NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

> Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages—a remedy that is not available under the IDEA.

PARTIES TO THE PROCEEDING

Stacy Fry and Brent Fry, as next friends of minor E.F., were plaintiffs-appellants in the proceedings below.

Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes were defendants-appellees in the proceedings below.

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JURISDICTION

The court of appeals entered judgment on June 12, 2015, and denied rehearing en banc on August 5, 2015. App. 53. The petition is filed within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Rehabilitation Act of 1973, the Handicapped Children's Protection Act of 1986, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at App. 55.

STATEMENT OF THE CASE

This case involves interpretation of the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), which requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. Petitioners brought this case under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to seek damages for the social and

emotional harm caused by the Defendant school district's refusal to permit E.F.'s trained service dog to accompany her to school.

A. The Facts

E.F. was born with cerebral palsy; her condition significantly limits her motor skills and mobility, but it imposes no cognitive impairment. Cplt. ¶ 2.[1] In 2009, when she was five years old, E.F. obtained a service dog prescribed by her pediatrician to help her live as independently as possible. *Id.* ¶ 3. The dog, a Goldendoodle named "Wonder," was certified and trained to help E.F. with mobility and to assist her in daily activities, such as retrieving dropped items, opening and closing doors, turning on and off lights, and taking her coat off. *Id*. E.F.'s pediatrician and family intended to have Wonder accompany E.F. at all times to facilitate her independence and to ensure that she and Wonder would bond after training. *Id*. ¶ 4.

Respondents Napoleon Community Schools and Jackson County Intermediate School District (collectively, the School District) refused to permit E.F. to attend school with her service dog. *Id.* ¶¶ 4-5. The School District reasoned that E.F.'s Individualized Education Program (IEP) already provided for a human aide to provide one-on-one support, and "Wonder would not be able to provide any support the human aide could not provide." App. 4. As a result, E.F. was forced to attend school without her prescribed service dog

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[1] Because the lower courts resolved this case on a motion to dismiss, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

from October 2009 to April 2010. Cplt. ¶ 5. After her attorneys met with the School District's counsel, E.F. was permitted to bring the dog to school on a "trial" basis until the end of the school year. *Id.* During that trial period, however, the school required the dog to remain in the back of the room during classes, forbade the dog from assisting E.F. with many tasks he had been specifically trained to do, and banned the dog from accompanying and assisting her during recess, lunch, computer lab, library time and other activities. *Id*. After the trial period, the School District refused to permit Wonder to accompany E.F. to school. *Id*. ¶ 6.

B. Statutory Background

Congress enacted the HCPA in response to *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court held that the Education for the Handicapped Act (the prior name for the IDEA) provided "the exclusive avenue" for students with disabilities to assert an educational-rights claim—even if that claim arose under some other federal statute or even the Constitution itself. See *id.* at 1012-1013. Congress responded swiftly to "reaffirm[] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with EHA as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 6 (1985).

In service of that goal, the HCPA amended the IDEA specifically to preserve educational-rights claims under the Constitution and other federal laws. In its current form, the relevant section of the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws **seeking relief that is also available under this subchapter**, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). This provision expressly preserves non-IDEA claims for the educational rights of children with disabilities, but it requires that, where a plaintiff "seek[s] relief that is also available under" the IDEA, that plaintiff must first exhaust state administrative remedies under that statute. See 20 U.S.C. § 1415(f) (requiring state to establish process for impartial due process hearing); *id.* § 1415(g) (providing for appeal to state educational agency if due process hearing is held by the local educational agency).

Preserving non-IDEA claims serves an important role, because the IDEA itself provides only limited substantive protection and authorizes only limited relief. Substantively, the IDEA's requirement of a "free appropriate public education [FAPE]," 20 U.S.C. § 1412(a)(1), implemented through an IEP, 20 U.S.C. § 1414(d), guarantees only a "basic floor of opportunity" for children with disabilities. *Board of Education v.*

Rowley, 458 U.S. 176, 201 (1982). It does not guarantee "'equal' educational opportunities." *Id.* at 198. Had E.F. challenged the denial of her service dog under the IDEA, then, she would have had to show not that the service dog was necessary to provide her equal access to the school facilities, but instead that the service dog was necessary for her to achieve the basic floor of *educational* opportunity that the IDEA guarantees. And although the IDEA authorizes an order of "reimbursement of the costs of private special-education services in appropriate circumstances," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009), it does not authorize the recovery of money damages. See *Burlington School Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that tuition reimbursement is available specifically because that remedy is restitutionary and does *not* constitute damages).

