No. 21-887

In the Supreme Court of the United States

MIGUEL LUNA PEREZ,
Petitioner,
v.
STURGIS PUBLIC SCHOOLS; STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION,
Respondents.

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

REPLY BRIEF FOR PETITIONER

ELLEN MARJORIE SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, RI 02806

MARC CHARMATZ
LEAH WIEDERHORN
NATIONAL ASSOCIATION OF THE DEAF
LAW AND ADVOCACY CENTER
8630 Fenton Street
Suite 820
Silver Spring, MD 20910

ROMAN MARTINEZ
Counsel of Record
CAROLINE A. FLYNN
JAMES A. TOMBERLIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

MITCHELL SICKON
DISABILITY RIGHTS MICHIGAN
4095 Legacy Parkway
Lansing, MI 48911

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

INTRODUCTION

The two questions presented cut to the core of the IDEA's exhaustion provision. On the first, the Sixth Circuit broke with virtually every other circuit in refusing to recognize *any* kind of futility exception to 20 U.S.C. § 1415(*l*), and it also created a clean 4-1 split in holding that petitioner Miguel Perez could not show futility under the circumstances here. On the second, the Sixth Circuit misinterpreted Section 1415(*l*) to require exhaustion when the plaintiff's claim seeks only money damages—the exact issue this Court granted certiorari to resolve in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017).

Sturgis quibbles over the exact contours of the splits and offers strained interpretations of other circuits' decisions. But the discord in the lower courts is real—and will persist until this Court steps in. Moreover, Sturgis has no persuasive response to the substantial policy problems created by the Sixth Circuit's approach. Congress did not intend to force children with disabilities to reject reasonable IDEA settlements simply to preserve their meritorious claims under other statutes.

Sturgis is also wrong about *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), which has nothing to do with the questions presented here. After *Cummings*, Miguel may no longer be able to obtain damages for purely emotional distress. But Sturgis's *twelve years* of severe neglect caused long-term language deficits that have dramatically limited Miguel's vocational prospects and earning capacity. That type of pecuniary harm is plainly compensable under the ADA through money damages. Nothing about *Cummings* will interfere with this Court's

ability to resolve the questions presented or block Miguel's entitlement to this pecuniary relief.

The petition should be granted.

ARGUMENT

I. THE COURT SHOULD CONFIRM SECTION 1415(*l*)'S FUTILITY EXCEPTION

A. The Circuit Splits Are Real

The Sixth Circuit issued two holdings on futility: (1) that Section 1415(*l*) is not subject to a futility exception at all, and (2) that even if a futility exception existed, Miguel's circumstances would not qualify. Both holdings created circuit splits.

1. Sturgis does not deny 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." *See* BIO 2. Instead, Sturgis points out that not *all* of the eleven other circuits have addressed the question since *Ross v. Blake*, 578 U.S. 632 (2016). BIO 14. But eight circuits have. Pet. 15-16. The United States has likewise recognized the existence of a futility exception to Section 1415(*l*) after *Ross*. *Fry* U.S. Br. I, 12, 21-23 (No. 15-497). And given that many circuits have recognized the futility exception based on *Honig v. Doe*, 484 U.S. 305, 326-27 (1988), the split is unlikely to get resolved without further word from this Court addressing that decision. Pet. 15; *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Sturgis also protests that not every court that has recognized the futility exception has granted relief on that basis. BIO 15-16. This just demonstrates that the circuits (sensibly) apply the exception in narrow

circumstances. In any case, at least six circuits *have* excused exhaustion based on futility. *See, e.g.*, *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 157 n.3 (2d Cir. 2016); *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 569 (7th Cir. 2004); Pet. 17-19 (citing cases from CA1/3/9/10).

2. The Sixth Circuit's alternative ruling on the question of *when* a futility exception applies also created a circuit conflict. Pet. 17-20; *see also* App. 26a-27a (Stranch, J., dissenting).

Sturgis all but concedes Miguel would have been entitled to relief under the Tenth Circuit's analysis in *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013). BIO 18, 23. It instead argues that *Muskrat* is in tension with that court's more recent decision in *A.F. v. Española Public Schools*, 801 F.3d 1245 (10th Cir. 2015). BIO 25. That's incorrect: *A.F. reaffirmed* the existence of a futility exception (citing *Muskrat* and *Honig*); it rejected the plaintiff's futility argument based solely on forfeiture. 801 F.3d at 1248-49.

Next, Sturgis denies any conflict between the Sixth Circuit's alternative holding and *Doucette v. Georgetown Public Schools*, 936 F.3d 16 (1st Cir. 2019), or *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), because prior IDEA proceedings in those cases had created administrative records. BIO 20-23. That's wrong too: The fact that the parties had obtained full IDEA relief via settlement was each court's primary basis for finding futility.

