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

BRIEF OF AMICI CURIAE 23 LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae (listed in the Appendix) are professors who research, write, and teach in the fields of disability law, special education, civil rights, and administrative law. They have an interest in the proper application of the statutory schemes that protect disabled students' rights as well as in the appropriate scope of exhaustion doctrine. *Amici* also have an interest in preserving the ability of parties to voluntarily settle disputes, and particularly so in the context of legislative schemes predicated on cooperation between parties.

SUMMARY OF ARGUMENT

This case has serious implications for the functioning of two intersecting statutory schemes designed to protect the rights of disabled children in school settings—the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act (ADA). After this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which ruled that all challenges related to the adequacy of disabled students' special education had to be channeled through the IDEA, Congress moved swiftly to reject that holding by enacting 20 U.S.C. § 1415(l). *See* Pub. L. No. 99-372, § 3, 100 Stat.

[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *Amici*, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief, and all parties received timely notice of *Amici*'s intent to file this brief.

796, 797. Section 1415(l) protects disabled students' rights to bring independent claims to address school-based discrimination and other civil rights violations in addition to IDEA claims challenging the adequacy of special education. Congress appended a "carefully defined" exhaustion provision, *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 746 (2017), requiring exhaustion, but only when plaintiffs bring other federal claims "seeking relief that is also available" under the IDEA. 20 U.S.C. § 1415(l).

In a sweeping decision that places it at odds with every other circuit, the Sixth Circuit now has held that the standard futility exception to exhaustion categorically does not apply to Section 1415(l). To support its conclusion, the Sixth Circuit takes out of context one statement from *Ross v. Blake*, 578 U.S. 632, 639 (2016)—which construed a wholly different, mandatory exhaustion provision from the Prison Litigation Reform Act (PLRA)—and makes it the departure point for a fundamental revision of exhaustion doctrine. In deciding that the longstanding futility exception does not apply to Section 1415(l), the Sixth Circuit ignores Congress's language, Section 1415(l)'s unique enactment history, and this Court's recognition of a futility exception in *Honig v. Doe*, 484 U.S. 305, 327 (1988). And the Sixth Circuit reached this decision in circumstances in which the plaintiff, prior to bringing his federal ADA action, had already pursued the administrative process to the point of obtaining all possible relief on his entitlement to a free appropriate public education (FAPE) under the IDEA and had had his

ADA claim dismissed by the administrative hearing officer. Holding a hearing when there is nothing left to dispute and no relief to grant is the very definition of an exercise in futility. For this reason, four other circuits specifically have recognized that exhaustion would be futile when plaintiffs have already obtained all relief from the administrative process. This Court should reject this deviation from accepted administrative law doctrine not just for Section 1415(l), but also to prevent the erroneous decision from spilling over into other contexts.

The Sixth Circuit's interpretation of Section 1415(l) undermines an IDEA dispute resolution system designed to foster collaboration between parents and schools and to encourage resolution of disputes as early as possible in the administrative process so that students promptly receive needed services. The decision gives a disabled child an overly circumscribed choice: 1) accept a satisfactory settlement of a special education dispute to get services promptly but give up any non-IDEA claim for compensatory damages, despite significant past harms; or 2) relinquish the opportunity to quickly obtain vital services, pursue a costly administrative hearing that can provide no greater relief than was already offered, but preserve the non-IDEA damage claim. By drastically limiting students' remedial choices, the decision risks unnecessary harm to disabled students and conflicts with the IDEA's goal of encouraging swift resolution of educational complaints.

Finally, the Sixth Circuit's non-textual reading of Section 1415(l) to require exhaustion when the IDEA hearing officer cannot provide the monetary relief sought departs from the well-recognized principle of reading a statute according to its terms. Once disabled students have satisfactorily settled FAPE claims with the school district, they are no longer "seeking relief available under [the IDEA]" and should have no further obligation to exhaust under Section 1415(l)'s plain language. This Court's *Fry* decision has not ended the lower court confusion over the scope of Section 1415(l), especially when students have non-IDEA claims that overlap with IDEA claims. Further clarification is needed to preserve those rights Congress explicitly preserved in Section 1415(l).

