No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE BRENNAN CENTER FOR JUSTICE, ACTION ALLIANCE OF SENIOR CITIZENS, AND THE EDUCATION LAW CENTER, AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amicus the Brennan Center for Justice at New York University School of Law, founded to honor the legacy of the late U.S. Supreme Court Justice William J. Brennan, Jr., unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Brennan Center's mission is to develop and implement an innovative non-partisan agenda that promotes equality and human dignity while safeguarding human freedoms. To that end, the Brennan Center has created the Poverty Program which, among its many activities, works to eliminate unnecessary obstacles that prevent low income individuals and communities from obtaining access to the courts for the purpose of securing their legal rights. The Brennan Center objects to requirements of administrative exhaustion in circumstances where, as in this case, exhaustion is a futile exercise.

Amicus Action Alliance of Senior Citizens is a non-profit organization that educates, organizes, and empowers senior citizens on issues related to health care and economic security through a network of clubs, retiree groups, and residence councils in Southeastern Pennsylvania. Action Alliance particularly is interested in preserving and improving the Social Security programs because of their importance in a changing landscape of economic benefits relied upon by all citizens. Action Alliance has participated in litigation to challenge various unfair provisions of the Social Security Act.

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[1] This brief was authored in its entirety by counsel for the amici. No person or entity, other than the named amici and their counsel, made any monetary contribution to the preparation or submission of this brief. Letters of consent from all parties have been filed separately with the Clerk of the Court.

Amicus the Education Law Center ("ELC") is a non-profit advocacy organization, founded in 1975, that seeks to promote quality and equity in Pennsylvania's public education system. As part of its work, ELC has helped thousands of families to understand and assert their children's rights under the federal Individuals with Disabilities Education Act ("IDEA"), and also has engaged in systemic litigation and advocacy around special education issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central issue in this case is whether Congress intended to require exhaustion of administrative procedures under 42 U.S.C. § 1997e(a) without exception even when the remedy sought is unavailable. The lower court held that § 1997e(a) did not allow for any exceptions. However, this Court long has recognized exceptions to the doctrine of administrative exhaustion under a number of narrow circumstances, especially in situations like those presented here, in which the remedy sought by Mr. Booth was not available.

This Court repeatedly has held that exhaustion of administrative remedies can be waived in a narrowly circumscribed set of circumstances. This line of cases mitigates the potential unjust results of an absolute exhaustion requirement and recognizes the need for exceptions for futile and purposeless administrative reviews, reviews prolonged by unreasonable delays, or where the relief sought is unavailable.

There is an essential need for there to be exceptions to administrative exhaustion. The impoverished, the elderly, the disabled – indeed, under certain circumstances, probably every citizen who relies upon a government agency for benefits or services – must contend with extensive administrative delays

before resolution of a dispute. Often, the hardships experienced by many of this nation's citizens are exacerbated by agency determinations predicated on erroneous application of rules and regulations by overburdened decisionmakers who must make their determinations under less than ideal conditions. Although exhaustion of remedies may be tedious for many, it is particularly hard on those for whom exhaustion would be futile.

There is a grave risk – presented squarely by this case – that denying any exception to administrative exhaustion under § 1997e(a) will shift the weight of case law in an undesirable direction. Never in our knowledge has this Court found that exhaustion is necessary when the relief sought is unavailable. To so hold would be to tell those who are most in need of judicial protection that they will be denied access to the courts in the hour of their greatest vulnerability. For example, challenges based on laws that adjudicative officers are unable to enforce will be delayed for months or even years – cases alleging illegal discrimination, or violations of the Equal Protection Clause, or transgressions of state or federal laws guaranteeing civil rights will be subject to unnecessary delays while they are presented to tribunals incapable of offering relief. If the available administrative remedies cannot provide adequate relief, then it is an exercise in futility to require their exhaustion, and this Court consistently has held that exhaustion should not be required. *See Honig v. Doe*, 484 U.S. 305 (1988); *Weinberger v. Salfi*, 422 U.S. 748 (1975).

Several constituencies are intensely concerned about the unyielding application of exhaustion requirements even when administrative review would be futile because the relief sought is unavailable. Among these concerned constituencies are Social Security claimants, welfare recipients, children attending public schools, especially those who need protection under the Individu-

als with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, residents of public housing, unemployment compensation beneficiaries, and employees exposed to workplace discrimination. Many of these individuals encounter violations of their rights by administrative agencies and they are relying on this Court to ensure that they are only required to exhaust administrative remedies when their efforts will not be futile.

