No. _____

In The
Supreme Court of the United States

K.M.,
individually and on behalf of M.M. and S.M.,
and all others similarly situated, *et al.*,

Petitioners,

v.

ERIC ADAMS,
in his official capacity as Mayor of New York City, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Individuals with Disabilities Education Act ("IDEA") requires, with certain exceptions, the exhaustion of administrative remedies before a judicial challenge under the Act may be brought. Is this exhaustion requirement jurisdictional, or rather, is it a claim-processing rule that must be raised as an affirmative defense that may be waived?

PARTIES TO THE PROCEEDING

The Petitioners in this case are K.M., Individually and on behalf of M.M. and S.M., and all others similarly situated, C.N., Individually and on behalf of V.N. and all others similarly situated, J.J., Individually and on behalf of Z.J. and all others similarly situated.

The Respondents in this case are Eric Adams, in his official capacity as Mayor of New York City, David C. Banks, in his official capacity as Chancellor of the New York City Department of Education, and the New York City Department of Education, New York State Department of Education, School Districts in the United States, State Departments of Education in the United States, Connecticut Regional School District No. 10 (Harwinton & Burlington), Clayton County Public Schools, Cobb County School District, DeKalb County School District, Marietta City Schools, City of Bristol School District, Pentucket Regional High School, Town of Branford School District, Town of Clinton and Clinton Board of Education, Pomfret CT School District, Town of Plainville and Plainville Board of Education, Seymour Board of Education, Town of Watertown and Watertown Board of Education, Town of Windham and Windham Board of Education, Town of Groton and Groton Board of Education, Town of Wallingford and Wallingford Board of Education, Town of Plymouth and Plymouth Board of Education, Town of Plymouth and Plymouth Board of Education, Martha's Vineyard High School, Pennsylvania Department of Education, Alpine Union School District, Bonsall

Union School District, Borrego Springs Unified School District, Cardiff Elementary School District, Carlsbad Unified School District, Chula Vista Elementary School District, Coronado Unified School District, Dehesa School District, Del Mar Union School District, Encinitas Union School District, Escondido Union Elementary School District, Escondido Union High School District, Fallbrook Union Elementary School District, Fallbrook High School Union District, Grossmont Union High School District, Jamul-Dulzura Union School District, Julian Union School District, Julian Union High School District, La Mesa Spring Valley School District, Lakeside Joint School District, Lemon Grove School District, McCabe Union School District, Mountain Empire Unified School District, Ramona Unified School District, Rancho Santa Fe Elementary School District, San Diego County Office of Education, San Dieguito Union High School District, San Marcos Unified School District, San Pasqual Union Elementary School District, San Pasqual Valley Unified School District, Santee School District, Solana Beach Elementary School District, Spencer Valley Elementary School District, Sweetwater Union High School District, Vallecitos Elementary School District, Valley Center-Pauma Unified School District, Warner Unified School District, Cherry Hill Public Schools, Middletown Township Public Schools, West Orange Public Schools, Readington Township Public Schools, Certain School Districts Located in the State of Virginia, Certain School Districts Located in the State of California, Town of Stratford Board of Education, City of Norwalk Board of Education, City of Stamford Board of Education, City of Bridgeport

Board of Education, Omaha Public School District, Austin Independent School District, Atlanta Independent School System, Fulton County School District, Minnesota State Department of Education, State of Washington, Washington State School for the Blind, Washington State School for the Deaf, and South Carolina Department of Education.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- In the United States Court of Appeals for the Second Circuit, *K.M., et al. v. Eric Adams, et al.*, Case No. 20-4128. Judgment was entered August 31, 2022.

- In the United States District Court for the Southern District of New York, *J.T., et al. v. Bill de Blasio, et al.*, Case No. 20-Civ-5878-CM. Judgment was entered November 13, 2020.

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OPINIONS BELOW

The decision of the Court of Appeals denying the Petition for Rehearing and Rehearing En Banc (A122-A125) is unreported. The decision of the Court of Appeals on the merits (A1-A12) is reported at 2022 U.S. App. LEXIS 24555. The decision of the District Court (A13-A121) is reported at 500 F. Supp. 3d 137.

JURISDICTION

The Second Circuit entered judgment on August 31, 2022, and denied the Petition for Rehearing and Rehearing En Banc on November 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The statutes involved are the following:

- 20 U.S.C. §§ 1415(j), which provides:

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

- 20 U.S.C. § 1415(l), which provides:

(l) Rule of construction

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 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT OF THE CASE

This case, brought under the Individuals with Disabilities Education Act ("IDEA"), began as a class action against school districts and departments of education throughout the United States. The case was brought on behalf of disabled students who are entitled to a free appropriate public education ("FAPE") under the IDEA, but were deprived of this right during the nationwide COVID-19 shutdown because, unlike their non-disabled peers, they are unable to be educated remotely.

