No. 20-905

IN THE
Supreme Court of the United States

INDEPENDENT SCHOOL DISTRICT NO. 283,
Petitioner,

v.

E.M.D.H. EX REL L.H. AND S.D.,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

The Government's brief is most notable for what it does not say. The Government does not dispute (at 10) that "an equitable exception allowing respondent to recover for violations outside the limitations period" would violate the Individuals with Disabilities Education Act (IDEA). The Government does not dispute that a Court of Appeals decision applying such an exception would squarely conflict with the decisions of two other circuits. And the Government does not dispute that such an exception would create a yawning loophole in the IDEA's statute of limitations—allowing claimants to file suit well over two years after they knew about a violation, creating a threat of stale

litigation that would loom over the school-parent relationship, contravening United States Department of Education guidance, and causing the same problems that prompted Congress to enact the two-year limitations period in the first place.

Instead, the Government argues that the Eighth Circuit did not actually apply a continuing-violation exception, even though that is precisely what the court said it was doing. That argument does not withstand scrutiny. And once the Government's misunderstanding of the decision below is corrected, all of the Government's arguments against certiorari lose force.

The Government claims that the decision below is correct, but only because it insists that the Eighth Circuit did not apply an atextual exception to sweep in otherwise untimely claims. The Government asserts that there is no circuit split, but only because it downplays the decisions of the Third and Fifth Circuits rejecting the type of equitable exception the Eighth Circuit embraced here. The Government waves away the harm the Eighth Circuit's decision will cause, but only because it disregards the views of some of the nation's leading organizations of school boards, superintendents, and principals, who warn that the decision below will have "disastrous consequences." Br. Amici Curiae of Nat'l Sch. Bds. Ass'n et al. 12 ("NSBA Amicus Br.") (capitalization altered); *see also* Br. Amici Curiae AASA et al. 17–22 ("AASA Amicus Br."); Br. Amicus Curiae of Minnesota Ass'n of Sch. Administrators 9 ("MASA Amicus Br."). And the Government invokes the specter of vehicle problems, but only because it speculates about the possibility—irrelevant

at this stage—that the Eighth Circuit *might* employ an alternative rationale on remand after this Court grants certiorari and reverses.

The circuits are split on a question of substantial importance to schools, parents, and students across the country. This Court should grant the petition.

ARGUMENT

I. THE GOVERNMENT DOES NOT DEFEND THE CONTINUING-VIOLATION EXCEPTION THE EIGHTH CIRCUIT APPLIED.

The Government does not dispute that a continuing-violation exception to the statute of limitations would conflict with the IDEA. The Government instead asserts (at 14) that the Eighth Circuit did not actually apply such an exception. But that is what the Eighth Circuit said it did.

1. The Eighth Circuit acknowledged that an IDEA violation occurring "outside of the IDEA's two-year statute of limitations would be untimely." Pet. App. 18a. But here's the next sentence: "[B]ecause of the District's *continued violation* of its child-find duty, at least some of [respondent's] claims of breach of that duty accrued within the applicable period of limitation." *Id.* (emphasis added). The court then sustained respondent's claim *in its entirety* even though that claim was rooted in a breach that took place when respondent was an eighth grader—outside of the limitations period. *Id*. at 21a. The only way to make sense of this decision is to take the Eighth Circuit at its word: It applied a "continued violation" exception to sweep in claims that accrued more than two years before respondent filed her complaint.

The relief the Eighth Circuit awarded confirms this understanding. The court did not limit relief to redressing breaches that occurred within the limitations period. To the contrary, the Eighth Circuit affirmed the full relief awarded by the district court even though the district court fashioned that award on the understanding that "the statute of limitations should not apply" at all. *Id*. at 45a.