For instance, special education impacts millions of our nation's children who have disabilities. There are extensive protections provided by law to insure children a free appropriate public education. Although most of the disputes that arise are resolved through the administrative process, there are occasions when the families of these children rely on the courts to resolve disputes and where it would be futile to exhaust administrative remedies. This Court's decisions in other contexts suggest how any case should be resolved where the relief sought is outside the powers of the administrative agency's procedures. Certainly in the context of special education, this Court has recognized that requiring exhaustion when it is futile would only frustrate parents, delay the educational process for students, and waste valuable administrative and judicial resources. Similarly, the Court's decisions have created an exception to the exhaustion rule in Social Security challenges to the Act and agency regulations and procedures. It just makes good sense, and would be consistent with the Court's precedents, to extend the exception for futility to this case where the relief sought was not available through the prison procedures.

Thus, *Amici* submit this brief to place before the Court significant concerns about what upholding the lower court's decision in this case might mean to people of low income who must regularly contend with administrative actions adverse to their livelihoods. Should this Court affirm the interpretation of the language "such administrative remedies as are available" from

42 U.S.C. § 1997e(a) to require exhaustion in all cases without exception this will have a negative impact on low income individuals in other contexts. If the Court in this case retreats from its longstanding futility exception to administrative exhaustion requirements, then the procedures applicable to the protection of the rights of Social Security, welfare, special education, and other public benefit recipients will be imperiled

The Court of Appeals recognized that the Petitioner could not get the remedy he sought, but nevertheless held that § 1997e(a) brooks no exception to the exhaustion requirement. The court applied the standard from *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000), and concluded that § 1997e(a) makes "exhaustion of all administrative remedies mandatory – whether or not they provide the inmate-plaintiff with the relief he says he desires." This standard leads to the inapposite result that because he failed to "'exhaust his available administrative remedies (*rather than those he believed would be effective*)' before filing his § 1983 claim," Mr. Booth's claim was dismissed properly by the district court. App. to Cert. Petition at 24a; *Booth v. Churner*, 206 F.3d 289, 300 (3d Cir. 2000) (quoting *Nyhuis*, 204 F.3d at 78 (emphasis added)). Should the Court uphold this misapplication of the plain meaning of § 1997e(a)'s "such administrative remedies as are available" language, and thus vitiate the well-established exception to administrative exhaustion when the relief sought is unavailable, then the availability of a waiver for futility will be on questionable ground for all who appear before administrative agencies.

ARGUMENT

A DECISION TO REQUIRE PRISONERS TO EXHAUST ADMINISTRATIVE REMEDIES WOULD BE CONTRARY TO EXISTING PRECEDENT, WHICH RECOGNIZES THE VALUE OF JUDICIAL DISCRETION IN WAIVING EXHAUSTION IN APPROPRIATE CASES

I. Courts Must Have the Power to Waive Exhaustion in Order to Further the Goals of an Efficient Judiciary and to Protect Meritorious Claims That May Otherwise Go Without Redress

The Court long has recognized that exhaustion generally refers to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and *obtain a remedy* if the decision is found to be unlawful or otherwise inappropriate." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (emphasis added). In *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976), this Court announced the "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injures to be suffered." This principle mitigates against exhaustion requirements that refuse to recognize an exception where administrative review would be futile, and it counsels especially that exhaustion should be excused where the remedies sought are not available through the ordinary administrative procedures.

Notwithstanding the legitimate purposes exhaustion serves, courts and legislatures traditionally have recognized narrow but important exceptions to the general rule requiring exhaustion. A substantial body of this Court's prior decisions has upheld waiver

of administrative exhaustion under limited circumstances where sound prudential and equitable principles compel it, and this Court consistently has held that "[a]dministrative remedies that are inadequate need not be exhausted." *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989).

