No. 25-1051

IN THE

Supreme Court of the United States

DEREK S., INDIVIDUALLY AND AS GUARDIAN AD LITEM OF HIS MINOR CHILD, J. S., *et ux.*,

Petitioners,

v.

BALLSTON SPA CENTRAL SCHOOL DISTRICT, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit correctly held that the IDEA's administrative exhaustion requirement applies when a plaintiff seeks mandatory injunctive relief compelling a school district to procure, fund, staff, and deliver Applied Behavior Analysis therapy as part of a student's Individualized Education Program—as opposed to the distinct question presented by the cases from other circuits, which involved only a district's refusal to permit a privately-funded ABA therapist already retained by the family to accompany a student on school property.

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STATEMENT OF THE CASE

Plaintiffs-Petitioners, Derek S. and Ashley T.S. (collectively "Petitioners"), are the parents of J.S., a minor diagnosed with Autism Spectrum Disorder ("ASD"). PA-027 ¶ 11[2]. J.S. currently is in fourth grade and attends school at Defendant-Respondent Ballston Spa Central School District ("Respondents").[3]

In February of 2019, upon J.S.'s initial certification as eligible for special education services, Respondents developed an Individualized Education Program ("IEP") for J.S, which did not specifically recommend Applied Behavioral Analysis therapy ("ABA"). PA-032 ¶ 33. Pursuant to his IEP, J.S. attended Newmeadow preschool from approximately 2019-2021, where he happened to

1. Citations to "Pet. App." are citations to the Petitioners' Appendix attached to their Petition for a Writ of Certiorari.

2. Citations to "PA" are citations to the Petitioners' Appendix filed with the United States Court of Appeals for the Second Circuit.

3. Petitioners also named "Ballston Spa Board of Education" as a party.

receive services that integrated techniques based on principals of ABA. PA-032 ¶ 36. Following a meeting held before Respondents' Committee on Special Education ("CSE"), Respondents decided dedicated ABA would continue to not be recommended on J.S.'s IEP for the 2021-2022 school year. PA-033 ¶ 42. None of the subsequent IEP's developed for J.S., recommended dedicated ABA, opting to implement other methodologies, PA-033 ¶ 43, a determination the CSE has made each year in the exercise of its professional judgment. Pet. App. 35a–36a. As of the date of this submission, Petitioners have not used all of the procedures available to them under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq. ("IDEA") to challenge J.S.'s IEP.

In this lawsuit, Petitioners allege Respondents discriminated against J.S. by failing to provide him with services, programs, and/or activities they believe are necessary for J.S. to have meaningful access to education—namely ABA therapy—in violation of Title II of the Americans with Disabilities Act of 1990 ("Title II") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). PA-037 ¶ 62; PA-039 ¶ 77.

On June 12, 2024, Petitioners commenced this action under Title II and Section 504, seeking only compensatory damages for alleged past harm. Pet. App. 31a. The complaint did not invoke the IDEA or seek modification of J.S.'s IEP.

A. The Relief Petitioners Sought.

On January 17, 2025—more than six months after filing suit—Petitioners filed an Order to Show Cause

("OTSC") seeking a mandatory preliminary injunction. The OTSC asked the Court to compel Respondents to:

> "change the education program offered to J.S. to include a structured ABA program [] closely supervised by a Board-Certified Behavior Analyst[4] [], including a 1:1 aide who is trained and supervised in ABA therapy to help J.S. make progress while this action is pending."

Pet. App. 36a.

Respondent's position in the proceedings below was unambiguous: complying with that order "would require it 'to create, staff, and implement a highly specialized, in-District [ABA] program, just for [J.S.].'" Pet. App. 36a. Petitioners did not dispute that characterization. The OTSC did not demand permission to bring a privately-retained therapist into school. It was a court order directing Respondents to change what it teaches, how it teaches, and who delivers that instruction—the substance of an IEP.

B. Proceedings Below.

On March 6, 2025, the District Court denied the OTSC. The court looked past the Title II and Section 504 labels in Petitioners' papers and assessed the substance of what was sought, finding "despite lacking a direct reference to a FAPE, even a passing review of the Complaint and the Motion reveals that the [Petitioners'] central concern is the adequacy of the educational services

4. Hereinafter "BCBA".

provided through J.S.'s IEP." Pet. App. 43a. The court further found it "difficult to imagine J.S. making the same claim against another public institution," because "J.S.'s alleged right to ABA therapy in the classroom and other educational services simply would not arise in other settings." *Id.* The injunction sought "IDEA-style relief" that required exhaustion of administrative remedies Petitioners had never pursued. Pet. App. 8a. It expressly preserved Petitioners' damages claims for continued litigation: "the Court merely finds that the requested preliminary injunction is barred; the claims set forth in the Complaint itself, which seek only compensatory damages not provided for in the IDEA, remain live." Pet. App. 50a.

On May 13, 2025, the District Court denied reconsideration, finding Petitioners had forfeited their newly-raised exhaustion exceptions and those exceptions were meritless. Pet. App. 18a.

On December 11, 2025, the Second Circuit summarily affirmed, holding Petitioners were "challenging [Respondents'] FAPE determination" and the injunction they sought was available under the IDEA, thereby making exhaustion a prerequisite. Pet. App. 8a. It observed "the only reason that Plaintiffs could plausibly expect such services from the School is that their complaint clearly concerns J.S.'s educational needs." *Id.* The court noted the proper path was "to follow the well-worn path of the IDEA—which enlists specialized officials who are 'experienced in addressing exactly the issues [J.S.] raises'"—rather than to "entangle a federal district court in delicate and difficult decisions regarding the education of a disabled child." Pet. App. 9a.

