No. 22-840

In the Supreme Court of the United States

K.M., *individually and on behalf of M.M. and S.M.*,
Petitioner,

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The question presented asks whether the IDEA's exhaustion requirement is a jurisdictional requirement or a claim-processing rule. That is a straightforward and important question of law. It is the subject of a deep and entrenched circuit split. And the decision below is on the wrong side of that split. Under a long line of this Court's cases, the answer to the question presented is clear: the exhaustion requirement is not jurisdictional.

The New York City respondents ("City") do not meaningfully dispute any of that. The City spends all of two footnotes on the circuit conflict and the merits. And it does not contend the jurisdictional label is immaterial in IDEA cases. Nor could it. This Court has repeatedly said mischaracterizing a requirement as jurisdictional comes with significant consequences. And those real world effects are felt by students with disabilities invoking the IDEA's protections. So this Court's review of the question presented is unquestionably warranted.

The City instead argues the Court should not answer that certworthy question in this case because of purported vehicle issues. There are no such issues. The question presented was both properly pressed *and* indisputably passed upon below. The disposition would have been different if the Second Circuit answered the question correctly. And the Court should not be dissuaded by the other nominal parties or unrelated issues. As the case comes to this Court, the City is the only relevant respondent; K.M. is the only petitioner; and the jurisdictional nature of the IDEA exhaustion requirement is the only issue. The petition should be granted.

ARGUMENT

A. There Is A Deep, Entrenched, And Undisputed Circuit Split

There is a deep and entrenched circuit split on the question presented. The First, Second, Third, and Tenth Circuits have all held that the IDEA's administrative exhaustion requirement is jurisdictional. Pet. 12-15. The Fourth, Seventh, and Ninth Circuits have all held the opposite. Pet. 15-17. And despite nearly two decades of decisions from this Court distinguishing between jurisdictional and claim-processing rules, and adopting a clear-statement rule, that circuit split shows no signs of resolving itself.

The court of appeals below, for example, acknowledged that its jurisdictional rule rested on unfirm ground, but considered itself "'bound'" by prior precedents "unless and until" they "are 'overruled by an en banc panel of our Court or by the Supreme Court.'" Pet. App. 10 n.3 (citation and alterations omitted). Still, the Second Circuit declined self-help, denying rehearing en banc. *Id.* at 125. Other courts of appeals have followed a similar course. *See, e.g.*, *T.R. v. Sch. Dist. of Phila.*, 4 F.4th 179, 190 (3d Cir. 2021) (adhering to circuit precedent). Only this Court can resolve the conflict.[1]

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[1] The City's only response (at 11 n.4) is a footnote-suggestion that the split is messier because the Sixth Circuit has rejected a futility exception on other grounds. That a conflict also exists about futility—which the Court could address in another case, *cf. Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 865 (2023) (declining to resolve futility question)—does not detract from the distinct conflict on the antecedent question whether exhaustion impacts a court's subject-matter jurisdiction.

B. The Decision Below Is Wrong And The Question Presented Is Important

1. The Second Circuit has adhered to its prior decisions holding the IDEA exhaustion requirement jurisdictional. That is plainly wrong. The City barely argues otherwise.

As this Court explained just weeks ago, "an exhaustion requirement . . . is a quintessential claim-processing rule" that "is typically nonjurisdictional." *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1112-13 (2023). "Indeed," the Court emphasized, it "ha[s] yet to hold that any statutory exhaustion requirement is jurisdictional" when applying "the clear-statement rule." *Id.* Following that consistent precedent, and finding no "unmistakable" evidence to the contrary, the Court held that an INA exhaustion requirement is nonjurisdictional. *Id.* at 1111-16.