In *Weinberger v. Salfi*, 422 U.S. 748, 766 (1975), the Court held that where administrative remedies are beyond the competence of the decisionmaker, namely, the constitutionality of a statutory provision that limited widow's benefits to those who had been married for at least nine months, it would "be futile and wasteful" to exhaust. The Court reached this conclusion notwithstanding the strong language requiring exhaustion contained in the Social Security Act. *Id.* at 757, 766 (noting that statutory language was more than simply a codified requirement of administrative exhaustion). The Court noted that circumstances justify waiving exhaustion 1) when it is futile to complete the administrative review process; 2) when challenges to agency policies and procedures involve illegal practices or violations of another federal or state law (e.g., in § 1983 claims); and 3) when administrative decisionmakers are not empowered to grant relief (e.g., challenges to the constitutionality of agency provisions, to curtail ongoing acts of discrimination, requesting money damages that the agency cannot accommodate, and other such issues where administrative review would not provide the relief sought). Absent either the adequate review procedures or the appropriate remedies, requiring administrative exhaustion would be an exercise in futility and this Court never has found exhaustion justifiable under such circumstances. *See id.* at 766.

Even where Congress specifically mandates exhaustion, there are sound reasons for a limited discretion to waive exhaustion. In *Salfi*, 422 U.S. at 766-67, the Court found that it is "inconsistent with the congressional scheme" of the Social Security Act to

require exhaustion of administrative review procedures where it is futile to exhaust, or is merely to satisfy the prerequisites for judicial review. In *Mathews v. Eldridge*, 424 U.S. at 331 n.11, the Court counseled that "the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." And in *Honig v. Doe*, 484 U.S. 305, 326-27 (1988), the Court held that exhaustion can be waived for claims brought under the prior version of the IDEA when it is futile to exhaust or where the remedies available are inadequate. Therefore, if the administrative procedures are incapable of providing the remedy sought, or are incapable of addressing the issues presented, then this Court never has required exhaustion. Denying Mr Booth's plea for waiver of exhaustion here would disturb this Court's long-established principle that futile administrative procedures need not be pursued and would not further the goals of an efficient judiciary.

A. Courts Must Retain An Exception to Exhaustion Where Administrative Procedures Cannot Provide the Relief Sought

The Court in *Salfi*, and its progeny, has waived statutory exhaustion requirements for constitutional challenges, in other circumstances where important issues are at stake that are beyond the capacity of the administrative procedures to resolve, for challenges to agency patterns and practices that may be illegal, and most particularly where the relief sought is not available as an administrative remedy. Based on the plain meaning of the language of 42 U.S.C. § 1997e(a), "such administrative remedies as are available," exhaustion should not be required because the remedy sought by Mr. Booth was not an available administrative remedy. Should the Court reject the view that the statute

requires waiver, then the Court should consider whether a limited waiver exception is permitted by the statutory language.

Because the prison procedures did not provide for monetary administrative remedies, exhaustion here would have been futile and this should weigh heavily in favor of waiver. This Court never has required exhaustion under circumstances where doing so would only promote a futile effort by the aggrieved party, or would result in a meaningless but inexorable outcome. *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (exhaustion not required when the administrative agency has "no power to decree" the relief sought); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) ("this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise"); *Honig*, 484 U.S. at 326-327 (parties "may bypass the administrative process where exhaustion would be futile or inadequate"). *See also McNary v. Haitian Refugee Center,* 498 U.S. 479, 496-97 (1991) (holding that an alien could bring a due process challenge to INS amnesty determination procedures because the statute did not evince intent to preclude pattern and practices challenges, and without waiving the exhaustion requirements there would be no means to obtain meaningful judicial review).

Many of this nation's neediest citizens rely for their livelihood on public agencies which often have complicated application procedures, periodic reviews of ongoing eligibility for benefits, and confusing requirements about reporting changes in circumstances. Certainly, the decisions of this Court suggest that these agencies occasionally violate the law in administering their programs. For many people, the administrative procedures associated with maintaining their income, or the very basic necessities of life, are so confounding that they often miss filing deadlines, or appointments, or phone contacts which an agency

might require for ongoing eligibility. Although due process rights are applicable under some circumstances, asserting these rights invokes other cumbersome requirements that for many impoverished, or elderly, or disabled individuals make it problematic even to recognize their rights, let alone enforce them.

