No. 21-887

IN THE

Supreme Court of the United States

MIGUEL LUNA PEREZ,

Petitioner,

—v.—

STURGIS PUBLIC SCHOOLS, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW YORK AND NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF PETITIONER

JEFFREY S. GINSBERG
Counsel of Record
KATHLEEN E. GARDNER
KATE ROSS
BASIL J. K. WILLIAMS
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
jginsberg@pbwt.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae[2] are two non-profit organizations that are actively involved in advocating for the rights of children and their families under the Individuals with Disabilities Education Act (IDEA) and other federal, state, and local laws. *Amici* have an interest in this case because of its impact on the proper interpretation of the IDEA and the appropriate scope of the exhaustion doctrine as it relates to the IDEA.

SUMMARY OF ARGUMENT

The recognition of a futility exception to the IDEA's exhaustion requirement found in 20 U.S.C. § 1415(l) is necessary to achieve the goals of the IDEA,

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[1] All parties have provided blanket consent to the filing of *amici curiae* briefs and no party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] *Amici* are Advocates for Children of New York (AFC) and New York Legal Assistance Group (NYLAG). AFC has worked for over fifty years with low-income families to secure quality public education services for their children, including children with disabilities; provides a range of direct services, including advocacy for students and families in individual cases; and also pursues institutional reform of educational policies and practices through advocacy and litigation. NYLAG is a leading not-for-profit civil legal services organization that advocates for adults, children, and families that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of special education, immigration, government benefits, family law, disability rights, housing law, and consumer debt, and collaborates with parents to ensure that students receive the educational services to which they are entitled through consultation and representation at impartial hearings, appeals, and court actions.

is consistent with the statute's text, structure, and purposes, and is supported by this Court's precedents and traditional administrative law principles. *Amici* submit this brief to highlight for the Court the statutory and historical bases for the futility exception, the recognition by this Court and others of exhaustion exceptions under the IDEA, and the problematic practical effects that this Court's failure to recognize an exception for futility would have on the IDEA's dispute resolution system.

The IDEA's two main purposes are "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE) and "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §§ 1400(d)(1)(A), (B). The IDEA affords parents various procedural rights that protect their ability to participate in school evaluations of their children and challenge whether their children received a FAPE through impartial due process hearings, mediation, and judicial review in state or federal court. *See, e.g.*, *id.* §§ 1415(b)(1), (3); 1415(e)–(g); 1415(i)(2).

While the IDEA ensures a FAPE for disabled students, and provides an administrative scheme for vindicating FAPE rights, Congress afforded disabled children other protections as well. The Americans with Disabilities Act (ADA), for example, protects disabled children from discrimination in, among other places, public schools. 42 U.S.C. § 12132. In fact, the IDEA specifically mentions this and other distinct forms of rights and remedies available to disabled children in its exhaustion provision, Section 1415(l).

To pursue one's IDEA rights, or rights under laws seeking relief also available under the IDEA, a party generally must turn "first to the statute's administrative framework to resolve any conflicts they had with the school's educational services." *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1064 (10th Cir. 2002). Specifically, Section 1415(l) requires exhaustion of administrative remedies before seeking judicial review when the "relief" "s[ought]" "is also available" under the IDEA. 20 U.S.C. § 1415(l). This Court has held that for exhaustion to be required under Section 1415(l), "a suit must seek relief for the denial of a FAPE"—and "in determining whether a suit indeed 'seeks' relief for such a denial, . . . court[s] should look to the substance, or gravamen, of the plaintiff's complaint." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017). This Court has also stated that "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 327 (1988). That futility exception to the IDEA's exhaustion requirement is at the heart of this case.

Here, Miguel Luna Perez did first turn to the statute's administrative framework, bringing an administrative case including IDEA and ADA claims. His ADA claim was dismissed by the administrative hearing officer for lack of subject matter jurisdiction. Perez then settled what remained—his IDEA claim—and his administrative case was dismissed. Aggrieved by the administrative dismissal of his ADA claim, Perez filed suit in federal court including a claim for damages.

The Sixth Circuit ultimately found that Section 1415(l)'s exhaustion requirement precluded Perez from recovering for ADA discrimination in federal court even though (a) he raised that same claim through administrative processes; (b) that claim was rejected and dismissed on jurisdictional grounds; and (c) he sought monetary relief for, among other things, emotional damages caused by discrimination, *not* relief for denial of a FAPE.

In barring Perez's suit, the Sixth Circuit ignored the IDEA's express language and well-recognized exceptions to the exhaustion requirement for students with disabilities. Perez's claims should have been exempt from exhaustion because they were both divorced from any relief for a FAPE denial and because they sought to vindicate rights that could not be vindicated under the IDEA. An exemption for such futility is essential to protect students' ADA rights to be free from *discrimination* in educational settings.

