No. 19-972

IN THE

Supreme Court of the United States

CHRISTOPHER EDWARD MCMILLEN,
AN INCAPACITATED PERSON,

Petitioner,

v.

NEW CANEY INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

New Caney Independent School District's brief in opposition is most notable for what it does not do. New Caney does not dispute that this Court granted review to resolve the question presented here but left it "for another day." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 n.4 (2017); *see id.* at 754 n.8. Nor does New Caney dispute that the question presented is important, because it determines whether parents must undergo long, costly, and pointless IDEA proceedings before vindicating their children's rights. And New Caney does not meaningfully dispute that the "injury-centered" approach adopted by most circuits contradicts the statutory text, as the en banc Ninth Circuit and the United States have both explained. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 873–74 (9th Cir. 2011) (en banc); Br. for the United States as Amicus Curiae at 23–25, *Fry*, No. 15-497 (U.S. Aug. 29, 2016).

Instead, New Caney makes the remarkable assertion that there is no split at all. That position is irreconcilable with *Fry*, in which this Court granted review precisely to resolve "confusion in the courts of appeals as to the scope of [20 U.S.C.] § 1415(*l*)'s exhaustion requirement," and explained that the Ninth Circuit disagreed with the majority approach. 137 S. Ct. at 752 & n.3. The United States also recognized the split, recommending certiorari in *Fry* based on it. The Fifth Circuit panel below acknowledged it, too, and found it outcome-determinative. And for good reason: the split is apparent on the face of the Ninth Circuit's en banc decision in *Payne*, which overruled the Ninth Circuit's own precedent and rejected the injury-centered approach of most other circuits in favor of a textualist, relief-centered reading of the statute.

Unlike other circuits, the Ninth Circuit does not require exhaustion just because a case involves the denial of a free appropriate public education (FAPE). *Payne* focuses on the *relief* the plaintiff seeks. If that relief is unavailable under the IDEA, the plaintiff need not exhaust, even if her *injury* involved a FAPE denial. And although *Payne* acknowledges a narrow exception to that basic principle to address the problem of artful pleading, that exception is irrelevant here and does not undermine the outcome-determinative disagreement between the Ninth Circuit and other courts of appeals. New Caney's contrary claim elides *Payne*'s distinction between non-IDEA claims that *substantively incorporate* the IDEA (thus requiring exhaustion) and claims resting on constitutional or statutory rights that exist *independent of the IDEA* (thus not requiring exhaustion, even if the plaintiff was also denied a FAPE). *See Payne*, 653 F.3d at 875, 879–80. Far from undercutting the split established by *Payne*, the Ninth Circuit's later decision in *Paul G. ex rel. Steve G. v. Monterey Peninsula Unified School District*, 933 F.3d 1096 (9th Cir. 2019), only confirms *Payne*'s vitality.

The courts of appeals are divided over a critical issue. This Court in *Fry* recognized that split and agreed to resolve it, but ultimately left the question open. Now is the time to answer it.

ARGUMENT

I. As this Court, the United States, and the Fifth Circuit have recognized, the courts of appeals are divided on whether exhaustion is required when plaintiffs seek relief that is not available under the IDEA

A. 1. As the Petition explained (at 15–23), there is an important and persistent split on the question this Court reserved in *Fry*: whether a plaintiff must exhaust the IDEA's administrative procedures when seeking relief that is unavailable under the IDEA. 137 S. Ct. at 752 n.4, 754 n.8. Nine circuits (the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh) follow the injury-centered approach. They hold that a plaintiff bringing non-IDEA claims and seeking only money damages must still exhaust his claims if the IDEA's administrative procedures could theoretically provide him with *some* relief for his injury—even if he is not seeking that relief. Pet. 16–17.

The en banc Ninth Circuit, in contrast, has rejected the injury-centered approach in a textualist opinion authored by Judge Bybee. *Payne*, 653 F.3d at 873–75; Pet. 17–19. Instead, the Ninth Circuit adopted a relief-centered approach that requires exhaustion only when a plaintiff "*actually* s[eeks] relief available under the IDEA." *Payne*, 653 F.3d at 875. In other words, plaintiffs must "exhaust the remedies available to them under the IDEA before they seek *the same relief* under other laws." *Id.* at 872. But if the "plaintiff can identify a school district's violation of federal laws other than the IDEA and can point to an authorized remedy for that violation unavailable under the IDEA, then there is no reason to require exhaustion." *Id.* at 881.

