No. 21-887

In the Supreme Court of the United States

MIGUEL LUNA PEREZ, PETITIONER

v.

STURGIS PUBLIC SCHOOLS, ET AL.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

The brief in opposition explained that this case is not certworthy because it is foreclosed by *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022); it implicates no split on the first question presented, which rarely arises and is of little practical importance anyway; and everyone concedes that there is no split on the second question presented, which this Court has recently denied. The government's invitation brief does little more than rehash the Petition's unpersuasive points.

1. The government tries to sidestep *Cummings* by claiming Petitioner can change his request for damages from emotional distress to lost income based on the phrase "compensatory damages" in the complaint. But Petitioner told both this Court and the Sixth Circuit that emotional-distress damages were all he sought. And now he says in his reply that he wants to amend his complaint. Too late. Petitioner disclaimed anything but emotional-distress damages, and the Sixth Circuit had no opportunity to conduct its futility analysis based on a request for lost-income damages. Even assuming the Americans with Disabilities Act (ADA) permits lost-income damages, administrative findings about Petitioner's education would be particularly valuable for assessing Petitioner's future earning potential. And any further relief he might have been awarded in administrative proceedings would mitigate his future lost income.

2. The government *agrees* that the second question presented, the issue left open in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752-53 n.4 (2017), is not independently certworthy. The government concedes that there is no longer any circuit split after

D.D. ex rel. Ingram v. Los Angeles Unified School District, 18 F.4th 1043, 1056-57 (9th Cir. 2021) (en banc).

3. The government's discussion of the first question presented confirms there is no certworthy circuit split. For starters, the government silently downgrades the split from 4–1 to 3–1, removing the First Circuit. The government presumably recognized that the First Circuit applies a conjunctive futility test that Petitioner cannot meet given the Sixth Circuit's holding that exhaustion would have produced a record that would aid judicial review. Pet. App. 13a-14a. There's also no conflict with Third Circuit for the same reason. And the Ninth Circuit case turns not on futility but on the first question presented, which isn't certworthy. Finally, the government doesn't confront the reasons Petitioner's case likely would have come out the same way in the Tenth Circuit, too.

4. The government doesn't make any importance argument, invoke its expertise, or even identify any particular interest in this case. It doesn't claim that this issue comes up with any frequency or explain why future litigants won't simply negotiate around whatever rule this Court might announce on the merits.

In sum, the government offers no persuasive arguments that this case is certworthy. The Court should deny review.

ARGUMENT

I. Petitioner's litigation choices make this case a particularly poor vehicle after *Cummings*.

As Respondents explained (at 10), *Cummings* makes this case a poor vehicle because it forecloses emotional-distress damages under the ADA. The government doesn't dispute that Petitioner cannot

recover emotional-distress damages. Instead, it claims that Petitioner's case can proceed because he also seeks "four years of lost income" since his inadequate education left "him 'years behind where he should have been.'" Gov't Br. 19 (quoting Pet. App. 6a). But Petitioner's filings tell a different story. Petitioner told this Court that "the specific remedy [he] requests" is "money damages for emotional distress." Pet. 30 (quoting *Fry*, 137 S. Ct. at 752 n.4). Indeed, in the court of appeals, Petitioner *disclaimed* other damages, stating that he "seeks *only* damages for a non-educational injury, emotional distress suffered due to the denial of effective communication." Pet'r CA6 Reply 8 (emphasis added); *accord id.* at 25 ("emotional distress damages" are "*[t]he* relief that [Petitioner] seeks" (emphasis added)). The court took him at his word. *See* Pet. App. 2a, 7a.

That choice makes this case a particularly poor vehicle for both questions presented. As the government acknowledges (at 10), one of the reasons the court of appeals rejected Petitioner's arguments was that exhaustion would not have been futile, even if the IDEA includes a futility exception, given the availability of relief and utility of an administrative record. Although it was Petitioner's burden to prove futility, *see, e.g.*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002), his briefing choices left the court no opportunity to consider how a request for lost-income damages affects the futility analysis. If anything, an administrative record is even more critical for lost-income damages, which must turn in part on the very educational harm and delay Petitioner disclaimed in asserting only emotional-distress damages. *See* Pet'r CA6 Reply 8.