Both questions presented in the petition warrant review. Whether the Court addresses the issue as the proper application of the well-established futility exception or as the proper interpretation of a built-in textual exception to Section 1415(l)'s exhaustion requirement, its resolution is of exceptional importance. This Court's intervention is needed to maintain the proper balance of authority between agencies and courts and to protect the ability of disabled students to settle IDEA claims without forfeiting other recognized rights.

ARGUMENT

I. By Extending *Ross* to Bar Longstanding Exceptions to the IDEA Exhaustion Requirement, the Sixth Circuit Distorts Exhaustion Doctrine and Creates a Circuit Split

The Sixth Circuit misinterprets *Ross* to bar all standard administrative law exhaustion exceptions unless they are specifically delineated in the statutory text. *See* Pet. App. 10a ("Section 1415(*l*) does not come with a "futility" exception, and the Supreme Court has instructed us not to create exceptions to statutory exhaustion requirements.") (citing *Ross*). By taking *Ross* out of context, the Sixth Circuit acts contrary to Section 1415(l)'s particular language and enactment history, and deviates from decisions in every other circuit, which have recognized exceptions such as futility in the IDEA context. *Amici* agree with Petitioner that this Court should address the circuit split and clarify that Section 1415(l) has a futility exception that applies in these circumstances. *See* Pet. 14–30.

A. The Sixth Circuit's Decision Creates a Circuit Split

Three decades ago, this Court recognized that under the IDEA,[2] "parents may bypass the administrative process for judicial review where exhaustion

[2] The statute's name has changed since its original enactment as the Education of the Handicapped Act. This brief refers to all versions as the IDEA.

would be futile or inadequate." *Honig*, 484 U.S. at 327. Since then, both before and after *Ross*, every other circuit that has addressed the question has decided that IDEA exhaustion is not required when it would be futile or inadequate. *See* Pet. App. 29a-30a, 32a-33a (Stranch, J., dissenting) (collecting cases); *see also A.F. ex rel. Christine B. v. Espanola Pub. Sch.*, 801 F.3d 1245, 1249 (10th Cir. 2015) (recognizing, in decision authored by then-judge Gorsuch, the continued existence of futility exception). Four circuits have also correctly concluded that IDEA exhaustion would be futile once the student has obtained IDEA relief through a settlement with the district, as Miguel Luna Perez ("Perez") did here. *See Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 33 (1st Cir. 2019); *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 786 (10th Cir. 2013); *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275–76 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc), *cert. denied*, 565 U.S. 1196 (2012); *W.B. v. Matula*, 67 F.3d 484, 490 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 799 (3d Cir. 2007) (en banc).[3]

[3] *See also D.D. ex rel. Ingram v. Los Angeles Unified Sch. Dist.*, 18 F.4th 1043, 1058 (9th Cir. 2021) (en banc) (also suggesting that where student has obtained all FAPE relief available in IDEA proceedings, exhaustion may well be futile).

B. The Sixth Circuit's Misreading of *Ross* Distorts Basic Principles of Statutory Construction

This Court's guidance is needed to ensure that *Ross*'s specific holding rejecting a special circumstances exception to the PLRA's exhaustion requirement is not misconstrued as a blanket prohibition against standard administrative law exceptions in *all* statutory exhaustion contexts, as the Sixth Circuit erroneously held. Pet. App. 10a. Such an exaggerated reading of *Ross* conflicts with the Court's recognition that "Congress sets the rules," and that statutory language and enactment history determine whether an exhaustion provision is mandatory or permissive. *Ross*, 578 U.S. at 638–42. *Ross* concluded that the PLRA's "mandatory exhaustion [regime]," designed to constrict the ability of people in prison to bring lawsuits, foreclosed judicial discretion to graft an unwritten "special circumstances" exception onto its text. *Id.* at 639–42. Contrary to the Sixth Circuit decision, *Ross* never says "*only* 'judge-made exhaustion doctrines'" permit exceptions. Pet. App. 10a (emphasis added). Rather, *Ross* specifically noted that when analyzing a statutory exhaustion provision with a different "text and history," judges have greater "leeway to create . . . or to incorporate standard administrative-law exceptions." *Ross*, 578 U.S. at 642 n.2 (citing 2 R. Pierce, Administrative Law Treatise § 15.3, p. 1245 (5th ed. 2010)). Here, where Section 1415(l) uses more permissive language within a provision specifically enacted to expand students' rights to bring non-IDEA claims