Thus, while the Sixth Circuit's ruling is contrary to Section 1415(l)'s text and legislative history, *Fry*'s teachings, and well-settled exhaustion doctrine, it also threatens to undermine the IDEA's stated purposes by preventing students with disabilities from enforcing their other, non-IDEA, rights in a forum that can actually provide a remedy. Moreover, a futility exception under the IDEA is critical to the proper functioning of numerous other categories of well-recognized IDEA situations in which exhaustion is currently excused.

This Court should reject the Sixth Circuit's strained reading of Section 1415(l), and reaffirm its

acceptance of the futility exception in the IDEA context. To do so would provide clarity for those bringing actions under the IDEA and protect the ability of disabled students to effectively vindicate both their IDEA and non-IDEA-related rights.

ARGUMENT

I. The IDEA's Plain Meaning, Statutory Scheme, and Legislative History Contemplate Exceptions to the Exhaustion Requirement

At issue here is whether the futility exception is a "judge-made exhaustion doctrine" that cannot be read into Section 1415(l), or whether Section 1415(l) already provides for this exception. *See Perez v. Sturgis Pub. Schs.*, 3 F.4th 236, 242 (6th Cir. 2021) (quoting *Ross v. Blake*, 578 U.S. 632, 639 (2016)). *Amici* respectfully submit that the latter view is correct. Such a view comports with the plain meaning of Section 1415(l), is consistent with the IDEA's stated purposes, and is confirmed by the IDEA's legislative history. This Court has long held that "in the absence of 'a clearly expressed legislative intent to the contrary,'" unambiguous statutory language "must ordinarily be regarded as conclusive." *See United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). And while legislative history is not to be used to construe statutory language that is plain and unambiguous, *see Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978), it can, and here does, reinforce a congressional intent that is consistent with clear statutory language. *See, e.g.*, *Gen.*

Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 590–91 (2004).

A. The Plain Language of Section 1415(l) Unambiguously Excuses Exhaustion Under Certain Circumstances

Section 1415(l), like any statutory provision, is "to be construed if reasonably possible to effectuate the intent of the lawmakers," first by "consider[ing] . . . the words themselves," and then "by considering," *inter alia*, "the purposes of the law." *See Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937). This Court "start[s] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). The IDEA's exhaustion requirement 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.

20 U.S.C. § 1415(l) (emphases added).

The provision's plain language assures students with disabilities broad protections under federal anti-discrimination laws like Section 504 of the Rehabilitation Act ("Rehabilitation Act") and the ADA, qualified *only* by the requirement that some disabled students first exhaust administrative remedies before coming to court. Moreover, by the provision's terms, this exhaustion requirement applies solely to "civil action[s] . . . seeking relief that is also available under [the IDEA]." *Id.*

This language requires a court to engage in a two-step process to determine whether a particular action is even subject to the exhaustion requirement. The Court must first determine what "relief" the "action" "seek[s]." The ordinary meaning of "relief" is the "redress[] or benefit" that attends a favorable judgment. *See Fry*, 137 S. Ct. at 753 (quoting Black's Law Dictionary 1161 (5th ed. 1979)). As *Fry* teaches, to identify what "redress" is sought, the Court must examine the "gravamen of the complaint." *See id.* at 752; *see also Seek*, Webster's New World Dictionary of the American Language 1289 (1984) ("to . . . resort to"; "to request; ask for"; "to . . . pursue"). Once the Court determines the relief sought, it must next ask whether such relief is "available" under the IDEA. *See* 20 U.S.C. § 1415(l). Relief is "available" when it is "accessible or may be obtained." *Ross*, 578 U.S. at 642 (quoting Webster's Third New International Dictionary 150 (1993)).

If the answer to the second question is "yes"—*i.e.*, the relief sought is "available" under the IDEA—

then the plaintiff must exhaust her action before pursuing it in federal court. However, if the answer to the second question is "no"—*i.e.*, if the relief sought is not "available" under the IDEA—then the plaintiff may sue in federal court whether or not she first exhausted her claim through the IDEA's administrative process. The text's terms thus envision two alternative categories of actions by students with disabilities that theoretically might be subject to the IDEA's exhaustion requirement, but only one that actually is. "[W]hen the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

Courts are thus bound by Section 1415(l)'s pronouncement that some actions will be excused from the IDEA's exhaustion requirement. Moreover, the second type of action—where no exhaustion is required because the relief sought is not "available" under the IDEA—tracks the futility exception routinely recognized by federal courts and on which Perez relies, excusing exhaustion where the relevant administrative process does not provide "adequate remedies." *See Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992) ("The policies underlying the exhaustion requirement do not come into play[] . . . when pursuit of administrative remedies would be futile because the agency . . . was unable to remedy the alleged injury."); Brief of Petitioner at 41; *see, e.g.*, *Honig*, 484 U.S. at 327; *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 786 (10th Cir. 2013) (Gorsuch, J.) (explaining that where parents took steps to seek relief via the administrative process, but did not "formally request a due process hearing under the IDEA," "it

would have been futile to then force them to request a formal due process hearing—which in any event cannot award damages—simply to preserve their damages claim"); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1168 (9th Cir. 2007) (noting that exhaustion is not required "where resort to the administrative process would either be futile or inadequate") (quoting *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992)).[3] The Sixth Circuit's conclusion that "Section 1415(l) does not come with a 'futility' exception" was incorrect; to the contrary, the exception is embedded in that Section's language itself. *See Perez*, 3 F.4th at 242.

