No. 20-____

IN THE
Supreme Court of the United States

INDEPENDENT SCHOOL DISTRICT NO. 283,
Petitioner,

v.

E.M.D.H. EX REL. L.H. AND S.D.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the continuing violation doctrine applies to the two-year statutory time limit to file an administrative complaint under the Individuals with Disabilities Education Act.

PARTIES TO THE PROCEEDING

Independent School District No. 283, petitioner on review, was the plaintiff-appellant/cross-appellee below.

E.M.D.H. *ex rel.* L.H. and S.D., respondent on review, was the defendant-appellee/cross-appellant below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

E.M.D.H. by & Through L.H. & S.D. v. *Indep. Sch. Dist. No. 283*, No. 17-020 (Minn. Dep't Educ. Mar. 16, 2018), *aff'd in part, rev'd in part*, *Indep. Sch. Dist. No. 283* v. *E.M.D.H. by & Through L.H. & S.D.*, No. 18-cv-00935 (D. Minn. Jan. 15, 2019) (reported at 357 F. Supp. 3d 876), *aff'd in part, rev'd in part*, No. 18-935 (8th Cir. June 3, 2020) (reported at 960 F.3d 1073), *reh'g denied* (Aug. 5, 2020).

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Independent School District No. 283 respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

INTRODUCTION

The Eighth Circuit applied an unwritten continuing violation exception to the express two-year statute of limitations that Congress wrote into the Individuals with Disabilities Education Act (IDEA). In doing so, it created a circuit split over whether Congress meant what it said when it enacted that provision in 2004, and revived exactly the same set of problems that Congress acted to solve when it amended that provision.

As originally enacted, the IDEA did not require parents to file a due process complaint within a specified time frame. This caused several problems. Some parents sat on claims for years, which delayed schools' ability to resolve good faith disputes about IDEA's requirements. *See* H.R. Rep. No. 108–77, at 115–116 (2003). Many special education teachers felt pressured to keep detailed records of all interactions with parents, for fear that a parent who seemed satisfied might change his mind years later. *See id.* Most importantly, students—who the IDEA was enacted to protect—often went years without the services that the IDEA was enacted to provide. *See id.*

To solve these problems, Congress amended the IDEA in 2004 to add a two-year statute of limitations. *See* 20 U.S.C. § 1415(f)(3)(C). This solution was flexible. Congress specifically included two equitable exceptions that can prevent otherwise untimely claims from being time-barred. *See id.* § 1415(f)(3)(D).

In the decision below, the Eighth Circuit set out a new unexpressed exception to the IDEA's statute of limitations: the continuing violation doctrine. The Eighth Circuit assumed that the parents here knew or should have known they had a so-called "child-find" claim in the spring of 2015, and yet did not file their administrative complaint until more than two years later in June 2017. It held that their claim was not time-barred because the school district's alleged violation repeated day after day such that it continued into the limitations period. *See* Pet. App. 17a–18a.

This decision created a sharp circuit split. The Third and Fifth Circuits hold that the continuing violation doctrine, and other equitable exceptions, cannot

be applied to the IDEA. The Eighth Circuit below held that it can.

The Eighth Circuit's view is wrong. Congress chose to include two equitable exceptions, and courts must respect that choice by not writing in other exceptions. The statutory history of the statute of limitations confirms this view: The continuing violation doctrine would undo the solution to the specific problem Congress acted to solve.

Reading this statute of limitations incorrectly has real consequences. Allowing parties to delay in bringing claims undermines the IDEA by delaying the resolution of disputes about the services a student ought to receive. Adhering to the statute of limitations, on the other hand, allows disputes to be resolved while evidence is readily available and memories are fresh. And it allows school districts to spend less time preparing for potential litigation, and more time serving students.

The decision below created a circuit split on an issue of national importance. This Court's intervention is urgently needed.