after *Smith* curtailed those rights, *see Fry*, 137 S. Ct. at 755, standard administrative law exceptions should apply.

Section 1415(l)'s text is much more permissive than the PLRA's. The PLRA 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) (emphasis added). In contrast, Section 1415(l) declares that "[n]othing in [the IDEA] should be construed to restrict or limit the rights, procedures, and remedies available under . . . Federal laws protecting the rights of children with disabilities. . . ." However, for those civil actions "seeking relief that is also available under [the IDEA]," Section 1415(l) requires that IDEA procedures shall be exhausted. 20 U.S.C. § 1415(l). *Fry* distinguished Section 1415(l)'s language from that of "a *stricter* exhaustion statute" that requires exhaustion prior to a lawsuit that "'*could have sought*' relief available under the IDEA (or, what is much the same, whether any remedies 'are' available under that law"). *Fry*, 137 S. Ct. at 755 (emphasis added) (citing Brief for United States as *Amicus Curiae* (contrasting Section 1415(l) with PLRA)). Similarly, *Ross* observed that an exhaustion provision making distinctions based on forms of relief "sought" would create a more permissive exhaustion provision than the PLRA's. 578 U.S. at 640.

Section 1415(l)'s enactment history in response to this Court's decision in *Smith* also supports incorporating administrative law exceptions. *Smith* held that disabled students could challenge matters related to

their special education only through the IDEA. 468 U.S. 992, 1009 (1982). In *Smith*, this Court also recognized that a futility exception applied to the IDEA. *See id.* at 1014 n.17. Congress responded to *Smith*'s limitations on the pursuit of claims by enacting Section 1415(l) to "re-affirm . . . the viability of" other federal statutes "as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 99-296, at 4 (1985). While Congress intended to channel special education complaints through the administrative process, exhaustion would not be required when "it would be futile" or "it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)." *Id.* at 7; *accord* S. Rep. No. 99-112, at 15 (1985). In addition to the explicit legislative history about preserving a futility exception, it can be assumed that Congress was aware of *Smith*'s recognition of the exception when it passed Section 1415(l). *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). After Section 1415(l)'s enactment, this Court continued to recognize that exhaustion exceptions applied in the IDEA context. *See Honig*, 484 U.S. at 327 (citing *Smith*, 468 U.S. at 1014 n.17).

Nothing in *Ross* should alter the understanding from *Smith* and *Honig* that the IDEA permits exceptions to exhaustion. *See generally Ross*, 578 U.S. at 649–50 (Breyer, J., concurring) (suggesting that "well-established" administrative law exceptions apply to statutory exhaustion provisions, even if "freewheeling" exceptions do not). Nor did *Ross* overrule prior cases

of this Court excusing exhaustion based on futility, including in statutory contexts. *See Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 404 (1988) (finding that statutory review process does not require futile presentation of question that is beyond reviewer's authority); *Montana Nat'l Bank of Billings v. Yellowstone Cnty.*, 276 U.S. 499, 505 (1928) (recognizing futility of application to agency that was "powerless to grant any appropriate relief"); *see also Union Pac. R.R. Co. v. Bd. of Cnty. Comm'rs*, 247 U.S. 282, 287 (1918) (rejecting requirement that railroad exhaust state statutory scheme for contesting tax assessment because there was doubt as to whether administrative process could provide relief).