In the short time since the Eighth Circuit ruled, its decision has been interpreted as embracing a continuing-violation exception. In a case the Government itself cites (at 20), a Minnesota district court characterized the Eighth Circuit's decision here as holding that respondent's claims were timely "because of [the] District's 'continued violation' of [its] child-find duty." *In re Minnetonka Pub. Schs.* v. *M.L.K. ex rel. S.K.*, No. 20-1036, 2021 WL 780723, at *6 (D. Minn. Mar. 1, 2021). The student in *M.L.K.* has appealed, citing the Eighth Circuit's decision here as a reason to treat her claims as timely given "the *continuing and repeated nature* of [child-find] claims until corrected." Br. of Appellees/Cross-Appellants at 63, *Minnetonka Pub. Schs.* v. *M.L.K. ex rel. S.K.*, Nos. 21-1707 & 21-1770 (8th Cir. July 14, 2021) (emphasis added). Thus, the Government's prediction (at 20) that the District "may be alone" in its understanding of the decision below is already incorrect.

2. In disputing the plain meaning of the Eighth Circuit's decision, the Government declines to adopt respondent's principal theory—*i.e.*, that there are two different types of continuing-violation doctrines and that the Eighth Circuit applied the benign type. *See* Opp. 2–3. The Government instead advances three

arguments (at 10) that the court below did not apply an equitable continuing-violation exception. These arguments are unpersuasive.

First, the Government offers an alternative explanation for the Eighth Circuit's decision to sweep in relief for pre-limitations-period violations, asserting (at 15) that the District "never suggested that the court do otherwise." But the Government is mistaken. In its brief, the District argued that respondent's claim was time-barred in its entirety. Pet'r's C.A. Br. at 62–63. But the District *also* argued that "even if the child-find claim is not time-barred in full, any occurrences within the Student's eighth grade year are unquestionably outside the limitations period." *Id.* at 63 n.17. Thus, if the Eighth Circuit believed that some portions of respondent's claim were timely and others untimely, it would have had to tailor its relief accordingly. It did not. And while the Government hypothesizes (at 15–16) that the Eighth Circuit would not have changed its award even if it had engaged in the necessary tailoring, it is impossible to test that hypothesis because the Eighth Circuit never addressed that question.

Second, the Government maintains (at 10) that the Eighth Circuit "relied on [the District's] discrete violations of its child-find obligations 'within' the limitations period" rather than sweeping in pre-limitations-period breaches. But that is an implausible reading of the decision below. The court never addressed any supposedly discrete violations within the limitations period, and instead focused entirely on what happened when respondent was in eighth grade. *See* Pet. App. 17a. The court then assumed that the initial

violation "was repeated well into the limitations period" and that respondent could recover for all of these violations under the "continued violation" exception. *Id.* at 18a. The Eighth Circuit's reference to an initial, out-of-time violation that was "repeated" underscores that the court focused on the pre-limitations-period violation and did not separately consider whether any new conduct gave rise to discrete violations for which relief would be proper.

Third, the Government notes (at 13) that the District "does not dispute that a child-find violation can recur and thereby trigger a new statute of limitations." That's true, but the Government errs in asserting (at 14) that this commonsense acknowledgement is "fatal" to the District's claim. It makes no difference that it is generally possible for discrete new violations to occur after an initial violation; what matters is that the Eighth Circuit did not find that a discrete new violation occurred here. Instead, the court assumed that because the District violated its child-find obligation when respondent was in eighth grade, the District must have violated that obligation when she was in ninth and tenth grades as well. Pet. App. 18a. But the court's assumption—that a child-find violation repeats itself every day until the violation is corrected—misunderstands child development and ignores that a child may require services one year that she no longer needs the next. *See* MASA Amicus Br. 11–12 n.4. Had the Eighth Circuit intended to grant relief based exclusively on "discrete" new violations, as the Government contends, it would have stated what those violations were rather than assuming that they followed from pre-limitations-period violations.

3. The most telling feature of the Government's brief is that it does not attempt to defend the continuing-violation exception the Eighth Circuit actually applied.

The Government does not defend this atextual exception because it is indefensible. Applying an equitable exception to sweep in untimely claims would allow parents to wait to file their complaint for many years after their claim first accrued, contravening the plain text of the IDEA. *See* 20 U.S.C. § 1415(f)(3)(C). Such a broad exception would lead to the same problems that Congress sought to solve by adding the two-year statute of limitations in 2004. *See* Pet. 16–17. And this exception would render the two exceptions that Congress *did* write into the IDEA's statute of limitations, *see* 20 U.S.C. § 1415(f)(3)(D), largely superfluous.