Indeed, circuit and district courts alike have repeatedly recognized that the futility exception unambiguously derives from this same language "limit[ing] the exhaustion requirement to cases where the plaintiff 'seek[s] relief that is also available' under the IDEA."[4] *See Kutasi*, 494 F.3d at 1168 (quoting 20

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[3] *See also Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 22, 31 & n.21 (1st Cir. 2019); *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 950 (8th Cir. 2017); *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007); *MM ex. rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002); *Heston v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 983 (5th Cir. 2020) (per curiam); *C.T. ex rel. Trevorrow v. Necedah Area Sch. Dist.*, 39 F. App'x 420, 422 (7th Cir. 2002); *N.B. ex rel. D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 190 n.10 (1st Cir. 1993); *Gardner v. Sch. Bd. Caddo Parish*, 958 F.2d 108, 111–12 (5th Cir. 1992); *Cox v. Jenkins*, 878 F.2d 414, 419 (D.C. Cir. 1989).

[4] *Amici* respectfully submit in the alternative that Petitioner meets the *Fry* test because the gravamen of his complaint was not for relief from the denial of a FAPE, but rather, money damages

U.S.C. § 1415(l)); *see also Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52 (1st Cir. 2000) (holding that futility exception "overlaps with the 'relief available' language of § 1415(l) in the sense that relief is not available within the meaning of § 1415(l) if the due process hearing provided by subchapter II of IDEA does not provide relief that addresses the claim of the complainant"); *W.B.*, 67 F.3d at 496 (similar); *B.H. v. Portage Pub. Sch. Bd. of Educ.*, No. 1:08-CV-293, 2009 WL 277051, at *8 (W.D. Mich. Feb. 2, 2009) (similar).

As Judge Straub wrote in *Coleman v. Newburgh Enlarged City School District*, 503 F.3d 198 (2d Cir. 2007)—which declined to deem exhaustion futile in a suit seeking relief from "harm" stemming from missed classes and extracurriculars—"[t]hese are not judicially-created exceptions." *See id.* at 211 (Straub, J., concurring). Nor, as Respondents suggest, do they originate in so-called *dicta* from *Honig*. Brief in Opposition to Petition for a Writ of Certiorari at 32. Rather, they are "statutory exceptions that courts must follow to carry out the clear intent of Congress." *See Coleman*, 503 F.3d at 211 (Straub, J., concurring). Similarly, then-Judge Gorsuch's explanation of futility in *A.F. ex rel. Christine B. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), invokes the key language of Section 1415(l) that was analyzed in *Fry*, describing the exception as applicable "when *no more relief* could possibly be won under the statute." *See id.*

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for his prolonged isolation and lack of access to services stemming from Respondents' failure to assist him in communicating with others in American Sign Language. *See Fry*, 137 S. Ct. at 752–53.

at 1249 (Gorsuch, J.) (emphasis added) (citing *Muskrat*, 715 F.3d at 786).

The Sixth Circuit did not address the overlap between Section 1415(l) and the futility exception, concluding instead that there is no futility exception and declining "to create" an exception when such an exception already exists.[5] *See Perez*, 3 F.4th at 242. The court thus ignored Section 1415(l)'s plain language and consequently disregarded the fact that the futility exception to the IDEA's exhaustion requirement is a statutory directive, not a judicially-created doctrine.

This directive becomes clear when one examines other statutes requiring exhaustion regardless of the circumstances through express language that is absent from the IDEA. These statutes demonstrate that Congress knows how to create absolute

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[5] The Sixth Circuit's reliance on *Ross* for this proposition is flawed because *Ross* analyzed the Prison Litigation Reform Act (PLRA)—an entirely different statute with its own text, purpose, and history. *See Perez*, 3 F.4th at 253 (Stranch, J., dissenting). *Ross* held that failure to exhaust under the PLRA cannot be excused because the PLRA's language is "mandatory" and, based on its history, Congress specifically intended to reject a prior version of the PLRA that made exhaustion discretionary. *See* 578 U.S. at 639; *see also* 42 U.S.C. § 1997e(a). As *Fry* observed, the PLRA's mandatory language is absent from Section 1415(l). *See* 137 S. Ct. at 755. Moreover, *Ross* made clear that its holding was not absolute, noting that "an exhaustion provision with a different text and history from § 1997e(a) might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions. . . . The question in all cases is one of statutory construction, which must be resolved using ordinary interpretive techniques." *See* 578 U.S. at 642 n.2. The Sixth Circuit ignored this caveat.

exhaustion requirements without any exceptions, but specifically chose not to do so here. Indeed, the Court does "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). Similarly, "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)).