The common thread running through the futility cases is a pragmatic concern with preventing useless exercises that will not serve any of the purposes of the exhaustion doctrine. *See Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (emphasizing "intensely practical" approach to exhaustion). In the context of the Social Security Act, another remedial statute, the Court has excused exhaustion when further administrative processes would be futile. *See id.* at 485 (excusing exhaustion when "there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise"); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (recognizing futility of exhaustion when agency could not resolve constitutional claim). After *Ross*, the Court has cited *Bowen* and *Salfi* with approval and once again recognized that exhaustion need not be required where it "would serve no

meaningful purpose." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776, 1780 n.21 (2019). Finally, last term, in the related context of issue exhaustion, the Court reaffirmed that it "has consistently recognized a futility exception to exhaustion requirements." *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) (acknowledging futility of forcing litigants to raise Appointments Clause challenges to ALJs in administrative process).

By misconstruing *Ross*'s careful PLRA analysis as a blanket prohibition against all standard administrative law exceptions, the Sixth Circuit upends longstanding, integral features of exhaustion doctrine.

II. The Sixth Circuit's Decision Frustrates the Goal of Promoting Voluntary Settlement and Is Not Justified by Any Purposes of Exhaustion

The Sixth Circuit's decision works at cross-purposes with the IDEA's goals of providing prompt services and fostering the early, voluntary resolution of educational disputes. It will force students to either relinquish non-IDEA claims to receive special education services promptly or place themselves at educational risk by rejecting a settlement to pursue those non-IDEA claims that Section 1415(l) sought to protect. Inevitably, the decision will deter IDEA settlements. It will also require exhaustion when it would be nothing more than an empty formality.

A. The IDEA is Structured to Resolve Disputes Quickly in Order to Provide Timely Special Education Services

A proper interpretation of a provision's text "requires a consideration of the entire statutory scheme." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007). The IDEA's overarching purpose is to ensure that children with disabilities receive a FAPE that will meet their unique needs and prepare them for further education, employment, and independent living. *See* 20 U.S.C. §§ 1400(d)(1)(A); 1412(a)(1); 1401(9). FAPE services are provided in conformity with the child's individualized education program (IEP) developed through a collaborative process among parents, educators, and other experts. *See Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (requiring "careful consideration of the child's individual circumstances").

Further, the IDEA is designed to provide a FAPE "with the speed necessary to avoid detriment to the child's education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (citation omitted). This emphasis on prompt provision of services comports with research demonstrating that intervention is the best path toward independence and mitigation of the disabling effects of a child's condition.[4] For disabled students who

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[4] *See, e.g.*, National Ctr. on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, *Why Act Early if You're Concerned about Development?* (Apr. 19, 2021), https://www.cdc.gov/ncbddd/actearly/whyActEarly.html. In the case of Deaf students, appropriate language services are needed to

must regularly practice educational and functional skills, such as students with developmental disabilities, "[e]very instructional minute is important [and] missing even a few weeks of school can undo months or even years of progress." *E.E. v. California*, No. 21-cv-07585-SI, 2021 WL 5139660, at *7 (N.D. Cal. Nov. 4, 2021) (cleaned up) (quoting special education expert).

The statute also contains dispute resolution procedures for when disagreements arise, which encourage voluntary settlement at multiple points in the administrative process. *See* Pet. 5–6. Consistent with this preference for voluntary dispute resolution, most parents do resolve their disputes without adversarial hearings.[5] For example, almost eighty percent of due process complaints filed and resolved nationwide in

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develop the social and communication skills required for nearly every aspect of adult life. *See generally* Susan R. Easterbrooks et al., *Ignoring Free, Appropriate, Public Education, a Costly Mistake: The Case of F.M. & L.G. versus Barbour County*, 9 J. Deaf Stud. & Deaf Educ. 219 (2004). Deaf students denied these services often never fully catch up, even with compensatory education, leaving some with permanent developmental problems, and many with reduced employability and earning potential. *Id.* at 225; *see* Wyatte C. Hall, *What You Don't Know Can Hurt You: The Risk of Language Deprivation by Impairing Sign Language Development in Deaf Children*, 21 Maternal & Child Health J. 961, 962 (2017).