It is therefore no surprise that the U.S. Department of Education agrees that the IDEA does not provide an "explicit exception[]" to the statute of limitations "when a violation is continuing." *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006). While the Government now strains (at 19) to explain why the Department of Education's view comports with the Eighth Circuit's decision, the Department of Education's view is a reason to grant certiorari, not to deny it.

It is also no surprise that some of the nation's leading organizations of superintendents, school boards, and other school administrators have warned that the Eighth Circuit's decision will have "disastrous

consequences" for school districts, teachers, and students. NSBA Amicus Br. 12 (capitalization altered); *see also* AASA Amicus Br. 17–22; MASA Amicus Br. 9. The Government largely ignores these amicus briefs, but the concerns they express are the product of deep familiarity with the IDEA and are due significant weight. As these *amici* explain, "[i]f there is no limit to the prospect of litigation based on a hindsight-driven examination of past decisions, * * * the system Congress intended will break down." MASA Amicus Br. 4.

Some of the costs of this breakdown will fall on schools—by creating a threat of stale claims that will loom over the school-parent relationship and burden school personnel. *See* Pet. 20–25. But "the greatest victims will be the very students the IDEA is intended to benefit." AASA Amicus Br. 4. Delayed IDEA claims harm students who would benefit from earlier intervention and may even cause schools to overidentify students to avoid the threat of future litigation. *See id.* This Court's intervention is needed to avert these damaging consequences.

II. THE GOVERNMENT'S EFFORTS TO DISCLAIM THE CIRCUIT SPLIT ARE UNAVAILING.

The Government claims (at 17) that "there is no tension between the decision below" and the decisions of the Third and Fifth Circuits. Once again, the Government's argument rests on its flawed reading of the decision below.

The Third and Fifth Circuits have held that courts may not apply equitable doctrines, such as the continuing-violation doctrine, that permit plaintiffs to bring claims based on acts that occurred outside the IDEA's

statute of limitations. *See* Pet. 10–12; Reply 3–4. But the Eighth Circuit reached the opposite conclusion here, relying on the "continued violation" doctrine. Pet. App. 18a; *see supra* pp. 3–4. The Courts of Appeals are therefore split over whether the continuing-violation doctrine may rescue IDEA claims that would otherwise be untimely.

The Government contends (at 17) that the decisions of the Third and Fifth Circuits merely "reinforce" that "a claim is not wholly barred by the statute of limitations" just because "some of the breaches occurred outside the two-year window." But the Government does not grapple with the actual holding of these cases.

The Third Circuit held in *D.K. ex rel. Stephen K.* v. *Abington School District*, 696 F.3d 233, 248 (3d Cir. 2012), that the IDEA "preclude[s] application of common law equitable tolling principles to save claims otherwise foreclosed by the IDEA statute of limitations." And it later applied that principle in *G.L.* v. *Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015), a case the Government barely mentions, to hold that "parents may not, without satisfying one of the two statutory exceptions, knowingly sit on their rights or attempt to sweep both timely and expired claims into a single 'continuing violation' claim brought years later." That is exactly what the Eighth Circuit allowed here.

The Fifth Circuit likewise concluded in *Reyes ex rel. E.M.* v. *Manor Independent School District*, 850 F.3d 251, 255 (5th Cir. 2017), that the IDEA's statute of limitations does not incorporate equitable exceptions that appear nowhere in the statutory text. The Fifth Circuit explained that such equitable exceptions—in

that case, "general state tolling provisions"—do not apply because the IDEA specified two narrow exceptions to the statute of limitations, and because the "history of the IDEA's limitations provision reinforce[d]" that Congress did not authorize courts to create other exceptions. *Id.* at 255 & n.2. The Government suggests (at 18) that "*Reyes* is of questionable relevance" because it did not involve precisely the same IDEA claim or the same equitable exception as this case. But *Reyes*'s holding forecloses any continuing-violation exception in the Fifth Circuit. Indeed, that is how district courts have understood *Reyes*. *See Washington ex rel. J.W.* v. *Katy Indep. Sch. Dist.*, 447 F. Supp. 3d 583, 592 (S.D. Tex. 2020).