The language in the Medicare Act and the Social Security Act (SSA), 42 U.S.C. §§ 401 *et seq.*; 1395 *et seq.*, is a striking example of an express exhaustion requirement with no exceptions. Section 405(h) of the SSA imposes an absolute exhaustion requirement without which a federal court lacks jurisdiction, stating that "[n]o findings of fact or decision of the Commissioner . . . shall be reviewed by any person, tribunal, or governmental agency except as herein provided" and "[n]o action against the United States, the Commissioner[,] . . . or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." *Id.* § 405(h). In turn, Section 405(g) of the SSA only permits judicial review of "final decision[s] of the Commissioner . . . made after a hearing to which [the complainant] was a party." *Id.* § 405(g). Such language appears nowhere in the IDEA.

In *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), this Court examined the effect of this language on whether the Medicare Act—

which expressly incorporates the SSA's exhaustion procedures—required nursing homes to exhaust through administrative processes, *inter alia*, unexhausted constitutional claims regarding certain Medicare regulations before coming to federal court. *See id.* at 10. The Court held that because Section 405(h) mandates such exhaustion with no permissible exceptions, the nursing homes' unexhausted claims were properly dismissed for lack of jurisdiction. *See id.* at 10, 13. In doing so, the *Shalala* Court distinguished Section 405(h) from language in typical statutory exhaustion provisions (like Section 1415(l)), explaining that Section 405(h) "prevents application of the . . . 'exhaustion' exceptions, *i.e.*, . . . it demands the 'channeling' of virtually all legal attacks through the agency," thus "assur[ing] the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying . . . 'exhaustion' exceptions case by case." *See id.* at 13. Decades earlier, this Court likewise held that the "plain language" of this same provision precluded social security claimants from bringing a constitutional class action in federal court without first exhausting those claims through the SSA's administrative processes. *See Weinberger v. Salfi*, 422 U.S. 749, 758–59 (1975).

The absence of mandatory language in the IDEA similar to that in Section 405(h) makes clear that the IDEA's exhaustion requirement is not absolute. Congress could have included a provision like the SSA's Section 405(h) in the IDEA, both being remedial statutes—but it did not. This fact evidences that Congress did not intend that exhaustion under

the IDEA be required irrespective of the circumstances.

B. Section 1415(l)'s Legislative History Confirms that Congress Intended to Excuse the IDEA's Exhaustion Requirement Where Exhaustion Would Be Futile

In addition to Section 1415(l)'s text, courts trace the exceptions to the IDEA's exhaustion requirement to its uniquely specific legislative history and historical context. *See, e.g.*, *Washington v. Cal. Dep't of Educ.*, 472 F. App'x 645, 647 (9th Cir. 2012); *MM*, 303 F.3d at 536; *Heldman*, 962 F.2d at 158–59; *W.B.*, 67 F.3d at 495; *Pihl*, 9 F.3d at 190 n.10. This background confirms that Congress contemplated distinct situations in which the exhaustion requirement would be excused to give students with disabilities the opportunity to obtain recourse through other avenues when necessary to protect their rights.

Indeed, during the Senate debate when the Education for All Handicapped Children Act (EHA) (IDEA's predecessor) was first passed, Senator Williams, the EHA's principal author, stated that "exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter." 121 Cong. Rec. 37416 (1975). When such "statements by individual legislators . . . are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

Further, both the Senate and House Reports accompanying the statute's 1986 amendments reaffirmed and amplified the earlier history. Each explains that Congress chose to amend the EHA in specific response to this Court's finding in *Smith v. Robinson* that the EHA provided *exclusive* relief for disability cases in the special education context. *See* S. Rep. 99-112, at 2 (1985); H.R. Rep. 99-296, at 4 (1985). Although the amended version preserves the exhaustion requirement, the two Reports explain, to protect the opportunity to vindicate non-EHA and EHA rights alike, its plain language necessarily contemplates exceptions to exhaustion for numerous scenarios.