The IDEA requires the exhaustion of state administrative remedies, prescribed by the IDEA, before a judicial action may be brought. However, this requirement is subject to certain exceptions, including for futility, such as in situations like the instant case where the state administrative officers lack the authority to provide the relief sought. Despite the applicability of this exception, the district court dismissed the case for failure to exhaust administrative remedies.

The district court found that the failure to exhaust deprived it of subject matter jurisdiction, placing the burden on the plaintiffs to show that an exception to the exhaustion requirement applied, and the Second Circuit affirmed. This finding is contrary to the language of the statute, and goes against multiple admonishments from this Court to narrow the application of the term "jurisdictional" to situations in which the court is rightfully deprived of the capacity to hear the case, and not to situations involving non-jurisdictional claim-processing rules.

There is a nationwide circuit split on this issue. Four Circuits (the First, Second, Third, and Tenth) currently hold that the failure to exhaust administrative remedies under the IDEA is jurisdictional; three Circuits (the Fourth, Seventh, and Ninth) hold that it is a claim-processing rule, and thus is an affirmative defense that is waived if not raised; three Circuits have noted the issue but are as yet undecided (the Fifth, Sixth, and Eighth); and the Eleventh Circuit has panel decisions on both sides of the issue, none of which address the conflict.[1]

The consequences of this national conflict are significant and widespread. If the exhaustion requirement is an affirmative defense, not only must the defendant raise it; it must prove it. This includes proof that none of the exceptions apply. The burden of proof rests with the defendant, not the plaintiff. As demonstrated by the Second Circuit's ruling in the instant case, improperly shifting this burden may be outcome-altering.

Conversely, if, as the Second Circuit held below, the exhaustion requirement is jurisdictional, the defendant need not raise the issue, much less provide any evidence to prove it. Instead, the court must examine the issue at the outset of the case, the plaintiff bearing the burden to ***plead***, in the complaint, the exhaustion of administrative remedies. Thus, while interpreting the same federal law, a law firm like the undersigned, which represents disabled students nationwide, must alter

[1] Among the geographic circuits, only the D.C. Circuit has yet to address the issue.

its pleading and litigation strategy depending upon the jurisdiction. Compounding this situation is the fact that multiple circuits are undecided on this issue, others have questioned their own binding precedent, and at least two circuits have changed their position, thus leaving the state of the law in a confusing flux.[2]

Hanging in the balance of this confusion, inconsistency, and volatility surrounding the applicable law are the educational rights of disabled students. In enacting the IDEA, Congress went to great lengths to establish and protect the right of disabled students to a free appropriate public education, instituting rigorous procedural safeguards around that right. Surely Congress did not intend for those safeguards to provide varying levels of protection depending on the state in which the student happens to live. Further, given that at least two circuits have changed course on this issue, and several others have questioned their own binding precedent (not to mention the Eleventh Circuit's internally conflicting precedent), the courts themselves are in a state of uncertainty with respect to this important and far-reaching issue. It is time for this Court to step in and resolve this issue for the benefit of all disabled students and their parents.

Background

In 1975, Congress enacted the Education for All Handicapped Children Act (since retitled the IDEA), *see* 20 U.S.C. § 1400 et seq., after

[2] It is unclear how a litigant should proceed in the Eleventh Circuit, given the internal conflict of its precedent.

determining that most of the Nation's disabled children were not receiving adequate public educational services. *Y.B. on behalf of S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 197–98 (3d Cir. 2021). The Act "was passed in response to Congress's perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'" *Id.* (citations omitted). The IDEA aims to give children with disabilities a FAPE designed to meet their unique needs. 20 U.S.C. § 1401(25), 1412.

Because the IDEA offers states federal funds to assist in educating children with disabilities, participating states must impose procedural safeguards for the general welfare of the children and their parents who seek to obtain the IDEA's guaranteed services. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 390-92 (2017). The IDEA includes procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311–12 (1988). Procedural safeguards include a parent's right to have an impartial due process hearing concerning any complaints they may have concerning their child's education, followed by an appeal process. 20 U.S.C. § 1415(f), (g). *See Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 200-01 (S.D.N.Y. 1988).

A parent dissatisfied with the results of this due process may file a civil action. § 1415(i)(2). However, the IDEA requires, with certain exceptions, the exhaustion of these administrative remedies before filing a civil action. *See* §§ 1415(i)(2)(a) and (l).

