No. 22-840

IN THE

Supreme Court of the United States

K.M., individually and
on behalf of M.M. and S.M., et al.,

Petitioners,

against

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ADAMS, BANKS, AND NEW YORK CITY DEPARTMENT OF EDUCATION

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QUESTION PRESENTED

Petitioners brought this action under the Individuals with Disabilities Education Act claiming that, by resorting to remote learning early in the pandemic, every school district and state education department in the country violated the rights of any student with an individualized education program. Throughout the case, it was undisputed that petitioners had not exhausted their state administrative remedies; the only question was whether their failure should be excused. In a non-precedential order, the court of appeals accepted petitioners' concession that they failed to exhaust and rejected their two arguments based on an equitable "futility" exception, finding one meritless and the other unpreserved. In a petition for rehearing, petitioners argued for the first time that the IDEA's exhaustion requirement is a claim-processing rule, not a jurisdictional prerequisite. The question presented is:

Did the court of appeals properly uphold the dismissal of petitioners' IDEA claims based on their conceded failure to exhaust administrative remedies, where their futility arguments fail regardless of their unpreserved contention that exhaustion is a claim-processing rule rather than a jurisdictional prerequisite?

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INTRODUCTION

Congress has specified that only parties "aggrieved by the findings and decision" of a state administrative officer have a right of action under the IDEA allowing them to bring suit "in a district court of the United States." 20 U.S.C. § 1415(i)(2)(A). Petitioners ask the Court to decide whether this statutory requirement—often referred to in terms of exhaustion of administrative remedies—is a mandatory claim-processing rule or a jurisdictional prerequisite. Certiorari should be denied, for two principal reasons.

First, petitioners have forfeited any argument in this vein. Not only did petitioners concede their failure to exhaust administrative remedies in both of the lower courts, they themselves treated the question as one of subject matter jurisdiction until their eleventh-hour petition for rehearing. Petitioners have no reasonable excuse for failing to preserve their newfound argument on either level below. Even if petitioners' forfeiture were debatable—and assuming the question they present were otherwise cert-worthy—the Court would be better served awaiting a case where the issue has been properly raised, fully briefed, and addressed in a reasoned opinion by the court of appeals.

Second, this case is a uniquely poor vehicle to address the question posed by petitioners in any event. None of the usual consequences for treating a statutory requirement as jurisdictional are implicated here: defendants raised petitioners' failure to exhaust at the first opportunity, so there is no credible argument that the point has been waived or forfeited; because the question was raised by the parties, the lower courts had no need to raise it on their own; and the parties and the courts all assumed that equitable exceptions exist to soften the impact of the exhaustion requirement. And petitioners' concession that they had not exhausted administrative remedies, as well as their litigation choices below, underscore that the question posed by the petition has no practical significance in this case.

STATEMENT

This IDEA action was deeply misconceived. A few months into the pandemic, petitioners brought suit in the United States District Court for the Southern District of New York against every school district and state education department in the country, seeking to force "an immediate reopening" of all public schools for in-person instruction (2d Cir. Appendix ("A") 100, 2d Cir. ECF Nos. 155-56).[1] Petitioners claimed that limiting in-person instruction violated the rights of every single student with an individualized education program, regardless of the nature of the student's disability, the content of the individualized education program, or the specifics of early-pandemic instruction and services (A105-09, 114).

Over time, petitioners abandoned all non-IDEA claims in the complaint (Pet. App. 6-7 n.1). But scrambling for a basis for the district court to assert jurisdiction over a huge number of out-of-state defendants, petitioners sought to add a RICO claim that was not included in their complaint (A185-230). To that end, petitioners alleged that every school

[1] As the district court observed, there was a serious question as to whether petitioners' counsel, the Brain Injury Rights Group, had been retained to represent all plaintiffs (2d Cir. Special Appendix ("SPA") 87-90, 2d Cir. ECF No. 157).

district conspired to create fraudulent individualized education programs during the pandemic, thereby wrongfully securing "hundreds of millions of dollars" in federal funds (A186-87). The petition makes no mention of this claim.[2]

Considering the breadth of the lawsuit and the timing of its filing shortly after the challenged school closings, it was obvious that petitioners had not exhausted state administrative remedies. But the complaint itself confirmed the point: petitioners alleged that they had merely initiated state administrative procedures, not exhausted them (A109-10, 129). No doubt for that reason, petitioners asserted directly in the complaint that they were "not required to exhaust administrative remedies" under "one or more of the exceptions of the exhaustion prerequisite" (A89; *see also* A90 n.180).