Even where they are able to assert their due process rights, for a large number of people the administrative procedures become more daunting still because of disabilities or other impediments to their full participation in the review process. Accompanying the often baffling requirements for obtaining administrative review are sometimes very lengthy delays in reaching a resolution, and frequently the remedies are incommensurate with the original deprivation of benefits. The obstacles can seem insuperable. Furthermore, while awaiting administrative review of adverse determinations about welfare, food stamps, Social Security, special education, or other public benefits, it is not uncommon for additional difficulties to arise that require involvement by even more agencies and more administrative review procedures, such as in grievances with utility companies, creditors, and landlords. Finally, when a plaintiff who has been deprived of much needed benefits relies on the courts to balance the competing interests over whether to waive exhaustion, it often is the case that the agencies have articulate advocates arguing against them. The impoverished, the elderly, the disabled, and the politically unpopular have a hard time making their legitimate grievances heard. Therefore, when this nation's most vulnerable people seek redress from the courts, they rely upon the judiciary for a just and speedy resolution of their claims. While hundreds and thousands of administrative claims are adjudicated every day, there is a continued role for the judiciary to play in defending minority rights and affording these minorities an opportunity to present their claims in a timely manner without exhausting patently futile avenues of redress.

The history of waiver of exhaustion jurisprudence counsels that this Court has been appropriately reluctant to ascribe to Congress an antipathy toward a reasonable waiver of exhaustion under some circumstances. Congress, on the other hand, has acquiesced through its silence to this Court's approach to this recurring issue. When it is possible for a claimant to get the relief sought, then the courts may require exhaustion; when there is no potential for the claimant to get the relief sought, then requiring exhaustion is illogical and inconsistent with this Court's long-standing and sound approach.

It would be illogical to require exhaustion in this case because even after exhausting the available administrative remedies, not having gotten the relief he sought, Mr. Booth will be compelled to call on the courts again for relief. To require this kind of futile exhaustion does not fulfill any legitimate purpose; it only postpones the inevitable and wastes precious time and resources for both the administrative agency and Mr. Booth. Where it is futile for a plaintiff to exhaust administrative remedies, this Court never has required exhaustion of administrative remedies and the Court ought not in this case to start requiring futile administrative exhaustion.

B. Courts Must Retain An Exception to Exhaustion Where An Agency Applies Its Rules Inappropriately or Illegally

In *Heckler v. Ringer*, 466 U.S. 602, 618 (1984), the Court held that "in certain special cases, deference to the [agency's] conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." And in *Bowen v. City of New York*, 476 U.S. 467, 485 (1986), the Court held that exhausting an illegal administrative review scheme would be futile and therefore excused exhaustion because under such circum-

stances there is "nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise."

In both Social Security Act claims and those arising under the IDEA, there are elaborate administrative procedures in place that primarily favor the respective agencies involved. For example, as a prerequisite to seeking judicial review of an adverse determination, Social Security claimants must cope with several layers of administrative procedures; only at the third level, the administrative hearing, do they participate personally. Often, the adverse determinations made by the agencies are incorrect or show a disregard for the rules and the agency's own policies. Even in a normal Social Security case, the administrative process may take several years, during which the procedures themselves become increasingly sophisticated. Under these conditions, claimants often abandon otherwise meritorious claims because of frustration over their inability to cope with the apparent hegemony of the agency's authority. It would be unfair for claimants in these situations to be unduly informed by the courts that they will not be excused from exhausting administrative procedures that in the end will not provide them with adequate relief.

The Court repeatedly has instructed the lower courts to be "especially sensitive to this kind of harm where the [agency] seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." *City of New York*, 476 U.S. at 484. Furthermore, where exhaustion is futile, the Court has often found that the agency's action constitutes a waiver of the requirement of exhaustion. *Mathews v. Diaz*, 426 U.S. 67, 75-77 (1976); *Eldridge*, 424 U.S. at 328, 330; *Salfi*, 422 U.S. at 763-65.

C. Courts Must Retain An Exception to Exhaustion Where Issues Are at Stake That Are Beyond the Power of the Adjudicator to Resolve

In *Salfi*, 422 U.S. at 765-66, the Court recognized circumstances where "further exhaustion would not merely be futile ... but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." In this case, it would have been futile for Mr. Booth to exhaust administrative remedies because the relief sought was not available through the prison's administrative procedures. Moreover, since the prison procedures did not permit money damages, requiring exhaustion in this case would clearly be a "commitment of administrative resources unsupported" by any interest because it was beyond the power of the prison's administrative procedures to provide the remedy sought by Mr. Booth.