For example, the Senate Report parrots the language in what became Section 1415(l) itself, explaining that the statutory language "makes it clear" that parents must exhaust "administrative remedies to the same extent as would have been necessary if the suit had been filed under the EHA." *See* S. Rep. 99-112, at 15. "*[T]hus*," the Report reasons, "exhaustion would . . . be excused where [parents] would not be required to exhaust under the EHA, *such as when resort to those proceedings would be futile*." *See id.* (emphases added). In other words, the Senate understood the new statutory language to explicitly provide for a futility exception so that, when parents cannot "seek[] relief that is also available" under the EHA—due to the futility of doing so—the language excuses exhaustion. Likewise, the House Report explicitly lists four "situations" where it is "not appropriate to require" exhaustion "before filing a law suit," including where (1) it would be "futile" to use the EHA's due process procedures; (2) the relevant agency

adopted a policy or pursued a practice of general applicability contrary to law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies; and (4) an emergency situation exists (e.g., failure to take immediate action will adversely affect a child's mental or physical health). *See* H.R. Rep. 99-296, at 7.

These repeated invocations of a futility exception to the exhaustion requirement from both houses of Congress are consistent with the plain meaning of Section 1415(l).[6] This pattern further supports the conclusion that, contrary to the Sixth Circuit's decision, exceptions, including futility, exist in the statute's language without the need for "judge-made exceptions."

C. Exceptions to Administrative Exhaustion Requirements Comport with Traditional Principles Underlying Exhaustion Doctrine That Courts Recognize in Numerous Contexts

Ordinarily, administrative exhaustion serves the "twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute*, PLRA, Pub. L. No. 104–134, § 803, 110 Stat. 1321, *as recognized in Woodford v.*

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[6] Courts, too, have recognized that the "legislative history of the IDEA supports the view that exhaustion is not a rigid requirement." *Pihl*, 9 F.3d at 190 n.10; *see also Heldman*, 962 F.2d at 158 ("The existence of a futility exception to section 1415's exhaustion requirement can be traced to the legislative history of the 1975 Act.").

Ngo, 548 U.S. 81 (2006). However, this Court has long recognized exceptions to administrative exhaustion requirements where "the interests of the individual weigh [too] heavily" and these "twin purposes" will not be served. *See id.* at 146–47. Loosely echoing the EHA House and Senate Reports, these exceptions include (1) where requiring exhaustion may cause "undue prejudice to" a "subsequent" court action, *i.e.*, where the administrative action has an "unreasonable or indefinite timeframe"; (2) where administrative remedies "may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief'"; or (3) where "the administrative remed[ies] may be inadequate because the administrative body is . . . biased or has otherwise predetermined the issue before it." *See id.* at 146–48 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)). Moreover, "agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021).

This Court repeatedly has found these principles persuasive for excusing exhaustion requirements in a variety of contexts beyond the IDEA to give litigants the chance to obtain timely and effective relief that would not be available through administrative processes. *See, e.g.*, *id.* at 1361 (applying futility exception to excuse issue exhaustion requirement under SSA for Appointments Clause challenge "about which SSA ALJs have no special expertise and for which they can provide no relief"); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 404 (1988) (excusing exhaustion of challenge to Medicare

regulation regarding insurance cost apportionment before intermediary body because intermediary was "without power to award reimbursement except as the regulations provide" and "any attempt to persuade [it] . . . otherwise would be futile"); *Mont. Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928) (excusing exhaustion of administrative remedies to challenge constitutionality of local tax statutes because "the county board of equalization was powerless to grant any appropriate relief"). The intersection of special education and disability rights falls neatly into these categories, in light of the IDEA, the Rehabilitation Act, and the ADA's remedial purposes as well as the challenges disabled students face in navigating local administrative proceedings. *See infra* Section II.

Amici recognize that the Court "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). However, Congress has not provided otherwise here. The plain language of Section 1415(l) provides for a futility exception, or in the alternative, is inapplicable whenever the "relief" sought is "[un]available" under the IDEA because of lack of authority, time constraints, inadequacy of agency procedures, and the like. *See Fry*, 137 S. Ct. at 752–53.

II. The Futility Exception to the IDEA's Exhaustion Requirement Is Necessary for Students to Vindicate Their Rights Under the IDEA

Absent a futility exception, numerous rights afforded under the IDEA would be unattainable.[7] Some are rights recognized in the language of the statute itself; others are noted in the legislative history and in IDEA case law. Either way, this Court's failure to recognize futility as an exception to the IDEA's exhaustion requirement would deprive students and parents of the full panoply of rights afforded under the statute. One of the stated purposes of the IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B). A futility

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[7] *Amici* note that it would be particularly ironic in this case—where the hearing officer dismissed Perez's ADA claim, and Perez *settled* his IDEA claim and had no ADA claim left to "exhaust"—that Perez somehow still would be required to exhaust, especially since courts in certain situations have found that a *failure to accept a full settlement* constitutes a failure to exhaust administrative remedies. *See, e.g.*, *Briley v. Carlin*, 172 F.3d 567, 572 (8th Cir. 1999) ("Plainly stated, a claimant who rejects an offer of full relief is not entitled to maintain a federal lawsuit."); *Francis v. Brown*, 58 F.3d 191, 193 (5th Cir. 1995) (holding that a "federal employee fails to exhaust his administrative remedies when he rejects a settlement offer for full relief on the specific claims he asserts"); *Wrenn v. Sec'y, Dep't of Veterans Affs.*, 918 F.2d 1073, 1078–79 (2d Cir. 1990) (failure to accept full settlement in discrimination case amounted to failure to exhaust); *Askew v. Stone*, No. 94-2153, 1996 WL 135024, at *4 (6th Cir. Mar. 25, 1996) (failure to accept full settlement in the administrative process precluded party from litigating claim). Yet here, the Sixth Circuit found that Perez's *acceptance of a full settlement* constituted a failure to exhaust.

exception is required to ensure that those rights are, in fact, protected.