As it turned out, even petitioners' allegation that they had initiated state administrative procedures was, at best, only partly true. Petitioners later

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[2] Petitioners' supplemental brief citing the Court's recent decision in *Luna Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023), is misguided. There, the Court held only that a party need not follow the IDEA's exhaustion procedures in connection with a non-IDEA claim that seeks relief which is unavailable under the IDEA. Since petitioners have abandoned all their non-IDEA claims, *Luna Perez* has no bearing here.

claimed to have filed nearly 200 administrative notices—many after the suit had already been brought (SDNY ECF Nos. 133, 141-42). Only 25 correlated to named plaintiffs (Pet. App. 87).

As relevant here, the New York City defendants[3] moved to dismiss under Rule 12(b)(1) based on petitioners' conceded failure to exhaust, anticipating the exceptions petitioners might rely on and explaining why they did not apply (A250-54, 257-58). In opposition, petitioners proved up their concession, submitting evidence showing that they had merely initiated state administrative proceedings, and even then only as to a subset of plaintiffs (SDNY ECF No. 149-13). Consistent with the complaint, petitioners' sole argument was that they were "not required to exhaust their administrative remedies" (A282).

Petitioners' opposition accepted, rather than contested, that IDEA exhaustion is a question of "subject matter jurisdiction" (A282). Petitioners never argued that exhaustion is a claim-processing rule rather than a jurisdictional prerequisite. Nor did they suggest that the distinction would make any difference in the case: they did not dispute that

[3] The New York City defendants include the New York City Department of Education, its Chancellor, and the Mayor of the City of New York.

exhaustion could be raised on a motion to dismiss; they did not raise any question as to who had the burden; and they did not claim that they needed discovery.

As relevant here, the district court dismissed the complaint under Rule 12(b)(1) based on petitioners' conceded failure to exhaust (Pet. App. 112-17).

On appeal to the United States Court of Appeals for the Second Circuit, petitioners stayed the course, conceding their failure to exhaust and arguing only that "[e]xhaustion is not required" (Br. for Plaintiffs-Appellants ("App. Br.") 43, 2d Cir. ECF No. 157). Relying on an equitable "futility" exception, petitioners claimed that exhaustion would be futile because (1) state administrative officers could not reopen schools; and (2) the administrative process would take too long (*id.* at 42-44). Once again, petitioners raised no argument as to whether the IDEA's exhaustion requirement is a claim-processing rule or a jurisdictional prerequisite, let alone suggested that the distinction mattered (*id.*; Reply Br. for Plaintiffs-Appellants 20-29, 2d Cir. ECF No. 280). Nor did the New York City defendants, who simply argued that petitioners were obliged to exhaust (Br. for New York City Appellees 35-39, 2d Cir. ECF No. 251). At the hour-long oral argument, neither the parties nor the court addressed the nature of the exhaustion

requirement (Oral Argument Audio, available at https://tinyurl.com/47amnvmm).

The Second Circuit affirmed in a non-precedential order (Pet. App. 1-12). The court first accepted petitioners' concession that they failed to exhaust state administrative remedies (*id.* at 8). It then rejected petitioners' argument that exhaustion would be futile because the administrative process would take too long, noting petitioners offered only conclusory assertions of delay (*id.* at 8-9). As for petitioners' argument that exhaustion would be futile because an administrative officer could not reopen schools, the court found the point was unpreserved (*id.* at 9-10). In a footnote, the court observed that it had "questioned the supposed jurisdictional nature of the IDEA's exhaustion requirement in the dicta of some of our recent decisions," but suggested that it was bound by prior statements made in two decisions dating back to 2002 (*id.* at 10 n.3 (cleaned up) (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2d Cir. 2002))).

Petitioners petitioned for panel rehearing or rehearing en banc, where they argued for the first time that the IDEA's exhaustion requirement is a claim-processing rule, not a jurisdictional requirement

(Petition for Rehearing & Rehearing En Banc, 2d Cir. ECF No. 366). The court denied the petition without requiring a response (Pet. App. 122-25).

REASONS FOR DENYING THE PETITION

Certiorari should be denied because (1) petitioners have forfeited any argument related to the question posed in the petition; and (2) the question has no practical significance here in any event.

A. The petition collapses under foundational rules of preservation and forfeiture.

Before this Court, petitioners do not claim that they preserved the argument that the IDEA's exhaustion requirement is a mandatory claim-processing rule, not a jurisdictional one. For good reason: petitioners forfeited the argument by failing to timely raise it either of the lower courts. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015).