REASONS FOR DENYING THE PETITION

Certiorari is appropriate only when "there are special and important reasons" for this Court's review. Sup. Ct. R. 10. The circuit conflict Petitioners assert is illusory, resting on a fundamental mischaracterization of the cases they cite. The question before the District Court and the Second Circuit was whether parents may bypass the administrative process Congress designed to resolve disputes such as this and obtain a federal court injunction compelling modification of a child's IEP without the benefit of an impartial hearing, expert administrative review, or a developed factual record. The answer, under this Court's precedents and the IDEA's plain text, is unquestionably no.

I. THERE IS NO GENUINE CIRCUIT CONFLICT WARRANTING THIS COURT'S REVIEW.

Petitioners argue the Second Circuit's decision conflicts with the Fourth Circuit's decision in *Z.W. ex rel. Warner v. Horry Cty. Sch. Dist.*, 68 F.4th 915 (4th Cir. 2023), and the Ninth Circuit's decision in *Hawai'i Disability Rights Ctr. v. Kishimoto*, 122 F.4th 353 (9th Cir. 2024). That claim of conflict cannot withstand examination of what the plaintiffs in those cases sought. A circuit split requires courts to reach conflicting conclusions on the same question. The courts here were presented with different questions.

A. The Alleged Split Rests on a False Factual Equivalence.

The question this Court must ask is whether, on materially identical facts, different circuits have reached

different legal conclusions. *See Braxton v. U.S.*, 500 U.S. 344, 347 (1991) (a "principal purpose" of the Supreme Court's certiorari jurisdiction is to resolve circuit splits). They have not.

The rule that appellate courts apply to evaluate whether a purported circuit split is genuine is the same rule that governs the exhaustion inquiry itself: look to the substance, not the label. *See Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 165 (2017). When the substance of each case is examined, the supposed conflict dissolves.

B. *Z.W.* and *Kishimoto* Involved "Permit/Allow" Claims; This Case Involves a "Provide" Claim.

Petitioners aver the Fourth and Ninth Circuits "disagree with the Second Circuit that a request for ABA therapy in school for an autistic child is subject to the IDEA exhaustion requirement." Pet. 6 (citing *Z.W.* and *Kishimoto*). In reality, those courts do not disagree—they were presented with materially different questions, arising from materially different facts, and answered those questions consistent with the Second Circuit's decision here.

In *Z.W.*, the Fourth Circuit addressed a district's refusal to allow a child's privately-supplied and privately-funded ABA therapist to accompany him at school. *Z.W.*, 68 F.4th at 918–19. *Z.W.*'s family's private insurance covered the cost of the ABA therapist; they asked the school at least four times to allow the therapist to be present "at no cost to the school district." *Id.* at 918. The school refused access. The Fourth Circuit described the "essence" of the dispute as "its refusal to permit [student]

to bring his privately supplied and funded ABA therapist to school with him." *Id*. at 920. The school in *Z.W.* was not being asked to provide anything—only to permit or allow someone else to provide a service during school.

In *Kishimoto*, the Ninth Circuit addressed a statewide challenge brought by the Hawai'i Disability Rights Center to policies of the Hawaii Departments of Education and Human Services ("DOE") that categorically banned all privately-arranged ABA providers from entering school campuses. *Kishimoto*, 122 F.4th at 359. The DOE had an express written policy stating ABA services "are to be provided by DOE and/or DOE contracted providers and may not be provided by a parent or parent's representative." *Id*. at 359. As in *Z.W.*, the defendant in *Kishimoto* was not being asked to provide anything; it was being challenged for barring outside providers from entering schools.

The relief sought in this case is distinguishable from the relief sought in *Z.W.* and *Kishimoto*. Petitioner's OTSC asked the District Court to compel Respondents to:

> "change the educational program offered to J.S. to include a structured ABA program [] closely supervised by a [BCBA] [], including a 1:1 aide who is trained and supervised in ABA therapy."

Pet. App. 31a. Petitioners did not ask the District Court to issue an order "[a]llowing an ABA therapist to provide services [to J.S.] on-site". Pet. 5. Rather, Petitioners asked the court to order Respondents to modify J.S.'s IEP to include ABA as part of his education program. They ask Respondent to change what it offers, not to

stop obstructing what the family has arranged. The three cases present distinct situations, not a circuit split. The Second Circuit's holding that compelled IEP modification requires IDEA exhaustion does not conflict with the Fourth and Ninth Circuits' holdings that a school may not categorically bar a student's privately-arranged accommodation from its premises.

The factual distinction maps directly onto the legal analysis under *Fry*. In "permit/allow" cases, the student's IEP is left intact; the school is simply asked to stop barring a privately-funded service from its campus. No IEP modification is sought, no IEP is implicated, and the relief would not require the school to employ, supervise, or fund anyone. That claim bears no necessary connection to a FAPE determination and can stand on Title II and Section 504 alone. In a "provide" case like this one, by contrast, the relief sought—compelling the school to hire a BCBA, assign a trained 1:1 aide, and implement a structured ABA program—cannot be granted without directing what goes into J.S.'s IEP. That is IDEA relief. "[T]he IDEA's exhaustion requirement applies when a plaintiff seeks relief that is 'available' under the IDEA." *Luna Perez*, 598 U.S. at 147. The relief Petitioners sought is available under the IDEA. Exhaustion was therefore required.