Similarly, in *Califano v. Sanders*, 430 U.S. 99, 109 (1977), the Court stated that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.... [W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence (citations omitted)." Where a claimant raises a colorable constitutional claim, the Court has excused the failure to exhaust administrative review under the Social Security Act, 42 U.S.C. § 405(g). In *Eldridge*, 424 U.S. at 331, the Court held that 42 U.S.C. § 405(g)'s exhaustion requirements could be waived before a final decision on Social Security disability benefits because exhaustion requirements did not bar federal jurisdiction over a collateral due process challenge. In *Heckler v. Ringer*, 466 U.S. 602, 618 (1984), the Court

upheld jurisdiction over claims considered collateral to the statutory review provisions and beyond the agency's expertise because precluding such claims would foreclose meaningful judicial review. *See also Traynor v. Turnage*, 485 U.S. 535, 544-45 (1988) (statutory prohibition of judicial review of Veterans Administration determinations did not preclude review of agency policy alleged to be in violation of the Rehabilitation Act). In short, the Court consistently has recognized that exception to waiver should apply whenever the available administrative remedies cannot adequately address the issues at stake because they are beyond the power of the agency to resolve. So too, here, where the agency had no power to grant monetary relief, the exhaustion requirement should have been waived for the money damages claim.

II. Requiring Exhaustion in This Case Where the Relief Sought Is Not Available Will Create Inconsistencies in This Court's Waiver of Exhaustion Jurisprudence

Most recently, in *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000), the Court re-affirmed the longstanding principle that "[d]octrines of 'ripeness' and 'exhaustion' contain exceptions ... which exceptions permit early review when ... exhaustion would prove 'futile.'" *Id.* at 22-23 (citations omitted). Clearly, in several different contexts this Court has recognized that where exhaustion is futile, where it cannot provide the remedy sought, where there are systemic problems within the administrative process that cannot be rectified by the system itself, where there are violations of law, or where exhaustion would ultimately only be postponing an inevitable return to court for the plaintiff, then none of the purposes of exhaustion is satisfied and courts rightly and prudently should excuse the exhaustion requirement. Especially where the remedy sought is not available, as is the case here, this Court should recognize an

exception for futility and not require exhaustion of administrative remedies under 42 U.S.C. § 1997e(a).

If the purposes of exhaustion are not satisfied, waiver should be considered under the limited circumstances already cognized by this Court. The Court's discretion should balance the determination of which priorities should prevail under the facts of a particular case. Here, the Court must determine whether it is the availability of administrative procedures or the availability of appropriate remedies that is paramount and comports with congressional intent. If the purpose of exhaustion of the administrative remedies is the potential for a claimant to obtain adequate relief without judicial intervention, then the Court should read statutes that require exhaustion as applying only when the relief is available through the administrative procedures.

To require exhaustion would be contrary to this Court's longstanding principle that judicial discretion requires having the capacity to determine whether waiver of administrative remedies should be allowed under some limited circumstances, especially where the relief sought is not available to a plaintiff. To be consistent with this Court's past waiver of exhaustion jurisprudence, this principle should apply regardless of whether the plaintiff is a prisoner or a Social Security claimant or a child protected under the IDEA. Denying Mr. Booth's plea for waiver of exhaustion where the remedy he sought was not available may have an adverse effect on this Court's well-reasoned exceptions to waiver of administrative remedies in other contexts where statutory exhaustion requirements apply.

III. The Court Waives Administrative Exhaustion in Social Security Claims When Exhaustion Would Be Futile, and Similar Equitable and Prudential Judicial Principles Commend the Court to Extend the Exception to 42 U.S.C. § 1997e(a) Where Exhaustion Is Futile Because the Relief Sought Is Not Available

If the Court decides that the plain meaning of the language "such administrative remedies as are available" from 42 U.S.C. § 1997e(a) does not provide an exception where a remedy is not available, then the exceptions to exhaustion provided by this Court in other contexts may be jeopardized and may lead to inconsistencies in the application of waiver permitted in Social Security cases. *See City of New York,* 4765 U.S. at 483 (recognizing futility exception)*; Eldridge*, 424 U.S. at 328; *Salfi*, 422 U.S. at 763-67. If the Court requires prisoners covered by § 1997e(a) to exhaust administrative remedies where the relief sought is not available, then it is possible that by extension many disabled or elderly recipients of benefits under the Social Security Act may lose this Court's well-considered exceptions to exhaustion in the context of their Social Security claims.