There is no reason to excuse petitioners' failure. From their complaint itself to their district court briefing to the oral argument on appeal, petitioners did not so much as hint that IDEA exhaustion should be considered non-jurisdictional. On the contrary, petitioners took the opposite position, telling the district court that exhaustion *is* about "subject matter jurisdiction" (A282). And in describing the requirement on appeal, petitioners directed the court of appeals to one of the decisions that they now contend was wrongly decided (App. Br. 42 (citing *Polera*, 288 F.3d at 483)).

Petitioners thus invited the lower courts to decide the exhaustion question under the rubric of subject matter jurisdiction. They cannot now be heard to complain that the "lower courts resolved the case on that understanding." *OBB Personenverkehr*, 577 U.S. at 37. To be sure, there is some room to forgive a party's lack of preservation, but, at the least, a party cannot have openly embraced the very framework that they ask this Court to set aside.

The argument was certainly available to petitioners to make in the lower courts in a timely manner. Petitioners suggest that the Second Circuit held that IDEA exhaustion goes to subject matter jurisdiction in two cases dating back to 2002 (Pet. 12 (citing *Murphy*, 297 F.3d 195; *Polera*, 288 F.3d 478)). Those decisions do include brief statements suggesting that a plaintiff's failure to exhaust ordinarily deprives a court of subject matter jurisdiction. *See Murphy*, 295 F.3d at 199; *Polera*, 288 F.3d at 483. But in neither instance did the Second Circuit actually adopt a strict jurisdictional approach. On the contrary, the Second Circuit expressed the view that "the exhaustion requirement is not an inflexible rule," and the court believed that equitable exceptions—like

futility—are available. *Murphy*, 295 F.3d at 199 (cleaned up); *Polera*, 288 F.3d at 488.[4]

After these 2002 decisions, this Court decided two significant cases—both highlighted in the petition (at 10)—that admonished courts to distinguish between claims-processing rules and those that are jurisdictional in the strict sense. *See Kontrick v. Ryan*, 540 U.S. 443 (2004); *Eberhart v. United States*, 546 U.S. 12 (2005). And soon thereafter, the Second Circuit stated that it had "yet to reach a clear conclusion" on whether IDEA exhaustion is a claim-processing rule or a jurisdictional requirement. *Paese v. Hartford Life & Acc. Ins. Co.*, 449 F.3d 435, 444 n.2 (2d Cir. 2006). And the court expressed some doubt about its prior statements suggesting that

[4] That the Second Circuit recognizes equitable exceptions like futility puts the lie to petitioners' suggestion that there is a clean, binary split between the circuits. Indeed, only one court of appeals has rejected an equitable futility exception, and petitioners locate that court in the "undecided" camp (Pet. 18). *See Luna Perez v. Sturgis Pub. Schs.*, 3 F.4th 236, 242 (6th Cir. 2021), *reversed on other grounds*, 143 S. Ct. 859 (2023). And, of course, a statutory requirement need not be jurisdictional in nature to preclude judicial recognition of exceptions that are not found in the text. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) ("As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.").

exhaustion is jurisdictional, asking whether those statements "remain[] good law" after *Kontrick* and *Eberhart*. *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204 (2d Cir. 2007). But in these post-2002 decisions, the Second Circuit found no need to reach the question because the answer would not affect the outcome. *See also B.M. v. N.Y.C. Dep't of Educ.*, 569 F. App'x 57, 58-59 (2d Cir. 2014); *Levine v. Greece Cent. Sch. Dist.*, 353 F. App'x 461, 463 (2d Cir. 2009).

More recently, and shortly before petitioners opposed the New York City defendants' motion to dismiss in the district court, the Second Circuit again addressed this subject in another case litigated by the same firm that has represented petitioners throughout this one. The panel there noted that it was "*arguably* bound" by prior statements suggesting that IDEA exhaustion is jurisdictional, but declined to address any broader question on that front because it made no difference in the case before it. *De Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519, 530 & n.44 (2d Cir. 2020) (emphasis added). Even so, the court again observed 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," *id.* at 530 n.44, and that it "had questioned more recently the

supposedly jurisdictional nature of the exhaustion requirement," *id.* at 530.

And before petitioners filed their opposition in the district court, the Second Circuit had also shown in other legal contexts that it had internalized this Court's directives about the importance of distinguishing between claim-processing rules and jurisdictional requirements. The Circuit has observed that the matter "must be given careful consideration," underscoring that "in recent years, the Supreme Court has repeatedly cautioned courts about the less than meticulous application of jurisdictional language in many court opinions." *Fed. Ins. Co. v. United States*, 882 F.3d 348, 360-61 (2d Cir. 2018); *see also Attipoe v. Barr*, 945 F.3d 76, 81-82 (2d Cir. 2019); *Matuszak v. Comm'r of Internal Revenue*, 862 F.3d 192, 195-96 (2d Cir. 2017).

Against this backdrop, petitioners had no excuse for failing to raise their current argument in the district court. And they had only more reason to raise the point on appeal. Before petitioners filed their opening brief, the Second Circuit continued to demonstrate its appreciation of this Court's admonishments, fully cognizant of the need "to bring some discipline to the use of the term jurisdictional," and aware that "even if important and mandatory … a rule should not be given the jurisdictional brand

unless it governs a court's jurisdictional capacity." *N.Y. State Dep't of Envtl. Conserv. v. FERC*, 991 F.3d 439, 446 n.7 (2d Cir. 2021) (cleaned up); *see also Desuze v. Ammon*, 990 F.3d 264, 270 n.6 (2d Cir. 2021).

And yet, when the case reached the Second Circuit, petitioners said nothing. Their silence is inexcusable, given the court's own equivocation on the subject of whether IDEA exhaustion is a claim-processing rule or a jurisdictional prerequisite. And even if the Second Circuit had not already identified the question as one open to debate, an argument that IDEA exhaustion is non-jurisdictional still would have been available to petitioners on appeal. In the Second Circuit, one panel may overrule the decision of a prior panel "if there has been an intervening Supreme Court decision that casts doubt on our controlling precedent," even if the intervening decision does not "address the precise issue." *Adams v. Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (cleaned up). In fact, the Second Circuit has relied on that principle to reclassify a statutory requirement as an element of a claim, when the precedential decision of a prior panel had designated the requirement as jurisdictional. *See id.* at 168-69.

Certainly, the court's non-precedential order in this case does not put future litigants on any worse

footing than petitioners during briefing of this appeal. That is especially true where the Second Circuit has only continued to prove its adherence to this Court's guidance about the distinction between claim-processing rules and jurisdictional prerequisites. *See, e.g.*, *Donnelly v. Controlled Application Review & Resol. Program Unit*, 37 F.4th 44, 53-54 (2d Cir. 2022); *United States v. Saladino*, 7 F.4th 120, 123 (2d Cir. 2021) (per curiam); *SEC v. Fowler*, 6 F.4th 255, 260-62 (2d Cir. 2021).

Of course, we do not know how the Second Circuit would have resolved the issue if petitioners had timely raised the argument and the point had any significance here. But there is every reason to believe that the court—at either the panel or en banc stage—would have given the matter "careful consideration." *Fed. Ins. Co.*, 882 F.3d at 360-61. As petitioners note (Pet. 16-17), the Fourth Circuit recently reconsidered and adjusted its approach. *K.I. v. Durham Pub. Sch. Bd. of Educ.*, 54 F.4th 779, 790-92 (4th Cir. 2022). The Second Circuit should have the same opportunity to bring its judgment to bear on the question, in a case where the point has been properly presented and fully briefed. And if this Court deems the question to be cert-worthy, it would benefit from reviewing it in a case where the court of appeals has addressed the issue in a reasoned opinion.

A final point on forfeiture: petitioners' failure to preserve their newfound argument was hardly harmless. For example, had petitioners raised the point at the trial level, the district court could have converted defendants' motion to dismiss into one for summary judgment—especially considering that petitioners themselves relied on a slew of materials outside the complaint. *See* Fed. R. Civ. P. 12(d). Or defendants could have taken steps to eliminate the distraction altogether by answering and moving for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c).

It is hard to imagine an argument being more clearly forfeited than the one here. The petition should be denied for that reason alone.

B. The question posed by petitioners has no practical significance in this case.

Even if petitioners had preserved the question they present and it otherwise warranted review, this would be a singularly unsuitable vehicle to confront the question because it has no practical significance in this case. The usual consequences of treating a requirement as jurisdictional are that it cannot be waived or forfeited, must be raised by a court on its own motion if not surfaced by the parties, and permits no equitable exceptions. *Santos-Zacaria v. Garland*, No. 21-1436, Slip op. at 4 (May 11, 2023). None

of these consequences is implicated here: defendants raised petitioners' failure to exhaust at the first opportunity; the courts therefore had no need to raise the issue on their own; and the parties and the courts assumed that there are equitable exceptions to exhaustion, including futility. *But see Luna Perez*, 143 S. Ct. at 865 (leaving open "whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception").

Petitioners themselves seem uncertain whether the question has any significance in this case, conceding that regardless of the answer "the ultimate outcome may or may not have been the same" (Pet. 26-27). While petitioners go on to assert that "the proceedings would have been much different" (Pet. 27), they never explain how. It bears repeating: from day one of this litigation, petitioners have conceded that they did not exhaust administrative remedies before bringing suit. With that concession, their case was destined to fail even in circuits that have purportedly adopted their preferred approach. *Cf. McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 909 (9th Cir. 2020) (addressing exhaustion for non-IDEA claims on a motion to dismiss where plaintiff conceded lack of exhaustion).

Assuming for the sake of argument that petitioners could claw back their concession at this late

stage, there is no credible argument that defendants waived or forfeited the argument that petitioners failed to exhaust state administrative remedies.[5] And in opposing defendants' motion to dismiss in the district court, petitioners relied on materials outside the complaint, and never suggested they wanted discovery, much less specified what the contours of discovery might be. In many ways, the parties charted a course more akin to summary judgment, and petitioners do not dispute that exhaustion can properly be resolved in that procedural posture.

Petitioners' main complaint appears to be that the complaint itself did not reflect their failure to exhaust (Pet. 27). The premise is mistaken. The complaint made explicit what the context of the litigation already did: petitioners had at most initiated state administrative procedures, not exhausted them, and believed that equitable exceptions forgave exhaustion (A109-10, 129). Again, circuits that have purportedly adopted petitioners' preferred approach allow motions to dismiss in similar situations. *See*

[5] In their supplemental brief (at 4) petitioners suggest that the district court should have determined whether defendants waived petitioners' failure to exhaust. The suggestion makes no sense when defendants raised the point well before waiver could possibly become an issue. *See* Fed. R. Civ. P. 12(h).

McIntyre, 976 F.3d at 909; *Bibbs v. Sheriff of Cook Cnty.*, 618 F. App'x 847, 849 (7th Cir. 2015).

Even if the complaint had been silent on exhaustion, that would not have saved petitioners. Congress has specified that only parties "aggrieved by the findings and decision" of a state administrative officer have a federal right of action allowing them to bring suit "in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A).[6] That command plainly carries with it a pleading requirement, regardless of whether it is thought of as a jurisdictional prerequisite or simply an element of an IDEA claim.

Otherwise, petitioners seem to believe that a defendant should bear the burden of disproving equitable exceptions to the IDEA's exhaustion requirement (*see* Pet. 4, 24-27). But no matter how the

[6] When Congress adopted this language to confer jurisdiction on district courts notwithstanding the amount in controversy, federal question jurisdiction was still generally limited by statute to actions where the amount in controversy was greater than $10,000. *See* 20 U.S.C. § 1415(e)(2) (1970); 28 U.S.C. § 1331(a) (1970). Though the matter is academic for the purpose of this case, the language in former § 1415(e)(2)—now § 1415(i)(2)(A)—referring to the amount in controversy suggests that the provision addresses subject matter jurisdiction in the strict sense.

requirement is classified, any burden borne by the defendant is discharged once it is known that a plaintiff did not exhaust—a point conceded in this case, and rightly so. Thereafter, the burden lies with the plaintiff, as the party invoking the courts' equitable powers, to establish that an exception to the statutory requirement applies. *Cf. Honig v. Doe*, 484 U.S. 305, 327 (1988) (holding that under IDEA predecessor "the burden … rests with [the party claiming the exception] to demonstrate the futility or inadequacy of administrative review").

Finally, deep in the petition, petitioners intimate that the IDEA does not require exhaustion at all when a plaintiff sues under the statute's pendency provision (Pet. 28 n.7 & 29 (citing 20 U.S.C. § 1415(j)). But that raises an entirely separate issue of statutory interpretation, one unmoored from the question posed in the petition (*see* Br. for New York City Appellees 28-35). The fact that petitioners continue to press such a fundamentally mistaken—and irrelevant—understanding of the pendency provision is just another reason to deny certiorari.

CONCLUSION

The petition should be denied.

May 2023 Respectfully submitted,

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