No. 22-840

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

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

Petitioners' Statement of the Case is devoid of any mention of the district court and the Second Circuit's rulings relating to Austin Independent School District (Austin ISD) and other non-New York Respondents that are still, remarkably, named as parties in this appeal. As this Court's consideration of the dismissal of the claims against Austin ISD will necessarily require a more thorough presentation of the facts, Austin ISD presents an abridged version of the accurate factual summaries contained in the United States District Court for the Southern District of New York's Opinion and Order and the Second Circuit's Summary Order.

Petitioners originally consisted of a loose group of approximately 100 students, classified under federal law as being disabled, and their parents, who are residents of various states within the United States.[1] A6. Petitioners initially attempted to bring a class action lawsuit against the Mayor and Education Chancellor of New York City, the New York City and State Departments of Education, *and every school district and state department of education in the United States* in the United States District Court for the Southern District of New York. A6; A14. One of the public school districts that was sued was Austin ISD, located in the State of Texas. *See* Original Complaint at Appendix B.

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[1] However, numerous concerns were raised below as to whether all of the parents realized what type of legal action that they were entering into with Petitioners' counsel, causing some parents to subsequently withdraw from the lawsuit. A14, n.1.

Petitioners generally alleged that, because of the global pandemic brought on by the novel coronavirus (COVID-19) – which caused state governors across the United States to physically close schools, as well as much of the globe to essentially shut down while nation after nation instituted quarantine measures for its citizens – every school district in the United States (totaling more than 13,000 school districts) deprived the Petitioner-Students (as well as the approximately 7.1 million other public school students, aged 3-21, who received special education services between March 2019 and July 2020) access to a free and appropriate public education (FAPE) defined by their individualized education plans (IEPs) in violation of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and State and Federal Constitutions. *See generally* Original Complaint. The absurdity of this lawsuit was quickly identified by the district court, which issued various orders to show cause in an effort to reduce this bloated case and pare away the obviously defective claims contained in the complaint. A16; A37-A39. Specifically, the district court provided Petitioners an opportunity to explain (1) why non-New York states and school districts, such as Austin ISD, can be sued in the Southern District of New York (SDNY) and (2) why it was appropriate to join individual claims against individual defendants into a single massive class action lawsuit. A38-A39.

In response, Petitioners fabricated a Racketeering Influenced and Corrupt Organizations Act (RICO) claim against over 13,000 out-of-state

school districts and departments of education, in a misguided attempt to manufacture personal jurisdiction. A49-A69. Without rhyme or reason, Petitioners alleged that all Respondents conspired and schemed to commit mail and wire fraud by receiving federal Medicare and Medicaid funds by electronic means, while failing to provide services to special education students as required by their IEPs. A49-A50.

The district court ultimately issued an over-100-page opinion dismissing all claims against all parties and denying Petitioners' application for a preliminary injunction. A13-A121. In doing so, the district court properly found that it lacked personal jurisdiction over Petitioners' claims against any out-of-state defendants and, further, that venue was not proper in the SDNY as to any out-of-state defendants. A42-A82. As such, all claims against Austin ISD were dismissed without prejudice for want of personal jurisdiction. A120-121. No petitioner subsequently attempted to bring a case against Austin ISD in a court of proper jurisdiction.

Petitioners appealed the entirety of the district court's order to the Second Circuit. A5. As such, Austin ISD filed responsive briefing. *See* Appellee-Austin ISD's Brief. Oral argument was held in front of a three-judge panel of the Second Circuit, at which time Petitioners immediately conceded that they were not pursuing any claims other than the IDEA and RICO claims against the New York City Respondents alone. A1; A6, n.1. To be clear, Petitioners unequivocally abandoned all claims against Austin ISD at oral argument. A7, n.2.