2. The Fifth Circuit below analyzed the split. App. 11a–12a. It sided with the majority position, and expressly rejected the views of both the Ninth Circuit in *Payne* and the United States, which had recognized the split and advocated the Ninth Circuit's view in *Fry*. Pet. 13–14; Br. for the United States as Amicus Curiae at 18–22, *Fry*, No. 15-497 (U.S. May 20, 2016) ("SG Cert. Br."). As the United States explained there, the "injury-centered" approach followed by most circuits "require[s] exhaustion whenever the IDEA can provide some relief for the injury alleged in the complaint"—whether or not the plaintiff's cause of action "invokes the IDEA," and even if the plaintiff does not "actually request[] the form of relief that might be available under [the IDEA]." SG Cert. Br. 19. "By contrast, the en banc Ninth Circuit has expressly rejected the 'injury-centered' interpretation of Section 1415(*l*) in favor of a 'relief-centered' approach" that "'applies to claims only to the extent that the relief *actually sought by the plaintiff* could have been provided by the IDEA.'" *Id.* at 20 (quoting *Payne*, 653 F.3d at 874); *see* Pet. 15–18.

This is precisely the split that this Court agreed to consider in *Fry*. *See* 137 S. Ct. at 752 & n.3. Noting the "confusion in the courts of appeals," the Court explained that the Ninth Circuit in *Payne* had "criticized" approaches "'treat[ing] § 1415(*l*) as a quasi-preemption provision.'" *Id.* (quoting *Payne*, 653 F.3d at 875). But because it resolved the case on other grounds, the Court left "for another day" the question whether "a plaintiff, although charging the denial of a FAPE, seeks a form of remedy that an IDEA officer cannot give," such as "money damages for resulting emotional injury." *Id.* at 752 n.4, 754 n.8.

B. New Caney ignores all of this, but still insists there is no split. In doing so, New Caney misreads the Ninth Circuit's decisions in *Payne* and *Paul G.* and then rewrites the question presented. On the *actual* question presented, the split is as intractable as ever.

1. New Caney apparently believes that there is no split because it reads *Payne* to require exhaustion whenever the plaintiff says he was denied a FAPE. *See* Opp. 13–17. But that reading distorts *Payne* beyond recognition, transforming it into the very injury-centered approach that the Ninth Circuit expressly rejected. Indeed, *the Fifth Circuit below* did not read *Payne* that way. Instead, it reached the question presented—on which it disagreed with *Payne*—only *after* it concluded that this case involved the denial of a FAPE. *See* Pet. 10a–11a.

The Fifth Circuit read *Payne* correctly. As noted above, *Payne*'s core principle is that exhaustion is required only when a plaintiff "*actually* s[eeks] relief available under the IDEA." 653 F.3d at 875. If a plaintiff seeks relief that is *not* available under the IDEA—such as damages—exhaustion is not required, *even if* the plaintiff's injury included the denial of a FAPE.

Indeed, in *Payne* itself, the Ninth Circuit remanded for application of its relief-centered approach even though the plaintiff had also alleged "that the defendants violated [the student's] 'statutory rights under the IDEA'" by locking the student in a closet-sized room without supervision. *Id.* at 865–66, 883. The court explained that the plaintiff's constitutional claim "is cognizable under the Fourth Amendment and exists separate and apart from the denial of a FAPE, irrespective of the fact that the alleged excessive punishment took place in a special education

classroom." *Id.* at 880. The court analogized it to a claim challenging an "unconstitutional beating" in the classroom—a claim that would not require exhaustion even if the beating prevented the student from obtaining a FAPE. *Id.*

To be sure, the Ninth Circuit in *Payne* noted that a plaintiff whose "claim arises *only* as a result of the denial of a FAPE" must exhaust "because there is no other federal cause of action for such a claim." *Id.* at 880 (emphasis added); *see id.* at 875. But that exceedingly narrow exception cannot bear the weight New Caney puts on it. As the Petition explained—and New Caney does not meaningfully dispute—that exception applies only to claims that *substantively incorporate the IDEA* because they require a plaintiff to prove a violation of rights created by the IDEA. It does not refer to claims, such as Christopher's, that assert rights that exist independently of the IDEA. *See id.*; SG Cert. Br. 21 & n.7; Pet. 25–27.[1]