Effective March 14, 2020, New York City Mayor Bill de Blasio ("Mayor de Blasio") and the Chancellor of New York City Department of Education Richard Carranza ("Chancellor Carranza") unilaterally moved all public school instruction to "remote learning" where students and staff would remain at their homes until April 20, 2020. (ECF 1 at 4). On April 11, 2020, Mayor de Blasio and Chancellor Carranza announced schools would remain closed and all services would continue to be provided through "remote learning" for the remainder of the 2019-2020 school year. (*Id.* at 5).

The Student-Plaintiffs are classified under federal law as being disabled and having an educational disability. Thus, they are entitled to a FAPE under the provisions of the IDEA. They were denied a FAPE because the New York City Department of Education ("DOE") failed to comply with the IDEA's procedural requirements and safeguards. (*Id.* at 59-60). DOE violated each Student's right to "stay put" in their educational status quo, in violation of 20 U.S.C. § 1415(j), by failing to maintain the Students in, or return the Students to, their educational programs, placements, and related services as required during proceedings brought pursuant to the IDEA. (ECF 1 at 76). The Students further were denied a FAPE because DOE

did not provide them with a proper IEP reasonably calculated to enable them to receive the educational benefits required by IDEA. 20 U.S.C. § 1401, et seq., 34 C.F.R. part 300. (ECF 1 at 76).

District Court Proceedings

On July 28, 2020, Student-Plaintiffs filed a Complaint in the district court for the Southern District of New York against various school districts and Departments of Education throughout the United States, seeking injunctive and declaratory relief. (ECF 1). Student-Plaintiffs alleged that, when schools were shut down due to the COVID-19 pandemic, every school district in the United States that went from in-person to remote learning (1) automatically and unilaterally altered the pendency placement of every special education student; and (2) ceased providing each one of those students with a FAPE, in violation of the substantive and procedural safeguards of the IDEA. (*Id.*).

On Aug. 22, 2020, Student-Plaintiffs filed a motion for a preliminary injunction. (ECF 29). The district court allowed the motion to proceed only against the New York City Defendants. (ECF 84). On Nov. 13, 2020, the district court issued an Opinion and Order, *inter alia*, dismissing the claims against the New York City Defendants under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction based on the finding that the Student-Plaintiffs had failed to exhaust administrative remedies under the IDEA. (A111-A118). The Student-Plaintiffs timely filed a Notice of Appeal on Dec. 11, 2020. (ECF 202).

The Court of Appeals' Decisions

On August 31, 2022, a panel of the Second Circuit, *inter alia*, affirmed the dismissal for lack of subject matter jurisdiction. (A1-A12). The Panel observed that the Court has questioned whether exhaustion of administrative remedies under IDEA is jurisdictional or an affirmative defense. Despite this observation, the Panel held it was bound by *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002), and *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002), which held that exhaustion of remedies under the IDEA is jurisdictional. (A10 n.3).

On September 14, 2022, the Student-Appellants filed a Petition for Rehearing and Rehearing En Banc. (ECF 366). The Student-Appellants argued, *inter alia*, that the Panel erred in holding that failure to exhaust administrative remedies under the IDEA is jurisdictional. (*Id.* at 1-41). They noted this Court's admonitions related to applying the term "jurisdictional" too loosely, highlighted the nationwide Circuit split on the issue, and noted the Second Circuit's questioning of its own binding precedent. (*Id.* at 4-8). The Second Circuit denied the Petition without discussion on September 30, 2022. (A122-125).

REASONS FOR GRANTING THE PETITION

I. This Court has Acknowledged the Importance of Distinguishing Between Rules that are Jurisdictional and those that are Claim-Processing Rules by Admonishing Lower Courts to Narrow their Use of the Word "Jurisdiction"

As early as 1998, this Court stated: "Jurisdiction, it has been observed, is a word of many, too many, meanings . . . ." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal citation and quotation marks omitted). In rejecting the argument that the time limit imposed by Bankruptcy Rule 4004 was jurisdictional, this Court, quoting *Steel*, noted the term "jurisdiction" was used far too loosely by courts. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). A year later, quoting *Kontrick*, this Court held: "'Clarity would be facilitated . . . if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a Court's adjudicatory authority.'" *Eberhart v. U.S.*, 546 U.S. 12, 16 (2005).

In *Eberhart*, this Court noted the confusion in the circuit courts caused by its "imprecision" in *United States v. Smith*, 331 U.S. 469 (1947), and *United States v. Robinson*, 361 U.S. 220 (1960), where this Court seemingly held that the time limitations in Bankruptcy Rules 33 and 45 were jurisdictional. 546 U.S. at 16–20. This Court retreated from those holdings, finding the limitation

in Rule 33 was not jurisdictional. *Id.* In 2009, this Court again weighed in on the issue, cautioning "against profligate use of the term [jurisdiction]." *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009). And again, the following term, this Court noted its "desire to curtail . . . 'drive-by jurisdictional rulings,' . . . which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action," quoting *Steel*, 523 U.S. at 91, and *Kontrick*, 540 U.S. at 456. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (internal citations omitted).