The Second Circuit issued a Summary Order dismissing the appeal from the district court's denial of a preliminary injunction as moot, dismissing the appeal as to all non-New York Respondents, and affirming the district court's judgment as to the New York Respondents. A1-A12. Petitioners filed a petition for rehearing en banc, which was denied. A122-A125. Petitioners subsequently filed a Petition for Writ of Certiorari in this Court, and failed to remove Austin ISD (and many of the other non-New York Respondents) from the appeal. *See* Petition at iv (Parties to the Proceedings).

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI AS TO RESPONDENT AUSTIN ISD

Petitioners explicitly abandoned any and all claims against Austin ISD and all other non-New York Respondents during oral argument held before the Second Circuit. What is more, Petitioners have continuously waived any claims against Austin ISD by failing to brief the district court's dismissal of Austin ISD in any of their appellate briefing to the Second Circuit and this Court. However, even if Petitioners had not abandoned or waived all claims against Austin ISD, the district court correctly found that it lacked personal jurisdiction over Austin ISD; the SDNY was not the proper venue for Petitioners' claims against Austin ISD; and, even if personal jurisdiction and proper venue existed, Petitioners' claims against the non-New York Respondents were improperly joined and should be severed and dismissed. Accordingly, this Court should not waste either its

own resources or the resources of Austin ISD deciding a question that has no bearing on Austin ISD.

In short, Petitioners have no reason – much less any compelling reason – to ask this Court to review the Second Circuit's acceptance of Petitioners' abandonment of all claims against Austin ISD and, thus, its dismissal of the appeal as to Austin ISD. Petitioners were tasked with following Rule 12.6 of this Court to advise the Clerk of this Court that Austin ISD should be removed as a party at this stage of the proceedings. Due to their failure to do so, this Court should tax costs against them, including the costs of printing copies of this responsive brief. Especially since, after being served with response waivers filed by Austin ISD (and many other non-New York Respondents), Petitioners still failed to file anything to remove Austin ISD as a party. *See* Respondents' Waivers.

REASONS FOR DENYING THE WRIT OF CERTIORARI AS TO RESPONDENT AUSTIN ISD

I. Petitioners expressly abandoned all claims against Austin ISD during oral argument in the Second Circuit.

When Petitioners appealed the district court's dismissal of their claims to the Second Circuit, they did not differentiate between their definition of Respondents as a group of over 13,000 "School Districts in the United States," all "State Departments of Education in the United States," and specific New York individuals. As such, Austin ISD filed responsive

briefing and further appeared at oral argument in the Second Circuit, located in New York City.

At oral argument, the *first question* posed to counsel for Petitioners was whether Petitioners were pursuing any claims against the non-New York Respondents (including Austin ISD). Counsel for Petitioners answered with a resounding no:

Pet.:	Good morning and may it please the Court. My name is Rory Bellantoni and I represent the Plaintiffs in this case.
Chin, J.:	Could I ask whether you are pursuing any of the claims in the case other than the IDEA claim against the City Defendants? Because you don't brief –
Pet.:	In this case –
Chin, J.:	I'm asking you a question.
Pet.:	No, Your Honor –
Chin, J.:	You don't brief –
Pet.:	The answer is no. We have brought actions against other defendants in their home states.
Chin, J.:	Alright, so you're not –
Pet.:	But the appeal is not against –
Chin, J.:	--in other words, on this appeal we don't need to worry about any of the Appellees other than the New

> York City Defendants. Is that correct?
>
> Pet.: Yes, Your Honor.

See Recording of Second Circuit Oral Argument at 1:33, held on May 12, 2022, found at https://www.ca2.uscourts.gov/decisions/isysquery/2f817a35-6fd2-41cb-b126-eb7886132dd9/351-360/list/ (cleaned up). What is more, later in the oral argument, counsel for Petitioners re-urged Petitioners' position that they were not pursuing any claims against the non-New York Respondents:

> Pet.: Your Honor, we are not backing away from any of the allegations as to these students in New York City. I *have to* back away from the allegations as to the out-of-state defendants.