OPINIONS BELOW

The Eighth Circuit's original decision is reported at 960 F.3d 1073. Pet. App. 1a–21a. The Eighth Circuit's order denying rehearing and rehearing en banc is not reported. *Id.* at 64a–65a. The District Court's decision denying plaintiff's motion for judgment on the administrative record and granting in part defendants' motion for judgment on the administrative record is reported at 357 F. Supp. 3d 876. *Id.* at 22a–50a. The District Court's decision granting in part

plaintiff's motion for a temporary restraining order and preliminary injunction is not reported but is available at 2018 WL 1955109. *Id.* at 51a–63a.

JURISDICTION

The Eighth Circuit originally entered judgment on June 3, 2020. *Id.* at 1a–2a. Petitioners timely sought panel rehearing and rehearing en banc, which was denied on August 5, 2020. *Id.* at 64a–65a. On March 19, 2020, this Court extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The IDEA, 20 U.S.C. § 1415(f)(3)(C), provides in relevant part:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint * * *.

20 U.S.C. § 1415(f)(3)(D) provides:

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was

required under this subchapter to be provided to the parent.

STATEMENT

A. Statutory and Legal Background

Under the IDEA, states that accept federal funding must make a "free appropriate public education" (FAPE) available to every child with a disability. 20 U.S.C. § 1412(a)(1)(A); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 246 (2009). To make this guarantee real, the IDEA imposes an affirmative "child-find" obligation on school districts, requiring them to ensure that "[a]ll children with disabilities residing in the State * * * are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A); *see Forest Grove*, 557 U.S. at 245. A district that fails to fulfill its child-find obligations opens itself up to liability under the IDEA. *See Forest Grove*, 557 U.S. at 245.

Prior to 2004, the IDEA did not contain a statute of limitations. *See, e.g.*, *Somoza* v. *New York City Dep't of Educ.*, 538 F.3d 106, 114 n.7 (2d Cir. 2008). Against this backdrop, a few federal courts applying state-specific statutes of limitations applied equitable doctrines like the continuing violation doctrine in IDEA cases. The First Circuit found a school district "in continuous violation" of a New Hampshire statute implementing the IDEA such that the district's "ongoing failure to comply" with the law throughout the statutory period "constituted a unitary violation under the IDEA" that prevented the claim from being time-barred. *Murphy* v. *Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186, 1195 (1st

Cir. 1994).[1] In contrast, in *M.D.* v. *Southington Board of Education*, the Second Circuit concluded that applying Connecticut's equitable tolling rule in an IDEA case "would defeat the goals of the [IDEA]." 334 F.3d 217, 224 (2d Cir. 2003) (internal quotation marks omitted).[2]

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[1] *See also Hammond* v. *District of Columbia*, No. Civ.A. 99-1723(GK), 2001 WL 34360429, at *5–6 (D.D.C. Mar. 1, 2001) (concluding that "the continuing violation doctrine applie[d]" and "render[ed] timely Plaintiffs' claims" because the district's actions over a period of two years "constituted an ongoing violation of the denial of FAPE"); *Jeffery Y.* v. *St. Marys Area Sch. Dist.*, 967 F. Supp. 852, 855–856 (W.D. Pa. 1997) (concluding "that it is appropriate to apply the [continuing violation doctrine] in an IDEA context"); *Scruggs* v. *Meriden Bd. of Educ.*, No. 3:03CV2224(PCD), 2005 WL 2072312, at *5 (D. Conn. Aug. 26, 2005) (concluding that under Connecticut's statute of limitations "Plaintiff allege[] a continuing course of conduct sufficient to" make the IDEA claim timely), *vacated in part on reconsideration on other grounds*, 2006 WL 2715388 (D. Conn. Sept. 22, 2006); *Anthony* v. *District of Columbia*, 463 F. Supp. 2d 37, 43 (D.D.C. 2006) (remanding for consideration of whether claims were "timely under the continuing violation or equitable tolling doctrines"); *Weyrick* v. *New Albany-Floyd Cnty. Consol. Sch. Corp.*, No. 4:03-CV-0095-DFH-WGH, 2004 WL 3059793, at *13 (S.D. Ind. Dec. 23, 2004) (explaining that "the continuing violation theory could avoid a statute of limitations defense to an IDEA claim in a proper case").