In sum, *Payne* does not require exhaustion just because the plaintiff says he was denied a FAPE. Indeed, if New Caney were correct, *Payne* would prescribe an injury-centered approach under which a plaintiff who alleges the *injury* of a FAPE denial must always exhaust. But *Payne* expressly *rejected* that rule in favor of a textually based *relief*-centered approach. *See Payne*, 653 F.3d at 873–75; Pet. 17–18. Unsurprisingly, both the panel below and the United States have repudiated New Caney's understanding of *Payne*. *See* SG Cert. Br. 18–21 & n.7; App. 11a–12a.

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[1] The Petition explained (at 25), and New Caney does not challenge, that the other two exceptions identified in *Payne* also are irrelevant here.

2. New Caney relies on the Ninth Circuit's recent decision in *Paul G.* A panel decision like *Paul G.*, of course, cannot overrule the *en banc* court's holding in *Payne* and eliminate the circuit split it created. In fact, *Paul G.* cites *Payne* and *reaffirms* the *Payne* framework.

The complaint in *Paul G.* alleged that "to receive a FAPE [Paul] required a residential placement" that "the state had failed to provide." 933 F.3d at 1099. The Ninth Circuit held that exhaustion was required because the "*only basis* for [Paul's] claim is that such a placement is required under the IDEA." *Id.* at 1102 (emphasis added); *see id.* (citing *Payne*). In other words, *Paul G.* falls into *Payne*'s narrow exception for claims that substantively incorporate the IDEA and that can be understood no other way. Although Paul's parents invoked other laws, they were necessarily relying on the IDEA because, as the panel explained, the IDEA was the *only possible* basis for Paul's claim.

Paul G., therefore, is a straightforward application of the *Payne* framework. Indeed, *Paul G.* reaffirms that, before requiring exhaustion, the Ninth Circuit continues to ask whether "[t]he only basis for … a claim" is a violation of the IDEA. *Id.* Exhaustion is *not* required where (as here) "constitutional and statutory rights that exist *independent* of the IDEA … entitle[] a plaintiff to relief *different* from what is available under the IDEA." *Payne*, 653 F.3d at 876.[2]

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[2] This Court denied review in *Paul G.* on April 20, 2020 (No. 19-1043). Of course, *Paul G.* does not implicate the split at issue here because the Ninth Circuit required exhaustion there even under *Payne*. Tellingly, the circuit split asserted by the petition

3. New Caney also tries to wave away the split by rewriting the question presented and suggesting that no split exists on its preferred formulation. *See* Opp. at i (suggesting that the question presented is whether exhaustion is required where a damages claim is "premised on the alleged denial of a [FAPE]"). Specifically, New Caney notes that even *Payne* requires plaintiffs to exhaust claims that are "premised on the denial of a FAPE." *Payne*, 653 F.3d at 875; *see* Opp. 19. But, as explained above and in the Petition, that sliver of an exception is limited to claims that *substantively incorporate the IDEA*. *See supra* pp. 5–6; Pet. 25–27. Thus, a split persists as to the large class of claims brought by plaintiffs who may have been denied a FAPE, but whose causes of action do not require them to prove a violation of IDEA rights, and who seek relief that is unavailable under the IDEA. As discussed below, Christopher's claims fall into this category, making this case an ideal vehicle.

II. This case is an excellent vehicle for addressing the important split left unresolved in *Fry*

A. This case perfectly presents the question reserved in *Fry*. That question can arise *only* when a court has already determined under *Fry* that the plaintiff's injury involves the denial of a FAPE. Otherwise, it would be clear under *Fry* itself that exhaustion is unnecessary. Here, the Fifth Circuit reached the question presented only after making that determination. App. 6a–10a. As the court recognized, that is what made it necessary to "address [the] question"

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was a purported conflict between the Ninth and First Circuits on a narrow futility question. *See* Pet. 8–9, *Paul G.*, No. 19-1043.

presented here, *i.e.*, "whether the exhaustion requirement applies when a plaintiff is seeking remedies not available under the IDEA." App. 11a.