The same is true of the IDEA's exhaustion requirement. Nothing about the text suggests Congress "clearly . . . imbued [that provision] with jurisdictional consequences." *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1497 (2022) (citation omitted). To the contrary, the exhaustion provision lacks any of the hallmarks of a jurisdictional rule. Section 1415(i)(2)(A) does not reference federal court jurisdiction. 20 U.S.C. § 1415(i)(2)(A). And the text is directed at the party filing suit, not the court. *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1850-51 (2019). All of the traditional clues show the provision "imposes a precondition to filing a claim," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010); it does not affect "a court's adjudicatory capacity," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

The City's only counterargument comes in a two-sentence footnote. The City asserts (at 19 n.6) that "the language [in § 1415(i)(2)(A)] referring to the amount in controversy suggests that the provision addresses subject matter jurisdiction" because, at the time the IDEA was enacted, "federal question jurisdiction" was generally limited "to actions where the amount in controversy was greater than $10,000." That is hardly enough to satisfy the clear-statement rule. Even if the amount-in-controversy clause was jurisdiction-granting, that does not mean the exhaustion requirement is jurisdictional too. "A requirement 'does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions.'" *Boechler*, 142 S. Ct. at 1499 (citation omitted). And there is no "clear tie" (or any tie) between the amount-in-controversy clause and the exhaustion requirement. *Id.*

2. The question presented is an important one that recurs frequently.

Exhaustion is potentially at issue in every IDEA case, as well as in cases raising non-IDEA claims "seeking relief . . . also available under" the IDEA. 20 U.S.C. § 1415(*l*); *see Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 864 (2023). And as the sheer number of circuit cases grappling with this question makes clear, the jurisdictional status of the exhaustion requirement has been litigated, exhaustively. For good reason: treating the exhaustion requirement as jurisdictional "carries with it unique and sometimes severe consequences." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 936 (2023). "[J]urisdictional rules are impervious to excuses like waiver and forfeiture" and must be "raise[d] and enforce[d] . . . *sua sponte*." *Id.* Jurisdictional

treatment also has "important practical consequences" for pleading and proof burdens and inferences. *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 745 (5th Cir. 2012). And because jurisdictional rules can "be raised at any time," *Henderson*, 562 U.S. at 434, "an exhaustion objection raised late in litigation" can waste "months of work," *Santos-Zacaria*, 143 S. Ct. at 1113 (citation omitted).

Those practical consequences are not hypothetical. Courts treating exhaustion as jurisdictional have excused waiver and raised exhaustion sua sponte, dismissing cases for failure to exhaust that would have survived in nonjurisdictional circuits. *See, e.g.*, *S.B. ex rel. S.B. v. Jefferson Parish Sch. Bd.*, 2022 WL 879369, at *2 (E.D. La. Feb. 1, 2022) (allowing belated exhaustion argument); *P.K. ex rel. Kotzis v. Melleby*, 2019 WL 4072114, at *5 n.2 (D.N.J. Aug. 28, 2019) (excusing waiver); *Smith v. Cheyenne Mountain Sch. Dist. 12*, 2017 WL 2791415, at *12 (D. Colo. May 11, 2017) (same), *adopted*, 2017 WL 2778556 (D. Colo. June 26, 2017); *D.M. & L.M. ex rel. E.M. v. N.J. Dep't of Educ.*, 2015 WL 7295992, at *5 (D.N.J. Nov. 17, 2015) (raising exhaustion sua sponte); *M.A. v. N.Y. Dep't of Educ.*, 1 F. Supp. 3d 125, 148 & n.12 (S.D.N.Y. 2014) (same, for one defendant); *Douglass v. Dist. of Columbia*, 605 F. Supp. 2d 156, 168-69 (D.D.C. 2009) (same, for one claim); *Taylor v. Altoona Area Sch. Dist.*, 513 F. Supp. 2d 540, 552 n.3 (W.D. Pa. 2007) (same). Such decisions "disturbingly disarm" IDEA plaintiffs in their efforts to secure the education they are owed. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

C. This Case Is An Appropriate Vehicle

The City's opposition argues, almost exclusively, that this case is an unsuitable vehicle. Other nominal respondents try to muddy the waters by invoking claims outside the question presented. None of the arguments raised counsel against a grant.

1. The City argues (at 9-16) that the Court should not review the question presented because petitioner "fail[ed] to timely raise it [in] either of the lower courts." That is incorrect, but also misstates the governing standard.