Id. at 55:12 (cleaned up) (emphasis added).

And yet, on appeal to this Court, Petitioners continue to name Austin ISD, and all other non-New York school districts and entities as parties to the proceeding. *See* Petition at ii-iv; *see also* Rule 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.").

This Court and Circuit Courts are unanimous that they do not address claims previously abandoned and not properly brought on appeal. *See, e.g., Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009); *U.S. v. Whitfield*,

590 F.3d 325, 346 (5th Cir. 2009); *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373-74 (6th Cir. 2007); *Morehead v. Stewart*, 47 F. App'x 817, 817 (9th Cir. 2002); *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *HCC v. Wilson*, 142 S. Ct. 1253, 1258-59 (2022). And counsel for Petitioners unequivocally abandoned any and all claims Petitioners may have had against Austin ISD during oral argument before the Second Circuit. *See Dorce v. City of New York*, 2 F.4th 82, 102 (2d Cir. 2021) ("[T]o the extent that certain statements in Plaintiffs' briefs here or in the district court are to the contrary, Plaintiffs are nevertheless bound by concessions made by their counsel at oral argument."); *see also* A7, n.2. As such, this Court should deny the writ as against Austin ISD.

II. Petitioners have further waived all claims against Austin ISD by failing to brief any of their claims in the Second Circuit and in their Petition to this Court.

Just as they failed to do in their appellate briefing to the Second Circuit, Petitioners fail to brief to this Court any part of the district court's order dismissing the claims against the non-New York Respondents, including Austin ISD, for a lack of subject matter jurisdiction, personal jurisdiction, or proper venue. *See generally* Petition; Appellants' Brief. Rather, Petitioners have consistently chosen to focus their briefing on the New York Respondents. *Id.*

Without ever addressing the district court's finding that it lacked personal jurisdiction over the non-New York Respondents, Petitioners have waived

their challenge to the dismissal of Austin ISD. *See, e.g., Gross*, 585 F.3d at 95 ("Gross does not address this issue in his principal brief. This constitutes waiver."); *McCarthy v. S.E.C.*, 406 F.3d 179, 186 (2d Cir. 2005) ("We think it reasonable to hold appellate counsel to a standard that obliges a lawyer to include his most cogent arguments in his opening brief, upon pain of otherwise finding them waived."); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (finding a party who inadequately briefs an issue waives the claim).

III. Even if Petitioners had not abandoned or waived their claims against Austin ISD, this Court should not waste scarce resources reviewing the dismissal of Austin ISD for lack of jurisdiction, proper venue, and proper joinder.

Even if Petitioners have identified an existing Circuit split, as noted by the district court in its order, "this is no class action at all, but rather tens of thousands of individual cases that [Petitioners'] counsel has tried to amalgamate into a single lawsuit." A40-A41 (inserts added). As such, the district court properly found it did not have jurisdiction over school districts outside of the SDNY, including Austin ISD, a public school district in the Great State of Texas.

1. The district court correctly found it did not have personal jurisdiction over the non-New York Respondents, including Austin ISD, because New York's long arm statute was not applicable and Petitioners failed to state a viable RICO claim.

The district court determined that Austin ISD, as a public school district in the State of Texas, is not subject to general or specific jurisdiction in New York. A46. First, the district court correctly determined that, because Austin ISD is "not incorporated, chartered or located in New York," New York's general jurisdiction is not established. A46.