The ADA, by contrast, is an antidiscrimination statute that substantively requires equal opportunity. In particular, Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The statute specifically contemplates that, to avoid discrimination, such a public entity will be required to make "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Congress authorized the Department of Justice to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134. Because of the importance of service animals to ensuring equal access for many people with disabilities, the Department has interpreted the statute's "reasonable modifications" language to

require that, with certain exceptions not applicable here, "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g) (2011).[2] This rule applies to all state and local government entities, and it does not require a showing of a particular *educational* need before an individual may invoke its protections. Unlike the IDEA, the ADA also provides for damages liability. See *Lane*, 541 U.S. at 517.[3]

C. Prior Proceedings

In 2010, following the School District's refusal to permit Wonder to accompany E.F. to school, her parents began homeschooling her. App. 4. They also filed a complaint with the Office of Civil Rights of the United States Department of Education (OCR); their complaint alleged that the School District had violated the ADA and the Rehabilitation Act by refusing to permit E.F. to use her service dog at school. *Id.* In

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[2] The service animal regulation reflects the Department's longstanding interpretation of Title II's reasonable-modifications requirement. See Statement of Interest of United States at 4-5 & n.5, *Alboniga v. School Bd. of Broward County*, No. 0:14-CV-60085-BB (S.D. Fla., filed Jan. 26, 2015), available at http://www.ada.gov/briefs/broward_county_school_board_soi.pdf.

[3] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, applies essentially the same substantive standards as ADA Title II, and it authorizes identical remedies. See 29 U.S.C. § 794a; 42 U.S.C § 12133. But instead of applying to all public entities, it applies only to entities that "receiv[e] Federal financial assistance." 29 U.S.C. § 794(a).

2012, after an investigation, OCR issued a 14-page decision, which concluded that the School District had violated the ADA and the Rehabilitation Act. Cplt. Exh. A. at 11. The agency noted the School District's argument that E.F. "was receiving a FAPE" even without being allowed to use her dog. *Id.* But OCR determined that a "FAPE analysis" was inappropriate, because it "fail[ed] to take into account one of the fundamental purposes of Title II: to increase the independence of individuals with disabilities." *Id.* The agency also concluded that the School District's argument ignored the Rehabilitation Act's "provisions relating to equal opportunity." *Id.*

In response to OCR's findings, the School District "agreed to permit [E.F.] to attend school with Wonder starting in fall 2012." App. 4. But it continued to deny liability. Cplt. Exh. A. at 11. E.F.'s parents "had serious concerns that the administration would resent [E.F.] and make her return to school difficult." Cplt ¶ 8. Accordingly, they decided to enroll her "in a school in a different district where they encountered no opposition to Wonder's attending school with" her. App. 4.

In December 2012, E.F., by and though her parents as next friends, filed this suit "seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012." *Id.* The lawsuit claimed that the School District's actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, and it sought damages for the social and emotional harm those actions caused E.F. Cplt. ¶ 51.

The district court dismissed the suit for failure to exhaust state administrative remedies under the

IDEA. App. 37. A divided panel of the Sixth Circuit affirmed. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." App. 17. But despite the HCPA's text, which limits exhaustion to cases "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the majority held that "this does not in itself excuse the exhaustion requirement," because otherwise plaintiffs could "evade" that requirement "simply by 'appending a claim for damages.'" App. 17 (quoting *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000)). The panel held that exhaustion is required "when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." App. 6. Because it concluded that the "core harms" alleged by E.F. "relate to the specific educational purpose of the IDEA," and that she "could have used IDEA procedures to remedy these harms," the panel concluded that the complaint was properly dismissed for failure to exhaust. App. 6.

Judge Daughtrey dissented. She specifically noted a conflict between the majority's decision and the Ninth Circuit's decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-875 (9th Cir. 2011) (*en banc*), cert. denied, 132 S. Ct. 1540 (2012), which "held [that] '[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (quoting *Payne*, 653 F.3d at 871 (emphasis in Judge Daughtrey's dissent)).

The court denied *en banc* review, though Judge Daughtrey stated that she would have granted rehearing. App. 53-54.