Petitioners' shifting language reveals they understand this distinction and are attempting to paper over it. When describing their case to this Court, Petitioners abandon the language of their OTSC and instead borrow the "permit" and "accompany" language of *Z.W.* and *Kishimoto*. Petitioners advise this Court they seek "to compel [Respondents] to allow an ABA therapist to

provide services on-site." Pet. 5. They describe their request as seeking to have "an RBT to accompany their son to school." Pet. 17. But their OTSC asked the court to order Respondents to "change the educational program offered to J.S. to include a structured ABA program." Pet. App. 31a. It was grounded in an "Independent Educational Neuropsychological Evaluation" that recommended specific changes to J.S.'s educational programming. *Id.* J.S.'s mother's own sworn declaration requested "that a structured ABA program be incorporated as part of J.S.'s educational program." PA 92 ¶ 64.

The contrast between how Petitioners described their request to the District Court and how they describe it to this Court is not a matter of phrasing. It reflects Petitioners' recognition that the "permit/allow" framing is what *Z.W.* and *Kishimoto* considered, and this Court will be more likely to grant certiorari if the cases appear substantially similar. They are not.

The record further confirms the distinction. After preschool, Petitioners spent years at CSE meetings trying to get Respondents to fund and provide ABA to J.S. A family seeking to compel the school to fund and deliver a specific service attends years of CSE meetings; a family seeking to "permit" a private therapist into the building does not.

C. The *Fry* Visitor Hypothetical Confirms the Distinction.

The *Fry* hypotheticals further illustrate why *Z.W.* and *Kishimoto* are factually distinguishable, and why this Court's analytical framework supports the Second Circuit's conclusion.

The visitor hypothetical in *Fry* asks whether a non-student visitor could pursue the same claim against the school. *Fry*, 580 U.S. at 171. In *Z.W.*, the answer was yes, a non-student adult with autism with a privately-retained ABA therapist, who visits a school that refuses to allow ABA therapists inside, could pursue the same access claim.[5] The claim is about building access, not a particular student's education plan.

In this case, the hypothetical produces no plausible analog. No non-student visitor to a school has any basis to demand the school procure and fund a structured ABA program for them, assign a trained 1:1 aide, arrange BCBA supervision, and incorporate all of this into what is effectively an IEP, during a visit to the building. The school has no obligation to provide therapeutic services to visitors. The claim only makes sense for a student enrolled in the school and receiving educational programming through an IEP. That is exactly what *Fry* identifies as the marker of a FAPE claim. 580 U.S. at 171–73.

Petitioners argue that people with autism are accompanied by ABA therapists in their daily lives, just as people with physical disabilities are accompanied by service animals. Pet. 17–18. This assertion does not survive scrutiny. A service animal is a constant-companion

5. This conclusion may appear reasonable, the underlying premise is implausible. It incorrectly assumes: an adult with autism will receive ABA when, "ABA services are predominantly provided to children", *Kishimoto*, 122 F.4th at 370 and, a public school student would receive "a non-student visitor (say, a friend, sibling, or other relative)", Pet. 9, during the school day when, in reality, students do not receive such "visitors" during their school day.

device that follows its owner everywhere. ABA is a structured, clinic-derived behavioral intervention that is administered in specific settings by trained providers pursuant to individualized protocols. It is not an extension of the person, like a service dog or a wheelchair. More fundamentally, demanding ABA therapy in school requires the school to employ or contract with a trained professional to administer it, to assign a 1:1 aide, and to arrange BCBA supervision—obligations that are indistinguishable from IEP content modification. A service animal needs no school employee to operate it. The comparison proves too much: accepting it would mean any therapeutic service recommended by a clinician becomes an "access accommodation" immune from IDEA exhaustion, eliminating the exhaustion requirement for nearly all special education disputes.

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS.

Even if the Court were to find a genuine circuit conflict—which it should not—the Second Circuit's decision is correct and consistent with both *Fry* and *Luna Perez*.

A. The IDEA Provides the Exclusive Mechanism for Modifying a Student's IEP.

The IDEA states that, as a condition of accepting federal funding, schools must provide a FAPE to all children with disabilities.[6] 20 U.S.C. §§ 1400(c), 1401(18).

6. FAPE "means, *inter alia*, 'special education and related services that . . . have been provided at public expense, under

The IDEA emphasizes special education and related services "designed to meet a child's unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected . . . and to assess and assure the effectiveness of efforts to educate children with disabilities." *Id.*

When a student in New York is eligible for special education services, the IDEA calls for the creation of an IEP. *Harden v. Buffalo Pub. Sch. Dist.*, 2018 WL 3537070, at *2 (W.D.N.Y. July 23, 2018) (stating "[t]he IDEA calls for an [IEP] to function as the primary vehicle for providing each child with the promised FAPE"). The IEP "is a comprehensive statement of the educational needs of a child, containing the specialized instruction and related services designed to meet this child's unique needs." *Id.*

Modifying a student's IEP falls solely within the purview of the IDEA and parents who wish to challenge a district's determinations regarding the contents of their child's IEP must do so by initiating a due process challenge before an Independent Hearing Officer ("IHO"). 20 U.S.C. § 1415(f); N.Y. Educ. Law § 4404(1)(a). The IHO conducts an impartial hearing and issues a decision; that decision may be appealed to the State Review Officer ("SRO"), who independently reviews the record and renders a decision subject to challenge in state or federal court. 20 U.S.C. § 1415(g)(1); N.Y. Educ. Law § 4404(2); 8 NYCRR § 200.5(k), 279.12(a);

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public supervision and direction, and without charge'; . . . and that 'include an appropriate preschool, elementary school, or secondary school education in the State involved.'" *A.R. v Conn. State Bd. of Educ.*, 5 F.4th 155, 157 (2d Cir. 2021) (quoting 20 U.S.C. § 1401(9)).