[2] *See also VanDenBerg* v. *Appleton Area Sch. Dist.*, 252 F. Supp. 2d 786, 792–793 (E.D. Wis. 2003) (finding that the continuing violation theory did not apply); *SJB ex rel. Berkhout* v. *New York City Dep't of Educ.*, No. 03 Civ. 6653(NRB), 2004 WL 1586500, at *7 (S.D.N.Y. July 14, 2004) (concluding that continuing violation doctrine should not be applied and explaining that "the concern of the IDEA is the prompt provision of necessary services as determined by knowledgeable professionals to disabled children").

Then, in 2004, Congress amended the IDEA to add a statute of limitations and enumerated exceptions to that limitations period. *See G.L.* v. *Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 604 (3d Cir. 2015). The provision sets a two-year time limit for parents to file an administrative complaint that runs from "the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C). The 2004 amendment also added two narrow exceptions to this limit: "if the parent was prevented from requesting the hearing due to" (1) "specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint," or (2) "the local educational agency's withholding of information from the parent that was required * * * to be provided to the parent." *Id.* § 1415(f)(3)(D).

Congress did not include another common equitable exception, known as the continuing violation doctrine, in the new statute-of-limitations provision. Under the continuing violation doctrine, "each overt act that is part of the violation and that injures the plaintiff * * * starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). In practice, the application of the continuing violation doctrine makes otherwise time-barred claims timely, because the clock does not start running on the plaintiff's time to file suit until the "last asserted occurrence of [the illegal] practice." *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 381 (1982); *see also, e.g.*, *Pegram* v. *Honeywell, Inc.*, 361 F.3d 272, 279 (5th Cir. 2004) ("[T]he continuing

violations doctrine is equitable in nature and extends the limitations period on otherwise time barred claims * * * .").

B. Factual Background

1. In 2015, respondent, E.M.D.H., was an eighth-grade student in St. Louis Park, Minnesota's Independent School District No. 283. In the spring of that year, her various psychological disorders worsened and she was placed in a psychiatric day-treatment facility in May 2015. As a result, she missed much of the last half of the last semester of her eighth grade year. *See* Pet. App. 1a–4a.

In June 2017, her parents consented to have the District conduct a special education evaluation, but also requested a special education due process hearing with the Minnesota Department of Education. *See id.* at 5a, 28a–29a, 33a–34a, 52a. At the conclusion of the evaluation process in October 2017, the District determined that the student did not qualify for special education under Minnesota's eligibility standards. *See id.* at 6a, 30a–31a.

2. The ALJ for the Minnesota Department of Education concluded that the District had failed to (1) identify respondent as a child with a disability by the spring of 2015, (2) conduct an appropriate special education evaluation, (3) find that she qualified for special education, and (4) provide her a FAPE. *Id.* at 6a–7a, 16a. To cure the violation, the ALJ ordered the District to (1) find the student "eligible for special education and related services," (2) "develop an Individualized Education Plan ('IEP') providing the student with a FAPE"; (3) "conduct quarterly meetings to consider changes to the IEP" until the student graduates

from secondary school; (4) reimburse respondent's parents more than $25,000 "for past diagnostic and educational expenses"; and (5) pay for certain future expenses from a private tutor and a psychiatrist for as long as is appropriate or until the student graduates. *Id.* at 7a. The ALJ further concluded that the IDEA statute of limitations did not bar respondent's claim primarily because the claim accrued in April 2017, when, according to the ALJ, the parents first knew of their rights under the IDEA. *Cf.* Pet. App. 44a–45a; ALJ Order at 43, D. Minn. Dkt. 1-1.

