No. _____

IN THE

Supreme Court of the United States

CHRISTOPHER EDWARD MCMILLEN,
AN INCAPACITATED PERSON,

Petitioner,

v.

NEW CANEY INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Andrew J. Clopton
JONES DAY
150 W. Jefferson
Suite 2100
Detroit, MI 48226

Terry P. Gorman
GORMAN LAW P.L.L.C.
901 Mopac Expressway S. 78746
Suite 300
Austin, TX 78733

Shay Dvoretzky
Counsel of Record
Alex Potapov
Parker Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

This case presents the question that this Court granted certiorari to review, but then expressly left open, in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 & n.4, 754 n.8 (2017), and that continues to divide the circuits:

Whether the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires administrative exhaustion when a plaintiff brings a non-IDEA claim seeking relief that is not available under the IDEA.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Kenneth Wayne McMillen; Lisa Carolyn McMillen; Christopher Edward McMillen, an incapacitated person v. New Caney Independent School District; Kenn Franklin, Individually and as Superintendent of New Caney Independent School District; Margaret Angela Hudman; David Wayne Loyacano; Bridgett Ann Heine; Monique Yvonne Richardson Moss; Dianne Elizabeth Gillis, No. 4:17-cv-02561 (May 30, 2018)

United States Court of Appeals (5th Cir.):

Christopher Edward McMillen, an Incapacitated Person v. New Caney Independent School District, No. 18-20420 (Oct. 2, 2019)

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INTRODUCTION

This case presents a question that this Court previously granted review to resolve but ultimately "le[ft] for another day," and one that continues to divide the circuits: whether the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires administrative exhaustion when a plaintiff alleges a denial of a "free appropriate public education" (FAPE), but asserts only non-IDEA claims and seeks only non-IDEA remedies. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 & n.4, 754 n.8 (2017).

The relevant statutory provision requires a plaintiff who seeks relief under the Constitution or applicable "Federal laws protecting the rights of children with disabilities" to "exhaust[]" certain IDEA administrative procedures "before the filing of a civil action under such laws *seeking relief that is also available* under" the IDEA. 20 U.S.C. § 1415(*l*) (emphasis added). That language requires a plaintiff to exhaust his non-IDEA claims only when he *seeks relief* that is *available* under the IDEA. Thus, when a plaintiff brings a non-IDEA claim seeking compensatory money damages—which are not available under the IDEA—he does not need to exhaust his claim.

That is what the Fifth Circuit should have held here. Petitioner Christopher McMillen seeks money damages under the Rehabilitation Act of 1973 and the Constitution for emotional distress resulting from discrimination based on his disability and religion. All agree that the monetary relief he seeks is not available under the IDEA. Thus, he should not be required to exhaust. But the Fifth Circuit, focusing on Christopher's injuries (which include the denial of a FAPE), held that exhaustion *was* required. App. 14a–15a.

Joining the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, the Fifth Circuit adopted the "injury-centered" approach to IDEA exhaustion, which requires plaintiffs who allege that they were denied a FAPE to exhaust *regardless* of the remedy that they seek. These courts reason that exhaustion is necessary because the IDEA might be able to remedy the injury, even if the relief offered is not the relief sought. App. 13a–14a. But that approach flouts the statute's plain text, as the Fifth Circuit itself all but acknowledged. *See* App. 12a–13a. And the approach is not merely atextual. It is also senseless and harmful. It keeps injured plaintiffs who seek damages out of court, and instead requires them to undertake IDEA proceedings that are lengthy, costly, and ultimately pointless—because the IDEA simply does not authorize damages.

The en banc Ninth Circuit alone has focused on the statute's text. Its "relief-centered" approach does *not* require plaintiffs to exhaust when they seek money damages that do not constitute an IDEA remedy or its functional equivalent. This approach honors the plain text of the statute and ensures that children with disabilities can exercise their independent statutory rights. It has also been endorsed, including in this Court, by the United States Department of Justice and the United States Department of Education. Even the Fifth Circuit had to acknowledge that "[t]he question may be a closer one than the circuit scorecard suggests." App. 12a.

With the decision below, the circuit split on this issue has only deepened. And absent this Court's intervention, the split will persist. This Court should grant certiorari to decide this important question.

OPINIONS BELOW

The opinion of the court of appeals is reported at 939 F.3d 640 and reproduced at App. 1a–15a. The judgment of the district court is not reported, but is reproduced at App. 16a–17a, with a related transcript reproduced at App. 18a–29a.

JURISDICTION

The court of appeals affirmed the district court's judgment on October 2, 2019. App. 1a, 15a. On November 26, 2019, Justice Alito extended the time to file this petition until January 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

As amended, the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(*l*), provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT OF THE CASE

This case centers on the IDEA's exhaustion requirement for non-IDEA claims. At issue is whether a

plaintiff who alleges the denial of a FAPE must exhaust the IDEA's administrative process even when he pursues non-IDEA claims and seeks relief that is not available under the IDEA. Here, Petitioner Christopher McMillen contends that Respondent New Caney Independent School District violated his rights under the Rehabilitation Act, the Fourteenth Amendment's Equal Protection Clause, and the First Amendment. He seeks money damages for injuries like emotional distress, a form of relief available under those laws but not under the IDEA. The Fifth Circuit nonetheless held that Christopher had to exhaust because he "challenges New Caney ISD's failure to provide him with [a] free appropriate public education." App. 10a.