In *Doucette*, the First Circuit concluded that because the Doucettes had "engaged in the administrative process until they received the relief that they sought" under the IDEA, "there was no

need" for further exhaustion. 936 F.3d at 30 & n.20; *see also id.* at 32 n.22. And although the First Circuit also stated that a finding of futility is appropriate when "the administrative process would provide negligible benefit to the adjudicating court," *id.* at 31, that's equally true here as well, *see infra* at 5-6.

Likewise, in *W.B.*, the Third Circuit's primary reason why exhaustion "would be futile" was that the requested relief "was unavailable in IDEA administrative proceedings" and "the administrative tribunal would [likely not] even be competent to hear plaintiff's IDEA claim since any rights that can be had have already been settled." 67 F.3d at 496. The administrative record was simply "a second rationale for excusing exhaustion." *Id.*[1]

Significantly, the Ninth Circuit has read *Doucette* and *W.B.* the same way Miguel does—to treat the IDEA settlements as the dispositive factor. *See D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043, 1058 (9th Cir. 2021) (en banc) (pointing to *Doucette*, *Muskrat*, and *W.B.* as holding that a "settlement agreement . . . can render further exhaustion futile"); *id.* at 1071 (Berzon, J., dissenting) (same).

Finally, Sturgis argues that *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999), was not about a "futility exception" per se. BIO 18-20. That is splitting hairs. There is no debate that the Ninth Circuit recognizes a futility exception generally, and the Ninth Circuit has since treated *Witte* as a case grounded in such principles. Pet. 19 & n.4.

---

[1] Sturgis also cites *Batchelor v. Rose Tree Media School District*, but *Batchelor* did not address a situation where the family had already settled the IDEA claim at issue in the damages litigation. 759 F.3d 266, 270-71, 280-81 (3d Cir. 2014).

B. The Sixth Circuit's Erroneous Decision Will Prevent Children With Disabilities From Vindicating Their Rights

Sturgis also defends the Sixth Circuit's holdings on the merits and argues that the issue is not sufficiently important to warrant review. It's wrong on all counts.

1. As to the existence of a futility exception, Sturgis (like the Sixth Circuit) incorrectly dismisses *Honig*'s futility discussion as "dicta." BIO 32. No other circuit reads *Honig* that way, and for good reason: The futility exception to the IDEA's procedures was essential to *Honig*'s reasoning about why its holding would not produce an untenable result. *See* 484 U.S. at 326-28; Pet. 23.

Sturgis is also wrong to argue that a futility exception applicable to *IDEA claims* does not necessarily apply to Section 1415(*l*)'s exhaustion requirement for *non-IDEA claims*. BIO 32. Section 1415(*l*) requires exhaustion of non-IDEA claims "to the same extent as would be required" if they were brought under the IDEA; it follows that the exceptions carry over. *See Fry* U.S. Br. 21-23. The legislative history—which Sturgis wants the Court to ignore, BIO 33—directly confirms this textual point, Pet. 22.

Finally, Sturgis overreads *Ross*. BIO 31. There, the Court made crystal clear that its PLRA-specific decision should not be understood to reject standard administrative-law exceptions to other statutory exhaustion requirements. 578 U.S. at 642 n.2; *see also id.* at 649-50 (Breyer, J., concurring in part).

2. As for the Sixth Circuit's alternative holding, Sturgis defends the court's view that it would not

have been futile for Miguel to reject the IDEA settlement, because the hearing officer might have created a record that would have "aided" Miguel's later ADA suit. *See* App. 13a-14a; BIO 29-30. But Sturgis ignores that ADA claims have components and defenses that differ from IDEA claims. Pet. 27. Indeed, the United States and amici agree that where the plaintiff is not seeking an IDEA remedy, "there is little (if any) prospect that the administrative process would generate a useful record that could assist in subsequent litigation." *Fry* U.S. Br. 14; *see also* Council of Parent Attorneys & Advocates (COPAA) Br. 3-4, 14, 17; Professors Br. 17-19; Weber & Perlmutter Br. 9-10.

Sturgis also says it's no big deal for families to forsake settlements granting immediate IDEA relief in order to preserve other non-IDEA claims. BIO 26-28. That is seriously mistaken. Litigating IDEA administrative hearings (which involve the presentation of witnesses and evidence) can be extremely expensive. Moreover, in most circumstances, rejecting a favorable settlement will mean the family cannot collect post-offer attorneys' fees even if it later prevails. Pet. 6, 29-30.[2] And there's always a risk that the administrative process will produce a *less* favorable result, or even outright defeat.