3. The District sought judicial review of the order in the district court, which affirmed the ALJ's decision but struck the order to pay for future private tutoring. *Id.* at 7a. The District argued, among other things, that the IDEA's two-year statute of limitations barred any claim based on acts two years before the parents filed their complaint. The court found that "it [wa]s undisputed that because the Parents first requested a due process hearing on June 27, 2017," their claims would "be limited to the District's conduct after June 27, 2015" unless one of the statutory exceptions applied. *Id.* at 44a. It then found that "the District failed to provide an adequate and complete notice of procedural safeguards as required by the IDEA and by applicable regulations." *Id.* at 45a. Based on this finding, it concluded that the IDEA's second equitable exception applied. *Id.* at 44a–45a (citing 20 U.S.C. § 1415(f)(3)(D)).

4. The Eighth Circuit affirmed, as relevant. *See id.* at 18a-21a.[3] But it did not adopt the district court's reasoning regarding the statute of limitations. Instead, it concluded that "the District staff responsible for identifying the Student in the ninth and tenth grades likewise failed to fulfill their child-find obligation." *Id.* at 18a. Relying on *In re Mirapex Products Liability Litigation*, 912 F.3d 1129, 1134 (8th Cir. 2019), the Court reasoned that "the violation was not a single event like a decision to suspend or expel a student; instead the violation was repeated well into the limitations period." Pet. App. 18a. As such, "because of the District's continued violation of its child-find duty, at least some of the Student's claims of breach of that duty accrued within the applicable period of limitation" and the claim was not barred by the statute of limitations. *Id.*

The District sought rehearing, which was denied. *See id.* at 64a-65a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUITS ARE SPLIT OVER WHETHER THE CONTINUING VIOLATION DOCTRINE APPLIES TO THE IDEA.

The decision below created a circuit split over whether the continuing violation doctrine applies to the IDEA's two-year statute of limitations.

1. The Third and Fifth Circuits hold that the continuing violation doctrine, and other unwritten equitable exceptions, cannot be applied to the IDEA.

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[3] The court reinstated the prospective, private tutoring fees. Pet. App. 21a.

In *D.K. ex rel. Stephen K.* v. *Abington School District*, 696 F.3d 233 (3d Cir. 2012), the Third Circuit concluded that the continuing violation doctrine does not apply to IDEA claims. The court explained that "legislative intent and the doctrine of *exclusio unius* preclude application of common law equitable tolling principles to save claims otherwise foreclosed by the IDEA statute of limitations." *Id.* at 248. To reach that conclusion, it pointed to the fact that the legislative and regulatory history made clear that "only the enumerated statutory exceptions may exempt a plaintiff from having his claims time-barred by the statute of limitations." *Id.* (citing S. Rep. No. 108–185, at 40 (2003); *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006)). Thus, the Third Circuit concluded, "IDEA plaintiffs cannot escape its statute of limitations by invoking equitable tolling doctrines"; they must rely only on the statutory exceptions. *Id.*

The Third Circuit reiterated this point in *G.L.* v. *Ligonier Valley School District Authority*, 802 F.3d at 625. There, it explained that "parents may not, without satisfying one of the two statutory exceptions, * * * attempt to sweep both timely and expired claims into a single 'continuing violation' claim brought years later." *Id.*; *see also B.B. ex rel. Catherine B.* v. *Delaware Coll. Preparatory Acad.*, 803 F. App'x 593, 595 (3d Cir. 2020) ("IDEA is not subject to the continuing violation doctrine * * * .").

The Fifth Circuit has similarly declined to read into the IDEA's statute of limitations additional equitable exceptions that Congress did not enact. In *Reyes ex*

rel. E.M. v. *Manor Independent School District*, the Fifth Circuit rejected the applicability of an equitable exception for a lawsuit filed by a person "of unsound mind." 850 F.3d 251, 255 (5th Cir. 2017) (internal quotation marks omitted). It explained that "[t]here is nothing in the IDEA that incorporates general * * * tolling provisions." *Id.* For support, the Fifth Circuit noted that the IDEA has previously been "silent as to limitations," and that Congress had "amend[ed] the statute to add a limitations period of two years." *See id.* at 255 n.2. Because IDEA claims are subject to "two federal tolling provisions involving the school making misrepresentations or withholding information," the Fifth Circuit concluded that other equitable exceptions do not apply. *Id.* at 255 (citing 20 U.S.C. § 1415(f)(3)(D)).