[5] *See* U. S. Gov't Accountability Off., GAO-20-22, Special Education: IDEA Dispute Resolution Activity in Selected States Varied Based on School Districts' Characteristics 9–11 (2019) [hereinafter GAO Report] (noting increase in mediation requests, decline in due process complaints, and sharp decline in full adjudications at hearings).

2018–19, were resolved without a hearing.[6] Any construction of the exhaustion requirement should consider the statutory scheme that has successfully encouraged voluntary settlements prior to a full administrative hearing.

B. The Sixth Circuit's Decision Undermines the Goal of this Court and Congress to Encourage Voluntary Dispute Resolution

The Sixth Circuit's decision will force those families who wish to preserve intentional discrimination damage claims to reject acceptable IDEA settlements and pursue (no longer disputed) FAPE issues, through administrative hearings that cannot provide any additional relief. Inevitably, it will discourage future settlements of IDEA claims, to the likely detriment of all parties. *See Marek v. Chesny*, 473 U.S. 1, 10–11 (1985) (noting that settlements benefit plaintiffs and defendants alike). Such a result runs contrary to the general public policy favoring settlement of disputes to avoid the extensive time, money, and judicial resources traditionally expended in further litigation. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *see also F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 154 (2013) (discussing policy favoring settlements). Because of these advantages, settlement is "the modal civil case outcome." Theodore

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[6] Center for Appropriate Disp. Resol. in Special Educ., *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2008–09 to 2018–19*, 11–12 (2020), https://www.cadreworks.org/resources/cadre-materials/2019-20-dr-data-summary-national.

Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 112 (2009).

Like the significant number of individuals who resolve educational disputes without adversarial hearings, *see* GAO Report 9–11, Perez and the school district reached a settlement prior to an adversarial hearing. The district agreed to provide him with placement at a school for the deaf and compensatory education and related services. Pet. App. 2a. Perez agreed to release the district from liability related to his IDEA claim but not his anti-discrimination claims. *See id.* This type of bifurcated resolution is not unusual; parties often settle some issues or claims and save others for later resolution by settlement or trial. *See*, *e.g.*, 1 California Deskbook on Complex Civil Litigation Management § 4.34 (2021). Parties also frequently settle injunctive claims to obtain immediate relief while saving damages claims for subsequent resolution. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 89–90 (1981) (endorsing this practice); *see also* 8 Moore's Federal Practice—Civil § 42.20 (2021) (discussing traditional divisibility of liability and damages determinations); 13 Moore's Federal Practice—Civil § 68.03 (2021) (discussing Fed. R. Civ. Pro. 68(c), which permits formal offers to settle damages after defendant's liability has been established).

Because "the law favors compromise . . . when parties have entered into a definite, certain, and unambiguous agreement to settle, it should be enforced." 66 Am. Jur. 2d Release § 2 (2021). The decision below

undercuts the settlement agreement reached within the administrative process. This Court's intervention is needed to ensure that this decision does not undermine the goal of encouraging voluntary settlements, both as an aim of the IDEA and, more generally, as the policy preference of this Court and Congress.

C. Requiring a Disabled Student to Have a Hearing on Claims that Have Already Been Resolved Does Not Further the Purposes of Exhaustion

This Court's intervention is needed to ensure that exhaustion does not become "a vain exercise" that fails to serve its underlying purposes of protecting administrative agency authority and promoting judicial efficiency. *See Carr*, 141 S. Ct. at 1361 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). The purposes of IDEA exhaustion are to permit agencies to exercise discretion and apply educational expertise, facilitate "exploration of technical educational issues," develop a factual record, and "promote[] judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992). The justification for exhaustion is strongest when its purposes are served. *See Bowen* 476 U.S. at 484 ("The ultimate decision of whether to waive exhaustion . . . should also be guided by the policies underlying the exhaustion requirement."). Thus, when an agency lacks institutional competence to adjudicate an issue or lacks authority to

grant relief requested, courts apply well-established administrative law exceptions to avoid imposing exhaustion as an empty exercise. *McCarthy*, 503 U.S. at 147–48.