1. a. The Rehabilitation Act prohibits discrimination on the basis of disability in programs receiving federal funding. Section 504 of the Act provides that "[n]o otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Money damages are available as a form of relief for violations of the Rehabilitation Act. 29 U.S.C. § 794a(a)(2); *see, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

b. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution also prohibits discrimination—on the basis of disability, religion, and otherwise. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–50 (1985) (disability); *Hassan v. City of New York*, 804 F.3d 277,

298–305 (3d Cir. 2015) (religion) (collecting authorities). And the First Amendment "bars even 'subtle departures from neutrality' on matters of religion"; thus, government action must not be based "on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). A plaintiff alleging the violation of these constitutional provisions may seek money damages under 42 U.S.C. § 1983. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253–55, 257–58 (2009) (equal protection); *Bible Believers v. Wayne County*, 805 F.3d 228, 255–56, 261–62 (6th Cir. 2015) (en banc) (free exercise).

c. The IDEA requires states and school districts accepting federal funds to adhere to several conditions, including providing a "free appropriate public education"—or FAPE—to all eligible children. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017). "[T]he centerpiece of the [IDEA's] education delivery system" is the "individualized education program, or IEP." *Id.* at 994 (cleaned up); *see* § 1414(d)(1)(A). An IEP is a "comprehensive plan" "for pursuing [a child's] academic and functional advancement." *Endrew F.*, 137 S. Ct. at 994, 999. The teacher, parents, and school officials must collaborate to develop the IEP under detailed procedures "requir[ing] careful consideration of the child's individual circumstances." *Id.* at 994.

Because parents and educators do not always agree on an IEP, however, the IDEA establishes formal dispute-resolution procedures. *Fry*, 137 S. Ct. at 749; *Endrew F.*, 137 S. Ct. at 994. Parents may trigger a "[p]reliminary meeting" with educators; instead (or in addition), they may pursue mediation. § 1415(e),

(f)(1)(B)(i). If those measures fail, the parties may proceed to a "due process hearing" before a state or local IDEA hearing officer. § 1415(f)(1)(A), (g). The hearing officer must issue a decision "on substantive grounds based on a determination of whether the child received a [FAPE]." § 1415(f)(3)(E)(i); *see Fry*, 137 S. Ct. at 754. And the only relief a hearing officer can provide is "enforce[ment of] the child's 'substantive right' to a FAPE." *Fry*, 137 S. Ct. at 754. After exhausting these administrative procedures, the losing party may seek relief in state or federal court. § 1415(i)(2)(A).

The IDEA's judicial remedies are limited as well. A court "shall grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii), but the IDEA does "not allow for damages," *Fitzgerald*, 555 U.S. at 254 n.1 (IDEA's predecessor statute); *see also, e.g.*, *Fry*, 137 S. Ct. at 752 n.4, 754 n.8 (calling "money damages for resulting emotional injury" "a form of remedy that an IDEA officer cannot give"); *Polera v. Bd. of Educ.*, 288 F.3d 478, 486 (2d Cir. 2002) (describing "the prevailing opinion of the … Circuits" "that damages are unavailable under the IDEA"). Instead, the IDEA permits equitable relief in the form of educational services that redress the denial of a FAPE or financial restitution for parents who were forced to finance educational services that should have been provided by the school. *See, e.g.*, *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 369–71, 374 (1985) ("equitable considerations are relevant in fashioning relief"); *Sellers ex rel. Sellers v. Sch. Bd.*, 141 F.3d 524, 527 (4th Cir. 1998).

c. In *Smith v. Robinson*, 468 U.S. 992, 1012–13, 1019–21 (1984), the Court held that the IDEA pro-

vided "the exclusive avenue" for students with disabilities to advance claims charging violations of special education rights protected by the IDEA—even if those claims arose under a different federal statute or the Constitution. *Smith* thus barred plaintiffs from relying on section 504 of the Rehabilitation Act, or on the Constitution, to vindicate a child's IDEA-protected special education rights. *Id.*[1]

Congress responded by enacting the Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99–372, 100 Stat. 796, which abrogated "*Smith*'s preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement." *Fry*, 137 S. Ct. at 750. The HCPA "'reaffirm[ed] the viability' of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.'" *Id.* (quoting H.R. Rep. No. 99–296, at 4 (1985)). Section 1415(*l*), the relevant provision, reads:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [(ADA)], title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same

[1] Until 1990, "the IDEA was called the Education of the Handicapped Act." *Fry*, 137 S. Ct. at 750 n.1. "To avoid confusion" "and acronym overload," this petition uses IDEA throughout. *Id.*

> extent as would be required had the action been brought under this subchapter.

This provision thus (i) guarantees that students with disabilities may advance non-IDEA claims for violations of their educational rights, but (ii) requires them to exhaust IDEA administrative remedies only to the extent the non-IDEA claims "seek[] relief that is also available under [the IDEA]." *See id.*

2. a. A lopsided but consequential split developed over the scope of § 1415(*l*)'s exhaustion requirement. Beginning with the Seventh Circuit in *Charlie F. v. Board of Education*, 98 F.3d 989, 990–93 (7th Cir. 1996), several courts of appeals adopted an "injury-centered" approach requiring exhaustion even when the plaintiff sought compensatory damages (not available under the IDEA) under other statutes or the Constitution—as long as the plaintiff's *injury* was within the IDEA's scope. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 873–74 (9th Cir. 2011) (en banc) (referring to this approach as the "'injury-centered' approach"); *see infra* pp. 16–17. The reasoning was that an IDEA officer could conceivably offer *some* relief that could address the plaintiff's alleged injury, even if the officer could not award the relief the plaintiff was actually seeking. *Charlie F.*, 98 F.3d at 991–93; *see infra* pp. 16–17. But in 2011, the en banc Ninth Circuit adopted a "relief-centered" approach, which—hewing to the language of § 1415(*l*)—requires exhaustion only when a plaintiff "*actually* s[eeks] relief available under the IDEA." *Payne*, 653 F.3d at 875.[2]

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[2] The Ninth Circuit overruled *Payne* on other grounds in *Albino v. Baca*, 767 F.3d 1162, 1168–71 (9th Cir. 2014) (en banc),

b. This Court granted certiorari in *Fry* to resolve the conflict between the injury-centered approach and the relief-centered approach. 137 S. Ct. at 752 & n.3. But the Court ultimately did not have to resolve that issue, because it was able to decide *Fry* on a logically antecedent ground.