This Court reviews issues that have *either* been "pressed *or* passed upon below." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (emphasis added) (citation omitted). And as the City acknowledges (at 7), the question was indisputably "passed upon." The Second Circuit adhered to circuit precedent treating exhaustion as jurisdictional, even while expressing doubts about the soundness of that rule. Pet. App. 10 n.3. It then declined to reconsider that precedent en banc. *Id.* at 125. The City's speculation that the Second Circuit would have deemed exhaustion *non*jurisdictional if given a chance (at 15) only goes to show how flawed the decision actually is—and is belied by what the Second Circuit actually did.[2]

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[2] That the panel "passed upon" the question in a nonprecedential footnote changes nothing. Binding *published* decisions treat exhaustion as jurisdictional. Pet. App. 10 n.3. And the Second Circuit's decision to rubber-stamp rather than reconsider prior precedent despite multiple opportunities to do so (City Opp. 11-13 (citing cases)) is a compelling reason to *grant* certiorari, not deny it.

The question presented was also sufficiently pressed. It "would [have been] futile" to make the argument before the panel because circuit "precedent precluded" it. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). Binding Second Circuit law held that IDEA exhaustion is jurisdictional. *E.g.*, *Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002). The City (at 10-14) disagrees with how stringent and binding the Second Circuit's "jurisdictional approach" really is.[3] Suffice it to say: the panel considered itself "'bound.'" Pet. App. 10 n.3 (citation omitted); *see Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 496 F. App'x 131, 133 n.3 (2d Cir. 2012). And while the City invokes the exception for "intervening" Supreme Court case law (at 14), the panel did not; that exception is considered "perilous" and is rarely used. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 156-57 (2d Cir. 2015). Petitioner asked the Second Circuit to reconsider its precedent at the earliest opportunity—in a petition for rehearing en banc. CA2 Dkt. 366 at 3-14.[4]

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[3] If the City's point (at 10-11) is that the Second Circuit calls the exhaustion requirement "jurisdictional," but does not treat it as "strict[ly]" jurisdictional (because it allows certain equitable exceptions), that just ignores the other jurisdictional consequences (*e.g.*, waiver rules, burden allocations) which inexorably follow.

[4] The City's suggestion (at 9) that petitioner affirmatively argued that the exhaustion requirement *is* jurisdictional is incorrect. *See* Dist. Ct. Dkt. 150 at 12 (arguing court "*has* subject matter jurisdiction" in response to City's 12(b)(1) motion (emphasis added) (capitalization normalized)); CA2 Dkt. 157 at 42 (citing *Polera* without any mention of "jurisdiction").

2. The City contends (at 16) the question presented "has no practical significance in this case." That too is wrong.

As an initial matter, that is not what the court of appeals said. In other cases, the Second Circuit has declined to revisit prior jurisdictional holdings because, the court said, it would not affect the outcome. *E.g.*, *De Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519, 530 n.44 (2d Cir. 2020); *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204 (2d Cir. 2007). Other circuits have followed the same approach. *E.g.*, *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 784-85 (10th Cir. 2013); *J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 593 n.2 (8th Cir. 2013). The panel here did not; it rested on the jurisdictional holding alone. Pet. App. 10 & n.3.

That is because the jurisdictional mislabel *does* matter. True, this is not a case where the defendant waived exhaustion or the court addressed it sua sponte. *See supra* at 5. And the panel did consider some exceptions like futility. Pet. App. 8-10. But jurisdictional treatment also impacts the procedural vehicle and burden allocations. This case would have proceeded differently if the exhaustion requirement had been properly treated as nonjurisdictional.

Let's start with the disposition: petitioner's IDEA claims were dismissed for lack of jurisdiction under Rule 12(b)(1). If exhaustion is not jurisdictional, no such dismissal could be upheld. And contrary to the City's suggestion (at 16), this is not a ministerial matter of converting a Rule 12(b)(1) dismissal into a summary judgment grant. *See Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004) ("[A] motion to dismiss for lack of jurisdiction cannot be converted into a Rule 56 motion . . . ."). Nor are the standards

applicable to a Rule 12(b)(1) motion comparable to other dispositive motions. *Compare APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (plaintiff not afforded benefit of inferences in 12(b)(1) motion), *with Matzell v. Annucci*, 64 F.4th 425, 433 (2d Cir. 2023) (plaintiff afforded benefit of reasonable inferences for 12(b)(6) and (c) motions), *and Kee v. City of New York*, 12 F.4th 150, 158 (2d Cir. 2021) (reasonable inferences drawn against movant on summary judgment).