The admonitions of *Steel*, *Kontrick*, *Eberhart*, *Union Pac.*, and *Reed Elsevier* do not simply clarify when a rule is jurisdictional or an affirmative defense; they specifically urge restraint from finding rules jurisdictional when they are not because courts were finding too many rules to be jurisdictional. In making these repeated admonitions over a period of years, this Court recognized, and underscored, the importance of making the distinction between a jurisdictional rule and a non-jurisdictional claim-processing rule. Notwithstanding these admonitions, as set forth below, several lower courts continue to hold that the IDEA's exhaustion requirement is jurisdictional, and several others are in a state of uncertainty and confusion on the issue.

II. There is a Nationwide Circuit Split on the Question Presented

A. Circuits that Hold IDEA Exhaustion to be Jurisdictional

1. The Second Circuit

In the instant case, the Second Circuit held that because Petitioners could not " . . . point to any non-waived basis on which to excuse their failure to exhaust their administrative remedies required by the IDEA, the District Court properly concluded it lacked subject-matter jurisdiction over Students and Parents' IDEA claims," citing and quoting *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) and *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2d Cir. 2002). (A10). The Court noted:

> To be sure, we "have questioned . . . the supposed jurisdictional nature of the [IDEA's] exhaustion requirement" in the dicta of some of our "recent[]" decisions. But unless and until *Murphy* and *Polera* are "overruled either by an en banc panel of our Court or by the Supreme Court," we are "bound" by them. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014).

(*Id.* at n.3).

Indeed, the Second Circuit has questioned its position on this issue numerous times. In *Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519 (2d Cir. 2020), the Court cited *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 203 (2d Cir. 2007), noting that its precedent " . . . has not been entirely clear on whether the IDEA's exhaustion requirement is a jurisdictional prerequisite or a mandatory claim-processing rule." 959 F.3d at 530 n.44. *Coleman* noted, after *Kontrick* and *Eberhart*, the Court has been "equivocal in our discussion of the IDEA's exhaustion requirement . . . ." *Id.* Similarly, in *Paese v. Hartford Life & Acc. Ins. Co.*, 449 F.3d 435 (2d Cir. 2006), the Court noted it has "yet to reach a clear conclusion" on whether the IDEA's exhaustion requirement is jurisdictional or an affirmative defense. In *Handberry v. Thompson*, 446 F.3d 335, 343 (2d Cir. 2006), the Court, citing *Polera*, noted it had "not yet ruled on whether the IDEA's exhaustion requirements are subject to waiver," but held it need not reach the issue because exhaustion was excused by futility.

Despite these clearly expressed misgivings, the Second Circuit, in the instant matter, held anew that the IDEA's exhaustion requirement is jurisdictional. In so doing, the Second Circuit takes the same position as three other Circuits.

2. The First Circuit

In *Valentin-Marrero v. Commonwealth of P.R.*, 29 F.4th 45, 53 n.4 (1st Cir. 2022), the First Circuit stated, in *dictum*: "We note the disagreement among the circuits as to whether the IDEA's exhaustion

requirement is jurisdictional or is a claims processing rule to be dealt with under Rule 12(b)(6). First Circuit precedent characterizes it as jurisdictional." The Court cited precedent from 1989[3] in support of this statement. *Id.*[4]

3. The Third Circuit

In *T.R. v. Sch. Dist. of Phila. L.R.*, 4 F.4th 179, 185 (3d Cir. 2021), the Third Circuit held that, unless an exception applies, the failure to exhaust administrative remedies under the IDEA deprives a court of subject-matter jurisdiction, quoting precedent from 2014.[5]

4. The Tenth Circuit

The Tenth Circuit found it "clear" that its precedent treated the failure to exhaust under the IDEA as jurisdictional, citing precedent as far back as 1989,[6] "but it is less clear our analysis is legally correct." *Muskrat v. Deer Creek Pub. Schs*, 715 F.3d 775, 783 (10th Cir. 2013). The Court noted this Court's admonishment "to employ the 'jurisdictional' label carefully given the important differences between jurisdictional and non-jurisdictional requirements," citing *Steel*, *Henderson v. Shinseki*,

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[3] *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1099 (1st Cir. 1989).

[4] The Court ultimately held that it need not address the question because the defendants had raised exhaustion below. *Id.*

[5] *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014).