Judicial review of state administrative decisions is strictly limited by the IDEA. *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 239 (2d Cir. 2012). In most IDEA cases, the questions presented to the court are whether the school complied with the procedures set forth in the IDEA and whether the challenged IEP is reasonably calculated to enable the child to receive educational benefits. *R.G. v. New York City Dep't of Educ.*, 980 F. Supp. 2d 345, 359 (E.D.N.Y. 2013) (citing *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 83 n. 3 (2d Cir. 2005)). Courts have determined that the questions of whether an IEP adequately addresses a student's behaviors and whether strategies for dealing with those behaviors are appropriate are "precisely the type[s] of issues upon which the IDEA requires deference to the expertise of the administrative officers." *Id.* (citation omitted). If a court determines the school has not complied with the IDEA, it is authorized to "grant such relief as the court determines is appropriate" based on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C).

While the IDEA provides for a federal cause of action to enforce a disabled student's right to a FAPE, it imposes a requirement that plaintiffs first exhaust their administrative remedies. *S.W. v. Warren*, 528 F. Supp. 2d 282, 292 (S.D.N.Y. 2015); *see Harden*, 2018 WL 3537070, at *2 (finding that where "a dispute arises regarding any aspect of a child's FAPE, the IDEA contains administrative procedures through which parents may resolve those disputes"); *Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519, 530 (2d Cir. 2020) (holding the IDEA requires plaintiffs to exhaust their administrative remedies before filing an action in federal court) (citing 20 U.S.C. § 1415(i)(2)(A)). The "[f]ailure to exhaust" IDEA remedies "deprives the court of subject

matter jurisdiction." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 245 (2d Cir. 2008).

This Court adopted a narrower view of the IDEA's exhaustion requirement in *Luna Perez v. Sturgis Public Schools,* 598 U.S. 142, 143 S.Ct. 859, 215 L.Ed.2d 95 (2023), holding the administrative exhaustion requirement found in 20 U.S.C. § 1415(l) applies only to claims that seek a remedy available under the IDEA. 598 U.S. at 146–48. Therefore, claims seeking "a form of relief . . . [the] IDEA does not provide," including compensatory and punitive damages, need not be exhausted, even if such claims seek to redress the denial of a FAPE. *Id.* at 148. Mindful of *Luna Perez*, Petitioners strategically framed this lawsuit as one seeking money damages only under Title II and Section 504. *See* PA-041 ¶ 85

However, Plaintiffs cannot circumvent the administrative exhaustion requirement by artful pleading. *Fry*, 580 U.S. at 165.

B. Title II and Section 504 Address Access to Education, Not the Content of an IEP.

The standards set forth in both Title II and Section 504 are generally the same. *McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) (holding claims brought under Title II and Section 504 are considered together, since the standards adopted by the statutes are nearly identical). To establish a claim under Title II or Section 504 for discrimination in public services, a plaintiff must demonstrate (1) he is a qualified individual with a disability, (2) the defendant is subject to the statute, and (3) he was denied the opportunity to participate in

or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant because of his disability. *GLD by GD v. City of N.Y.*, 2020 WL 5076824, at *2 (S.D.N.Y. Aug. 27, 2020); *see Monterroso v. City of New York*, 2024 WL 360816, at *3 (S.D.N.Y. Jan. 31, 2024). This Court held in *A.J.T. v. Osseo Area Schools, Indep. Sch. Distr. No. 279*, 605 U.S. 335, 145 S. Ct. 1647 (2025), that schoolchildren bringing claims under Title II and Section 504 relating to their education are subject to the same standards that should be applied in other disability discrimination contexts. *A.J.T.*, 605 U.S. at 350–51.

C. Application of the Law to the Facts.

The distinction between access to an educational program and the content of that program is decisive here. The District Court recognized the denial of access to an appropriate educational program on the basis of disability is a Section 504 issue, whereas dissatisfaction with the content of an IEP would fall within the purview of the IDEA. Pet. App. 44a; *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 334 (S.D.N.Y. 2005). Petitioners' OTSC is a pure content dispute. It does not allege J.S. was barred from school, excluded from classes, or denied access to any program or activity. Instead, it demands Respondents change J.S.'s IEP. That is the IDEA's domain, not the domain of Title II or Section 504.

Petitioners' own submissions in this litigation confirm the characterization. Their OTSC argued Respondents discriminated against J.S. by "denying special education services that are necessary and recommended for students

with autism, which deprived [J.S.] of the ability to have any meaningful access to an education." Pet. App. 43a. They argued J.S. needs ABA in school to make educational progress and Respondents had refused to provide and continue to deprive J.S. of access to a meaningful education. The gravamen of these formulations is that the content of J.S.'s IEP is inadequate to provide him a FAPE—not that Respondents excluded him from a program or facility on the basis of disability.

Petitioners strategically avoided using the phrase "free and appropriate public education" in their papers. But the absence of those words does not change the nature of their claim. This Court held in *Fry*, courts look to "the substance, or gravamen, of the plaintiff's complaint," not to "particular labels and terms" or "artful pleading." *Fry*, 580 U.S. at 169, 165. The substance here is a challenge to J.S.'s educational programming—the paradigmatic FAPE claim.

D. The Second Circuit Correctly Applied the Fry Hypotheticals, and Petitioners' Counsel Conceded the Result at Oral Argument.

Under *Fry*, the IDEA's exhaustion requirement applies when the "gravamen" of a complaint "concerns the denial of a FAPE." *Fry*, 580 U.S. at 165. This Court provided several tools in *Fry* to evaluate whether the gravamen of a claim concerns the denial of a FAPE, and the District Court here appropriately used those tools to reach the conclusion Petitioners challenge.