Beyond that, and contrary to the City's assertion (at 19), exhaustion is not a pleading requirement. It is an affirmative defense. *See Mosely v. Bd. of Educ. of the City of Chi.,* 434 F.3d 527, 533 (7th Cir. 2006). That means a motion to dismiss cannot be granted unless a plaintiff effectively pleads herself out of court. *Id.*[5] It means the defendant should bear the burden of pleading and proving a failure to exhaust. *Cf. Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 491 (2d Cir. 2018) ("[T]he burden of pleading and proving Title VII [administrative] exhaustion lies with defendants . . . ."). And it means that factfinding may be needed to establish (or refute) the

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[5] The City's cases (at 19) confirm as much. In *Bibbs v. Sheriff of Cook County*, the Seventh Circuit reversed a dismissal for failure to exhaust because "it was not clear from the face of the [complaint] that the defense applied." 618 F. App'x 847, 849 (7th Cir. 2015). And in *McIntyre v. Eugene School District 4J*, the Ninth Circuit agreed IDEA exhaustion should only be considered on 12(b)(6) "[i]n the rare event that a failure to exhaust is clear on the face of the complaint." 976 F.3d 902, 909 n.6 (9th Cir. 2020) (alteration in original) (citation omitted). Here, petitioner never "conceded" (City Opp. 4, 17-19) a failure to exhaust. The complaint paragraphs on which the City relies either allege that the IDEA's exhaustion requirement does not apply or reference other plaintiffs filing administrative claims. *See* CA2 A89-90 & n.180, 109-10; *see also id.* at 129.

applicability of exhaustion. *E.g.*, *Wieczorek v. Slivia*, 2015 WL 73810, at *3 (N.D. Ill. Jan. 5, 2015).

All of which is to say that the practical significance of the jurisdictional mislabel will depend on how the proceedings move forward on remand based on the correct motion, the applicable burdens, and the admissible evidence. None of those questions are before this Court—and the one question that is remains an essential predicate for all that follow.

3. The other nominal respondents add nothing that would counsel against this Court's review.

The question presented is a narrow question of law that implicates a single respondent (the City), a single petitioner (K.M.), and a single set of statutory claims (under the IDEA). The other respondents have been dismissed from this case for reasons that have nothing to do with IDEA exhaustion. *See* Pet. App. 7 n.2 (noting petitioner's concession regarding non-City respondents).[6] Same for the non-IDEA claims. *Id.* at

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[6] Respondent Austin Independent School District ("Austin ISD") is not entitled to damages or costs under Supreme Court Rule 42.2. Petitioner was required to list every party to the Second Circuit proceedings. *See* Sup. Ct. R. 14.1(b)(i). A Rule 12.6 notice is not mandatory, and Austin ISD was free to file its own letter of non-interest, as respondents have done in other cases after a response was requested. *E.g.*, May 2, 2023 Letter of Respondent Adidas AG, *Nike, Inc. v. Adidas AG*, No. 22-927 (U.S. May 9, 2023). More fundamentally, the question presented is facially limited to the IDEA claims; Austin ISD's decision to file a brief defending against claims "expressly abandoned in the Second Circuit" (at 17), and expressly omitted from the petition, cannot be charged to petitioner. And, finally, the Court's rules preclude the relief requested—as Austin ISD appears to acknowledge (*id.*). *See* Sup. Ct. R. 43.3. This certainly is not the sort of "rare[]" case that could warrant sanctions. Stephen M. Shapiro et al., *Supreme Court Practice* ch. 15.9 (11th ed. 2019).

6-7 nn.1-2. The other petitioners named in the petition (but not included in the reply caption) are a vestige of the court of appeals' caption and have no children in the City school system. And any lingering doubt on this score should be dispelled by the question presented, which is facially limited to IDEA exhaustion. *See* Sup. Ct. R. 14.1(a).

What remains is an IDEA case brought on behalf of K.M., who is still seeking compensatory education for her children years after the COVID-19 pandemic began. Like many children with disabilities, K.M.'s children have struggled to overcome the loss of learning that resulted from fully remote education, a poor substitute for in-person learning. But the courts below never considered the merits of K.M.'s claims because the Second Circuit wrongly concluded it lacked jurisdiction. Review of that narrow question is needed.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court does not grant plenary review, it should, at a minimum, grant the petition, vacate the Second Circuit's judgment, and remand the case for further consideration in light of *Santos-Zacaria*.

Respectfully submitted,

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