NO. 21-1373

In the Supreme Court of the United States

D. D., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, MICHAELA INGRAM,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner's request should be rejected because it is based on the erroneous premise that the justiciable questions presented *in this case* following the *en banc* majority's opinion are (1) whether 20 U.S.C. section 1415(l) requires exhaustion of claims seeking money damages not available under the Individuals with Disabilities Education Act (IDEA),[1] and (2) whether, in any event, courts should exclude the exhaustion mandate when to do so would be futile. (Petition at pgs. i and 3.) These questions, however, are not actually at issue *in this case* and indeed Petitioner's attempt to underpin his appeal on these "issues" misstates or misconstrues the Ninth Circuit's holding, is significant overreach, and indeed, the type of "artful" pleading *Fry* warned against.

Rather, here, the Ninth Circuit majority ruled that "the only disputed issue is whether the gravamen of *this complaint* is the failure to offer a FAPE." (18 F.4th 1043, 1048 [emphasis in the original].)[2] That is, the *gravamen of Petitioner's complaint* did not seek money damages for claims not available under the IDEA. Accordingly, this Court need not, and should

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[1] This, of course, is the question posed in footnote 4 of *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 752 (*Fry*) where this Court concluded, "we leave for another day a further question about the meaning of § 1415(l): is exhaustion 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?"

[2] App.3a.

not, address Petitioner's first issue posited in his Petition's "issues presented" and pondered in *Fry's* footnote 4 because the Ninth Circuit majority completed its analysis under *Fry*, as required by *Fry*, in conclusively finding Petitioner's operative complaint's express allegations (the *gravamen*) only sought relief "available under" the IDEA. The Ninth Circuit conclusively found the crux, or gravamen, of Petitioner's claims were IDEA claims, not non-IDEA claims for monetary damages.

Further, regarding the "futility" argument and the purported second issue Petitioner frames in his petition, the Ninth Circuit in this case conclusively ruled, "[w]e similarly decline to reach the related question of whether (petitioner's) settlement rendered further exhaustion futile . . . (Petitioner) conceded at oral argument *that he did not preserve the issue for our review*. His failure to do so is underscored by the inadequate record on futility." (18 F.4th at 1058 [emphasis added].)[3] Thus, Petitioner cannot presuppose an issue for this Court (futility) when that "issue" was never preserved in the first place.

That Petitioner tries to forge ahead in this Court with framed issues that are not actually "at issue" is merely another instance of Petitioner trying to recast his allegations to fit under *Fry's* footnote 4—indeed, Petitioner ignores and disavows this Court's concern over "artful pleading." The Ninth Circuit pointed out Petitioner's habitual conduct in this regard: "[i]n the latter, the operative complaint, D. D. *reframes* the same actions and omissions by the District as an ADA violation, but the gravamen remains the same—that the District failed to offer D. D. supports needed to

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[3] App.24a.

receive a FAPE." (18 F.4th at 1055 [emphasis added]);[4] and (2) "[w]e reject D. D.'s argument that he need not exhaust because he seeks relief that is not available under the IDEA, namely compensatory damages for emotional distress. The threshold problem with this argument is that it *re-writes* D. D.'s ADA Complaint." (18 F.4th at 1056 [emphasis added].)[5] This Court should recognize this tactic and disallow its use where Petitioner overreaches or "recasts," "reframes," or "re-writes" his allegations and the scope of the Ninth Circuit's ruling in this case.

Moreover, the related case, *Perez v. Sturgis Public Schools*, 3 F.4th 236 (6th Cir. 2021) (*Perez*) Petitioner relies upon and currently presented for review does not change this result. This is because, unlike in *D. D.*, the *Perez* court conceded that plaintiff's claims in that case were for "compensatory damages for emotional distress." (3 F.4th at 241.) The *Perez* court noted that the Sixth Circuit precedent confirmed that exhaustion was still required even if the lawsuit "requests a remedy the IDEA does not allow." (*Id.*, citing *Covington v. Knox County Sch. Svs.*, 205 F.3d 912, 916-917 (6th Cir. 2000).) And, unlike in *D. D.*, the petitioner in *Perez* not only preserved the futility issue but made it a central argument on appeal. Thus, D. D.'s appeal and Petition do not stand in the same shoes as the *Perez* appeal and petition because (1) in *D. D.*, unlike *Perez*, the Ninth Circuit confirmed the gravamen of Petitioner's complaint was for the failure to offer a free and appropriate public education and founded upon the

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[4] App.18a.

[5] App.19a.

IDEA, and (2) in *D. D.*, unlike *Perez*, Petitioner did not preserve the futility issue for appeal.

CONCLUSION

Thus, for the aforementioned reasons, Respondent Los Angeles Unified School District respectfully requests that this Court deny Petitioner's Petition.

Respectfully submitted,

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