[6] *Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 810 (10th Cir. 1989) (analyzing the IDEA's predecessor statute).

562 U.S. 428 (2011), *Reed Elsevier*, *Union Pac.*, and *Eberhart*. *Id.* at 783 and n.2. The Court noted that most of the decisions from other Circuits holding the IDEA's exhaustion requirement to be jurisdictional "appear to be the sort of drive-by rulings that the Supreme Court has cautioned against." *Id.* at 784. The Court noted that "[m]ost contrary decisions are no more thorough." *Id.* Having noted its misgivings, ultimately the Court held that it need not reach the issue in the case before it. *Id.* Thus, while the Court has openly questioned its precedent, binding law in the Tenth Circuit continues to hold IDEA exhaustion to be jurisdictional.

B. Circuits that Hold IDEA Exhaustion to be Non-Jurisdictional

There are three Circuits on the other side of the ledger.

1. The Seventh Circuit

The Seventh Circuit has ruled that a failure to exhaust under the IDEA is an affirmative defense. *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006). Thus, the Court held that the earliest the issue could be resolved is after the answer is filed, via a Rule 12(c) motion for judgment on the pleadings. *Id.* The Court noted:

> [p]arties and courts occasionally take short-cuts and present certain arguments through a motion to dismiss for failure to state a claim upon which relief can be granted under Rule

> 12(b)(6), if the allegations of the complaint in the light most favorable to the plaintiff show that there is no way that any amendment could salvage the claim.

Id. The Court held that such was not the situation in the case at bar because there was nothing in the complaint to compel the conclusion that the plaintiff failed to exhaust. *Id.* The Court held that the plaintiff "had no obligation to allege facts negating an affirmative defense in her complaint . . . ." *Id.*

2. The Fourth Circuit

The Fourth Circuit had held that the failure to exhaust under the IDEA was jurisdictional. *MM v. Sch. Dist. of Greenville Cnty*, 303 F.3d 523, 536 (4th Cir. 2002). However, less than three months ago (as of this writing), the Court reversed course. In *K.I. v. Durham Pub. Sch. Bd. of Educ.*, 54 F.4th 779, 790 (4th Cir. 2022), the Court noted the holding in *MM*, but then observed that it "need not follow precedent by a panel or by the court sitting en banc if the decision rests on authority that subsequently proves untenable in light of Supreme Court decisions." *Id.* Then, citing *Kontrick*, *Steel*, *Reed Elsevier*, as well as *U.S. v. Wong*, 575 U.S. 402, 410 (2015) ("traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences"), and *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019) (holding that Title VII's exhaustion requirement is non-jurisdictional), the Court declined to follow *MM*, holding instead that the IDEA's exhaustion

requirement was a non-jurisdictional claim-processing rule. *Id.* at 791-92.

3. The Ninth Circuit

The Ninth Circuit has given perhaps the most detailed discussion of the issue. In *Payne v. Peninsula School Dist.*, 653 F.3d 863, 868 (2011) (en banc), the Court noted this Court's warnings against profligate use of the term "jurisdiction," citing, *inter alia*, *Union Pac.*, *Reed Elsevier*, and *Kontrick*. The Court then analyzed the IDEA statutory framework, finding no indication that the exhaustion requirement is jurisdictional. *Id.* at 869-870. The Court overruled its prior holdings to the contrary, noting:

> We think our misstep well illustrates the Supreme Court's observation that "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier*, 130 S.Ct. at 1243–44.

C. Circuits that are Undecided

Three Circuits have discussed the issue, but have not ruled decisively.

1. The Fifth Circuit

The Fifth Circuit has observed: "Our circuit has not addressed whether the IDEA's exhaustion requirement is jurisdictional." *W.S. v. Dall. Indep. Sch. Dist.*, 2022 U.S. App. LEXIS 28097 *3 n.2 (5th Cir. Oct. 7, 2022) (citing *Logan v. Morris Jeff Cmty. Sch.*, 2021 U.S. App. LEXIS 29254 *3-4 (Sep. 28, 2021)).

2. The Sixth Circuit

The Sixth Circuit noted that it "has left this question open," but expressed "healthy skepticism for those courts that view the exhaustion rule as jurisdictional." *Doe v. Knox Cnty. Bd. of Educ.*, 56 F.4th 1076, 1084 (6th Cir. 2023).

3. The Eighth Circuit

In *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 946 (8th Cir. 2017), a case in which the parties and the district court both treated the exhaustion requirement as jurisdictional, the Eighth Circuit noted the disagreement between the Ninth and Second Circuits, and then held that it need not reach the issue.