The Court in *Fry* "beg[a]n, as always, with the statutory language at issue, which … compels exhaustion when a plaintiff seeks 'relief' that is 'available' under the IDEA." *Id.* at 753 (quoting § 1415(*l*)). And the text indicates, at a minimum, that exhaustion may be required *only if* "a lawsuit seeks relief for the denial of a free appropriate public education." *Id.* at 754. After all, if a complaint does not allege the denial of a FAPE, an IDEA hearing officer cannot provide any relief, so IDEA relief necessarily is not "available." *Id.* Thus, at the threshold of the exhaustion analysis, courts must determine whether a complaint "seeks redress for a school's failure to provide a FAPE." *Id.* at 755. The Court instructed lower courts to perform that inquiry by looking to the substance, or "gravamen," of the complaint. *Id.*

Finding that the court of appeals had not performed that analysis, the Court remanded. The Court thus "le[ft] for another day" the original question presented, which is also presented in this case: whether exhaustion is required when a plaintiff who *is* "charging the denial of a FAPE[] seeks a form of remedy that an IDEA officer cannot give—for example, … money

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holding that exhaustion should be addressed by motion for summary judgment rather than by "unenumerated Rule 12(b) motion." The Ninth Circuit has made clear that *Albino* did not disturb *Payne*'s substantive exhaustion holding. *See M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014).

damages for resulting emotional injury." *Id.* at 752 n.4, 754 n.8.

3. a. Petitioner Christopher McMillen is a young man who has been diagnosed with autism spectrum disorder, emotional disturbance, and learning disabilities related to his central auditory processing disorder. App. 33a. He lives with his parents and court-appointed guardians, Ken and Lisa, in New Caney, Texas. *Id.* Respondent New Caney Independent School District receives IDEA funds. App. 34a. Christopher attended public school in New Caney from 2003 (pre-kindergarten) through October 2015 (eleventh grade), when the events giving rise to this lawsuit culminated in his expulsion. App. 2a–4a.

b. For much of Christopher's schooling, New Caney had successfully managed his behavioral challenges. App. 2a–3a. But that changed during Christopher's junior year of high school, when New Caney moved Christopher from a special education environment to the regular classroom setting. App. 3a. Christopher's new English teacher, Margaret Hudman, subjected Christopher to an escalating pattern of disturbing mistreatment, including informal "psychology sessions." App. 37a. In these "sessions," Hudman sought to "save" Christopher by trying to convert him from Islam to Christianity and by encouraging him to take herbal supplements to cure his autism. *Id.* & n.3.

When these efforts proved unsuccessful, Hudman concluded that Christopher was beyond redemption and set out to exploit Christopher's disabilities and conspire with other school officials to expel him from school. App. 3a–4a, 37a–38a. She began collecting and circulating written material from Christopher that,

taken out of context, made Christopher appear dangerous. App. 3a–4a, 38a–39a. School administrators falsely assessed Christopher as posing a danger to others and referred the matter to the district's police department, which arrested Christopher and charged him "with the felony of making a terroristic threat." App. 40a–41a. School administrators even failed to inform the police of Christopher's disabilities. App. 53a. Despite his significant disabilities, Christopher was held in custody for three days at the Montgomery County Juvenile Detention Center. App. 41a.

New Caney, in turn, summarily declared the charges a "conduct violation" and announced its intent to "exile[] [Christopher] to an alternative campus." *Id.* Through Hudman, it filed a false and malicious complaint against Christopher's parents, Ken and Lisa, with Texas Child Protective Services. App. 42a. (The complaint was summarily closed with no action taken. *Id.*) And it threatened to "pursue additional charges" if Christopher returned to school. App. 45a.

Meanwhile, the prosecutor agreed to drop all criminal charges if Christopher's parents would agree to "never re-enroll Chris into school" in New Caney and to "personally provide Chris with all mental health treatment that Chris may hereafter need with regard to Chris's disabilities." App. 43a. Perceiving no other option, Christopher and his parents accepted the deal. App. 4a. Since then, Christopher's parents have endeavored to provide care for Christopher's disabilities. App. 43a.

4. Christopher filed suit in federal court. App. 4a. The operative complaint asserts claims and seeks money damages under 42 U.S.C. § 1983 (for violation of the First Amendment and the Equal Protection

Clause of the Fourteenth Amendment) and section 504 of the Rehabilitation Act, 29 U.S.C. § 794. App. 4a, 43a–44a, 58a–59a. The complaint does not allege any IDEA claim. App. 47a.[3]

New Caney moved to dismiss, contending (as relevant here) that Christopher had failed to exhaust the IDEA's administrative remedies. The district court granted the motion. App. 4a, 16a–17a.[4] The court explained that it found New Caney's treatment of Christopher "extremely troubling." App. 23a. "[T]he idea that a teacher can force her religion on a student," the court continued, is "odious," "no matter how well-intentioned the proselytizer, no matter what the merits of the religion." App. 29a. And, the court observed, "the bureaucracy was not as responsive as it should be." *Id.* The court nonetheless concluded that "[t]his … is classically an IDEA case" and therefore had to be dismissed for failure to exhaust. *Id.* The court further held—siding with "most of the circuits who have ruled

[3] The Fifth Circuit seemed to overlook Christopher's First Amendment claim, stating that his complaint "asserts a Rehabilitation Act claim and an equal protection claim under section 1983." App. 4a. The court made this statement in passing; its decision did not turn on the particular nature of Christopher's claims, and so the court had no need to scrutinize Christopher's complaint. The district court's judgment, in contrast, correctly reflects all three claims. App. 16a.

[4] The district court had dismissed the Rehabilitation Act claim in the prior complaint for failure to exhaust but permitted Christopher to replead his constitutional claims. D. Ct. Minute Entry, Jan. 23, 2018. The court's May 31, 2018, order reflects dismissal of all of Christopher's claims. App. 16a–17a.

on the issue"—that Christopher was obligated to exhaust even though he sought money damages. App. 28a–29a.