REASONS FOR GRANTING THE PETITION

The HCPA explicitly provides that the IDEA is not the exclusive remedy available to children with disabilities who allege a violation of their rights. 20 U.S.C. § 1415(*l*). The plain text further provides that children who file suit under other statutes must first exhaust state administrative proceedings under the IDEA only when those children "*seek[] relief* that is also available under" the IDEA. *Id.* (emphasis added). The courts of appeals have persistently disagreed about the proper interpretation of this statutory language. Although damages are not available under the IDEA, the Sixth Circuit held that a disabled child who brings a damages claim under the ADA and the Rehabilitation Act must first exhaust IDEA proceedings "when the *injuries* alleged can be remedied through IDEA procedures, or when the *injuries* relate to the specific substantive protections of the IDEA." App. 6 (emphasis added). At least six other circuits have adopted substantially the same rule.

But the Ninth Circuit, in an *en banc* opinion by Judge Bybee, has specifically rejected that "'injury-centered' approach" as conflicting with the HCPA's plain language. *Payne*, 653 F.3d at 874-875.[4] Rather,

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[4] In *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.), cert. denied, 135 S. Ct. 403 (2014), the Ninth Circuit overruled *Payne* (and earlier Ninth Circuit cases) to the extent that they allowed courts (in and out of the IDEA context) to consider exhaustion through the vehicle of "unenumerated Rule 12(b) motions" rather than

the Ninth Circuit has held that a "relief-centered approach" better accords with the text: "[W]hether 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." *Id.* at 875. Had Petitioners brought this suit in the Ninth Circuit, their case would not have been dismissed on exhaustion grounds, because the damages relief they actually sought is not available under the IDEA.

This Court denied a petition for *certiorari* in *Payne*, even though the Ninth Circuit acknowledged that its decision conflicted with the rulings of several other courts of appeals. See *id.* at 873-874 & n.3. In opposing the petition in *Payne*, the successful plaintiff argued that this Court should "allow *Payne*'s 'relief-centered' approach to play-out in the federal circuits," before taking on the issue. Br. in Opp., *Peninsula School Dist. v. Payne*, 2011 WL 6859439 at *9. Since that time, the Second and Sixth Circuits have refused to budge from their prior "injury-centered" approach even after specifically considering the analysis in *Payne*. The Third and Tenth Circuits, too, have applied the "injury-centered" approach post-*Payne*, though without explicitly addressing that case. It should now be clear that the conflict created by *Payne* will not be resolved without review by this Court.

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motions for summary judgment. But the Ninth Circuit has reaffirmed *Payne*'s HCPA 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). That, of course, is the holding relevant here.

The fact pattern presented by this case is a recurring one. As here, school districts have repeatedly denied children with disabilities their rights, guaranteed by the ADA and the Rehabilitation Act, to bring service dogs to school. And they have done so on the ground that the service animals were unnecessary to satisfy the districts' educational obligations under the IDEA.[5] These children with disabilities, and their

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[5] See *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 244 (2d Cir. 2008) (district refused to allow child with hearing impairment to bring his service dog, based on its determination that he "enjoyed full access to the district's special education programs and facilities and that he currently did not need a service dog at school, because he was functioning satisfactorily under the approved IEP"); *Alboniga v. Sch. Bd. of Broward County Fla.*, No. 14-CIV-60085, 2015 WL 541751, at *8 (S.D. Fla. Feb. 10, 2015) (district refused to allow child with multiple disabilities to bring his service dog, based on its view that "the service animal is not necessary for or relevant to A.M.'s educational experience—that the services provided by the animal are performed through other means by school staff in order to provide A.M. a FAPE in accordance with his IEP"); Settlement Agreement Between United States & Delran Township Sch. Dist., June 2014, available at http://www.ada.gov/delran-sa.htm (Department of Justice found that district refused to allow child with autism to bring his service dog to school, based at least in part on the district's uncertainty whether the child would be "able to benefit from instruction without the service animal"); Statement of Interest of United States at 5, *C.C. v. Cypress Sch. Dist.*, No. CV 11-00352 AG (RNBx) (C.D. Cal., filed June 10, 2011), available at http://www.ada.gov/briefs/cc_interest.pdf (district refused to allow child with autism to bring his service dog to school because of doubts that the dog was necessary to enable him to achieve the educational goals of his IEP, without "consider[ing] how a service dog might benefit C.C. in other settings, supported by use at school, and whether C.C. might have a civil right to use a service dog").

parents, have been forced to file complaints in court and with the United States Department of Justice to enforce their ADA and Rehabilitation Act rights. The position of the Sixth Circuit would require them first to exhaust state administrative proceedings under the IDEA—a statute that does not form the basis for their claims and does not offer them a damages remedy—before going to court to enforce their rights. Imposing this burdensome step flies in the face of the plain statutory text. The Court should grant the petition for *certiorari*.