A. The Court Should Apply the Futility Exception to This Case Because the Agency Has No Power To Provide the Remedy Sought

Because the core of any exception to the final decision exhaustion requirement under 42 U.S.C. § 405(g) implicates the determination of the relief or remedies that are available, this Court's interpretation of the language from 42 U.S.C. § 1997e(a) about "such remedies as are available" could have a profound impact on how other courts will interpret the Court's well-reasoned and carefully crafted exceptions to the final decision

prerequisites to judicial review in Social Security claims. A claimant who seeks to challenge any "initial determination"[2] by the Commissioner of the Social Security Administration must exhaust several stages of administrative review prior to seeking judicial review of the challenged decision.[3] The Social Security Act, 42 U.S.C. § 401 *et seq.*, provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, may obtain a review of such decision by a civil action" in federal district court. 42 U.S.C. § 405(g). The Act does not specify when a decision becomes the "final decision of the Commissioner." *See Salfi*, 422 U.S. at 766. *See generally Bowen v. Yuckert*, 482 U.S. 137, 142 (1987) (describing administrative review process for Social Security claims). The Court has held that "the exhaustion requirement of 405(g) consists of a nonwaivable requirement that a 'claim for benefits shall have been presented to the Secretary,' and a waivable requirement that the administrative remedies prescribed by the [Commissioner] be pursued fully by the claimant." *Ringer*, 466 U.S. at 617 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)).

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[2] "Initial determination" is defined as a decision about eligibility for benefits "or about any other matter ... that gives ... a right to further review." 20 C.F.R. §§ 404.900(a)(1), 416.1400(a)(1).

[3] Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, provides for the payment of monthly benefits to disabled persons who have contributed to the program's insurance fund. Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, provides for the payment of Supplemental Security Income ("SSI") benefits to low income persons who are aged, blind, or disabled.

In *Bowen v. City of New York*, 476 U.S. 467 (1986), the Court held that challenges to the procedures applied by the Social Security Administration could be sustained without administrative exhaustion under some very limited circumstances. The "final decision" requirement for exhaustion may be waived "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Id.* at 483 (quoting *Mathews v. Eldridge*, 424 U.S. at 330). Courts generally consider three factors in determining whether waiver of the exhaustion requirement is appropriate in these cases: 1) whether the issue raised is collateral to the substantive claim; 2) whether irreparable harm is likely absent the waiver; and 3) whether the underlying purpose of exhaustion is meaningful or whether requiring exhaustion would be futile for the claimant. *Id.* at 483-85. Of these three factors, the exception for futility is most germane Booth's claim here.

The futility exception to exhaustion under § 405(g) requires a determination whether the policies underlying the exhaustion requirement would be served by exhausting the administrative review or whether exhaustion would be futile. *City of New York*, 476 U.S. at 484; *Salfi*, 422 U.S. at 765. None of the underlying purposes of exhaustion is justified when a plaintiff challenges an agency policy as inconsistent with the regulations or the statute. System-wide policies that are inconsistent with the law can not be remedied through administrative review, since policies do not depend on the specific facts of any particular case, nor are hearing officers empowered to invalidate agency rules and regulations. If the agency applies rules and regulations which deprive a claimant of a fair assessment of his or her eligibility, then exhausting the administrative remedies will be futile. Thus, where exhaustion is futile, "there [is] nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *City of New York*, 476 U.S. at 485.

The Court has provided a well-considered exception to the "final decision" prerequisite for judicial review under 42 U.S.C. § 405(g). This exception has facilitated the judicial discretion to determine when equitable and prudential principles call for exhaustion and when they compel waiver. Within certain very limited circumstances, the Court has waived exhaustion when there is a showing that exhaustion would be futile. Because of the exception to the exhaustion requirements, the lower courts have retained the discretion to determine when a plaintiff's meritorious claim would only languish interminably in exhausting a purposeless administrative review. The Court in this case should not disturb these longstanding precedents, and their consistent application in other courts, by refusing to recognize a futility exception for prisoners covered by 42 U.S.C. § 1997e(a) where the administrative remedies sought are not available.

IV. This Court Waives Administrative Exhaustion in Claims Under the Individuals with Disabilities Education Act When Exhaustion Would Be Futile, and Similar Equitable and Prudential Principles Commend the Court to Extend the Exception to 42 U.S.C. § 1997e(a) Where Exhaustion Is Futile Because the Relief Sought Is Not Available

For claims brought under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, ("IDEA"), the Court has recognized a futility exception, just as it has in other substantive areas for many years; it makes sense to extend this approach to the present case. Should the Court decide, however, that the plain meaning of "such administrative remedies as are available" under 42 U.S.C. § 1997e(a) does not provide an exception where administrative review would be futile, then it is possible that the exception to exhaustion provided by this Court in its application

of jurisdiction under the IDEA will be in conflict with the Court's decision in the present case.