5. The Fifth Circuit affirmed. App. 1a–15a.

a. Applying the *Fry* framework, the Fifth Circuit started by asking whether Christopher had alleged the denial of a FAPE. It held that the answer was yes, because his "lawsuit challenges New Caney ISD's failure to provide him with the free appropriate public education that the IDEA promised him." App. 10a. The court thus proceeded to the question this Court left open in *Fry*: whether the IDEA's "exhaustion requirement applies when a plaintiff is seeking remedies not available under the IDEA." App. 11a.

b. The Fifth Circuit began by acknowledging the entrenched circuit split on the question. The court noted that the First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits require plaintiffs like Christopher "to exhaust regardless of the remedy they seek," whereas the Ninth Circuit focuses on whether the relief sought is available under the IDEA. App. 11a–12a. The court of appeals sided with the majority view that "relief available" under the IDEA "mean[s] relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." App. 13a (quoting *Charlie F.*, 98 F.3d at 991–92). "According to this view," the Fifth Circuit reasoned, "because the IDEA can remedy the failure to provide a blind student with a reader by giving her one, a suit seeking damages for such a failure must first exhaust the IDEA's administrative procedures." App. 13a–14a. The court believed that "such an approach is neces-

sary to enforce the statutory scheme, under which 'educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.'" App. 14a (quoting *Charlie F.*, 98 F.3d at 992).

Despite rejecting the relief-oriented approach set out by the Ninth Circuit in *Payne*, the Fifth Circuit emphasized that "[t]he question may be a closer one than the circuit scorecard suggests." App. 12a. The court acknowledged that "there is a textualist case that a claim does not 'seek relief that is also available' under the IDEA if the plaintiff cannot seek the same remedy under the IDEA." App. 13a. If "relief" and "remedy" mean the same thing, as dictionaries suggest, then a plaintiff "does not 'seek relief that is also available' under the IDEA if the plaintiff cannot seek the same remedy under the IDEA." *Id.* The court further observed that "[t]he Solicitor General took this textualist approach in *Fry*," arguing "that exhaustion is not required '[w]hen a plaintiff seeks only compensatory damages under a non-IDEA statute.'" *Id.* (quoting Br. for the United States as Amicus Curiae at 18, *Fry*, No. 15-497 (U.S. Aug. 29, 2016) ("SG Merits Br.")).

As the Fifth Circuit recognized, this case presents the question that "*Fry* did not answer": whether and when plaintiffs should be required to exhaust IDEA procedures if they are seeking a remedy the IDEA cannot provide. App. 14a; *see* App. 11a.

REASONS FOR GRANTING THE WRIT

I. There is an important and persistent split on the question reserved in *Fry*

The courts of appeals are divided as to whether a plaintiff must exhaust the IDEA's administrative procedures when he seeks relief (*i.e.*, a specific remedy) that is not available under the IDEA. *See Fry*, 137 S. Ct. at 752 & n.3 (noting "confusion in the courts of appeals as to the scope of § 1415(*l*)'s exhaustion requirement"); *id.* at 752 n.4 ("leav[ing] for another day" the question whether exhaustion is required "when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award"); *id.* at 754 n.8 (similar). This Court granted certiorari on this question in *Fry*, but ultimately left it open. With the decision below, the split has only deepened. This Court's review is warranted.

A. The courts of appeals are split on whether exhaustion is required when plaintiffs seek relief that is not available under the IDEA

The circuits remain divided about when exhaustion is required for non-IDEA claims. Most circuits, now including the Fifth Circuit, adhere to the injury-centered approach, under which a plaintiff complaining of the denial of a FAPE must exhaust, regardless of what remedies she seeks. In contrast, the en banc Ninth Circuit, looking to the IDEA's plain text, has adopted a relief-centered approach requiring exhaustion only when the "relief" sought is available under

the IDEA. *Payne*, 653 F.3d at 875. Under that approach, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.*

1. Nine circuits—the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—as well as the Fourth Circuit in an unpublished decision, have adopted the injury-centered approach.

a. The Fifth Circuit opted for the injury-centered approach in the decision below. The court relied on the Seventh Circuit's decision in *Charlie F.* to hold that a plaintiff who seeks only money damages must exhaust if the IDEA's administrative procedures could theoretically provide *some* relief (even if the plaintiff is not seeking that relief). *See supra* pp. 13–14.

In *Charlie F.*, a child sought money damages (and no other form of relief) under the ADA, the Rehabilitation Act, and 42 U.S.C. § 1983 because his teacher allegedly engaged in a campaign to bully and harass him on the basis of his disabilities. 98 F.3d at 990–91. Despite recognizing that the IDEA does not make money damages available, the Seventh Circuit dismissed the complaint for failure to exhaust. *Id.* at 991–93. The court reasoned that "what relief is 'available' does not necessarily depend on what the aggrieved party wants," and that students with disabilities who complain about "educational shortfalls" must always therefore give the school district "the first crack at formulating a plan to overcome the consequences." *Id.* at 991–92. In the Seventh Circuit's view, because "the IDEA offers comprehensive educational solutions," "at least in principle relief is available under the IDEA." *Id.* at 993. The court therefore

reasoned that "even if the plaintiff wants a form of relief that the IDEA does not supply," he must "activate the IDEA's process." *Id.* at 992.

b. The First, Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits have also adopted the injury-centered approach, typically relying on *Charlie F. See, e.g.*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60–64 (1st Cir. 2002); *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246–47 (2d Cir. 2008); *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276–78 (3d Cir. 2014); *Fry v. Napoleon Cmty. Schs.*, 788 F.3d 622, 630–31 (6th Cir. 2015), *vacated on other grounds*, 137 S. Ct. 743 (2017); *Covington v. Knox Cty. Sch. Sys.*, 205 F.3d 912, 916–17 (6th Cir. 2000) (dicta); *J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 595 (8th Cir. 2013); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063–68 (10th Cir. 2002); *Babicz v. Sch. Bd.*, 135 F.3d 1420, 1422 (11th Cir. 1998). In addition, a panel of the Fourth Circuit has reached the same conclusion in an unpublished decision. *See Z.G. ex rel. C.G. v. Pamlico Cty. Pub. Schs. Bd. of Educ.*, 744 F. App'x 769, 776–80 & n.14 (4th Cir. 2018) (citing *Batchelor*, 759 F.3d at 276–77, and *Covington*, 205 F.3d at 916).