A. There is a Persistent Conflict in the Circuits

The Sixth Circuit held that, before filing a damages lawsuit under the ADA and the Rehabilitation Act, a child with a disability must first exhaust state administrative proceedings under the IDEA if those proceedings could possibly have provided a remedy—though not a *damages* remedy—for the injuries the child alleges. App. 6. That holding accords with the rulings of at least six other courts of appeals. But it squarely conflicts with the Ninth Circuit's *en banc* holding in *Payne*, *supra*.

The Sixth Circuit's holding is but the latest in a line of cases that derives from the Seventh Circuit's decision in *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996).[6] In *Charlie F.*, a fourth grader sued his school under the ADA, the Rehabilitation Act, and the Constitution for disability-

[6] The Sixth Circuit relied (App. 17) on its earlier decision in *Covington*, 205 F.3d at 916-917, which itself specifically relied on *Charlie F.*

based harassment that his teacher allegedly orchestrated; he sought damages for emotional distress. See *id.* at 990-991. Although it recognized that compensatory damages are not available under the IDEA, see *id.* at 991, the Seventh Circuit nonetheless held that the district court properly dismissed the suit for failure to exhaust IDEA administrative remedies, see *id.* at 991-993. The court reasoned that IDEA proceedings might conceivably result in non-damages relief that could address the harms of which the plaintiff complained, and that the plaintiff therefore first had an obligation to pursue those proceedings before seeking damages under other legal regimes. "Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm," the court explained. *Id.* at 993. "But," it concluded, "parents cannot know that without asking, any more than we can." *Id.* Because "at least in principle relief [was] available under the IDEA," *id.*, even if the lawsuit did not "seek[]" that relief (cf. 20 U.S.C. § 1415(*l*)), the Seventh Circuit held that exhaustion was required: "the theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply." *Id.* at 992.

In addition to the Sixth Circuit here, the First, Second, Third, Tenth, and Eleventh Circuits have specifically relied on *Charlie F.* to hold that a plaintiff who seeks compensatory damages must still exhaust IDEA remedies if administrative proceedings under that statute could theoretically provide any relief for his or her injuries. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 61-63 (1st Cir. 2002); *Cave*, 514

F.3d at 246-247 (Second Circuit); *Batchelor v. Rose Tree Media School District*, 759 F.3d 266, 276-278 (3d Cir. 2014); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063-1068 (10th Cir. 2002); *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1422 & n.10 (11th Cir.), cert. denied, 525 U.S. 816 (1998). Several of these decisions highlight the breadth of the pro-exhaustion doctrine applied by the circuits that follow *Charlie F.*

In *Cave*, the Second Circuit required exhaustion in a case brought under the ADA, the Rehabilitation Act, and Section 1983 to challenge a district's refusal to permit a child with a disability to attend school with his service dog. The court reached that result even though the plaintiffs sought "pecuniary damages, a remedy unavailable under the IDEA." *Id.*, 514 F.3d at 247. In so holding, the court specifically relied on *Charlie F.*'s "theory behind the grievance" language. *Id.* at 246. The Second Circuit has specifically refused to reconsider that ruling in light of the Ninth Circuit's decision in *Payne*. See *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 496 F. App'x 131, 134 (2d Cir. 2012) (summary order). See also *Stropkay v. Garden City Union Free Sch. Dist.*, 593 Fed. Appx. 37 (2d Cir. 2014) (summary order) (reaffirming these cases).

The Third Circuit applied the same principle in *Batchelor*, *supra*. A child with a disability and his mother alleged that the school district had retaliated against them in violation of, *inter alia*, the ADA and the Rehabilitation Act; they filed a federal-court complaint seeking compensatory damages. See *Batchelor*, 759 F.3d at 270-271. Although it

acknowledged that compensatory damages are not available under the IDEA, see *id.* at 277 n.13, the Third Circuit held that the plaintiffs' case was properly dismissed for failure to exhaust remedies under that statute, see *id.* at 278. Like the Second Circuit, the court relied on *Charlie F.*'s "theory behind the grievance" language. *Id.* at 276.