D. The Eleventh Circuit's Intra-Circuit Conflict

The Eleventh Circuit presents the most compelling case for this Court's intervention. In *N.B. by D.G. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996), the Court held explicitly that

the IDEA's exhaustion requirement is not jurisdictional. However, in *Babicz by & Through Babicz v. School Bd.*, 135 F.3d 1420, 1421-22 (11th Cir. 1998), the Court affirmed the district court's dismissal of the action for lack of subject-matter jurisdiction, on the grounds that the plaintiffs had failed to exhaust their IDEA-required administrative remedies. The Court provided no explanation for its departure from the standard set forth in *N.B.* Again, in *J.P. v. Cherokee County Bd. of Educ.*, 218 Fed. Appx. 911, 914 (11th Cir. 2013), the Court held: "Plaintiffs were required to exhaust administrative remedies before filing this court action. The district court properly dismissed the matter since it lacked subject matter jurisdiction." The Court did not discuss the jurisdictional nature of the exhaustion requirement, and again gave no hint as to why it was departing from prior precedent.

Given the fact that neither the *Babicz* Court nor the *J.P.* Court addressed, or even acknowledged the departure from binding precedent, it does not appear that the Court intended to change course on this issue. It certainly did not do so in light of this Court's admonitions, since it referenced none of them. It seems more likely that the ambiguity, uncertainty, and lack of guidance left the Court without a clear grasp of the issue.

As the foregoing demonstrates, the question presented in this Petition is one this Court has recognized as important enough that it has given multiple admonitions, over a number of years, to lower courts to narrow their interpretation of the all-important term "jurisdictional." IDEA exhaustion is

a prime example of the type of rule to which this Court's admonitions apply. Despite these admonitions, as set forth above, several courts continue to hold IDEA exhaustion to be jurisdictional; others equivocate as to whether it is jurisdictional or not, ultimately "punting" the issue; still others question their own binding precedent; multiple Circuits have reversed their position; and still another has an unaddressed intra-Circuit conflict.

III. The Second Circuit's Ruling is Contrary to the Language of the IDEA and this Court's Direction

In *Wong*, this Court held that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." 575 U.S. at 410. In drafting the exhaustion requirement of the IDEA, Congress imbued no procedural bar with jurisdictional consequences. As the Ninth Circuit held in *Payne*:

> . . . nothing in § 1415 mentions the jurisdiction of the federal courts. In fact, neither the word "courts" nor the word "jurisdiction" appears in § 1415(l). Section 1415 is written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of the federal courts to hear the suit. That textual choice strongly suggests that the restriction may be enforced by defendants but that the

> exhaustion requirement may be waived or forfeited.

653 F.3d at 869. Next, the Court noted that the jurisdictional provisions of § 1415 did not require exhaustion. Section 1415(i), which lists the types of actions that may be brought under the IDEA, makes no mention of federal subject-matter jurisdiction. *Id.* at 870. The Court held further:

> If we were to hold that exhaustion was jurisdictional, the question of exhaustion *vel non* would haunt the entire proceeding, including any appeals. We would have the obligation to raise the issue *sua sponte*, a particularly frustrating exercise for parties and courts when Congress has authorized the parties to file suit in state court in the first place.

Id. at 870. The Court concluded: "In sum, we hold that the exhaustion requirement in § 1415(l) is not jurisdictional. It 'is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions.'" *Id.* at 870-71 (quoting *Reed Elsevier*, 559 U.S. at 166).

The Ninth Circuit's reasoning is sound. Consistent with this Court's direction, a procedural rule should not be considered jurisdictional unless Congress so stated in the statute. Congress did not explicitly state that the IDEA's exhaustion requirement is jurisdictional, nor is it mentioned in

the sections of the statute that do address federal court jurisdiction. The Second Circuit's holding that IDEA exhaustion is jurisdictional is inconsistent with the language of the statute itself, and is discordant with this Court's many admonitions to avoid "drive-by" jurisdictional rulings.

IV. This Court has Held Exhaustion Requirements in other Areas of Law to be Non-Jurisdictional

In other contexts, this Court has held exhaustion requirements to be non-jurisdictional. This Court held that the failure to exhaust administrative remedies under the Prison Litigation Reform Act is an affirmative defense, "and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007). In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987), this Court noted that the requirement to exhaust remedies available in the tribal court system does "not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." This Court acknowledged that exhaustion in a habeas action is an affirmative defense, as set forth in Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. *Day v. McDonough*, 547 U.S. 198, 208 (2006). With respect to the exhaustion of administrative remedies before the EEOC, this Court noted that "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a

jurisdictional prerequisite to suit in the district court." *Zipes v. TWA*, 455 U.S. 385, 397 (1982).