First, a court is instructed to assess the overall purpose and scope of the statutes at issue. "[T]he IDEA,

of course, protects only 'children' . . . and concerns only their schooling." *Id.* (citing § 1412(a)(1)(A)). In contrast, "[Title II] and [Section 504] cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination[.]" *Id.* Based on this consideration, the District Court correctly concluded "[Petitioner'] claims, though brought under Title II and Section 504, directly implicate the right to a FAPE provided under the IDEA." PA-17. It found "[t]he nature of the claims strongly implicates the IDEA's purpose in protecting a student's right to a FAPE. Despite lacking a direct reference to a FAPE, even a passing review of the Complaint and the Motion reveals that the [Petitioners'] central concern is the adequacy of the educational services provided through J.S.'s IEP." *Id.* (citing *Ambrister v. New York Dep't of Educ.*, 2024 WL 3888743, at *8 (S.D.N.Y. Aug. 20, 2024) ("A challenge to the adequacy of a student's IEP or special education program is a textbook example of the types of cases justifying administrative exhaustion") (internal quotation marks omitted)). The District Court also highlighted the fact "J.S. is, of course, a child, and [Petitioners'] claims implicate the specific rights he is afforded in the school setting. Indeed, in seeking the present injunctive relief, [Petitioners] seek to satisfy what they deem to be J.S.'s 'unique needs': an education which incorporates ABA therapies and involves 1:1 instruction with an RBT." *Id.* (citing § 1401(29)). The District Court further relied upon the fact Petitioners brought the OTSC "right after" Respondents allegedly rejected the independent evaluator's recommendations, as well as the fact Petitioners relied heavily upon J.S.'s previous IEPs as evidence of Respondent's alleged culpability. PA-17–18 (citing PA-202–PA-366).

Second, a court is instructed to consider "a pair of hypothetical questions[:] . . . [C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And . . . could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Fry*, 580 U.S. at 170–73. Applying those tools, the Second Circuit and the District Court correctly concluded the gravamen of Petitioners' injunction request is the denial of a FAPE. Pet. App. 7a–9a, 42a–44a. Both Courts correctly "set[] aside any attempts at artful pleading" employed by Plaintiffs and "did not consider only whether the words 'FAPE' or 'IEP'" appear in the complaint. *Id.* at 169-70. This approach is consistent with *Fry*, where this Court noted that in suits brought under statutes other than the IDEA, "the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program." *Id.* at 170. Ultimately, when faced with claims under Title II and Section 504, *Fry* demands a court assess whether the lawsuit most directly implicates the IDEA's guaranty of "individually tailored education services" or Title II and Section 504's "promise of non-discriminatory access to public institutions." *Id.*

As to the first *Fry* hypothetical: it is not possible to imagine the same claim being filed against a library or theater. As the Second Circuit observed directly at oral argument, the claim concerns "treatment that is part of an educational program"—not a physical barrier like a ramp that any member of the public might invoke. 2d OA

at 10:25.[7] No library patron can demand the library hire and supervise a BCBA, assign a 1:1 trained aide, and deliver a structured ABA program. The claim is school-specific because it concerns the content of an educational program, which exists only in the school context.

As to the second hypothetical: Petitioners' own counsel conceded the answer at oral argument. The Second Circuit asked directly: "Could an adult sue [Respondents] demanding ABA therapy?" Counsel responded: "Well, no, because an adult is not receiving, seeking a benefit of an education from [Respondents]." 2d OA at 5:52. That concession is decisive. Counsel then acknowledged the relief sought in the OTSC could be obtained through the IDEA process—and the court replied: "If the answer is yes, then you should have exhausted." 2d OA at 27:18. The Second Circuit pressed counsel repeatedly on why Petitioners had not used the available process: "Wouldn't it have been simpler to go through the process then come all the way up here, and given the amount of time that's gone by?" 2d OA at 10:57. Counsel offered no practical answer—only legal arguments the Second Circuit correctly rejected. The panel's questions were not rhetorical. They were an observation that the IDEA's "well-worn path," Pet. App. 9a, was available from the moment J.S. entered kindergarten in 2021, and Petitioners chose not to take it.

Third, a court is instructed to consider whether the relevant claims more closely resemble a "child su[ing] his

7. Citations to "2d OA" are citations to the Second Circuit oral argument held on December 8, 2025, which is accessible at https://ww3.ca2.uscourts.gov/decisions/isysquery/078d31f1-ed99-457b-af4c-2d5163b0e233/41-50/list/

school for discrimination . . . because the building lacks access ramps" or "a student with a learning disability su[ing] his school . . . for failing to provide remedial tutoring in mathematics." *Fry,* 580 U.S. 171–72. The former, though it implicates the child's right to a FAPE to a certain extent, is better understood as a suit to protect the child's rights against discrimination. The child could file "the same basic complaint if a municipal library or theater had no ramps[,] [a]nd similarly[,] an employee or visitor could bring a mostly identical complaint against the school." *Id.* at 172. The gravamen of the latter scenario, this Court noted, is better understood as the vindication of the student's right to a FAPE because it is difficult to "imagine the student making the same claim against a public theater or library[,] [o]r similarly, [to] imagine an adult visitor or employee suing the school to obtain a math tutorial[.]" *Id.* at 172–73. Here, the District Court correctly characterized Petitioners' claim as "substantially similar to *Fry*'s hypothetical student suing over the failure to provide remedial tutoring", which is a scenario this Court posed would implicate the right to a FAPE. PA-018.