Beyond that, it makes little sense for this Court to decide whether a request for damages that "are not available under the IDEA" excuses exhaustion, Pet. i, when Petitioner has not established that those damages are available under the ADA, either. *See generally Ambrose v. New England Ass'n of Schs. & Colls., Inc.*, 252 F.3d 488, 499 (1st Cir. 2001) ("courts consistently have rejected students' claims of 'educational malpractice' against schools"); *Ross v. Creighton Univ.*, 957 F.2d 410, 414-16 & n.2 (7th Cir. 1992) (collecting decisions from 11 states).

II. The government concedes that the second question presented is not certworthy.

The government admits that the second question presented—whether 20 U.S.C. § 1415(*l*)'s exhaustion requirement applies to an action seeking money damages unavailable under the IDEA—does not "implicate[] a division of authority independently warranting certiorari." Gov't Br. 22. Indeed, the government acknowledges that the en banc Ninth Circuit's decision in *D.D.* "aligned [that court] with its sister circuits," eliminating any circuit split. *Id.* The government also implicitly acknowledges that this Court has recently denied cert on this question. Gov't Br. 21 (citing *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2803 (2020)). Nothing in this case changes the calculus. Opp. 11-12. As the government concedes, the second question presented is "not independently 'certworthy.'" Gov't Br. 22 (citation omitted).

In any event, the government is wrong on the merits for the reasons Respondents explained (at 12-13). "[I]f a request for damages could excuse the failure to exhaust, then any student seeking money damages

could skip the administrative process," and § 1415(*l*) "would have no force." Pet. App. 13a. This Court's decision in *Fry* likewise would become a dead letter, because a student complaining of educational injury could head to court seeking damages no matter the gravamen of the complaint.

III. Review is not warranted to address whether § 1415(*l*) includes a futility exception.

The government does little more than rehash Petitioner's arguments without responding to the brief in opposition. The government furtively downgrades the alleged 4–1 split to 3–1 and fails to explain why the first question presented is recurring or important (or why the United States has any interest in this case beyond responding to the Court's invitation, *see* Gov't Br. 1). But there isn't a split, and this case wouldn't have come out differently in the other circuits Petitioner or the government cites. Nor would this Court's intervention make any practical difference. The issue rarely arises, and when it does, school districts could require releases of non-IDEA claims in their settlement offers, while families, for their part, could require waiver of exhaustion defenses. Either way, taking up this poor vehicle will at most allow the Court to change a default rule that parties will simply settle around in the rare cases that raise it. What's more, the court of appeals was correct on the merits.

A. This case does not implicate any circuit split over whether § 1415(*l*) contains *some* kind of a futility exception.

The government first repeats the Petition's argument that "the Sixth Circuit's no-futility holding conflicts with the uniform view of its sister circuits." Gov't Br. 14. But the government fails to (1) identify

any decisions in that consensus; (2) note whether any particular decision *held* that exhaustion was futile (rather than just taking a "view"); or (3) cite any such case decided after *Ross v. Blake*, 578 U.S. 632 (2016). As Respondents explained (at 15-17), nearly all the decisions Petitioner cited found that administrative exhaustion was *not* futile. The Sixth Circuit may well be the first to revisit these issues after *Ross* and *Fry*.

Moreover, this case doesn't implicate any supposed split about the availability of a futility exception in *some* cases. The question here is whether the courts of appeals disagree in circumstances like *Petitioner's*. That's why the government, like Petitioner, quickly pivots to a purported split about futility in the settlement context. *See* Gov't Br. 14-15.

B. There is no certworthy circuit split over whether § 1415(*l*) excuses exhaustion when plaintiffs settle their IDEA claims.