In *Pa. State Police v. Suders*, 542 U.S. 129, 137-38 (2004), this Court addressed a defense to Title VII sexual harassment enunciated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998). Pursuant to this defense, in cases involving supervisor harassment "when no tangible employment action is taken" by the employer, the employer may avoid liability by showing that it exercised reasonable care to prevent and correct the offending behavior, and that the complaining employee failed to avail themselves of "any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Suders*, 542 U.S. at 137-38 (internal citation and quotation marks omitted). This Court recognized this defense, which includes an exhaustion component, as an affirmative defense. *Id.* at 139 (referring to the "*Ellerth/Faragher* affirmative defense").

To hold that the IDEA's exhaustion requirement is jurisdictional, as the Second Circuit did, would be a conspicuous, and unjustified, departure from the usual treatment of exhaustion requirements in other legal contexts.

V. The Second Circuit's Ruling Imposes an Undue Burden on Disabled Students

Should this Court hold that failure to exhaust under the IDEA is an affirmative defense rather than a jurisdictional bar, both the nature of the analysis, and the outcome of the case at bar, change.

A defendant must not only plead but also prove the affirmative defense of failure to exhaust. *Hardaway v. Hartford Pub. Works Dep't,* 879 F.3d 486, 489-91 (2d Cir. 2018). *See Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 1997 U.S. App. LEXIS 19794 *10 (2d Cir. 1997) (the defendant has the burden of proof on an affirmative defense); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998) ("Since fair use is an affirmative defense to a claim of infringement, the burden of proof is on its proponent."); *Dejesus v. H.F. Mgmt. Servs., LLC*, 726 F.3d 85 (2d Cir. 2013) ("a claim of exemption under the FLSA is an affirmative defense, on which the employer bears the burden of proof.").

In *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267 (1994), this Court held that "burden of proof" does not just mean "burden of production" but "burden of persuasion" – the proponent must meet its burden by a preponderance of the evidence. It is axiomatic that a proponent cannot prove a defense by a preponderance of the evidence with no evidence. The Second Circuit wrongfully placed the burden of production on the Petitioners:

> To establish futility on account of delay, the Students and Parents must show that the relevant "administrative bodies persistently fail to render expeditious decisions as to a child's educational placement." *Frutiger v. Hamilton Cent. Sch. Dist.*, 928 F.2d 68, 74 (2d Cir. 1991) (emphasis added). But beyond

> vague and conclusory assertions that there was "delay caused by the COVID closures" or "generally by [New York] City and the administrative processes," Students and Parents Br. at 44, the Students and Parents have failed to show that any such delays actually existed–much less that they were "persistent[]," *Frutiger*, 928 F.2d at 74.

(A8-A9).

The District Court rejected the Petitioners' argument of futility based on delay, finding:

> futility is not measured by the fact it takes time to hold hearings. Plaintiffs conveniently do not allege that their impartial hearings have been held, let alone that no decision has been entered on a "fully briefed" due process complaint. **I greatly doubt** that any complaint has been "fully briefed;" indeed, most of the hearings that have been requested in this case were requested a month or less prior to the date when counsel argued that exhaustion was futile–thereby falling within New York's 30-day resolution period before the City need even hold a due process hearing. See 34 CFR § 300.510; *J.Z. v. New York City Dep't of Educ.*, 281 F. Supp. 3d 352, 363 (S.D.N.Y. 2017) [(S.D.N.Y. 2017)]. (See "IHO Emails," Dkt. No. 149-13.)

> Plaintiffs' futility argument is premature.
>
> Moreover, **this Court is prepared to make allowances** for the fact that the pandemic will inevitably result in delays in the holding of impartial hearings. I am not prepared to divorce this lawsuit from the circumstances that precipitated it.

(A117) (emphasis added). None of these findings were based on evidence produced by NYC–they produced none. The Court's reliance on its own doubts and allowances was not evidence produced by NYC and would have been insufficient to meet NYC's burden of proof relative to the affirmative defense of failure to exhaust administrative remedies.

The District Court and Second Circuit found NYC need only raise the issue of failure to exhaust to require Petitioners to prove that an exception applies. If Petitioners failed, the matter would be dismissed for lack of jurisdiction, with no opportunity for discovery. Such is not the nature of an affirmative defense where the proponent bears the burden of proving the defense with evidence, and the opposing party may offer evidence in opposition to it. Such analysis is decidedly fact-based and inappropriate for resolving a 12(b)(1) motion to dismiss. Had the District Court and Second Circuit treated the exhaustion requirement as an affirmative defense, which had to be raised and proved by NYC, the ultimate outcome may or may

not have been the same, but the proceedings would have been much different.