In total, the *Fry* considerations unmistakably indicate the gravamen of Petitioner's OTSC seek to vindicate J.S.'s right to a FAPE.

E. The Record Is Replete with Admissions That This Is an IEP Dispute.

Petitioners' own filings and conduct confirm what the *Fry* analysis reveals. J.S.'s mother's sworn declaration requested "that a structured ABA program be incorporated as part of J.S.'s educational program." Pet. App. 26a. The same declaration requests ABA to ensure J.S. "can fully

participate in class while managing his autism effectively." *Id*. This is not the language of access or accommodation. It is the language of IEP content.

The Independent Educational Evaluation ("IEE") that anchors Petitioners' demand is equally revealing. Petitioners based their injunction request on Dr. Jodie Cohen's report, which they describe as an "Independent Educational Neuropsychological Evaluation." Pet. App. 35a–36a. That instrument is a formal creature of the IDEA. Under 34 C.F.R. § 300.502, parents who disagree with a district's evaluation may obtain an IEE at public expense, and the district is legally required to consider, though not bound to adopt, its findings. An IEE is a tool Congress created specifically to inform the IEP process. Invoking that tool while insisting the resulting dispute lies outside the IDEA's reach is difficult to square with logic or the statutory text.

Petitioners anticipate this conclusion and resist it. They characterize Dr. Cohen's evaluation as "not an IDEA administrative procedure" and describe the IEE request as "a very practical effort to bridge the gap between the parties by subjecting [Petitioners'] request for [ABA] to independent analysis by a third party in the hope that the parties might then agree." Pet. 21. But this characterization fails. An instrument defined by IDEA regulations, obtained through IDEA procedures, and submitted to a CSE convened pursuant to the IDEA does not shed its statutory character because the party invoking it prefers a different forum.

The timeline the District Court reconstructed from the record further defeats Petitioners' characterization.

The IEE was requested after the CSE declined to include ABA and an RBT in J.S.'s IEP. Pet. App. 35a–36a. After the evaluation report was submitted, Dr. Cohen participated in a CSE meeting, where she reiterated the recommendations in her report. Pet. App. 36a. The OTSC was filed immediately after that CSE meeting concluded without the outcome Petitioners sought. Pet. App. 31a. In support of the OTSC, Petitioners relied extensively on J.S.'s prior IEPs as evidence of Respondents' alleged culpability. Pet. App. 11a–12a. Taken together, this is not the conduct of a family asserting a standalone disability-accommodation claim under Title II and Section 504. It is the conduct of a family that engaged the IDEA's mechanisms at every stage, including CPSE/CSE meetings and review, and an IEE, up to and including the point at which those mechanisms would have required an impartial hearing before an IHO. At that precise juncture, Petitioners elected a federal court injunction instead. That election does not transform the nature of their claim. It only confirms it.

Petitioners spent years pursuing ABA through the CSE before filing this lawsuit. Pet. App. 35a–36a. The CSE is the IDEA's mechanism for developing IEPs. A family that believed ABA was a medical accommodation with no connection to a child's IEP would have had no reason to spend years engaging that mechanism. Those years of CSE engagement constitute a concession in conduct that Petitioners' litigation theory seeks to retract in words.

F. ABA Therapy Is an IDEA "Related Service" Under Both Federal and New York State Law.

The IDEA defines "related services" to include "supportive services . . . as may be required to assist a

child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). New York State Education Law expressly recognizes ABA therapy as an educational service. It defines ABA as "the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relations between environment and behavior." 8 N.Y.C.R.R. § 200.1(ww). The choice to define ABA in the Education Law reflects the settled understanding that ABA, when delivered in a school setting, is an educational intervention.

Petitioners contend that ABA is a "medical" service exempt from IDEA coverage. Pet. 7. In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) this Court drew a line between medical support and medical treatment based on whether the service requires a licensed physician. Under *Tatro*, ABA therapy falls within the category of services schools can and do provide under the IDEA, which is precisely what makes it subject to IDEA exhaustion.

Other courts addressing similar "medical" arguments have uniformly rejected them when ABA is sought as a component of a student's school-based educational program. *See, e.g.*, Pet. App. 26a (citing *L.A. v. New York City Dept. of Educ.*, 2021 WL 1254342 (S.D.N.Y. Apr. 5, 2021) (holding "insofar as Plaintiffs seek additional services—e.g., ABA therapy—they seek amendment of V.K.'s IESP, which the IHO can certainly award")); *Id.* (citing *H.G. v. Orcutt Union Sch. Dist.*, 2022 WL 18277271 (C.D. Cal. Nov. 30, 2022) (rejecting the argument

that ABA is a "medical service exempt from the IDEA's coverage", and holding that ABA "falls under the 'related services' requirement of the IDEA, and thus requires exhaustion.")). The decision below is consistent with this uniform authority.

G. The Decision Below Is Consistent with *Luna Perez*.

Petitioners suggest the decision below conflicts with this Court's decision in *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142 (2023). It does not.

Petitioners strategically framed this lawsuit as one seeking only money damages under Title II and Section 504. *Luna Perez* holds that the IDEA's exhaustion requirement does not apply to claims seeking "a form of relief . . . IDEA does not provide"—specifically, compensatory damages. *Luna Perez*, 598 U.S. at 148. This Court noted, however, that a plaintiff filing an ADA action seeking both compensatory damages and "the sort of equitable relief IDEA provides may find his request for equitable relief barred or deferred" absent exhaustion. *Id.* at 150.