2. The en banc Ninth Circuit, in contrast, rejected the injury-centered approach in an opinion authored by Judge Bybee. *Payne*, 653 F.3d at 873–75. Instead, looking to statutory text and congressional intent, the court adopted a relief-centered approach. *Id.* at 874–77.

The Ninth Circuit began by observing that the injury-centered approach "is inconsistent with the IDEA's exhaustion provision," which requires exhaustion "'before the filing of a civil action … seeking *relief*

that is also available under [the IDEA.]'" *Id.* at 875 (quoting § 1415(*l*)). The Ninth Circuit explained that the injury-centered approach ignores this statutory text by requiring exhaustion *regardless* of the relief sought (as long as the plaintiff is "alleging misconduct that *in theory* could have been redressed by resorting to administrative remedies under the IDEA"). *Id.* In the Ninth Circuit's view, that approach "treat[s] § 1415(*l*) as a quasi-preemption provision," extending far beyond its text, that "requir[es] administrative exhaustion for any case that falls within the general 'field' of educating disabled students." *Id.*

Focusing on the statutory text, the legislative history, and an amicus brief signed by both the Department of Justice and the Department of Education, the en banc Ninth Circuit adopted a relief-centered approach instead. The court held that "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant." *Id.* "[W]hat matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.* "In other words," the court explained, "when determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA." *Id.* And "[i]f it is not, then it is likely that § 1415(*l*) does not require exhaustion in that case." *Id.*

The relief-centered framework that the Ninth Circuit adopted in *Payne* conflicts with the injury-centered approach, as the Fifth Circuit recognized below, the Ninth Circuit recognized in *Payne*, and this Court recognized in *Fry*. *See Fry*, 137 S. Ct. at 752 n.3; *Payne*, 653 F.3d at 873–75; App. 11a–14a.

B. The split is important

The question presented in this case is hugely important for children with disabilities (like Christopher) and their parents. As this Court has recognized, IDEA "proceedings might prove long and tedious." *Honig v. Doe*, 484 U.S. 305, 324 (1988). Yet under the injury-centered rule that prevails in most circuits, children and their parents are forced to participate in those lengthy and costly IDEA proceedings even though those proceedings cannot provide the relief they seek. *See* Petitioners' Br. 38–43*, Fry*, No. 15-497 (U.S. Aug. 22, 2016) (detailing the time-consuming nature of IDEA proceedings). Even when asserting the most fundamental of rights—such as equal protection or freedom of religion under the Constitution—those plaintiffs find the courthouse doors locked unless they first engage in a concededly pointless exercise. And the number of potentially affected plaintiffs is vast, because seven million students—fourteen percent of all public students—receive special education services under the IDEA. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education 2019*, at xxxii, https://nces.ed.gov/pubs2019/2019144.pdf. It is unsurprising, then, that the issue continues to arise in the courts of appeals. *See infra* pp. 20–23.

On many occasions, this Court has recognized the importance of providing guidance to parents and educators by taking up IDEA questions. *See, e.g.*, *Endrew F.*, 137 S. Ct. 988; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526

U.S. 66 (1999); *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993); *Burlington*, 471 U.S. 359. This issue presents an even stronger case for this Court's review because, by granting certiorari in *Fry* and ultimately suggesting that the question presented would be addressed on "another day," this Court has already acknowledged the split's importance. 137 S. Ct. at 752 n.4.

The United States has also recognized the importance of the question presented and the split it has produced. The United States recommended that the Court grant certiorari in *Fry*, and advocated the relief-centered approach, in a brief signed by both the Solicitor General and the General Counsel of the Department of Education. *See* Br. for the United States as Amicus Curiae, *Fry*, No. 15-497 (U.S. May 20, 2016) ("SG Cert. Brief"). The government also participated as amicus curiae before the en banc Ninth Circuit in *Payne*, again in a brief signed by both the Justice Department and the Department of Education. 653 F.3d at 875 ("We agree with much of the approach proposed by amicus United States Department of Justice."); Br. for the United States as *Amicus Curiae* Supp. Pls.-Appellants, *Payne*, No. 07-35115 (9th Cir. Nov. 4, 2010) ("U.S. *Payne* Br.").

C. The split will persist unless this Court intervenes

With the addition of the Fifth Circuit, the split has only deepened since *Fry*. *See* App. 11a–12a. And absent this Court's intervention, the split will persist.

1. Cases implicating the split have continued to arise after *Fry*. *See, e.g.*, *id.*; *J.L. ex rel. Leduc v. Wyo. Valley W. Sch. Dist.*, 722 F. App'x 190, 194 (3d Cir.

2018); *Z.G.*, 744 F. App'x at 777 n.14 (4th Cir.); *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 950 (8th Cir. 2017); *Prunty v. Desoto Cty. Sch. Bd. & Dist.*, 738 F. App'x 648, 652 (11th Cir. 2018). In many of these cases, the question left open in *Fry* and presented again here proved dispositive. *See, e.g.*, *J.M.*, 850 F.3d at 950 ("[T]he IDEA's exhaustion requirement remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought." (quoting *J.B.*, 721 F.3d at 595)); *J.L.*, 722 F. App'x at 194 ("Our conclusion does not change because J.L. requested money damages, which are not available under the IDEA and cannot be awarded at an administrative hearing.").

2. The split is unlikely to resolve itself. Courts adhering to the injury-centered approach have had the benefit of the Ninth Circuit's reasoning on the relief-centered approach, and vice versa. *See* App. 11a–14a; *supra* pp. 15–19; *Payne*, 653 F.3d at 873–75. Indeed, the Ninth Circuit itself followed the injury-centered approach until it adopted the relief-centered approach en banc in *Payne*. 653 F.3d at 874–75 ("[W]e reject the 'injury-centered' approach developed by" *Robb v. Bethel School District # 403*, 308 F.3d 1047 (9th Cir. 2002).). The split persists all the same.