The Second Circuit has held that "a defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint." *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315 (2d Cir. 2021) (quoting *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406 (2d Cir. 2008)). Such is not the case here. First, the City brought its motion under Rule 12(b)(1), not Rule 12(b)(6). Second, the failure to exhaust, including the inapplicability of the relevant exceptions, did not appear on the face of the Complaint. The District Court made its findings based on doubts and allowances.

Because failure to exhaust did not appear on the face of the Complaint, the issue should have been considered an affirmative defense raised in the context of the 12(b)(1) motion to be proven by NYC by a preponderance of the evidence. The Second Circuit erred in affirming the District Court's erroneous conclusion that the Petitioners bore the burden of proving exhaustion was not required. Petitioners have no burden to prove NYC's affirmative defense, particularly on a Rule 12(b)(1) motion. The pleading requirements in the Federal Rules of Civil Procedure do not compel a litigant to anticipate potential affirmative defenses and affirmatively plead facts to avoid such defenses. *Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007). Instead, Rule 8 requires a plaintiff to provide only a short and plain statement of the claim showing that the pleader is entitled to relief. *Id.*

Determining whether administrative remedies have been exhausted is inherently fact-based. In *Payne*, the Ninth Circuit observed that questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the general purposes of exhaustion, **are better addressed through a fact-specific assessment of the affirmative defense** than through an inquiry about whether the Court has the power to decide the case at all. 653 F.3d at 870. Here, the District Court expressed doubts, made pandemic-related allowances, and found that Petitioners' futility argument was "premature." These fact questions should be decided in the context of an affirmative defense, not a Rule 12(b)(1) motion.[7]

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[7] The District Court erred by even considering whether exhaustion was excused by futility. In *Ventura*, the Second Circuit held that the parents were excused from the exhaustion requirement because they alleged a violation of the IDEA's stay-put provision. 959 F.3d at 531. This Court rejected the City's argument that exhaustion was not excused because the City had not violated the stay-put provision. The Court found such argument "conflates the merits inquiry of whether the Parents have stated a claim upon which relief can be granted with the arguable threshold inquiry of whether the Parents needed to exhaust their administrative remedies." 959 F.3d 519 Here, the Petitioners alleged a violation of the stay-put provision in their Complaint. Under *Ventura* and other binding precedent, the District Court should have found the Petitioners were excused from the exhaustion requirement by virtue of their pleadings, without reaching the question of whether exhaustion was excused by futility or any other reason. Petitioners raised this argument in their briefs, and at oral argument, but the Second Circuit did not address it.

By treating the issue as jurisdictional, the District Court erroneously addressed the fact-specific question whether the school closure constituted a change in placement, finding that it did not, without the Plaintiff-Students being able to obtain discovery and present evidence on the issue. Adding insult to injury, the District Court's finding was contrary to this Court's long-established precedent. The maximum amount of time a school district can displace a student and change the educational program without triggering a violation of 20 U.S.C. § 1415(j) is 10 school days. *See Honig*, 484 U.S. at 325, 325-26 n.8 (noting that because "parents may bypass the administrative process where exhaustion would be futile or inadequate . . . we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances"). Here, the school closure was more than ten days; thus, it constituted a change in placement, triggering the "stay-put" provision of § 1415(j). Because this case involved a claim under the "stay-put" provision, no exhaustion was required. By holding that the failure to exhaust was jurisdictional, the Second Circuit affirmed the District Court's finding, with no opportunity for the Plaintiff-Students to present evidence to support their position.

VI. This Issue is Ripe for Review, and this Case is an Appropriate Vehicle for this Court's Review

This issue is ripe for review. This Court has been admonishing lower courts to narrow their interpretation of the term "jurisdictional" for more

than 20 years. Despite these admonishments, there remains a Circuit split with respect to whether IDEA exhaustion is jurisdictional, with 11 of the 12 geographic Circuits having addressed the issue, and eight of them taking a position on the issue: four on one side, three on the other, and one with an internal conflict.

The IDEA protects the educational rights of more than seven million disabled students in the United States.[8] The IDEA is widely applied, and litigated, throughout the federal court system. The incorrect interpretation of this statute, which is at issue in this case, has widespread and devastating consequences on these important rights. The instant case presents this issue squarely before the Court, which may resolve the conflict by ruling in this matter.

In addition to the interpretation of the IDEA, a ruling in this case would establish valuable precedent that would be persuasive in cases involving the interpretation of similar exhaustion provisions in other federal statutes. In short, a ruling by this Court in this case would constitute an important and necessary contribution to the case law covering this important issue of statutory interpretation.

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[8] According to the National Center for Education Statistics, in the 2020-21 school year, 7.2 million students received special education services under the IDEA. *See* https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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Respectfully submitted,

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