabilitation Act and the ADA. *Id.* at *1. They then moved for judgment on the administrative record, supplemented by testimony from two more witnesses. *Id.* at *2. The district court granted judgment for plaintiffs across the board. The "record … establishe[d] that Defendant violated" not only the IDEA, but also the Rehabilitation Act and the ADA, *id.* at *6-10, and that "Plaintiffs [were] entitled to compensatory damages," *id.* at *13.

Petitioner is also wrong that exhaustion "would have been futile" just because the hearing officer "lacked jurisdiction to adjudicate [his] ADA claim." Pet. 25. The Nevada hearing officer in *Rogich*—like the Michigan hearing officer here—lacked "jurisdiction over claims arising under … the Americans with Disabilities Act." *Student ex rel. Parent v. School Dist.*, No. DO-011419, at 2 n.2 (Nev. Dep't of Educ. Jan. 14, 2019), https://tinyurl.com/27hxmdyd. The *Rogich* plaintiffs built an administrative record anyway. Petitioner could have, too.

E. The Sixth Circuit's decision is correct.

The court of appeals got it right. Petitioner claims the court "disregarded" this Court's precedent and flouted congressional intent. Pet. 24. But this Court has never recognized a futility exception under § 1415(*l*), and the Sixth Circuit correctly declined to write one into the statute.

1. The Sixth Circuit correctly declined to write a futility exception into § 1415(*l*).

The court of appeals correctly held that there is no futility exception to § 1415(*l*). Section 1415's

procedural rules are "elaborate and highly specific." *Rowley*, 458 U.S. at 205. But they include no futility exception, and the Sixth Circuit correctly refused to write one into the statute. That decision accords with *Honig*, where this Court acknowledged that it was "not at liberty to engraft onto [§ 1415] an exception Congress chose not to create." 484 U.S. at 325.

Ross v. Blake, which interpreted the Prison Litigation Reform Act's (PLRA) exhaustion requirement, confirms the Sixth Circuit's reasoning. *Ross* explained that "mandatory language"—like "'shall' bring 'no action'"—means a court may not excuse a failure to exhaust, even to take [special] circumstances into account." 578 U.S. at 638-39. Instead, courts must take such statutes at "face value—refusing to add unwritten limits onto their rigorous textual requirements." *Id.* at 639. Like the PLRA, § 1415(*l*) uses mandatory language: "shall be exhausted." Under *Ross*, that language "foreclos[es] judicial discretion." *Id.*

2. Petitioner's counterarguments fail.

Petitioner advances several counterarguments. None is persuasive.

a. Petitioner claims (at 24) that *Ross* did not address "exhaustion provisions other than the PLRA." But the principles that *Ross* announced apply to other statutes, too. *See* 578 U.S. at 639 (citing non-PLRA cases). Courts may create exceptions "only if Congress wants them to": the question is "one of statutory construction," and the touchstone is "mandatory language." *Id.* at 639, 642 n.2. Given such language, "a court may not excuse a failure to exhaust," even under "special circumstances." *Id.* at 639.

b. *Smith* and *Honig* don't help Petitioner either. Petitioner first suggests that *Smith* "noted the

widespread view" that § 1415 "contained a futility exception" for IDEA claims. Pet. 20. Not so. The Court decided *Smith* two years *before* Congress enacted § 1415(*l*). And *Smith* cited only two appellate decisions discussing a futility exception, plus a handful of district court opinions. *See* 468 U.S. at 1014 n.17, 1019-20 n.23; *infra* pp. 33-34. The Court did not endorse that exception, which neither party had raised. *See also* Pet. App. 11a.

Petitioner next says that *Honig* "held" that "IDEA exhaustion is not required where it 'would be futile or inadequate.'" Pet. 20 (citation omitted); *see* Pet. 23. But as the court of appeals explained, *Honig* did not address § 1415(*l*), let alone hold that it includes a futility exception. Pet. App. 10a-11a. *Honig* held that by indefinitely suspending violent and disruptive students, a school district violated the IDEA precursor's stay-put provision, which requires that students "remain in [their] then current educational placement" during "the pendency of any [IDEA] proceedings." 484 U.S. at 312, 315-16 (citation omitted). The Court declined to "read a 'dangerousness' exception" into the statute, *id.* at 323, finding such an exception "[c]onspicuously absent" and concluding that the provision "means what it says." *Id.* at 325. Only then, having decided the question presented, did the Court respond to policy concerns about accommodating dangerous students, noting that schools might be able to invoke futility in "exigent" circumstances. *Id.* at 326-27.

Those statements are dicta. They do not control here. What's more, *Honig* said nothing about § 1415(*l*), the provision at issue here. *Honig* could not possibly have held that § 1415(*l*) includes a futility exception because *Honig* did not even consider § 1415(*l*).

c. Petitioner also relies on § 1415(*l*)'s legislative history. Pet. 24. But "the best evidence of Congress's intent is the statutory text," *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), and legislative history may "never" be "used to 'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted). Section 1415(*l*)'s text is clear and mandatory, permitting no futility exception.

d. Citing *Smith*, Petitioner asserts that a futility exception was "widespread" when Congress enacted § 1415(*l*), so Congress must have "incorporated" that exception into the statute. Pet. 20-21. But the Court rejected a similar argument just last term in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). Respondents there collected cases from nine circuits that had purportedly adopted their preferred construction, yet the Court found it "unlikely" that a "smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it." *Id.* at 1541 (citation omitted). So too here, where *Smith* counted only two circuits. *See* 468 U.S. at 1014 n.17, 1019-20 n.23.

Nor did Congress acquiesce to a futility exception by amending the IDEA without "eliminating this recognized futility exception." Pet. 21. Congressional inaction typically "lacks persuasive significance." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (citation omitted). That's especially true when, as here, "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

Forest Grove School District v. T.A., 557 U.S. 230 (2009), does not suggest otherwise. There, this Court adhered to its prior construction of an IDEA provision, finding that "[i]t would take more than Congress' failure to comment" to abrogate the Court's decisions. *Id.* at 243. Here, in contrast, the issue is not whether Congress abrogated this Court's statutory interpretation, but whether a "judge-made doctrine[]" was "effectively codif[ied] … based only on Congress' failure to address it." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., concurring) (citation omitted). Nor is this case like *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015), where legislative history offered "convincing support" that Congress knew of and adopted the "consensus judicial view." Petitioner offers nothing of the sort here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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