Second, the district court found it did not have specific jurisdiction under New York's long arm statute because Austin ISD did not "transact business" in New York. A47. In doing so, the district court rejected Petitioners' assertions that Austin ISD "transacted business" in New York through receipt of federal monies, noting the Center of Medicare and Medicaid Services is actually headquartered in Maryland and, "under the IDEA's grant provision, federal Medicaid funds for the education of disabled students are provided to states, which then pass the money on to LEAs." [2] A47-A48. The district court also rejected Appellants' contention that Austin ISD "transacted business" in New York through its supposed pension fund investments, noting the claims in this lawsuit do not arise from Austin ISD's alleged

[2] LEA stands for "local educational agency" and is most often a school district.

in-state transactions as required to establish specific personal jurisdiction through New York's long arm statute. A48-A49. As such, the district court correctly found that Austin ISD does not "transact business" in New York. A49; *see also Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 498 (2d Cir. 2020) ("[*Daimler AG v. Bauman*, 571 U.S. 117 (2014)] established that, except in a truly exceptional case, a corporate defendant may be treated as essentially at home only where it is incorporated or maintains its principal place of business." (insertions added)).

The district court further found it lacked personal jurisdiction because Petitioners failed to plead a viable RICO claim. A49-A69. As argued in the district court by Petitioners, Austin ISD (and all the other school districts) allegedly violated RICO by committing mail and wire fraud after receiving federal monies to provide special education services to students, but failed to provide such services during the pandemic. A49-A50. However, the district court correctly determined that Petitioners asserted a RICO claim "as an afterthought, not *ab initio*, and solely to try to manufacture jurisdiction over parties who could not be sued on these claims in this court." A53. The district court went on to find that Petitioners lacked standing and failed to allege an enterprise, conspiracy, or predicate acts necessary to establish a viable RICO claim. A55-A68. The following quote summarizes the district court's manifestly correct analysis of Petitioners' RICO claim:

> Frankly, the RICO allegations here asserted reek of bad faith and contrivance. Plaintiffs have baldly

> asserted that every school district in the country, in trying to respond to an unprecedented nationwide health crisis, has perpetrated a fraud on the federal government. They have not the slightest basis for so asserting. Their use of the phrase "on information and belief" does not save this patently defective pleading. This effort to inject racketeering into what is simply an IDEA lawsuit is bad faith pleading writ large. . . Plaintiffs' failure to assert a tenable RICO claim dooms their quest to obtain *in personam* jurisdiction over the out of state defendants.

A68-A69 (internal citations and quotations omitted, omissions added).

What is more, the discussion between Petitioners' counsel and Second Circuit Judge Chin held during oral argument further sums up Petitioners' RICO claim perfectly:

> Chin, J.: It's troubling that this kind of lawsuit was brought the way that it was. Was the intent to serve 13,800 school districts from around the country? And then to accuse them of participating in a RICO *scheme*? What's the good faith basis for that?
>
> Pet.: Your Honor, I believe the good faith basis was information

learned from the clients in various jurisdictions, but --

Chin, J: That a school district in Utah is conspiring in a RICO conspiracy with someone in New York City over the treatment of these IDEA cases during the pandemic? There's a good faith basis for that kind of a claim?

Pet.: Your Honor, again, I wasn't there. I can't say there was. But I would suggest to Your Honor that, if that portion is troubling to the Court, it doesn't make the portion that involves the New York City plaintiffs and defendants --

Chin, J: It seems to me that it undermines the credibility of the whole thing. I'm asking you for, "what was the good faith basis for a complaint," where you are up here defending it. And you don't know what the good faith basis was for making that kind of an allegation. I find it troubling, that's all. Go ahead, finish up.

See Recording of Second Circuit Oral Argument at 55:40, held on May 12, 2022, found at https://www.ca2.uscourts.gov/decisions/isysquery/2f817a35-6fd2-41cb-b126-eb7886132dd9/351-360/list/ (cleaned up).

2. The district court correctly found venue was not proper in the SDNY as to Petitioners' claims against the non-New York Respondents, including Austin ISD.