A. Without the Futility Exception, the IDEA's "Stay-Put" Provision Would Be Unenforceable in Federal Court

While a student's IDEA due process proceeding is pending, "unless the State or local education agency and parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). This requirement is called the IDEA's "stay-put" provision. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002). In the absence of a futility exception, students could not vindicate their statutory "stay-put" rights.

Notwithstanding the IDEA's exhaustion requirement, students may immediately challenge their pendent placements—that is, their educational placements during the pendency of their IDEA due process proceedings—in federal court before exhausting the administrative process. This is because courts characterize vindication of the stay-put provision as an exception to the IDEA's exhaustion requirement. For example, in *Murphy*, then-Judge Sotomayor explained that "an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to this jurisdictional prerequisite,"[8] reasoning:

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[8] Elsewhere, the Second Circuit has presented these exceptions as a single futility exception, explaining that "[t]he requirement is excused . . . when exhaustion would be futile because the administrative procedures do not provide an adequate remedy." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112 (2d Cir.

> The administrative process is inadequate to remedy violations of [the stay-put provision] because, given the time-sensitive nature of the [provision], an immediate appeal is necessary to give realistic protection to the claimed right. . . . If the child is ejected from his or her current educational placement while the administrative process sorts out where the proper interim placement should be, then the deprivation is complete. A belated administrative decision upholding a student's stay-put rights provides no remedy for the disruption already suffered by the student. Hence, as a practical matter, access to immediate interim relief is essential for the vindication of this particular IDEA right.

Id. at 199–200 (citations and internal quotation marks omitted); *see also N.D. ex rel. parents acting as guardians ad litem v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1110–11 (9th Cir. 2010) ("Exhausting the administrative process [to enforce the stay-put provision] would be inadequate because the [provision] . . . is designed precisely to prevent harm while the proceeding is ongoing."); *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 230 n.8 (3d Cir. 2017) (explaining that "there is no exhaustion requirement for actions seeking relief under the . . . 'stay put' provision"); *Digre v. Roseville*

2004). Regardless of its articulation, an exhaustion exception recognizing and protecting against the inability of the administrative process to protect these statutory stay-put rights is necessary to give full effect to the stay-put provision.

Schs. Indep. Dist. No. 623, 841 F.2d 245, 250 n.3 (8th Cir. 1988) (citing the exhaustion exceptions in support of the proposition that federal courts can consider immediate challenges to pendent placements).

The futility or inadequacy exception is necessary for students with disabilities to enforce their stay-put rights in federal court. Without an exception to the exhaustion requirement, one of the main goals of the IDEA—to ensure that disabled students' rights are protected—could not be fully met.

B. The Futility Exception Is Necessary to Enforce Administrative Hearing Orders Under the IDEA

In New York City, the jurisdiction with the largest number of administrative hearings, administrative hearing orders are timely implemented at an extraordinarily low rate. From April 13, 2021 to July 12, 2021, the New York City Department of Education (NYC DOE) timely implemented[9] only 4.3% of payment orders—that is, orders requiring NYC DOE to make a payment to a parent, private service provider, evaluator, or private school. Guidehouse Report at 3. During the same period, the agency timely implemented only 10.9% of service orders—that is, orders requiring NYC DOE to take any action other than making a payment; only 10.2% of service action

[9] "Timely implemented" refers to compliance with the time period specified in an order, or if no time period is specified, within 35 days after the order was issued. Guidehouse, L.V. v. D.O.E. 03 Civ. 9917 (RJH) Stipulation and Agreement of Settlement Independent Auditor's Post Corrective Action Forty-Eighth Quarterly Report 3 n.5 (Oct. 14, 2022) [hereinafter Guidehouse Report].

items—that is, actions listed in a service order; and only 3.5% of payment action items—that is, payments detailed in a payment order. *Id.*