Indeed, the injury-centered approach remains binding law in the many circuits that have adopted it. And the courts that have addressed the issue have expressly held that *Fry* did not reopen the question in any way. *See, e.g.*, *J.M.*, 850 F.3d at 950 (noting that *Fry* left open the question but holding that the pre-*Fry* precedent mandating an injury-centered approach remains binding); App. 14a (adopting majority's injury-centered view and concluding that "[a]lthough *Fry* did

not answer this question, its broader reasoning on the exhaustion requirement tends to support the majority view").

On the other side, the Ninth Circuit's relief-centered approach will almost certainly remain binding law in that circuit because *Payne* was an en banc decision, which (as the Fifth Circuit acknowledged) was based on careful textualist reasoning endorsed by the United States both before and after the decision. *See* App. 12a (calling the question "closer" "than the circuit scorecard suggests"); SG Merits Br.; U.S. *Payne* Br. Indeed, since *Fry*, the Ninth Circuit has applied *Payne* in assessing whether a non-IDEA claim had to be exhausted. *See Paul G. ex rel. Steve G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1102 (9th Cir. 2019). As the district court there explained, it "look[ed] to *Payne*" to determine "whether the IDEA's exhaustion requirement applies when a plaintiff seeks damages" precisely "[b]ecause the Supreme Court did not resolve the question." *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, No. 16-cv-5582, 2018 WL 2763302, at *7 (N.D. Cal. June 8, 2018), *aff'd*, 933 F.3d 1096. Other district courts in the Ninth Circuit have continued to apply *Payne* as well. In *A.M. ex rel. Mixon v. Fresno Unified Sch. Dist.*, No. 16-cv-0725, 2017 WL 6209389, at *8–10 (E.D. Cal. Dec. 8, 2017), for example, the court found that race discrimination claims seeking damages complained of the denial of a FAPE under *Fry* but nonetheless did not require exhaustion under *Payne*.

Given the persuasiveness of the Ninth Circuit's view, it is entirely possible that one or more other circuits will adopt it. But even if the Ninth Circuit alone

continues to follow the relief-centered approach, approximately 20% of the country's population will continue to live under a different legal regime. *See* U.S. Census, *QuickFacts*, http://www.census.gov/quickfacts/fact/table/US,WA,CA,NV,AZ,OR/PST045219 (last visited Jan. 28, 2020).

Unless and until this Court steps in, plaintiffs who allege the denial of a FAPE but seek forms of relief that are not available under the IDEA (such as damages) will receive wholly different treatment depending on the circuit in which they reside. This entrenched split requires this Court's resolution.

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

As the Fifth Circuit's opinion reflects, this case turns squarely on the issue left open in *Fry*, 137 S. Ct. at 752 n.4, and which continues to divide the circuits. *See* App. 11a ("The Supreme Court declined to answer the question in *Fry*."); *supra* p. 15. The Fifth Circuit affirmed the district court's dismissal of Christopher's non-IDEA claims because he had not exhausted them. The Ninth Circuit, in contrast, would have held that exhaustion is not required and allowed those claims to proceed.

A. Christopher could not proceed in the Fifth Circuit because that court has adopted the injury-centered approach

Following the injury-centered approach, the Fifth Circuit affirmed the dismissal of Christopher's complaint for failure to exhaust. The court first examined the gravamen of the complaint. App. 6a–10a. The court determined that while Christopher "asserts a Rehabilitation Act claim and an equal protection

claim under section 1983," the "*injury* [he] seeks to remedy" is the "failure to provide him with the [FAPE] that the IDEA promised him." App. 4a, 10a (emphasis added).

The Fifth Circuit next determined that Christopher's suit "seeks damages for injuries like emotional distress," and that "such traditional compensatory damages are not available under the IDEA." App. 11a (citing *Fry*, 137 S. Ct. at 752 n.4). The court thus moved on to the question presented here: "whether the IDEA's exhaustion requirement applies when the plaintiff seeks a *remedy* that the IDEA does not supply." App. 2a (emphasis added); *see Fry*, 137 S. Ct. at 752 n.4. Despite the "textualist" appeal of the relief-centered approach, the court ultimately chose the injury-centered approach. App. 14a–15a. As a result, Christopher—who alleged denial of a FAPE but sought remedies never available under the IDEA—could not have his claims heard on the merits.

B. Christopher's claims would have gone forward under the Ninth Circuit's relief-centered approach

1. As the Fifth Circuit recognized, the outcome would have been different in the Ninth Circuit. *See* App. 12a. The Ninth Circuit's relief-centered approach would have required an examination of the underlying "prayer for relief" to "determine whether the relief sought is also available under the IDEA." *Payne*, 653 F.3d at 875. And that inquiry would have concluded that, because the relief Christopher is seeking is *not* available under the IDEA, "§ 1415(*l*) does not require exhaustion." *Id.*; *see* App. 12a (noting that the Ninth Circuit "requir[es] exhaustion when a plaintiff

sought an IDEA remedy or its functional equivalent, such as money to pay for private school or tutoring, but not when seeking other damages").

2. Like the courts in the majority, the Ninth Circuit recognized in *Payne* that a clever plaintiff might try to plead around the exhaustion requirement. *See Payne*, 653 F.3d at 875–76; App. 14a. But unlike the courts in the majority, the Ninth Circuit addressed that concern not by wholly disregarding the language of the statute, but rather by adopting the framework offered by the United States as amicus. That framework "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent," such as private school tuition reimbursement; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student"; and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action." *Payne*, 653 F.3d at 875.

Christopher's suit does not fall into any of those categories. Christopher did not seek (1) "an IDEA remedy or its functional equivalent" or (2) "prospective injunctive relief to alter an IEP or the educational placement." *See id.* Nor did he (3) "seek[] to enforce rights that arise as a result of a denial of a [FAPE]." *See id.* Christopher's rights arise from the Rehabilitation Act and the Constitution—they are not based on a denial of a FAPE or a failure to satisfy any other IDEA standard.

As the Solicitor General explained in *Fry*, *Payne*'s third category refers to claims that "*rely on rights created by the IDEA*"—that is, claims that directly invoke the IDEA or its "substantive standards." *See* SG Cert. Br. 21 & n.7 (citing *Payne*, 653 F.3d at 875, 879). In other words, exhaustion is unnecessary for claims that do not require the plaintiff to establish a violation of the IDEA's substantive standards. *See id.* at 21. That is true even where the challenged action (to use an example from *Payne*, "an unconstitutional beating") "might interfere with a student enjoying the fruits of a FAPE." 653 F.3d at 880.