The Government rehashes (at 19) respondent's reliance on decisions from the Second and Eleventh Circuits. But neither of these decisions invoked or applied a continuing-violation exception, as the Eighth Circuit did here. *See* Reply 5–6. As the Government recognizes (at 19), these cases merely stand for the uncontroversial proposition that a plaintiff may sue based on new, discrete breaches within the limitations period "even if the school district's first breach allegedly occurred outside the limitations period."

Retreating from its attempts to dispel the split, the Government contends (at 20) that the split does not warrant review at this time because "[n]o other court of appeals has adopted" the equitable exception adopted by the Eighth Circuit. But the Eighth Circuit's adoption of that exception now means that the courts of appeals are divided. *See, e.g.*, *Bd. of Educ. of City Sch. Dist. of City of New York* v. *Tom F. ex rel. Gilbert F.*, 549 U.S. 1251 (2007) (mem.) (granting

certiorari on two-to-one split on IDEA question); Reply 7. The question presented has been well ventilated by lower courts, and the courts that have addressed this issue have laid out the case against the Eighth Circuit's atextual approach. No further percolation is necessary, particularly in light of the *amici*'s warning of the harm caused by the decision below.

III. THIS CASE IS AN IDEAL VEHICLE.

The Government contends (at 20) that this case is a "poor vehicle." Its arguments miss the mark.

First, any disagreement between the parties "about the meaning of the decision below" at the certiorari stage would not, as the Government claims (at 20-21), "complicate this Court's review." This Court regularly grants certiorari in cases where the parties disagree about the meaning of the lower court's decision at the petition stage. *See, e.g.*, *Rodriguez* v. *FDIC*, 140 S. Ct. 713 (2020); *United States* v. *Husayn*, No. 20-827 (U.S.). That makes sense: Parties opposing certiorari should not be able to thwart review by claiming that the decision did not mean what it said. Here, the Eighth Circuit's decision is clear, and the parties' briefs on the merits would focus on whether the continuing-violation exception the Eighth Circuit applied violates the IDEA. Nor is it true that "Respondent does not defend the rule" the Eighth Circuit applied, *see* U.S. Br. 20: Respondent contends that the decision correctly applied the continuing-violation doctrine. *See* Opp. 17–18.

Second, the Government argues (at 21) that resolution of the question presented would have "little practical significance" in this case. Not so. If the Court resolves the question presented in the District's favor,

the District can defeat liability on remand by demonstrating based on the record that no new, discrete violations occurred within the limitations period. In any event, the mere fact that the Eighth Circuit might have more work to do on remand is no reason to deny certiorari. This case cleanly tees up the question presented, and the resolution of this question will affect school districts, teachers, and students across the country. Thus, contrary to the Government's claim (at 21), this case has enormous "practical significance."

Third, it is irrelevant that "the court of appeals might adopt" an "alternative theor[y]" on remand "if this Court were to grant certiorari and reverse." *Id.* The Eighth Circuit did not address any alternative theories below. So those theories are not properly before the Court now, and would have no bearing on this Court's consideration of the question presented or the guidance it would provide going forward. This Court routinely grants certiorari even though the Court of Appeals could conceivably reach the same result on different grounds on remand. *See, e.g.*, *Borden* v. *United States*, 140 S. Ct. 1262 (2020) (mem.) (granting certiorari even though the defendant could have received the same sentence on remand); *see also* Br. for the U.S. in Response to Pet. at 15, *Borden* v. *United States*, 141 S. Ct. 1817 (2021) (No. 19-5410) (agreeing that the case "presents a suitable vehicle" notwithstanding that possibility).

In short, this case is a clean vehicle for resolving the question presented. *See* Pet. 26. The Court should grant certiorari now to resolve this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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