Non-implementation of orders is a longstanding problem. In 2003, students with disabilities brought suit against NYC DOE, alleging that the agency failed to provide ordered services and payments. *See* Second Am. Compl. ¶¶ 38–152, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. May 13, 2004), ECF No. 46. The parties entered into a stipulation requiring NYC DOE to satisfy mandatory benchmarks for implementation of orders. *See* Order at 3, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Apr. 10, 2008), ECF No. 120. Under the stipulation, the agency was required to implement a "Corrective Action Plan" if it did not satisfy the benchmarks. Stipulation ¶ 10(a), *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Sept. 3, 2019), ECF No. 207-2. But NYC DOE failed to meet the stipulation's first mandatory benchmarks, and then failed to create or implement a Corrective Action Plan. Independent Auditor's First Benchmark Report at 6, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Sept. 3, 2019), ECF No. 207-6; Shore Decl. ¶¶ 4, 5, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Sept. 3, 2019), ECF No. 208. As of late January 2018, even after creating an "implementation unit," the agency still had not complied with the first mandatory benchmarks. *See* Navigant, L.V. v. D.O.E. 03 Civ. 9917 (RJH) Stipulation and Agreement of Settlement Independent Auditor's Post Corrective Action Thirty-Fourth Quarterly Report at 3, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Sept. 3, 2019), ECF No. 207-12. Consequently, last year, the district court

appointed a special master to oversee NYC DOE's compliance with the stipulation. Order at 1, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Jan. 28, 2021), ECF No. 255.

When orders are not implemented, students suffer. For example, in *L.V.*, NYC DOE's failure to provide ordered health services prevented a student from attending school for *four years*. *See* Mot. to Appoint Special Master at 28, *L.V. v. N.Y.C. Dep't of Educ.*, No. 03-CV-9917 (S.D.N.Y. Sept. 3, 2019), ECF No. 206. Delays in implementing orders regularly and profoundly affect the progress of disabled students. *See, e.g.*, *SJB ex rel. Berkhout v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 6653 (NRB), 2004 WL 1586500, at *2 (S.D.N.Y. July 14, 2004) (noting that failure to provide ordered services for a year resulted in "significant setbacks in [a student's] educational and life skills achievement levels, including a deterioration in his ability to speak, [and] a loss of the ability to recognize letters and numbers").

Courts routinely and necessarily apply the futility exception where disabled students seek to enforce administrative orders. *See, e.g.*, *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069–70 (9th Cir. 2002) (concluding that exhaustion of due process procedures to enforce a hearing officer's decision would be futile or inadequate in part because the State's special education hearing office lacked jurisdiction to enforce its own orders); *R.B. ex rel. L.B. v. Bd. of Educ. of N.Y.C.*, 99 F. Supp. 2d 411, 415–16 (S.D.N.Y. 2000) (concluding that exhausting administrative remedies to enforce implementation of a hearing officer's order was

"unnecessary" and "pointless"); *K.W. v. District of Columbia*, 385 F. Supp. 3d 29, 42 (D.D.C. 2019) (applying the futility exception where "it [was] difficult to foresee how [the school district] could rely on alleged 'specialized [administrative] expertise'" to address a failure to implement hearing orders); *SJB*, 2004 WL 1586500, at *3–5 (concluding that it would be futile to exhaust a challenge to an implementation failure); *cf. Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 117–18 (1st Cir. 2003) (concluding that a student was not required to exhaust the administrative process to enforce a hearing officer's initial decision in part because requiring the student to "obtain[] a new order every school year before he may seek review of the original order . . . would create a situation capable of repetition, yet evading review").[10]

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[10] Delays in due process hearings similarly support the need to apply the futility exception to enforcement of administrative orders. Data from New York City illustrates this problem. New York law contemplates a total of seventy-five days from the filing of an administrative due process complaint to the issuance of an order by an impartial hearing officer (IHO). *See* 8 N.Y.C.R.R. §§ 200.5(j)(2)(v), (5). As of January 2020, it took an average of 259 days for students to receive an IHO order. Special Education Solutions, LLC, Update on the NYC Impartial Hearing System 7 (Jan. 12, 2020), https://www.regents.nysed.gov/common/regents/files/P-12%20-%20Update%20on%20the%20NYC%20Impartial%20Hearing%20System.pdf (relying on New York State Education Department data). These delays are not just a consequence of the COVID-19 pandemic; case lengths have increased year-to-year since the 2014–2015 school year. *See id.* Students with disabilities outside of New York City also face delays in their due process hearings. *See, e.g.*, Diane M. Holben & Perry A. Zirkel, *Due Process Hearings Under the Individuals with Disabilities Education Act: Justice Delayed* . . . , 73 Admin. L. Rev. 833, 856–57 (2021). It would be untenable for those students to spend months, if not

The goals of the IDEA cannot be effectuated without enforcement of administrative hearing orders. The futility exception is necessary to enable students with disabilities to seek enforcement of those orders in federal court.