Here, Christopher's claims for money damages under the Rehabilitation Act and the Constitution do not arise under the IDEA itself or otherwise directly invoke the IDEA's "substantive standards." *Payne*, 653 F.3d at 875. Although Christopher does allege that his injuries arose from circumstances that (among other things) resulted in the denial of a FAPE, that will be true in *any* case that meets *Fry*'s threshold criterion for exhaustion (whether the plaintiff alleged the denial of a FAPE) and therefore requires resolution of the question *Fry* left open. But the mere fact that a denial of a FAPE occurred does not mean that plaintiffs like Christopher are required to exhaust under *Payne*. Indeed, the abuse Christopher suffered at school is no different, for these purposes, than the "unconstitutional beating" that the Ninth Circuit in *Payne* expressly held would not trigger the exhaustion requirement. *See* 653 F.3d at 880.

More generally, although Christopher alleges injury from his treatment at and ultimately expulsion from school, his claims do not turn on the denial of any particular level of educational benefit. He has no need

to establish the denial of a FAPE as such. Indeed, Christopher's claims would exist even in a world where the IDEA did not. For example, to make out a violation of the Rehabilitation Act, he needs to show only that he was "excluded from the participation in," was "denied the benefits of," or was "subjected to discrimination" by the school district. 29 U.S.C. § 794(a). And to press his equal protection claim, Christopher need only show that he was treated differently on account of his religion or disability. Accordingly, Christopher's case does not rest on the IDEA's substantive standards and does not fall into the third category of cases in which *Payne* requires exhaustion.[5]

In sum, the Fifth Circuit required Christopher to exhaust, whereas the Ninth Circuit would have allowed his claims to proceed to the merits. This case therefore cleanly presents the question left open in *Fry*. That question continues to arise, and the split it has produced will not resolve itself. *See supra* pp. 20–23. The Fifth Circuit considered the arguments on

[5] The Ninth Circuit's example of a claim falling within the third *Payne* category was "a claim for damages under § 504 of the Rehabilitation Act … premised on a denial of a FAPE." 653 F.3d at 875. As noted, that language refers to situations where a Rehabilitation Act claim is premised on a violation of the IDEA's "substantive standards." *Id.* As the petition in *Fry* explained, "[t]he Ninth Circuit was evidently referring to cases brought under [34 C.F.R. § 104.33(a)], in which the plaintiff seeks to prove the substance of an IDEA violation in order to establish a violation of the Rehabilitation Act. But the ADA and Rehabilitation Act"—like other federal laws—"impose an array of requirements … that are not premised on the denial of a FAPE." Cert. Pet. 16–17 n.8, *Fry*, No. 15-497 (U.S. Oct. 15, 2015). Here, Christopher's Rehabilitation Act and equal protection claims do not invoke § 104.33(a) and are not otherwise premised on a violation of the IDEA's substantive standards.

both sides and issued a decision turning squarely on its choice of test. And as the opinion reflects, there are no jurisdictional disputes, procedural complications, or other obstacles to this Court's review. This stubborn split must be resolved sooner or later, and this case is the right vehicle for doing so.

III. The Fifth Circuit's decision is wrong

Finally, the decision below is fundamentally wrong. Christopher's non-IDEA claims sought one principal form of relief: "traditional compensatory damages." App. 11a. That means, as the Fifth Circuit noted, that Christopher sought "remedies not available under the IDEA." *Id.* And because the exhaustion requirement applies only in cases "seeking *relief that is also available under* [*the IDEA*]," § 1415(*l*) (emphasis added), Christopher was not obligated to exhaust under the plain text of the statute.

A. The injury-centered approach is inconsistent with the plain text of § 1415(*l*)

1. Section 1415(*l*) preserves the rights of children with disabilities to seek remedies under other federal statutes and the Constitution. The statute imposes only one restriction on non-IDEA litigation: Children with disabilities must exhaust the IDEA's administrative procedures "before the filing of a *civil action* under [section 504 of the Rehabilitation Act, 42 U.S.C. § 1983, or other specified laws] *seeking relief that is also available* under [the IDEA]." § 1415(*l*) (emphases added). By its plain text, § 1415(*l*) prescribes a relief-centered approach.

The "relief" a plaintiff is "seeking" is the relief requested in his complaint, because the statute makes "distinctions based on the particular 'forms of relief

sought and offered,'" *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)); *see Payne*, 653 F.3d at 875; SG Merits Br. 16–17. *See generally McCarthy v. Madigan*, 503 U.S. 140, 142, 152 (1992) (looking to complaint to determine that the plaintiff was "seeking only money damages"); *Bowen v. Massachusetts*, 487 U.S. 879, 892–93 (1988) (looking to forms of relief that "the complaints sought" under "the plain language" of a statute focusing on "[a]n action … seeking relief other than money damages" (citation omitted)). As the Ninth Circuit put it, "whether a plaintiff *could have* sought relief … is irrelevant—what matters is whether the plaintiff *actually* sought [such] relief." *Payne*, 653 F.3d at 875. And relief is "available" under the IDEA only when the IDEA authorizes it. *See generally, e.g.*, *Ross*, 136 S. Ct. at 1858–59 ("the ordinary meaning of the word 'available' is … 'that which is accessible or may be obtained'" (cleaned up)).

In sum, the plain text of § 1415(*l*) provides that exhaustion is required *only* when a plaintiff's complaint seeks remedies that are authorized under the IDEA. And because the IDEA does not authorize compensatory damages, *supra* pp. 6, 28, it does not require exhaustion of non-IDEA claims that seek only compensatory damages.