Forcing families to reject settlements to preserve their non-IDEA rights will also delay educational benefits to victimized children. Yet when it comes to

---

[2] Sturgis has no authority for its implausible theory that if a family "ultimately" wins *both* its IDEA action *and* a later ADA case, the IDEA court might enhance the fee award based on success in the ADA case. BIO 26-27; *see also Fry* U.S. Br. 34.

educating disabled children, "[e]very instructional minute is important." Professors Br. 13-14 (alteration in original) (citation omitted). Accordingly, Congress wanted parents to accept—not reject—reasonable IDEA settlements. Pet. 6, 29-30. It would not have forced them to sacrifice valid non-IDEA claims as the cost of doing so.

3. Finally, Sturgis asserts that the futility issues here do not often recur. BIO 25-26. But the entrenched circuit splits speak for themselves, as does the chorus of practitioner, advocacy, and academic amici highlighting the importance of this question presented. *See* Pet. 17-20; Professors Br. 3-4, 15; Weber & Perlmutter Br. 25-26: COPAA Br. 3-4, 17. Indeed, there is another *pending petition* presenting the exact same question. *D.D. v. L.A. Unified Sch. Dist.*, No. 21-1373 (requesting a hold for this case). This Court should resolve Miguel's first question presented here and now.

II. THE COURT SHOULD ALSO REVIEW THE SECOND QUESTION PRESENTED

The Court should also decide the issue it planned to resolve in *Fry*: whether IDEA exhaustion is required when the plaintiff complains of the denial of a FAPE, but requests only money damages. *See* 137 S. Ct. at 752 n.4. The answer to that question is no—because Section 1415(*l*)'s plain language requires exhaustion only when "seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*); *see* Pet. 31-33.

Sturgis is correct that the circuits appear to have fallen in lockstep, and that the Court has denied review on this question since *Fry*. But whether the exhaustion requirement even applies in the

circumstances here is logically entangled with the first question presented—which is undeniably certworthy on its own. Granting both questions will allow the Court to address the proper interpretation of Section 1415(*l*) in a comprehensive fashion.

Review of the second question presented is also warranted because the circuit consensus is *wrong*. Pet. 31-34. Whereas Section 1415(*l*) requires exhaustion if the non-IDEA action "seek[s] relief that is also available under [the IDEA]," the circuits require exhaustion even if the only relief sought is *not* available under the IDEA. As the United States has explained, there is "no textual support" for that view. *Fry* U.S. Br. 23; *see* Pet. 33-34 (citing cases). Indeed, Sturgis's defense of the circuits is striking in its failure to analyze, in any depth, the statutory language actually at issue. *See* BIO 12. This Court should grant the second question and enforce Section 1415(*l*) according to its text.

III. *CUMMINGS* IS NO BARRIER TO REVIEW

Sturgis argues that this Court's recent decision in *Cummings* renders Miguel's petition "academic" because he is seeking damages for emotional distress under the ADA, and *Cummings* forecloses such relief. BIO 10. That's wrong. *Cummings* does not implicate the questions presented in this petition, and Miguel can still obtain money damages for Sturgis's egregious ADA violations. There is no vehicle problem.

1. Sturgis does not—and cannot—argue that *Cummings* obviates Miguel's questions presented or precludes this Court from resolving them. *Cummings* held that damages for emotional distress are not available under Section 504 of the Rehabilitation Act,

142 S. Ct. at 1569, 1576, which Sturgis argues carries over to Title II of the ADA, BIO 10. But *Cummings* does not affect QP1—whether Section 1415(*l*) has a futility exception and how that exception is triggered. Nor does *Cummings* affect QP2—whether Section 1415(*l*) requires exhaustion "when the plaintiff is seeking money damages." Pet. i.

Sturgis rightly does not argue that *Cummings* reduces the general importance of either question. Although *Cummings* may bar claimants from seeking emotional-distress damages for certain statutory claims, it does not affect the availability of other compensatory relief—such as damages for lost income, lost earning capacity, or physical injury—that students often seek under non-IDEA statutes. *See, e.g.*, *Heston v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 979, 982-83 (5th Cir. 2020) (per curiam); *Patricia N. v. Lemahieu*, 141 F. Supp. 2d 1243, 1247, 1251 (D. Haw. 2001); *cf.* Professors Br. 12-13 n.4 (noting that children denied educational services face "reduced employability and earning potential"). Nor does *Cummings* affect the availability of emotional-distress damages for Section 1983 constitutional claims. *See, e.g.*, *Doucette*, 936 F.3d at 28-29 & n.18, 32.