But exhaustion of the IDEA process makes little sense for a damage claim under Title II of the ADA, particularly given that the IDEA hearing officer lacks authority to award damages. *See Fry*, 137 S. Ct. at 752 n.4. The IDEA hearing officer's remedial powers are limited to equitable relief awarding future special education and related services and reimbursement of parents' past out-of-pocket educational expenditures. *See School Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369–71 (1985). In addition, in states like Michigan, the hearing officer lacks basic jurisdiction to hear ADA claims. Pet. App. 2a, 37a-38a. Moreover, exhausting IDEA processes to bring claims for past intentional wrongs will not serve the purpose of permitting an agency to correct its mistakes since it cannot undo its past intentional discrimination in the administrative process. Requiring a hearing when students cannot obtain the relief they are seeking would be futile. *See Doucette*, 936 F.3d at 22 (holding it futile to require hearing in order to assert Section 1983 claim in part because money damages could not be awarded in administrative process).

IDEA and ADA claims in the school setting are not coextensive; therefore, the expertise of the hearing officer and administrative record created are of limited value in resolving ADA claims. The central questions in an IDEA claim are whether the school followed

IDEA procedures and whether the child received a FAPE. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982); *see also* 20 U.S.C. § 1415(f)(3)(E). On the other hand, the central questions in an ADA damage claim are: 1) whether a school provided the disabled student with equal and non-discriminatory access to and participation in its programs, *see* 42 U.S.C. § 12132, and 2) whether the discrimination was intentional. *See, e.g.*, *Miraglia v. Bd. of Supervisors of the La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018).

A finding that a child was provided a FAPE does not determine whether equal access or effective communication was provided under the ADA. *See K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013) (holding ADA effective communication claim not foreclosed by finding that plaintiffs with hearing disabilities had been provided a FAPE). Alternatively, even if a hearing officer determines that a child was *denied* a FAPE, such a determination does not establish the intent required for an ADA damage claim, which requires plaintiffs to demonstrate bad faith, deliberate indifference, or gross misjudgment.[7] Federal courts, not IDEA hearing officers, have unique

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[7] *See, e.g.*, *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 265 (3d Cir. 2013) (requiring deliberate indifference); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010) (requiring bad faith or gross departure from accepted educational standards); *see also Nieves–Marquez v. Puerto Rico*, 353 F.3d 108, 126–27 (1st Cir. 2003) (suggesting discriminatory animus required).

expertise in assessing such claims, as they routinely consider whether plaintiffs have proffered sufficient evidence on intent to create triable issues of fact in discrimination claims. *See*, *e.g.*, *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 841 (2d Cir. 2014) (granting summary judgment against parents on Section 504 claim, even though IDEA violation shown, because of insufficient evidence of "bad faith or gross misjudgment"). And the record of a hearing would not reach the additional question of whether and to what extent the ADA plaintiff suffered emotional distress, which may be determined by a jury, in any event. *See*, *e.g.*, *Dorsey v. City of Detroit*, 157 F. Supp. 2d 729, 732 (E.D. Mich. 2001).

Finally, it is certainly inefficient to hold a hearing where, as here, a student has obtained all possible IDEA relief through a settlement with the district. In *Muskrat v. Deer Creek Public Schools*, the Tenth Circuit held that parents who had already obtained a change to their child's IEP need not pursue "a formal due process hearing—which in any event cannot award damages—simply to preserve their damages claim." 715 F.3d at 785.

For these reasons, the Sixth Circuit's unfounded assertion that a further administrative record "would have improved the accuracy and efficiency of judicial proceedings," Pet. App. 13a, should be rejected. The benefit of any peripheral factfinding would be marginal. The hearing officer's relevant expertise is limited. *See* 20 U.S.C. § 1415(f)(3)(A)(ii). Holding a hearing—when the parties no longer dispute the appropriate relief

under the IDEA—wastes the time and resources of both the parties and the administrative forum. And what would the hearing officer even address at such a hearing? Certainly, requiring exhaustion under these circumstances does not serve the doctrine's purposes.