The government rehashes Petitioner's claim that the Sixth Circuit's decision conflicts with decisions of the Third, Ninth, and Tenth Circuits—while dropping the First Circuit, the only court of appeals to address the issue after *Ross v. Blake*, *see* Gov't Br. 16-18. But there is no split (much less a ripe one) over the availability of a futility exception in circumstances like Petitioner's. The Third Circuit's 1995 decision requires development of an administrative record—just like the First Circuit, which the government has abandoned—and so doesn't conflict with this case, where the Sixth Circuit found that exhaustion would have produced a helpful record. The Ninth Circuit's 1999 decision isn't a futility decision but an overruled decision on the *first* question presented. And there's no reason to think that Petitioner's case would come out

the same way in the Tenth Circuit today. The alleged split is both stale and illusory. It doesn't warrant this Court's review.

1. The government renews Petitioner's contention that the Sixth Circuit's decision conflicts with the Third Circuit's decision in *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995), *abrogated on other grounds*, *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007). The government claims that developing an administrative record was merely a "second rationale for excusing exhaustion," alongside the impossibility of exhausting after settlement. Gov't Br. 17 (citation omitted). But the Third Circuit never said that *either* rationale was sufficient *alone*. That makes sense: As Respondents explained (at 22-23), *W.B. Matula* relied (67 F.3d at 496-97) on the conjunctive two-factor test from *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865, 869-70 (3d Cir. 1990). Both showings are required. And that means *W.B. Matula* doesn't conflict with the Sixth Circuit's decision here, which explained that exhaustion would have produced "an administrative record [that] would have improved the accuracy and efficiency of judicial proceedings." Pet. App. 13a.

The government probably dropped the First Circuit from the purported split for this same reason. In *Doucette v. Georgetown Public Schools*, 936 F.3d 16, 31 (1st Cir. 2019) (citations omitted; emphasis added), the court explained that "[f]utility applies when (1) the plaintiff's injuries are not redressable through the administrative process *and* (2) the administrative process would provide negligible benefit to the adjudicating court." That's a conjunctive, not disjunctive test, and the government doesn't claim Petitioner can satisfy it.

2. The government's claim that *Witte v. Clark County School District*, 197 F.3d 1271, 1275 (9th Cir. 1999), "rests on futility," Gov't Br. 18, also fails, for the reasons Respondents have already explained (at 18-20). The government's cherry-picked quotations ignore the en banc Ninth Circuit's recent statement that it was "leav[ing] for another day whether a different settlement agreement—for example, one that gave the student the services allegedly denied, or in which the school district concedes that it has not provided a FAPE—can render further exhaustion futile." *D.D.*, 18 F.4th at 1058. That's the first question presented, *left undecided*.

D.D.'s statement makes sense, because *Witte* isn't an exhaustion case. Indeed, that's why, as the government concedes, "*Witte* did not use the word 'futility.'" Gov't Br. 18. Instead, *Witte* excused exhaustion based on its now-overruled holding on the *first* question presented here—that "Plaintiff seeks only monetary damages," and "monetary damages are not available under [the IDEA]." 197 F.3d at 1275; *accord D.D.*, 18 F.4th at 1058 n.7 (*Witte* "excused exhaustion where a plaintiff sought only damages for past physical injuries"). That's not a futility issue, and it's not even the law any longer in the Ninth Circuit. In *Payne v. Peninsula School District*, 653 F.3d 863, 872-73, 880-81 (9th Cir. 2011), the court relied on *Witte* to hold that a claim for damages unavailable under the IDEA excused exhaustion. But as the government concedes (at 22) and Respondents explained (at 11), *D.D.* narrowly reinterpreted *Payne*, eliminating that reading and thus any circuit disagreement. The question is no more certworthy today than it was when there was a split. *See supra* pp. 2-4.

3. Finally, the government fails to confront the several reasons Petitioner cannot show that his case would have come out differently in the Tenth Circuit under *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013).