The District Court and the Second Circuit applied *Luna Perez* precisely as written. Backward-looking compensatory damages claims in Petitioners' Complaint—relief unavailable under the IDEA—were expressly preserved and continue to be litigated. *See* Pet. App. 50a. Forward-looking, IEP-modifying injunctive relief sought through the OTSC—equitable relief available under the IDEA—was deferred pending exhaustion. That is exactly what *Luna Perez* contemplated. *Id.* at 150. The damages

claim and the injunction request are on different tracks because they seek different kinds of relief. *Luna Perez* drew that line and the courts below followed it. *See Doe v. Franklin Square Union Free School District*, 100 F.4th 86, 102, n.9 (2d Cir. 2024) (holding that a plaintiff who seeks both money damages and equitable relief is "barred" from seeking the equitable forms of relief until the plaintiff exhausts their remedies under the IDEA.) (citing *Luna Perez*, 598 U.S. at 150);*Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510, 519 (5th Cir. 2024) (allowing an ADA claim to proceed because it sought "compensatory damages unavailable under the IDEA."). The decision below reaches the identical result: damages proceed, injunctive relief requires exhaustion. There is no conflict.

H. Petitioners Cannot Show the Bad Faith or Gross Misjudgment Required to Succeed on the Merits.

Even setting aside exhaustion, Petitioners face a formidable merits barrier. This Court held in *A.J.T. v. Osseo Area Schools*, 605 U.S. 335 (2025), that schoolchildren asserting disability discrimination in educational services under Title II and Section 504 are subject to the same standards applied in other discrimination contexts. *A.J.T.*, 605 U.S. at 350–51; *R.B. v. Bd. of Educ. of the City of New York*, 99 F. Supp. 2d 411, 419 (S.D.N.Y. 2000). The record here shows nothing that rises to this level. Respondents' CSE has evaluated J.S. annually, developed an IEP each year, and made considered professional judgments about educational methodology. Pet. App. 35a–36a. Disagreement with those judgments, regardless of how sincerely held, does not establish the requisite level of intentional discrimination. This independent merits

deficiency further confirms that certiorari would not advance the resolution of Petitioners' claims.

I. The "Window of Opportunity" Argument Confirms That the IDEA Process Was the Right Forum—Not This Court.

Throughout this litigation, Petitioners have invoked the concept of a "window of opportunity", which proposes that early intervention is critical for children with autism, and that delay forecloses developmental progress. But the window-of-opportunity argument does not support certiorari. It defeats it.

The Second Circuit recognized the urgency argument and asked counsel directly: "Wouldn't it have been simpler to go through the process then come all the way up here, and given the amount of time that's gone by?" 2d OA at 10:57. The question was pointed precisely because the timeline reveals the flaw in Petitioners' strategy. Respondents did not include ABA as a specific program or service in J.S.'s IEP when he entered kindergarten in September 2021. Petitioners did not file this lawsuit until June 2024, did not seek injunctive relief until January 2025, did not obtain a ruling they could appeal to the Second Circuit until March 2025, and did not receive the Second Circuit's affirmance until December 2025. They now ask this Court to intervene in early 2026, nearly five years after the alleged deprivation began.

At every juncture, Petitioners could have requested a due process hearing before an IHO, which operates on mandatory timelines, under 20 U.S.C. § 1415(f) and N.Y. Educ. Law § 4404(1)(a). Had Petitioners initiated a due

process proceeding in 2021 the matter could have been heard, decided by an IHO, reviewed by an SRO, and appealed to federal court years before this petition was filed. The urgency Petitioners assert is not a product of an inadequate system, but a product of their decision not to use it.

As the District Court observed, any emergency in this case is, "at least in part, 'a problem of their own making.'" Pet. App. 20a. Petitioners cannot invoke the passage of time as a reason to bypass the very process that would have resolved the dispute efficiently, and then argue to this Court the process was inadequate. The window-of-opportunity cases Petitioners cited in the proceedings below are instructive in precisely this respect, for in each one, the families pursued the IDEA's administrative process and obtained an IHO determination before seeking judicial relief. That is the path Congress prescribed. Petitioners declined to take it.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Even if the Court were persuaded that a circuit split exists and that the question warrants resolution—it should not be—this case presents significant problems that counsel against granting review.

A. The Record Is Undeveloped.

The proceedings below addressed only the denial of a preliminary injunction on an emergency motion record. Respondents' educational evaluations, IEP development records, and expert assessments have not been presented

to or reviewed by a factfinder. Respondents' detailed explanation for why it has not incorporated ABA into J.S.'s IEP—grounded in educational methodology judgments by the CSE—appears in the record only through the Backus Affidavit, which the courts below cited but which has not been subjected to adversarial testing.

If this Court resolves the scope of the IDEA's exhaustion requirement as applied to ABA claims, it should do so on a more developed record that permits examination of whether the therapy sought is educational or medical, whether the IDEA's administrative process was available and adequate, and how the *Fry* factors apply across the factual spectrum. A preliminary injunction denial on an undeveloped record is not that vehicle.

B. The Procedural Posture Is Narrow.

The Second Circuit's decision is a summary affirmance of the denial of a preliminary injunction. It is not a ruling on the merits of Petitioners' Title II or Section 504 claims. The courts below expressly preserved those claims for further proceedings. Pet. App. 50a. The question of whether a district has discriminated against a student by denying ABA—and what remedies are available—has not been resolved by any court in this case.

This Court's resolution of a question about the IDEA exhaustion requirement would therefore address only a gatekeeping issue at the preliminary injunction stage, on a record where the underlying merits have never been tested. The same question could be presented more cleanly and on a fuller record if Petitioners were to exhaust their IDEA administrative remedies, and then seek review of any adverse administrative decision in federal court.