Thus, to the extent New Caney argues (at 18–19) that this case is a poor vehicle simply because Christopher was denied a FAPE, it gets things precisely backwards. Far from presenting a vehicle *problem*, that much is *required* to tee up the question this Court left open in *Fry*.

B. New Caney also contends that this case is a poor vehicle because Christopher's "claim … is premised on the alleged denial of a FAPE." Opp. 18. Again, if New Caney means to invoke *Payne*'s narrow exception for claims that require a plaintiff to prove a violation of the IDEA's substantive standards, that argument fails for the reasons above.

Of course, as the Petition explained (at 26–27), the circumstances giving rise to Christopher's claims did occur in a classroom and did result in the denial of a FAPE. But the claims in the operative complaint in no way depend on proving a violation of the IDEA. Instead, Christopher alleges that he suffered independently unlawful and unconstitutional abuse and discrimination at the hands of his English teacher and the school officials who conspired to expel him because of his disability and religion. Pet. 10–12; App. 3a–4a, 36a–38a & n.3. Indeed, he challenges disability- and religion-based discrimination, not the failure to meet any educational standard. Christopher's Rehabilitation Act, Equal Protection Clause, and First Amendment claims do not require proof of rights created by the IDEA; they do not depend on substantive standards set forth in the IDEA; and they would be cognizable even if the IDEA did not exist. That is true even if

Christopher's treatment and expulsion—like the "unconstitutional beating" described in *Payne*—interfered with the achievement of a FAPE. 653 F.3d at 880.

Rather than explaining why it thinks Christopher's claims rely on rights created by the IDEA, New Caney spends several pages (at 18–20) discussing Christopher's individualized education program, the educational context, and the procedural history of this case. But the most any of that can show is that Christopher's injury involves a FAPE denial. And, as explained, that is precisely what tees up the question left open in *Fry*. In short, far from identifying a vehicle problem, New Caney has confirmed that this case is a perfect vehicle.

III. The Fifth Circuit's decision is wrong

As the Petition explained (at 28–33), the Fifth Circuit's injury-centered approach is atextual and incorrect. The statute requires exhaustion only in cases "seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). Plaintiffs like Christopher thus need not exhaust, because they seek only a form of relief that is *unavailable* under the IDEA: compensatory damages. *See* App. 54a. This relief-centered approach finds ample support in statutory purpose and legislative history as well. *See* Pet. 32–33.

New Caney does not address these arguments. Instead, it rests its merits arguments largely on *Fry*. *See* Opp. 21–22. But *Fry reserved* the question presented here. 137 S. Ct. at 754 n.8; *see id.* at 752 n.4. And *Fry*'s reasoning cuts *against* New Caney's position, because *Fry* reiterates that statutory interpretation must "begin … with the statutory language." *Id.* at 753. As

even the Fifth Circuit recognized, the relief-centered approach is the "textualist approach." App. 13a.

In the end, New Caney effectively admits that the majority's injury-centered approach is driven by the policy interest in avoiding "artful pleading." Opp. 2, 21–22. But New Caney makes no effort to explain why artful pleading is a serious problem that cannot be dealt with through other means. (It's not, and it can be. Pet. 32.) Nor does New Caney address the costs of the majority approach: forcing parents to participate in costly, futile proceedings. Pet. 32–33. And New Caney cannot explain how its policy position, even if it were persuasive, could overcome the plain language of the statute.

* * *

The question this Court reserved in *Fry,* and which continues to divide the circuits, is important to children, families, and educators. The majority's injury-centered approach forces students and parents to endure costly, pointless proceedings. And it does so *in contravention* of the statutory language. As the Fifth Circuit acknowledged, there is a powerful "textualist case"—set out by the Ninth Circuit and by the United States—for adopting a *relief*-centered approach. App. 13a. And a court's estimation of what is "necessary to enforce the statutory scheme," App. 14a, cannot justify disregarding what Congress wrote. This Court should step in to enforce the statute as written and protect plaintiffs like Christopher.

CONCLUSION

The Court should grant the petition for writ of certiorari.

May 4, 2020

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