In *Cudjoe*, 297 F.3d at 1068, the Tenth Circuit held that a student with a disability was required to exhaust IDEA administrative remedies before bringing suit against his school district under the Rehabilitation Act—even though the student sought damages and had never even been identified as eligible for services under the IDEA. The court relied on *Charlie F.* to hold that "the IDEA's exhaustion requirement will not be excused simply because a plaintiff requests damages, which are ordinarily unavailable in administrative hearings held pursuant to the statute." *Id.* at 1066. Rather, the court held, exhaustion is required if "the plaintiff has alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Id.* (internal quotation marks omitted). The Tenth Circuit recently reaffirmed that principle. See *A.F. ex rel. Christine B. v. Espanola Public Schools*, ___ F.3d ___, 2015 WL 5333491 at *2 (10th Cir., Sept. 15, 2015).

In its *en banc* decision in *Payne*, by contrast, the Ninth Circuit explicitly rejected the position of circuits like these that apply an "injury-centered" approach to exhaustion under the HCPA. *Payne*, 653 F.3d at 874. In a comprehensive opinion by Judge Bybee, the Ninth Circuit explained that a focus on whether the plaintiff "alleg[ed] misconduct that *in theory* could have been

redressed by resorting to administrative remedies under the IDEA" improperly "treat[s] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students." *Id.* at 875. The statutory text, the court concluded, establishes that "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." *Id.*

Applying the plain text of the HCPA, the Ninth Circuit held that the statute "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent," *id.*[7]; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student" (really just a subset of the first category), see *Payne*, 653 F.3d at 875; and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action," *id.*[8]

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[7] *Payne*'s example of a "functional equivalent" involved a plaintiff "seek[ing] damages for the cost of a private school education." *Payne*, 653 F.3d at 875. Although the IDEA does not provide for damages, it does require school districts to reimburse the cost of a private school education in some circumstances. See p. 5, *supra*.

[8] As an example of this sort of case, *Payne* listed a Rehabilitation Act claim "premised on a denial of a FAPE." *Id.* The Department of Education's Rehabilitation Act regulations require schools to provide all qualified children with disabilities "a free appropriate public education." 34 C.F.R. § 104.33(a). The Ninth Circuit was evidently referring to cases brought under this regulation, in which

In so holding, the court largely adopted the position urged by the United States Departments of Education and Justice in a jointly-signed *amicus* brief. See *id.*

Had E.F. brought this case in the Ninth Circuit, the court would not have dismissed it for failure to exhaust. E.F. did not seek an IDEA remedy or its functional equivalent, seek prospective relief to alter her IEP or educational placement, or raise any claim that relied on the denial of a FAPE. To the contrary, *none* of the relief she specifically requested was available under the IDEA. See p. __, *infra*. She sought damages for emotional distress—a form of relief that is not available in IDEA proceedings. And her claim relies entirely on the ADA and Rehabilitation Act's guarantee that people with disabilities can generally use service animals in public buildings (whether those buildings are schools, courthouses, or hockey rinks). It is in no way premised on the denial of a free appropriate public education. Because the remedies E.F. actually sought—as opposed to those she might conceivably have sought in a hypothetical alternate universe—were not available under the IDEA, the Ninth Circuit would not have dismissed her case. The conflict in the circuits thus determined the outcome.

That conflict is not likely to resolve itself without this Court's intervention. The Sixth Circuit made its

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the plaintiff seeks to prove the substance of an IDEA violation in order to establish a violation of the Rehabilitation Act. But the ADA and Rehabilitation Act also impose an array of requirements, like the requirement of reasonable modification of policies and its specific application to permit people with disabilities to use service dogs, that are not premised on the denial of a FAPE. See pp. 5-6, *supra*.