III. The Sixth Circuit's Decision is Contrary to Section 1415(l)'s Text

A. Section 1415(l) Should Be Read According to Its Plain Language

As correctly argued by Petitioner, Section 1415(l) does not require exhaustion prior to commencement of a non-IDEA claim for compensatory damages because that relief cannot be provided under the IDEA. *See* Pet. 30–34. This Court has often stated that a statute must be interpreted "in accord with the ordinary public meaning of its terms at the time of its enactment." *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

In *Fry*, the Court addressed the meaning of Section 1415(l)'s language "seeking relief that is also available under [the IDEA]." Considering the ordinary meaning of "relief" and "available," the Court explained that the "relief available under the IDEA" is relief for the denial of a FAPE. *Fry*, 137 S. Ct. at 753 (citing *Ross*, 136 S. Ct. 1850, 1858). That relief is "available . . . when it is 'accessible or may be obtained,' " but not when the child would be sent away from the IDEA forum "empty-handed." *Id.* at 753–54 (citation omitted). *Fry* provided this guidance on when relief is

available under the IDEA but refrained from answering the question on which certiorari had been granted: whether a student with a non-IDEA claim for compensatory damages must exhaust IDEA processes, even though the student cannot get monetary relief in the IDEA forum. *See id.* at 752 n.4.

The unanswered *Fry* question is critical because, as explained in Part II.C, *supra*, the IDEA hearing officer has limited equitable powers and lacks authority to award monetary relief beyond *reimbursement* of past *out-of-pocket expenditures* for education-related services. Under the language of the statute, since students seeking monetary damages for past injuries under another federal law cannot get that relief from the IDEA hearing, they should not have to exhaust IDEA processes.

In *Fry*, the Solicitor General urged the Court to adopt just such a textual reading of Section 1415(l). *See* Brief for the United States as *Amicus Curiae* at 32, *Fry*, 137 S. Ct. 743 (No. 15-497) Similarly, five dissenting judges of the Ninth Circuit recently endorsed this literal interpretation "because damages are not a form of relief available under the IDEA." *See D.D.*, 18 F.4th at 1058–62 (Bumatay, J., concurring in part and dissenting in part). Courts, however, have generally declined to adopt this straightforward reading and have been unwilling to excuse plaintiffs from IDEA exhaustion despite an independent claim for monetary damages. *See McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 643, 645–48 (5th Cir. 2019) (dismissing on exhaustion grounds damage claim found to be perfectly

coextensive with FAPE claim and collecting cases from eight circuits). Despite this seemingly lopsided tally, "[t]he question may be a closer one than the circuit scorecard suggests." *Id*. at 647 (discussing but not adopting textualist interpretation of Section 1415(l)). The Court could alleviate this continuing confusion by adopting the textual reading of Section 1415(l) that it has required in other contexts, and that has been urged by the United States.

Clarification of this point would not result in a rush to file damage claims against school districts. First, evidence indicates that parents already have difficulties accessing even the more user-friendly IDEA administrative procedures, s*ee* GAO Report 20, 28, and parents are at least as likely to be deterred by the even greater barriers to commencing a federal court action. The additional evidentiary standards for establishing intentional discrimination and entitlement to emotional distress damages, *see supra* note 7, at 18, also create further barriers. Consequently, there is little incentive to file ADA damage claims except in the most egregious cases.