The district court appropriately dismissed, *sua sponte*, Petitioners' claims against Austin ISD for lack of proper venue. A69-A71; *see Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999) ("A district court may not dismiss a case *sua sponte* for improper venue absent extraordinary circumstances."). After dispensing with Petitioners' frivolous RICO claim, the district court determined that "there can be no question that venue is improper as to these out-of-state defendants [including Austin ISD] because no part of the events or omissions giving rise to the claims against them occurred in this district." A70 (insertions added). "There is no way that any, let alone a substantial part, of the events leading to the out-of-state [Petitioners'] claims of failure to provide a FAPE, or to maintain pendency took place in the Southern District of New York." A71 (insertions added). Petitioners' decision to amalgamate all of their disparate and unrelated claims against a kaleidoscopic array of governmental entities into one lawsuit is exactly the sort of extraordinary circumstance that warranted the district court's *sua sponte* dismissal on the basis of improper venue.

3. The district court correctly noted that, even if it did have personal jurisdiction and venue was proper, the claims against the non-New York Respondents were improperly joined and should be severed and dismissed.

The district court applied well-established authority to find joinder was improper, even if personal jurisdiction and proper venue existed. A71-A81. As noted by the district court, "it is impossible for all [Petitioners] to currently be joined in a putative class action against *all* [Respondents], because the [Petitioners] do not have claims against *all* [Respondents]." A73 (emphasis in original, insertions added). As pled, this action amounts to thousands of discrete lawsuits that have been joined as one. And the district court ably exercised its discretion to determine permissive joinder under Federal Rule of Civil Procedure 20 is not appropriate in this matter. A71-A81. In doing so, the district court noted that, in this case:

> [T]he complaint asserts that most of the 13,821 school districts in the United States closed their schools at more or less the same time because of the pandemic – albeit pursuant to the separate orders of fifty-two different sovereignties. It does not allege any facts tending to show that any individual state's or school district's decisions about how to handle special education during the pandemic was related to or dictated by the decision of any other district. Indeed, [Petitioners]

> acknowledge that some school districts actually remained open, even as most closed; that some districts re-opened earlier than others; that different districts provided different levels of special education during the pandemic; and that different school districts provided their special education teachers and staff with different levels of resources.

A77 (insertions added). The district court further correctly noted that each claim brought by an individual Student-Respondent will require that Student-Respondent to exhaust his or her administrative remedies prior to bringing a suit under the IDEA. A77-A78. This will necessitate a review of individualized, supporting documentation and evaluations of that particular Student-Respondent, as well as testimony from that Student-Respondent's teachers and service providers. *Id*.

As noted by the district court, "the purpose of permissive joinder is efficient litigation," but "[t]here is not the slightest possibility that joinder would facilitate settlement, since there is no possibility of the creation of a common fund . . . Nor would joinder facilitate the fashioning of a single order that could be applicable to the *individualized* educational plans of the various students." A80, A78 (emphasis in original, omissions added).

In sum, given the apparent bad faith in which the claims against Austin ISD and the non-New York Respondents were brought, the procedural

irregularities in this case, and the host of fatal deficiencies in Petitioners' claims outlined above, this case – regardless of the merit of the circuit split identified by Petitioners – is simply not a good vehicle for this Court to address the question presented. The Court should wait for another, better postured case to decide the question presented. And, if the Court is inclined to grant certiorari, it should do so only as to Respondents located within the State of New York.

IV. Because the appeal as against Austin ISD is frivolous, Austin ISD requests the Court tax costs against Petitioners.

Petitioners' decision to pursue their claims against Austin ISD on appeal to this Court has forced a Texas public school district to expend additional costs and fees to defend claims against it that were expressly abandoned in the Second Circuit below. *See* Rule 12.6. In light of Petitioners' unequivocal abandonment of their claims against Austin ISD, their inclusion of Austin ISD in this certiorari petition is frivolous. Therefore, Austin ISD requests the Court tax its costs, including costs of printing copies of its responsive brief, against Petitioners' counsel. *See* Rules 42.2, 43.7; *but see* Rule 43.3 ("The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.").

CONCLUSION

For the above reasons, the Court should deny Petitioners' Petition for a Writ of Certiorari as against Respondent Austin ISD and further tax costs, including printing costs, against Petitioners' counsel.

Respectfully submitted,

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