ruling with *Payne* in full view. The dissenting judge specifically called attention to the Ninth Circuit's holding that "'[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (Daughtrey, J., dissenting) (quoting *Payne*, 653 F.3d at 871) (emphasis in opinion below). But the majority persisted in following prior Sixth Circuit precedent that held that exhaustion is required even when plaintiffs "seek money damages, a remedy unavailable under the IDEA." *Id.* at 17 (citing cases). The Second Circuit, too, has specifically refused to reconsider its prior precedent in light of *Payne*. See *Baldessarre*, 496 F. App'x at 134. And although the Third Circuit did not specifically address *Payne*, it has nonetheless continued, as recently as 2014, to apply the "injury-centered" approach the Ninth Circuit explicitly rejected. See *Batchelor*, 759 F.3d at 276-278. The Tenth Circuit did the same in September 2015. See *A.F.*, 2015 WL 5333491 at *2. This Court should grant *certiorari* to resolve the conflict.

B. The Sixth Circuit's Decision is Wrong

Petitioners' complaint sought one principal form of relief: "damages in an amount to be determined at trial." Cplt. 16 (prayer for relief). It also sought two ancillary forms of relief on Petitioners' federal claims: (1) "a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, [and] Title II of the Americans with Disabilities Act"; and (2) "attorneys' fees pursuant to

the Rehabilitation Act, the Americans with Disabilities Act, [and] 42 U.S.C. § 1988." *Id.*[9]

None of these forms of relief was available under the IDEA. The IDEA does not provide for damages. See p. 5, *supra*. Nor does the IDEA specifically provide for declaratory relief—and the IDEA provisions empowering state administrative adjudicators certainly grant them no authority to issue a declaration that a school district violated some *other* statute like the ADA or the Rehabilitation Act. See 20 U.S.C. § 1415(f)(3)(E) (hearing officer may decide whether child received a free appropriate public education and was accorded certain related procedural protections under the IDEA), § 1415(k)(3) (hearing officer may decide whether child's misconduct was a manifestation of a disability and

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[9] The complaint also contained a boilerplate request for "any other relief this Court deems appropriate." *Id.* In its response to the *en banc* petition below, Respondent argued that, because Petitioners sought "*any* other relief," and IDEA administrative proceedings could grant *some* other relief, Petitioners' complaint necessarily sought relief that is also available under the IDEA. Resp. to Pet. for Rhg. 6. That argument is too clever by half. At the time Petitioners filed their complaint E.F.'s parents had moved her to a different school district and had no intention of returning her to Respondent's schools. See p. 7, *supra*. Thus, they could seek only retrospective damages that were not available under the IDEA—and the complaint *never* specifically asked for forward-looking relief of a type that was available under the IDEA in any event. Even if it had, when a plaintiff brings a case that contains some claims that should have been exhausted and others that need not have, the proper procedure is to dismiss only the claims for which exhaustion was required. See *Jones v. Bock*, 549 U.S. 199, 221-222 (2007). But the lower courts dismissed this case *in its entirety*—including the claims for damages that are concededly not available under the IDEA.

whether maintaining the child's current placement is substantially likely to lead to injury). And although the IDEA provides for attorneys' fees, it provides only for fees "[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. § 1415(*i*)(3)(B)(i). Here, the complaint seeks attorneys' fees, not for IDEA proceedings, but for the effort to enforce E.F.'s distinct rights under the ADA and the Rehabilitation Act.

Because the complaint sought relief that was *not* available under the IDEA, and the HCPA specifically limits its exhaustion requirement to cases "seeking relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the lower courts erred in dismissing the case for failure to exhaust. This Court has long held that any requirement of administrative exhaustion depends on congressional intent in constructing the particular statutory scheme. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of paramount importance to any exhaustion inquiry is congressional intent.") (internal quotation marks omitted); *McKart v. United States*, 395 U.S. 185, 193 (1969) ("Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."). Cf. *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000) (stating that "requirements of administrative issue exhaustion are largely creatures of statute").

In particular, the Court has repeatedly stated that "'a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.'" *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 580 (1989) (quoting *Patsy v. Florida Board of Regents,* 457 U.S. 496, 501-502 (1982)). And the legislative intent is best

determined by the statutory text. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted). Here, the text could not be more clear: Administrative exhaustion is required only where the plaintiff "seek[s] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). By requiring exhaustion of E.F.'s claims, though the relief she sought was not available under the IDEA, the Sixth Circuit disregarded that plain text.