First, *Muskrat* never suggested that further efforts to exhaust could have produced a helpful record, so it's possible that the Tenth Circuit would apply the second prong of the First and Third Circuit tests in a future case. Before suing for "damages for the alleged continuing medical consequences" of timeouts, the plaintiffs "worked through administrative channels to obtain the relief they sought," modification of the individualized education program (IEP) to prevent future timeouts. *Id.* at 785-86. The problem was that the school refused to abide by the IEP and continued to place the student in timeouts. *Id.* at 780-81. In other words, there was already a completed administrative process, and further exhaustion would not have helped the court determine whether the school wrongly refused to abide by the IEP. Here, in contrast, the Sixth Circuit found that further exhaustion would have developed "an administrative record [that] would have improved the accuracy and efficiency of judicial proceedings" and could even have "aided [Petitioner's] follow-on suit under the ADA." Pet. App. 13a-14a.

Second, *Muskrat* pre-dates three other decisions that could cause the Tenth Circuit to reassess or at least clarify its approach. Start with *Fry*, which requires exhaustion only when the gravamen of the complaint is denial of a FAPE. But it's far from clear that in *Muskrat* the gravamen was the denial of a FAPE—so exhaustion might be excused anyway. Then there's *Ross v. Blake*, which held that courts

cannot imply judicially created exceptions to statutory exhaustion requirements. 578 U.S. at 638-39.

Finally, in *A.F. ex rel. Christine B. v. Española Public Schools*, 801 F.3d 1245, 1248 (10th Cir. 2015), then-Judge Gorsuch held that a Plaintiff "cannot bring an IDEA lawsuit in federal court after choosing to settle her IDEA claims" and thus that "an ADA … lawsuit seeking the same relief is also barred." That's this case. To be sure, the government tries (at 17) to minimize *A.F.* by noting that the plaintiff forfeited a futility argument. But the point is this: if *Muskrat* had laid down a categorical rule in the Tenth Circuit that settling IDEA claims always excuses exhaustion as futile, as the government implies, then *A.F.* would be wrongly decided. Given *Fry*, *Ross*, and *A.F.*—not to mention *Doucette* and *W.B. Matula*—the Tenth Circuit is likely to take *Doucette*'s conjunctive approach if not get rid of futility altogether under *Ross v. Blake*, just like the Sixth Circuit here.

C. The futility question does not warrant this Court's intervention.

The most notable thing about the government's importance argument is that there isn't one. The government doesn't explain why the questions presented warrant this Court's intervention, even though the government knows how to do that in IDEA cases. Compare, for instance, the government's invitation brief in *Fry*, which devoted a whole section to importance. *See* Gov't CVSG Br. 22-23, *Fry*, No. 15-497. But the government's omission isn't surprising: the first question presented—the only question the government claims is independently certworthy—rarely arises. Even on the government's view, the question

has reached other courts of appeals only three times *since 1995*.

What's more, it's unclear why this Court's intervention would make any practical difference. Nothing prevents a family offered an IDEA settlement from countering that the school district should waive the exhaustion requirement in future non-IDEA litigation, or from countering with a global settlement offer resolving those non-IDEA claims. And outside the Sixth Circuit, nothing prevents a school district from offering an IDEA settlement that also expressly releases non-IDEA claims. In short, it's not clear that reversal would change anything in future cases.

D. The Sixth Circuit's decision is correct.

The government's merits argument (at 12-14) rests almost entirely on the notion that *Honig v. Doe*, 484 U.S. 305, 327 (1988), held that the IDEA contains a futility requirement, which Congress ratified. Respondents (at 30-34) and the Sixth Circuit (Pet. App. 10a-11a) already explained why those arguments are wrong. *Honig* didn't interpret § 1415(*l*), the provision here, but merely made comments about *the possibility* that a *school* might be able "to demonstrate the futility or inadequacy of administrative review" under a different provision in "exigent" circumstances. 484 U.S. at 327.

Honig doesn't control. "First of all, the reenactment canon does not override clear statutory language," *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022), like § 1415(*l*)'s. Second, "[d]icta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning." *Id.* Here, *Honig* "did not even purport to interpret the text" of § 1415(*l*), *id.*, which would

require a futility exception "beyond anything *Honig* … might have recognized," Pet. App. 11a. Whatever dicta *Honig* may contain about exhaustion, § 1415(*l*) contained no futility exception when it was written, and it didn't pick one up through ratification just because Congress did "[n]othing." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966-67 (2017). The Sixth Circuit got it right.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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