A. The Court Should Apply the Futility Exception to This Case Because the Agency Has No Power To Provide the Remedy Sought

If the Court were to interpret the language from 42 U.S.C. § 1997e(a) about "such remedies as are available" as denying all exceptions to exhaustion, this could impact how other courts will interpret the Court's well-reasoned exception to exhaustion of administrative remedies under the IDEA. Should the Court decide that exhaustion without exception is required in this case, then the potential increases for inconsistent application of the IDEA's longstanding futility exception.

In *Honig v. Doe*, 484 U.S. 305 (1988), the Court excused exhaustion for claims brought under the prior version of the IDEA[4] where it is futile to exhaust or where the available remedies are inadequate. *Id.* at 326-27 ("parents may bypass the administrative process where exhaustion would be futile or inadequate"). In the context of IDEA claims, exhaustion is futile or inadequate where the agency violates the law or where the harm cannot be addressed through the ordinary administrative procedures. *See, e.g., Urban v. Jefferson County Sch. Dist.*, 89 F.3d 720, 724 (10th Cir. 1996) (waiver permitted where adminis-

[4] The statute has been amended several times, including Pub. L. No. 101-471, 104 Stat. 1141 (1990) (renaming "Education of the Handicapped Act" as the "Individuals with Disabilities Education Act"), more recently in Pub. L. No. 105-17, 111 Stat. 37, 88 (1997), and again in Pub. L. No. 106-25, 113 Stat. 49 (1999). See *Heldman v. Sobol,* 962 F.2d 148, 150 n.1 (2nd Cir. 1992) (discussing legislative history of IDEA).

trative remedies would be futile, fail to provide relief, or the agency has adopted a policy or practice that is contrary to the law); *W.B. v. Matula,* 67 F.3d 484, 496 (3d Cir. 1995) (finding it "futile, perhaps even impossible, for plaintiffs to exhaust" where relief sought is unavailable under IDEA); *Pihl v. Massachusetts Dep't of Educ,*, 9 F.3d 184, 190 (1st Cir. 1993) (exhaustion "may not be required where the pursuit of administrative remedies would be futile or inadequate; waste resources, and work severe or irreparable harm on the litigant; or when the issues raised involve purely legal questions"). Courts also have excused exhaustion where further delay poses a risk or danger to the child plaintiff. *See Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994).

As the Court recognized in *Burlington School Committee v. Massachusetts Dept. of Education,* 471 U.S. 359, 370 (1985), the IDEA's "review process is ponderous. A final judicial decision on the merits of an IEP [Individualized Educational Program] will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." This Court prudently has recognized that parents should not be required under all circumstances to exhaust IDEA administrative procedures, especially where the relief they seek ultimately is not available except through the courts. It is logical to extend the same principles to this case and waive exhaustion of administrative remedies where the relief sought was not available through the prison administrative procedures.

Regardless of the context of the claim, if none of the purposes of exhaustion is satisfied, then waiver should be allowed under the limited circumstances already cognized by this Court. The

Court has recognized that where exhaustion is futile, where it cannot provide the remedy sought, or where exhaustion would ultimately only postpone an inevitable return to court for the plaintiff, then none of the purposes of exhaustion is satisfied and the Court prudently has excused exhaustion. Especially where the remedy sought is not available, as is the case here, the Court ought not to begin to require exhaustion of administrative remedies.

CONCLUSION

In the context of Social Security, education for children with disabilities, and many other forms of public benefits, individuals who challenge the legality of administrative regulations and policies should not be required to exhaust the normal administrative review process, especially when nowhere within the review process can any adjudicator provide the appropriate relief. Requiring exhaustion of useless procedures would be contrary to the purposes of administrative exhaustion principles, and would be inconsistent with this Court's longstanding precedents holding that potential litigants are not required to pursue unavailable administrative remedies. Thus, there is a compelling justification to retain a "futility" exception to the general administrative exhaustion requirements, whether imposed by statute or common law principles.

For the reasons set forth in the Petitioner's Brief and above, this Court should hold that Congress did not intend to prohibit waiver of the administrative exhaustion requirement in the 42 U.S.C. § 1997e(a) under all circumstances and should accordingly reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

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