Rather than follow the text of the statute, the Sixth Circuit applied a test under which a court must ask whether the "core harms" alleged by the plaintiff "relate to the specific educational purpose of the IDEA," and whether the plaintiff "could have used IDEA procedures to remedy these harms"—even if those procedures could not have provided the relief actually requested in the lawsuit. App. 6. But, as the United States has explained, a test that focuses "not [on] what relief the plaintiff actually seeks, but rather [on] what relief the plaintiff *could have* sought based on the injuries alleged" is one that "amounts to a rewriting of the statutory text." Brief for the United States as *Amicus Curiae* at 14, *Payne v. Peninsula Sch. Dist.*, No. 07-35115 (9th Cir., filed Nov. 9, 2010), available at http://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/paynebr.pdf.[10] The HCPA requires exhaustion

[10] The *Payne* brief was signed both by the General Counsel of the Department of Education and the Assistant Attorney General for Civil Rights. Because the Department of Education administers and enforces the IDEA, and the Department of Justice enforces the

for an action "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*)—not for an action that *might, hypothetically, have sought* such relief.

In justifying its ruling, the Sixth Circuit did not look to text but to policy considerations. In particular, the court sought to prevent children with disabilities and their families from "evad[ing]" the exhaustion requirement simply by seeking damages. App. 17. The Sixth Circuit's holding derives from the Seventh Circuit's *Charlie F.* decision, which also aimed to prevent parents from "opt[ing] out of the IDEA." *Charlie F.*, 98 F.3d at 992. But it is not the job of a court "to rewrite the statute" simply to avoid what seems like an objectionable policy result. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015).

In any event, the objective of avoiding evasion of the IDEA's exhaustion requirement and channeling educational-rights claims into the IDEA administrative processes does not reflect "a fair understanding of the legislative plan" of the HCPA. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). To the contrary, those goals better fit with *Smith v. Robinson*, *supra*—the case that Congress specifically *overturned* in the HCPA. See *Smith*, 468 U.S. at 1012-1013 (stating that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme" and therefore concluding that "the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim" to educational rights). Congress sought in the

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ADA and the Rehabilitation Act, the views in that brief are entitled to particular respect.

HCPA to preserve the right to go to court to pursue non-IDEA educational-rights claims—and to eschew *Smith*'s channeling of those claims into IDEA administrative fora. See pp. 3-4, *supra*. In place of *Smith*, the HCPA adopted a simple regime, in which plaintiffs filing educational-rights actions need not exhaust unless they "seek[] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). To require exhaustion for cases that do *not* seek relief available under the IDEA directly conflicts with the HCPA's text and purpose.

In both its text and its purpose, the HCPA is decisively unlike the exhaustion provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA). In *Booth v. Churner*, 532 U.S. 731 (2001), this Court read the PLRA to require prisoners seeking money damages in federal court first to exhaust prison administrative proceedings—even if damages were not available in those proceedings. The *Booth* Court relied on the PLRA's text, which provides that "[n]o action shall be brought with respect to prison conditions * * * until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Court noted that this text simply refers generally to "such administrative remedies as are available," rather than requiring the availability of any particular form of relief as a prerequisite for exhaustion. See *Booth*, 532 U.S. at 738-739. Moreover, the PLRA's exhaustion provision seemed specifically crafted as a response to this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). *McCarthy* had read an earlier version of Section 1997e(a) as not requiring exhaustion where a prisoner sought only money damages and the prison's administrative remedies could not provide such

damages. See *id.* at 150. In broadening Section 1997e(a)'s exhaustion requirement in the PLRA, the Court concluded, "the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result." *Booth*, 532 U.S. at 740.

Unlike the PLRA, the HCPA *does* specifically refer to the particular relief the plaintiff seeks. It requires, as a prerequisite for exhaustion, that such relief have been "available under" the IDEA. 20 U.S.C. § 1415(*l*). And unlike the PLRA, the HCPA was not designed to *broaden* the exhaustion requirement or otherwise to reduce federal litigation. Cf. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (PLRA aimed "to reduce the quantity and improve the quality of prisoner suits"). Rather, the HCPA was designed to expand access to federal courts for children with disabilities asserting violations of their rights—and to overturn this Court's *Smith* decision that channeled all such cases into the IDEA process. The Sixth Circuit's holding thus conflicts with both the text and the purpose of the HCPA. This Court should grant certiorari to reaffirm the primacy of the framework Congress constructed, and to resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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