C. The Damages Claims Remain Live.

Petitioners' compensatory damages claims are continuing to be litigated in the Northern District of New York. Pet. App. 50a. A ruling by this Court on the exhaustion question would not resolve those claims. The case is not final, and review now would fragment the litigation, potentially requiring this Court's attention a second time after the damages claims are resolved.

IV. THE IDEA'S ADMINISTRATIVE PROCESS HAS PROVEN AN EFFECTIVE PATH FOR FAMILIES SEEKING ABA THERAPY—CONFIRMING THAT EXHAUSTION IS NEITHER FUTILE NOR ILLUSORY.

Petitioners suggest that requiring them to exhaust the IDEA's administrative process would be futile or would deprive them of any meaningful remedy. The record of reported decisions tells a different story. Families seeking ABA have gone through the IDEA's administrative hearing process and obtained relief from IHOs, from SROs, and from federal courts reviewing those administrative determinations. That body of case law confirms that the IDEA process is not a dead end; it is, in the Second Circuit's own words, a "well-worn path." Pet. App. 8a–9a.

The Ninth Circuit's decision in *Kishimoto* itself acknowledged that fact, noting "several of [HDRC's] constituents have successfully pursued administrative remedies to obtain in-school ABA services". *Kishimoto*, 122 F.4th at 366. The court further observed that the fact

constituents had sometimes been able to "acquire relief regarding ABA services in school—albeit after alleged 'fierce advocacy' and 'political pressure'—demonstrates that there exists a 'forum for their grievances.'" *Id.* Petitioners now ask this Court to accept, in essence, the same futility argument the Ninth Circuit rejected in the very case they most heavily rely upon. They cannot have it both ways.

The District Court in this case cited *M.G. v. New York City Department of Education*, 2020 WL 4905390 (S.D.N.Y. Aug. 7, 2020), as an illustration of precisely what the IDEA process can accomplish: "a failure to provide ABA therapy is actionable under the IDEA where claimants have exhausted their administrative remedies." Pet. App. 27a. *M.G.* is not an outlier. It is representative of a recognized category of cases in which parents who believed a district wrongly denied ABA pursued that claim through the IDEA's administrative process and obtained federal court review on the merits. Petitioners themselves cited multiple cases that followed exactly this route. In *B.D. v. Debuono*, 130 F. Supp. 2d 401 (S.D.N.Y. 2000), a federal court reached the merits of claims involving ABA for children with autism following exhaustion of IDEA administrative remedies. *See Robert F. v. N. Syracuse Cent. Sch. Dist.*, 2019 WL 13120328 (N.D.N.Y. July 24, 2019); *Robert F. v. N. Syracuse Cent. Sch. Dist.*, 2021 WL 3569108 (N.D.N.Y. Aug. 12, 2021) (decisions arising from litigation that proceeded through the IDEA's administrative framework before reaching federal court); *Gabel ex rel. L.G. v. Board of Education*, 368 F. Supp. 2d 313 (S.D.N.Y. 2005) (a Section 504 and

ADA claim involving the adequacy of educational services was litigated in federal court following the exhaustion of available administrative remedies).

Each of these cases, cited by Petitioners in the proceedings below as supporting their position on the merits, demonstrates the opposite of futility: the IDEA's administrative process is precisely the mechanism through which disputes about whether a district has properly denied a specific form of therapy are resolved, with federal court review available to any party dissatisfied with the outcome. The families in those cases did what Petitioners have declined to do: they followed the well-worn path of the IDEA, which enlists specialized officials experienced in addressing exactly the issues J.S. raises. Pet. App. 8a–9a (quoting *Fry*, 580 U.S. at 168).

There is a practical dimension to this point that deserves emphasis. If this Court were to grant certiorari and hold that the IDEA's exhaustion requirement does not apply to demands that a district fund and deliver ABA, the consequence would not be to speed relief to children who need it. It would be to route those cases away from the IHOs and SROs who have the expertise and factual record-development tools to evaluate whether ABA is appropriate for a specific child and into federal courts that must rule on emergency motions without any of that expertise or record. The danger is not hypothetical. In this very case, Petitioners asked a federal district court to compel a highly specialized behavioral therapy program based on a record consisting largely of publicly available scientific literature and a single educational evaluation, with no opportunity for Respondents' experts to be heard,

no IHO to assess the child's specific educational profile, and no SRO to review the determination. That is not a better process for children. It is a worse one.

The availability of the IDEA administrative process answers Petitioners' urgency arguments. Petitioners may request a due process hearing at any time under 20 U.S.C. § 1415(f) and N.Y. Educ. Law § 4404(1)(a). New York's administrative process operates on defined timelines. Had Petitioners initiated that process when Respondents first declined to include ABA in J.S.'s Kindergarten IEP—in 2021—the administrative and federal court review process could have been completed long before this petition was filed.

CONCLUSION

This Court is presented with a petition from parents who love their child and believe, with evident conviction, Respondents have failed him. Respondents do not ask this Court to dismiss that conviction. They ask only that this Court recognize what the Second Circuit, the District Court, and ultimately even Petitioners' own counsel at oral argument acknowledged: the relief Petitioners sought through their preliminary injunction is the relief Congress made available through the IDEA's administrative process, which has been open to them from the day J.S. entered kindergarten, remains open to them today, and is designed by trained professionals to deliver exactly the individualized determination J.S. deserves.

For the foregoing reasons, this Court should conclude that there is no genuine circuit conflict, that the decision

below is correct, and deny the petition for a writ of certiorari.

Respectfully submitted,

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