B. The Arguments for Requiring Exhaustion Are Non-Textual and Unsupportable After a Student Has Accepted an IDEA Settlement

Citing non-textual concerns, some courts have been reluctant to dispense with exhaustion for damage claims. The concern is that unless exhaustion is

required, parents will try to circumvent the IDEA administrative process and go straight to court either after letting the IDEA clock run out on their FAPE claim or by simply "tacking on" a monetary damage claim. *See McMillen*, 939 F.3d at 648; *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002); *Polera v. Board of Ed.*, 288 F.3d 478, 487–88, 490 (2d Cir. 2002). Even if factors outside the statute's text merited consideration, these non-textual concerns do not apply to the procedural posture here. Perez attempted to bring his ADA claim in the IDEA forum, only to have that claim dismissed at the behest of the school district. He also fully resolved his IDEA claim in a settlement with the district. Under such circumstances, it cannot be said that he used his damage claim to evade IDEA review. Perez pursued that IDEA administrative process until he was offered the relief he was seeking—this was not an effort to prematurely interrupt the administrative process. *See McKart v. United States*, 395 U.S. 185, 193 (1969). He then pursued his ADA claim for the additional relief that was not available under the IDEA. This is precisely as the statute, according to its language, was intended to work.

Students like Perez may suffer dual deprivations. According to *Fry*, they can seek relief for both harms by bringing a FAPE claim challenging an IEP and an ADA claim challenging "discriminatory access to public institutions," even when "[t]he same conduct might violate [both] statutes." *Fry*, 137 S. Ct. at 756. Importantly, the complaint "seeking redress for those other harms [such as the refusal to make an accommodation under

the ADA], *independent of any FAPE denial*, is not subject to § 1415(l)'s exhaustion rule." *Id.* at 754–55 (emphasis added). Under Section 1415(l)'s language and *Fry*'s guidance, the IDEA claim requires exhaustion, and the independent ADA claim should not.

In decisions contrary to Section 1415(l)'s language, however, courts are requiring exhaustion prior to litigation of overlapping but independent discrimination claims, even after students have satisfactorily resolved their FAPE claims. *See* Pet. App. 8a; *McMillen*, 939 F.3d at 643, 646–48 (dismissing non-IDEA damage claims for failure to exhaust despite the family's agreement to leave the school district). In such cases, where the student has resolved a FAPE claim—at any stage in the IDEA administrative process—the student has fulfilled the IDEA obligation to resolve the special education claim in collaboration with school officials. *Muskrat*, 715 F.3d at 778. Having done so, the student should have a right unfettered by any IDEA exhaustion requirement to bring a non-IDEA claim seeking damages. For Perez, once he settled his FAPE claim, he could not get any other relief from the IDEA process. At that point, his ADA claim could not possibly be one "seeking relief available under [the IDEA]." Rather than reach this inescapable conclusion, the Sixth Circuit determined that, even in the face of a settlement agreement that preserved his ADA claims, by settling his IDEA claims, Perez "traded off" his right to bring his ADA claim. Pet. App. 9a. This is not the type of tradeoff that the student can or should be asked to make under Section 1415(l).

The Court should correct this dramatic departure from the statute's command. Without such clarification, courts will continue to require exhaustion just because the suit "arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education." *See Fry*, 137 S. Ct. at 754. Here, the Sixth Circuit required IDEA exhaustion because Perez's ADA claim for damages touched on his "core complaint" of the denial of an appropriate education. Pet. App. 8a-9a.[8] Such a reading interprets Section 1415(l) language not as " 'a civil action seeking relief that is also available under IDEA' . . . but instead, [as] involving a situation that hypothetically might be addressed in some way under the IDEA." Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 Tex. J. C.L. & C.R. 1, 25 (2010). Rather than remaining faithful to the statutory language, the decision below treats Section 1415(l) as a "quasi-preemption provision, requiring exhaustion for any case that falls within the general 'field' of educating disabled students," *see generally Fry*, 137 S. Ct. 752 n.3 (citation omitted), and returns us to the days before Section 1415(l)'s enactment.

[8] This analysis is notably similar to the Sixth Circuit's analysis before this Court's *Fry* decision. *See Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 627 (6th Cir. 2015) (requiring IDEA exhaustion to bring non-IDEA damage action challenging denial of right to use service dog at school because claim related to denial of FAPE), *vacated and remanded*, *Fry*, 137 S. Ct. 743.

CONCLUSION

For these reasons, *amici curiae* respectfully urge this Court to grant the petition for a writ of certiorari.

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Respectfully submitted,

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