C. Without the Futility Exception, Students Would Be Unable to Challenge Systemic or Structural Harms Effectively

The ability to challenge "systemic" or "structural" issues under the futility exception is critical to the provision of services mandated by the IDEA. Courts apply the futility exception where plaintiffs challenge "the framework and procedures for assessing and placing students in appropriate education programs . . . or [where the] nature and volume of complaints [are] incapable of correction by the administrative hearing process." *J.S.*, 386 F.3d at 114. For example, in *J.S.*, the Second Circuit applied the futility exception where students with disabilities alleged "systemic problems," including the school district's failures to "prepare and implement Individualized Education Programs" (IEPs) and "provide parents with required procedural safeguards regarding identification, evaluation, and accommodation of otherwise disabled children." *Id.* at 115.

Similarly, in *Heldman*, the Second Circuit applied the futility exception to a parent's challenge to New York State's procedures for selecting hearing

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years, waiting for a prior favorable order to come into effect without redress in federal court.

officers. 962 F.2d at 158–59. The court reasoned in part:

> To require a systemic challenge . . . to pursue administrative remedies would not further the purposes of the IDEA and would only serve to insulate the state procedures from review—an outcome that would undermine the system Congress selected for the protection of the rights of children with disabilities.

Id. at 159; *see also T.R. v. Sch. Dist. of Phila.*, 4 F.4th 179, 192 (3d Cir. 2021) ("Claims that . . . meet the systemic exception[11] often challenge policies that concern the administrative dispute-resolution mechanism itself."); *Ass'n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) ("Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms."); *cf. Hoeft*, 967 F.2d at 1309 ("Exhaustion may also be excused because of inadequacy of administrative remedies where the plaintiffs' substantive claims themselves concern the adequacy of the administrative process.").

One systemic failure that disabled students face is non-implementation of IEPs. IEPs are annually-developed plans that set out, among other things, disabled students' educational goals and the services

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[11] Under Third Circuit precedent, the "systemic exception" "flows implicitly from, or is in fact subsumed by, the futility and no-administrative-relief exceptions." *T.R.*, 4 F.4th at 185 (quoting *Beth V. ex rel. Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996)).

required for students to meet those goals. 20 U.S.C. § 1414(d)(1)(A)(i). *J.L. ex rel. J.P. v. New York City Department of Education*, 324 F. Supp. 3d 455 (S.D.N.Y. 2018), illustrates how non-implementation of IEPs affects students and their families. J.P. suffered from a rare genetic disorder that caused frequent seizures, and his IEP recommended a bus nurse to accompany him to school. *Id.* at 461. NYC DOE failed to provide a bus nurse, prohibiting him from attending kindergarten for the entire school year. *Id.* The following year, the agency failed to provide necessary porter and transportation services to J.P. *Id.* On certain occasions, the school bus that was provided could not fit J.P.'s wheelchair.[12] *Id.* The court permitted J.P.'s parents to challenge NYC DOE's failure to implement his IEP in federal court without exhausting the administrative process. *Id.* at 464–66.

Courts rely on the futility exception to permit disabled students to challenge similar failures to implement IEPs. *J.S.*, 386 F.3d at 115; *Heldman*, 962 F.2d at 158 n.11 (explaining that "there are certain situations in which it is not appropriate to require the exhaustion of [IDEA] administrative remedies before filing a civil law suit," including where "an agency has failed to provide services specified in the child's [IEP]" (quoting 131 Cong. Rec. 21392–93 (1985))); *S.G. v. Success Acad. Charter Schs., Inc.*, No. 18 Civ. 2484 (KPF), 2019 WL 1284280, at *11 (S.D.N.Y. Mar. 20, 2019); *cf. Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 489 (2d Cir. 2002) (recognizing that the futility exception applies to claims that "involve nothing more

[12] Because *J.L.* was decided at the motion-to-dismiss stage, the court's opinion accepted the allegations in the complaint as true. 324 F. Supp. 3d at 460–61.

than 'implementation' of services already spelled out in an IEP"). The futility exception is necessary for students to effectively challenge systemic issues, including failures to implement IEPs, and structural harms that undermine "the administrative dispute-resolution mechanism itself." *T.R.*, 4 F.4th at 192.

In sum, disabled students cannot protect pendent placements, enforce administrative hearing orders, effectively challenge systemic issues, or vindicate all of the rights afforded to them without the futility exception. Absent the futility exception, a fundamental purpose of the statute—"to ensure that the rights of children with disabilities and parents of such children are protected"—cannot be realized. 20 U.S.C. § 1400(d)(1)(B).

CONCLUSION

The Sixth Circuit's judgment should be reversed, and Petitioner's ADA case should be allowed to proceed.

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Respectfully submitted,

JEFFREY S. GINSBERG
Counsel of Record
KATHLEEN E. GARDNER
KATE ROSS
BASIL J. K. WILLIAMS
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
jginsberg@pbwt.com

Attorneys for Amici Curiae Advocates for Children of New York and New York Legal Assistance Group