2. Sturgis's only point about *Cummings* is that it renders this specific case a poor vehicle—purportedly because, even if Miguel wins on exhaustion in this Court, he will ultimately lose his ADA claim below. BIO 10. That assertion does not hold up. *Cummings* does not foreclose Miguel's right to obtain money damages for his pecuniary harms.

a. For twelve years—the vast majority of his K-12 education—Sturgis failed to provide Miguel with an interpreter who knew American Sign Language,

failed to teach him sign language or English, and failed to provide him with any meaningful classroom instruction. ECF 10 at 5-10, No. 1:18-cv-001134 (W.D. Mich.) (Compl.). Throughout this time, Miguel was unable to effectively communicate with others, unable to understand others, and unable to read or write anywhere near his grade level. *Id.* at 5-7, 9-11.

As a result, Miguel had to undergo additional schooling at the Michigan School for the Deaf past his intended high-school graduation date. *Id.* at 10. Miguel was deprived of the opportunity to earn income during that four-year period.

Sturgis's failures also permanently stunted Miguel's language development and harmed his long-term earning capacity. Before this ADA action was filed, a neuropsychologist concluded that due to Sturgis's "severe neglect," Miguel sustained "long-term . . . language and academic deficits" with "obvious vocational, educational and financial consequences." Peter K. Isquith, Report of Neuropsychological Consultation at 13 (Sept. 2016). Although Miguel would otherwise "have been a good candidate for college," he is now "unlikely to gain sufficient communication and academic skills to gain entrance or to learn at a college level." *Id.* Similarly, Miguel's "limited reading, writing and math skills" will "impede his entry to, and success in, a wide range of vocational/technical programs." *Id.*

After the decision in *Cummings*, a vocational expert further assessed the effects of Sturgis's ADA violation. The expert concluded that Miguel will likely only be able to undertake "supported employment"—i.e., employment where a specialist is on hand to assist Miguel—and that he will only be able to obtain "unskilled" work, for instance, as an

"[a]ssembler." Heidi Peterson, Vocational Assessment of Miguel Perez at 5-6 (May 2022).[3] But for Sturgis's educational neglect, the expert determined, Miguel "could have obtained the training necessary to secure employment on his own without the use of supportive employment," and "would have been able to secure a skilled," higher-paid position, such as in "construction" or as a "carpenter." *Id.* at 6 (emphasis omitted). The expert estimates that Miguel's educational deficits have reduced his lifetime earning capacity by approximately 40%. *Id.*

b. The harms detailed above are fully compensable under the ADA. *See supra* at 9. *Cummings* rejected money damages for emotional distress, but it did not reject damages for traditional pecuniary injuries. 142 S. Ct. at 1568, 1571-72. If this Court reverses the Sixth Court's exhaustion ruling, Miguel will be able to obtain relief for the financial harm inflicted by Sturgis's discrimination.

Sturgis notes that Miguel's complaint focuses on his emotional harms. BIO 10. But the complaint seeks "compensatory damages" broadly, and it alleges that Sturgis violated the ADA by depriving him of educational services—the precise cause of the pecuniary harm set forth in the expert reports described above. Compl. at 3, 5, 9-14. Moreover, if on remand Sturgis challenges the sufficiency of the complaint's current allegations under *Cummings*, Miguel will be able to amend his complaint to set forth

---

[3] Miguel is prepared to lodge both expert reports with the Court under Rule 32.3, should the Court so request.

the full range of pecuniary harms documented by the experts.[4]

In short, this Court's review of the questions presented remains essential. That's true not just for Miguel, but for countless other children with disabilities seeking to vindicate their statutory rights. Certiorari is warranted.

---

[4] Sturgis has not questioned Miguel's right to amend his complaint to respond to this change in the law. *See* Fed. R. Civ. P. 15(a)(2); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). After all, the parties litigated this case below under pre-*Cummings* precedent authorizing emotional-distress damages, *see Johnson v. City of Saline*, 151 F.3d 564, 572-74 (6th Cir. 1998), and Sturgis never challenged Miguel's complaint based on the rationale that prevailed in *Cummings*.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ELLEN MARJORIE SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, RI 02806

MARC CHARMATZ
LEAH WIEDERHORN
NATIONAL ASSOCIATION OF THE DEAF
LAW AND ADVOCACY CENTER
8630 Fenton Street
Suite 820
Silver Spring, MD 20910

ROMAN MARTINEZ
Counsel of Record
CAROLINE A. FLYNN
JAMES A. TOMBERLIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

MITCHELL SICKON
DISABILITY RIGHTS MICHIGAN
4095 Legacy Parkway
Lansing, MI 48911

Counsel for Petitioner

May 24, 2022