2. The injury-centered approach, in contrast, has no textual basis. The statute does not speak of the injury suffered; it speaks of the relief sought. Indeed, the Fifth Circuit recognized the "textualist case" for a relief-centered approach. *See* App. 13a. The court noted, among other things, that "the ordinary meaning of 'relief' in the legal setting is remedy" and "the

words define each other in the leading legal dictionary." *Id.*; *see also supra* p. 14. Indeed, the Fifth Circuit seemed almost puzzled that the "circuit scorecard" was as lopsided as it was. App. 12a.

The panel nevertheless refused to read the statutory text as written, and instead chose to "read the statute differently" based on purported policy concerns. App. 13a–14a. That was error. "[W]hen the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also, e.g.*, *Murphy*, 548 U.S. at 296 ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citation omitted)). And "[w]hen a term goes undefined in a statute," courts must "give the term is ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The court of appeals concededly did not do that here.[6]

[6] The only apparent attempt at textual analysis by courts taking the injury-centered approach involves not § 1415(*l*), but rather Federal Rule of Civil Procedure 54(c). That rule provides that "final judgment should grant the relief to which each party is entitled." Based on that language, the Seventh Circuit concluded that, under § 1415(*l*), a court must examine "[t]he nature of the claim and the governing law [to] determine the relief no matter what the plaintiff demands." *Charlie F.*, 98 F.3d at 991–92. But that argument is perfectly self-defeating. Rule 54(c) actually *distinguishes* between "relief to which [a] party is entitled" and relief that "the party has … demanded … in its pleadings." Thus, to the extent Rule 54(c) is relevant, it strongly *reinforces* the point that the relief that a plaintiff seeks is distinct from the relief to which she might be entitled.

B. The injury-centered approach is also inconsistent with the purpose and history of § 1415(*l*)

Even if it were necessary to consider atextual evidence of congressional intent, the injury-centered approach would come up short. In abrogating *Smith*, Congress "reaffirm[ed] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with [the IDEA] as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99–296, at 6; *see supra* pp. 6–8. By restoring the viability of other statutes, Congress cleared the way for plaintiffs to seek damages. And in requiring exhaustion only when the IDEA action is "seeking relief" that is "available" under the IDEA, Congress let plaintiffs go directly to court when all they wish to do is recover such damages.

Thus, as the House Report explains, exhaustion is required for non-IDEA claims "where exhaustion would be required under [the IDEA] and the relief [the plaintiffs] seek is also available under [the IDEA]." H.R. Rep. No. 99–296, at 7. But exhaustion is *not* required when "the hearing officer lacks the authority to grant the relief sought." *Id.*; *see also Payne*, 653 F.3d at 876 (discussing legislative history). Indeed, the lead draftsman and proponent of the HCPA submitted an amicus brief in *Fry* to explain how badly courts following the injury-centered approach have misunderstood congressional intent. *See* Br. of Amicus Curiae Hon. Lowell P. Weicker, Jr. in Support of Petitioners, *Fry*, No. 15-497 (U.S. Aug. 29, 2016) ("Weicker Br.").

C. The Fifth Circuit's reasoning is otherwise unpersuasive

1. Given statutory text, purpose, and history, there is no reason to consider policy-based arguments. Courts may not "substitute [their] view of … policy for the legislation which has been passed by Congress." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (citation omitted). But even if they could, the Fifth Circuit's concerns about "circumventing the scheme that Congress established in section 1415(*l*) through clever pleading," App. 14a, would be unpersuasive from a policy standpoint.

First, the injury-centered approach is an unnecessarily punitive response to an imagined problem. Plaintiffs who can actually get relief through IDEA proceedings have little reason to evade those proceedings through artful pleading. The presumption should be that plaintiffs (typically parents) are concerned with their children's wellbeing and whether their children are in fact receiving a FAPE. And even if artful pleading *were* an issue, it could be addressed through far more modest means, such as making clear that exhaustion is required when a complaint seeks IDEA remedies *or their functional equivalents*. *See generally Payne*, 653 F.3d at 875.

Second, the harms of the injury-centered approach outweigh any conceivable benefits. The injury-centered approach forces students and their parents to undertake time-consuming administrative proceedings—only to inevitably fail to obtain the relief they seek. Had Congress intended that pointless result, it would have said so expressly, especially given that "[t]his Court's precedents have recognized" that where an agency cannot "grant effective relief" "the interests

of the individual weigh heavily against requiring administrative exhaustion." *McCarthy*, 503 U.S. at 146–47 (citation omitted). Instead, Congress said just the opposite: Exhaustion is required only "to the same extent as would be required had the action been brought under [the IDEA]." § 1415(*l*). And the IDEA does not require exhaustion "where exhaustion would be futile or inadequate," *Honig*, 484 U.S. at 327, including in situations where the agency "lack[s] authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148. Again, the question is what relief the plaintiff requests, not what relief might be available for the injury alleged. *See supra* pp. 28–31; Weicker Br. 17–18.

2. The Fifth Circuit's half-hearted suggestion that *Fry*'s "broader reasoning" "tends to support" the injury-centered approach lacks merit. App. 14a. This Court expressly stated—twice—that its opinion in *Fry* did not answer the question presented here. 137 S. Ct. at 752 n.4, 754 n.8. And if anything, the "broader reasoning" in *Fry* undercuts the injury-centered approach. As the Court (once again) made clear in *Fry*, statutory interpretation must "begin … with the statutory language." *Id.* at 753. But the injury-centered approach concededly starts and ends with policy choice.

* * *

The question left open in *Fry* continues to arise as the determinative question where students and their parents seek money damages for violations of their statutory and constitutional rights. The entrenched split on the question has only deepened, and, as the United States has explained, the majority of the cir-

cuits have gotten the answer badly wrong. The consequences are significant: Plaintiffs like Christopher are subjected to an onerous and pointless exhaustion requirement that violates statutory text and congressional intent. This Court should intervene without delay.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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Respectfully submitted,

Andrew J. Clopton
JONES DAY
150 W. Jefferson
Suite 2100
Detroit, MI 48226

Terry P. Gorman
GORMAN LAW P.L.L.C.
901 Mopac Expressway S. 78746
Suite 300
Austin, TX 78733

Shay Dvoretzky
Counsel of Record
Alex Potapov
Parker Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner