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,

v.

ERIC L. ADAMS,
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 NEW YORK STATE DEPARTMENT OF EDUCATION

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QUESTION PRESENTED

Whether the failure to exhaust administrative remedies prior to bringing a claim under the Individuals with Disabilities Education Act is a jurisdictional bar to judicial consideration of that claim, or a nonjurisdictional but mandatory claims-processing requirement.

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INTRODUCTION

In July 2020, approximately four months after the COVID-19 health emergency developed in the United States, petitioners filed this lawsuit purporting to bring claims under the Individuals with Disabilities Education Act (IDEA), among other statutes, on behalf of a class of all disabled public-school students nationwide and their parents. The complaint named as defendants every local school district and every state education department in the United States. The complaint alleged that defendants' decisions to close school buildings and conduct remote learning in response to the COVID-19 pandemic had automatically violated every putative class member's rights under the IDEA. Petitioners sought, inter alia, an order compelling every public school to reopen immediately. This brief in opposition to the petition for certiorari is submitted on behalf of the New York State Education Department (NYSED), one of the many state education departments named as a defendant.[1]

The district court dismissed the complaint, including the claims against NYSED. The district court dismissed the claims against all defendants located outside of New York for lack of personal jurisdiction and improper venue, among other reasons. As relevant here, the court dismissed the IDEA claims against the New York City Department of Education (NYCDOE) and New York City officials because petitioners had failed to exhaust their administrative remedies and because school closures applicable to all students in a district did not alter special-education students' educational placements.

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[1] All other respondents who have appeared in this proceeding are separately represented.

Petitioners never served NYSED with their complaint, and the district court concluded that NYSED was not obligated to respond to the complaint. The district court sua sponte dismissed the claims against NYSED for essentially the same reasons that it dismissed the claims against the New York City defendants.

On appeal, petitioners abandoned their IDEA claims against NYSED and all other non–New York City defendants. The court of appeals therefore dismissed petitioners' appeal as to NYSED and all other non–New York City defendants. The court of appeals affirmed the dismissal of the claims against the New York City defendants.

Certiorari should be denied. As a preliminary matter, NYSED is not a proper party to this litigation for several reasons, and the petition does not contend that NYSED is a proper party. First, the district court never obtained personal jurisdiction over NYSED because petitioners failed to serve NYSED with their complaint. Second, on appeal, petitioners abandoned their claims against NYSED (and all other non–New York City defendants). Third, petitioners' claims against NYSED are moot in any event because schools have reopened to full-time in-person learning, damages are not available as to NYSED, and petitioners' remaining requests for relief were not brought against NYSED.

Although NYSED is not a proper party, and essentially is in the role of amicus curiae here, NYSED supports New York City's opposition to the petition. This case is a poor vehicle for deciding the question presented because petitioners failed to preserve their question presented for review. They did not raise their challenge to the jurisdictional nature of the IDEA's

exhaustion requirement to the district court or to the court of appeals panel. Rather, they raised that issue for the first time in their petition to the court of appeals for rehearing en banc. Petitioners' question presented was thus not fully litigated in the courts below and is not adequately presented for this Court's review.

STATEMENT

1. Petitioners' counsel initiated this lawsuit in July 2020, by filing a putative class action complaint in the U.S. District Court for the Southern District of New York. Petitioners—school-aged children who have various disabilities, and their parents or guardians—purported to represent a class of all public-school students nationwide who are entitled to receive special-education services under the IDEA. According to the complaint, the putative class included 7.1 million students, or fourteen percent of all public-school students in the United States. The putative class also included all parents of those students. (Compl. ¶¶ 126-129, SDNY ECF No. 1.) The complaint named as defendants the Mayor of New York City, the New York City Department of Education (NYCDOE), and the Chancellor of NYCDOE (together, the "New York City defendants"). The complaint also named as defendants every school district in the United States and every State's department of education. (*Id.* ¶¶ 120-125.) NYSED was one of the many state departments of education named as a defendant. (*Id.* ¶ 124.)

As relevant here, petitioners purported to bring claims under the IDEA on behalf of all class members against all defendants. The complaint alleged that in March 2020, defendants closed school buildings in response to the COVID-19 pandemic and transitioned

students to remote learning. According to the complaint, these actions deprived every disabled public-school student of the free appropriate education required by the IDEA, and changed every disabled public-school student's individualized education program (IEP) in violation of the IDEA. (*Id.* ¶¶ 136-143.) As relief, the complaint sought: (i) an order requiring defendants to reopen all public schools nationwide or provide parents with vouchers to "self-cure"; (ii) an order directing all defendant school districts to "immediately conduct extensive independent evaluations" of students' performance and to provide additional education services to students to compensate for any loss in performance; and (iii) compensatory and punitive damages. (*Id.* at 81-82, Prayer for Relief.)

Approximately one month after filing the complaint, petitioners sought a preliminary injunction requiring defendants to immediately provide all of the relief sought in the complaint, including damages (Mot. for Prelim. Inj. at 11, SDNY ECF No. 90-7.[2]) On August 22, 2020, the district court directed petitioners to serve the preliminary injunction motion on each defendant by no later than August 24, 2020, at 10:00 AM, and to retain proof of service. (Order at 2, SDNY ECF No. 29.)

2. Petitioners never served NYSED with their complaint. Nor did they properly or timely serve NYSED with their preliminary injunction motion by the August 24 10 AM deadline set by the district court. Instead, five hours after the deadline, petitioners emailed their preliminary injunction motion to a general email address used by NYSED's Office of Special Education. That email did not include the complaint.

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[2] The motion also sought a temporary restraining order, which the court denied. (*See* Order, SDNY ECF No. 89.)

On August 26, 2020, NYSED filed a letter informing the district court that petitioners had not sent the complaint to NYSED at all—let alone properly served the complaint. The letter also noted that the email sending the preliminary injunction motion to NYSED had been both untimely and an invalid means of service. (Letter at 1-2, SDNY ECF No. 32.) NYSED explained that it had learned of petitioners' lawsuit from New York City's Corporation Counsel. (*Id.* at 2 n.3.) NYSED also advised the district court that petitioners' counsel, the Brain Injury Rights Group (BIRG), should have known that an email message to a NYSED email address is not proper service given that BIRG has brought many prior lawsuits against NYSED. (*Id.* at 2.)

3. On September 2, 2020, the district court issued an order directing petitioners to show cause why the complaint should not be dismissed as to all defendants other than the New York City defendants. (Order at 2-3, SDNY ECF No. 84.) The district court's order also directed the New York City defendants to respond to petitioners' filings. The order further directed all other defendants, including NYSED, to refrain from making any submissions to the court until further notice.[3] (*Id.* at 4.)

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[3] Two private attorneys, who represented particular school districts, each wrote a letter advising the district court that local inquiries in their districts had revealed that the law firm representing petitioners, BIRG, had filed administrative due process hearing requests on behalf of students without the authorization of the students or their families, and without having been retained by the students or families for the purpose of requesting such administrative hearings. (*See* Letters, SDNY ECF Nos. 110, 120.) After receiving these letters, the district court enjoined petitioners' then-attorney from making any request for an administrative hearing on behalf of any member of the putative class without first obtaining

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Later that month, the New York City defendants moved to dismiss the complaint. Among other reasons for dismissal, the New York City defendants argued that petitioners had not exhausted their administrative remedies as required by the IDEA and that this requirement was jurisdictional. (Mot. to Dismiss at 22-23, SDNY ECF No. 140.) In response, petitioners argued that they were not required to exhaust their administrative remedies because doing so would be futile. (Reply & Opp'n at 8-12, SDNY ECF No. 150.). Petitioners did not argue that the exhaustion requirement is not jurisdictional.

4. In November 2020, the district court denied a preliminary injunction and dismissed the complaint. (Pet. App. 13-121.) The court dismissed the complaint as against all defendants located outside of New York based on, inter alia, lack of personal jurisdiction and improper venue. (Pet. App. 43-49, 69-71.)

The court dismissed most of the claims against the New York City defendants for lack of subject-matter jurisdiction, explaining that petitioners had failed to exhaust their administrative remedies as required to

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an appropriate signed retainer letter. (*See* Order, SDNY ECF No. 128.) More than a week after that order was entered, a law firm representing the Bristol, Connecticut, Board of Education sent the district court a letter stating that BIRG had filed an IDEA due process request purportedly on behalf of one of the named plaintiffs in this action, that the request had been made without the parent's awareness or consent, and that the parent had asked for the child "be removed from this lawsuit." (Letter, SDNY ECF No. 146.) A few days after that, a law firm in New Jersey provided the court with a copy of a letter from an attorney representing parents who asked that an unauthorized due process complaint filed by BIRG on behalf of their child be withdrawn. (Letter, SDNY ECF Nos. 155, 155-1.)

bring a claim for denial of free appropriate public education (FAPE) under the IDEA. The district court explained that, although some of the petitioners had requested administrative hearings, they had not completed those hearings or appealed any adverse determinations. (Pet. App. 111-117.) The court rejected petitioners' contention that exhaustion of administrative remedies would be futile, noting that most of the hearings requested by petitioners had been requested less than a month before counsel claimed futility, and thus fell within the time for a school district to resolve a parent's concerns through informal meetings. (Pet. App. 117 (citing 34 C.F.R. § 300.510).)

The court dismissed for failure to state a claim petitioners' claims against the New York City defendants under the IDEA's pendency provision, which requires that a student with an existing IEP continue to receive in-person education pending resolution of an IDEA due process proceeding. (Pet. App. 97-110.) The district court acknowledged that, unlike a claim for denial of FAPE, a pendency claim (also sometimes referred to as a "stay put" claim) need not be administratively exhausted. (Pet. App. 115-116.) But the court concluded that a switch to remote service is a change in how services are provided, not a change in placement—and, more generally, that a system-wide administrative change that applies equally to students with and without disabilities, such as the COVID-19 switch to remote learning, is not a change in placement. (Pet. App. 102-108.)

The district court also dismissed the claims against NYSED. The court determined that NYSED had never been served with the complaint and thus had never become obligated to respond to the complaint. The court determined that dismissal was warranted in any event

because petitioners' claims against NYSED suffered from the same threshold defects as their claims against the New York City defendants. (Pet. App. 118.) For example, the court explained, petitioners had failed to properly exhaust their FAPE claims against NYSED. (Pet. App. 118.) As to petitioners' pendency claim against NYSED, the court noted that pendency claims "lie against individual school districts, not against the State." (Pet. App. 119.)

5. Petitioners appealed to the Second Circuit. On appeal, petitioners abandoned their claims against NYSED. Petitioners' briefs to the court of appeals focused on their claims against the New York City defendants rather than any claim against NYSED or the other non–New York City defendants. (*See* Br. for Appellants at 5-6, 11, 27-31, 34-35, 43, CA2 ECF No. 157; Reply Br. at 1-6, 8-16, 24-29, CA2 ECF No. 278.) Petitioners then abandoned their claims against NYSED during oral argument. Specifically, the Second Circuit panel asked petitioners' counsel whether petitioners were pursuing any of their claims "other than the IDEA claim against the City Defendants." (CA2 Oral Argument Audio at 1:40-1:53.) Petitioners' counsel responded: "The answer is no." (*Id.* at 2:01-2:03.) The panel then asked: "on this appeal, we don't need to worry about any of the appellees other than the New York City defendants, is that correct?" (*Id.* at 2:09-2:16.) "Yes, Your Honor," answered petitioners' counsel. (*Id.* at 2:17-2:18.)[4]

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[4] Later in the oral argument, petitioners' counsel clarified that petitioners also wished to appeal the dismissal of their claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) solely to the extent that the district court had dismissed any RICO claim with prejudice rather than without prejudice. (CA2 Oral

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Petitioners also did not argue in their briefs or at oral argument in the court of appeals that exhaustion of administrative remedies under the IDEA is a nonjurisdictional requirement, or suggest that it is a claim-processing rule or affirmative defense. Rather, in their briefs on appeal, petitioners argued that exhaustion of their FAPE-based claims would have been futile under the particular facts of their case because administrative hearing officers would not have had the power to grant the relief petitioners sought, i.e., an order requiring all public schools to reopen. (*See* Br. for Appellants, *supra*, at 43; Reply Br., *supra*, at 20-29.) Petitioners also argued that "delays caused generally by the City and administrative processes" made exhaustion futile. (Br. for Appellants at 44.)

In August 2022, the court of appeals issued a summary order dismissing petitioners' appeal as to all non–New York City defendants, including NYSED; affirming the district court's dismissal of the complaint as to the New York City defendants; and dismissing as moot petitioners' appeal from the denial of the preliminary injunction. (Pet. App. 12.)

The court dismissed petitioners' appeal as to all non–New York City defendants, including NYSED, because petitioners had conceded during oral argument that they were not pursuing their appeals or claims against those defendants. As the court observed, petitioners had instead limited the scope of their appeal to

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Argument Audio, *supra*, at 2:40-3:20.) The Second Circuit, after dismissing the appeal in full as to the non–New York City defendants (Pet. App. 7 n.2), also rejected petitioners' arguments that the district court should have allowed amendment of the RICO claim (Pet. App. 10-11). Petitioners do not raise any arguments related to their RICO claims in their petition for certiorari.

their claims against the New York City defendants. (Pet. App. 6-7 nn.1-2.)

The court then affirmed the dismissal of petitioners' claims against the New York City defendants. The court of appeals observed that petitioners did not dispute that they had failed to exhaust their administrative remedies and instead argued that it would have been futile for them to exhaust. (Pet. App. 8.) The court of appeals then rejected petitioners' futility arguments as meritless or unpreserved. As the court explained, petitioners' argument about administrative delay was meritless because petitioners had failed to plausibly allege that any such delay existed or was persistent. The court further explained that petitioners had failed to preserve their argument that administrative hearing officers would not have been able to require schools to reopen. (Pet. App. 8-10.)

In September 2022, petitioners filed a petition for rehearing of the appeal en banc. (Pet. for Rehr'g & Rehr'g En Banc, CA2 ECF No. 366.) In their rehearing petition, petitioners argued for the first time that the IDEA's exhaustion requirement is not a jurisdictional requirement and is instead a claims-processing rule that needs to be raised by defendants as an affirmative defense. (*Id.* at 3-14.) The court of appeals denied the en banc petition. (Pet. App. 122-125.)

REASONS FOR DENYING THE PETITION

I. THE NEW YORK STATE EDUCATION DEPARTMENT (NYSED) IS NOT A PROPER PARTY BECAUSE PETITIONERS FAILED TO SERVE THE COMPLAINT ON NYSED AND ABANDONED THEIR CLAIMS AGAINST NYSED, AND BECAUSE ANY SUCH CLAIMS ARE MOOT.

A. Petitioners Abandoned Their Claims Against NYSED.

Claims that a party abandons in a lower court are not reviewable in this Court. *See Gabelli v. SEC*, 568 U.S. 442, 447 n.2 (2013). Here, petitioners abandoned all claims against NYSED during oral argument in the court of appeals. Specifically, during oral argument, the Second Circuit panel asked petitioners' counsel if petitioners were pursuing any of their claims other than the IDEA claim against the New York City defendants. Petitioners' counsel responded: "The answer is no." (CA2 Oral Argument Audio, *supra*, at 2:01-2:03.) The panel then asked whether "on this appeal, we don't need to worry about any of the appellees other than the New York City defendants, is that correct" (*id.* at 2:09-2:16), and petitioners' counsel confirmed "Yes, Your Honor" (*id.* at 2:17-2:18). And the Second Circuit relied on petitioners' concessions in dismissing petitioners' appeal as to all non–New York City defendants, including NYSED. (Pet. App. 7 n.2.) This Court should not review any claims against NYSED when no claim against NYSED was pressed or passed upon in the court of appeals. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

B. Petitioners Never Served NYSED with Their Complaint.

Even before petitioners abandoned their claims as to NYSED on appeal, they failed to serve NYSED with their complaint. "Service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (quotation & alteration marks omitted). Here, the district court never obtained personal jurisdiction over NYSED, and NYSED was therefore not a proper party to the litigation.

Petitioners plainly did not serve NYSED with their complaint. Under the Federal Rules of Civil Procedure, service of process upon a state government agency must be made by serving the summons and complaint either upon the agency's chief executive officer or "in the manner prescribed by that state's law for serving a summons or like process on such a defendant." Fed. R. Civ. P. 4(j)(2). New York law requires that service on a state government agency be made either by delivering the summons to the agency's chief executive officer, or by mailing the summons by certified mail to the agency's designated officer in an envelope marked "URGENT LEGAL MAIL" in capital letters and personally serving the summons on the Office of the Attorney General. *See* N.Y. C.P.L.R. 307.

Here, petitioners never sent NYSED the complaint at all—let alone properly served the complaint on NYSED. Rather, after the district court directed petitioners to serve their preliminary injunction motion on all parties, petitioners emailed their preliminary injunction motion to a general email address used by

NYSED's Office of Special Education. See *supra* at 4-5. Even presuming that use of that email address were proper, the email did not include the complaint. Thus, petitioners' email did not constitute proper service of process on NYSED under either federal or New York law.[5]

C. Any Claims Against NYSED Are Moot.

Petitioners' lawsuit is moot as to NYSED. (*See* Compl., *supra*, at 81-83, Prayer for Relief.) The federal courts, including this Court, lack jurisdiction to hear cases that do not present an actual or concrete dispute between the parties. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). A concrete dispute is required throughout "all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotation marks omitted). A case becomes moot on appeal if, during the litigation, "a court finds that it can no longer provide a plaintiff with any effectual relief." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

Here, petitioners' claims against NYSED are moot because there is no effectual relief that the Court could order NYSED to provide to petitioners. The principal relief that petitioners sought below—an order commanding public schools to reopen (*see* Compl., *supra*, at 81-82, Prayer for Relief)—can no longer be awarded against

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[5] It is difficult to imagine a plausible excuse for the failure of petitioners' counsel, BIRG, to properly serve the complaint or preliminary injunction motion. NYSED has previously called to BIRG's attention the proper way to serve a state agency, including in a motion to dismiss filed in 2019, more than a year before BIRG brought the current case. *See* Mot. to Dismiss Mem. of Law at 6-7 & n.3, *Ventura de Paulino v. New York City Dep't of Educ.*, No. 19-cv-222 (S.D.N.Y. Jan. 28, 2019), ECF No. 19.

any defendants because schools in New York have long since reopened for in-person learning. *See* N.Y. State Educ. Dep't, *Back to School 2021-2022: Board of Regents Meeting September 2021*, at 8 (Sept. 2021). And there is no other requested relief that could be ordered against NYSED. To the extent that petitioners seek evaluations of students and compensatory educational services, the complaint sought such relief solely against local school districts and not against any state education department, including NYSED. (*See* Compl., *supra*, at 81-83, Prayer for Relief.) And to the extent petitioners seek damages (*see id.*), that form of relief is not available here. *See Luna Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 864 (2023). Accordingly, even if petitioners had made NYSED a party and had not abandoned their appeals or claims as to NYSED, the only appropriate relief from this Court would be dismissal and vacatur for mootness as to NYSED. *See, e.g., Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142, 1142 (2007).

II. PETITIONERS FAILED TO PRESERVE THEIR QUESTION PRESENTED.

For the reasons discussed, NYSED is not a proper party. But acting essentially in the role of amicus curiae here, NYSED supports the New York City defendants' opposition to the petition for a writ of certiorari and explains here why certiorari is unwarranted. Certiorari should be denied because petitioners failed to preserve the question that they ask this Court to review, i.e., whether the IDEA's exhaustion requirement is jurisdictional or is instead "a claim-processing rule." (*See* Pet. i.)

This Court is "a court of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, it will ordinarily not decide questions not

raised or litigated in the lower courts. *See, e.g., Financial Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc.*, No. 22-96, 2023 WL 3356529, at *4 & n.2 (U.S. May 11, 2023); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

Here, petitioners failed to argue to the district court or to the Second Circuit panel on appeal that the IDEA's exhaustion requirement is not jurisdictional and is instead a claim-processing rule. Nor did they argue that respondents should have been required to produce "evidence" that petitioners had failed to exhaust. (*See* Pet. 27.) Rather, petitioners contended that they were not required to exhaust their administrative remedies at all. See *supra* at 9. Indeed, in response to a question at oral argument in the court of appeals, petitioners appeared to concede that they had not exhausted their administrative remedies. (*See* CA2 Oral Argument Audio, *supra*, at 17:20-17:28.) Certiorari should be denied when petitioners did not properly preserve their question presented.

In their en banc petition to the court of appeals, petitioners raised their challenge to the jurisdictional nature of exhaustion for the first time and contended that they were not required to preserve it because the district court and circuit panel were bound by circuit precedent. (Pet. for Rehr'g, *supra*, at 14 (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002); *Polera v. Board of Educ.*, 288 F.3d 478, 483 (2d Cir. 2002).) But circuit precedent does not relieve a litigant from preserving issues in the lower federal courts for appellate and certiorari review. *See Financial Oversight & Mgmt. Bd.*, 2023 WL 3356529, at *4 & n.2; *see also In re Fiorano Tile Imports, Inc.*, 619 F. App'x 33, 34 (2d Cir. 2015) (party proposing overruling of circuit precedent must present that argument to both

district court and circuit panel "to preserve it for review before this Court sitting en banc or before the Supreme Court"). Although the Second Circuit's summary order below, in a footnote, observed that "dicta of some of our recent decisions" had questioned whether the IDEA's exhaustion requirement is jurisdictional, the court did not analyze that question or suggest that anything in this case turns on whether the exhaustion requirement is jurisdictional. (Pet. App. 10 n.3.) Nor did the court consider what doctrine might supplant the jurisdictional requirement, such as the claim-processing rule petitioners now propose. (Pet. App. 10 n.3.) Where a question was "never argued" in the lower courts and "barely addressed" by them, certiorari to review that question is inappropriate. *See Financial Oversight & Mgmt. Bd.*, 2023 WL 3356529, at *4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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