As one commentator has noted, "the weight of judicial authority thus far has rather clearly favored the inapplicability of the continuing violations theory in IDEA [statute of limitations] cases." Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act*, 35 J. Nat'l Ass'n Admin. L. Judiciary 305, 323-324 (2015).[4]

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[4] The overwhelming majority of district courts to have addressed the issue agree. *See, e.g.*, *Jefferson Cnty. Bd. of Educ.* v. *Lolita S.*, 977 F. Supp. 2d 1091, 1124 (N.D. Ala. 2013) (concluding that the continuing violation doctrine did not apply to a child-find claim under IDEA because "if that argument succeeded, then no statute of limitations bar would be enforceable, because every violation would continue past the statutory bar"), *aff'd*, 581 F. App'x 760 (11th Cir. 2014) (per curiam); *Lakeview Neurorehab*

2. The Eighth Circuit, in contrast, held that courts may apply an unwritten continuing violation exception to the IDEA's statute of limitations.

The Eighth Circuit concluded that a district's "continued violation of its child-find duty" may make an otherwise time-barred claim timely. Pet. App. 18a. It reasoned that the district's child-find violation "was not a single event like a decision to suspend or expel a student," but rather "was repeated well into the limitations period." *Id.* As such, the claim was timely

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Ctr. Midwest, Inc. v. *Palin*, No. 3:09-CV-00083-TMB, 2010 WL 11619416, at *7 (D. Alaska Mar. 5, 2010) (declining to apply "the doctrines of equitable estoppel or continuing violation," because "[s]uch common law doctrines may not be applied"); *Bell* v. *Bd. of Educ. of the Albuquerque Pub. Schs.*, No. CIV 06-1137 JB/ACT, 2008 WL 4104070, at *18 (D.N.M. Mar. 26, 2008) ("[B]ecause Congress has set forth explicit exceptions to the two-year limitation period, * * * the Court does not believe it is free to apply a common-law doctrine to [the] claims * * * ."); *Estate of D.B. ex rel. Briggs* v. *Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 336 (N.D.N.Y. 2016) (noting that "courts in this Circuit have been reluctant to apply the [continuing violation] doctrine to the IDEA"), *abrogated on other grounds by Christiansen* v. *Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017) (per curiam); *J.K.* v. *Missoula Cnty. Pub. Schs.*, No. CV 15-00122-RWA, 2016 WL 4082633, at *6 (D. Mont. July 29, 2016) (rejecting applicability of continuing violation theory in IDEA context). *But see Jana K. ex rel. Tim K.* v. *Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 598–599 (M.D. Pa. 2014) (applying "continuing violation" doctrine to conclude that because student "was deprived of a FAPE each day that she went to school, the scope of claims in this case include, at a minimum, those occurring within the two years prior to the * * * complaint"); *D.G.* v. *Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008) ("Plaintiffs' IDEA claim also is not barred by the above two-year statute of limitations period under the continuing violations doctrine.").

because "at least some of the Student's claims of breach of that duty accrued within the applicable period of limitation." *Id.*

The Eighth Circuit's decision thus created a split among the federal courts of appeals as to whether equitable doctrines like the "continuing violation" doctrine apply to the two-year statute of limitations in the IDEA.

II. THE DECISION BELOW IS WRONG.

The decision below gets the text, history, and purpose of the 2004 IDEA amendments wrong.

1. The text of the IDEA makes clear that the continuing violation theory cannot be applied to its two-year statute of limitations. Congress enacted "two equitable * * * exceptions" that toll the running of the statute of limitations. *G.L.*, 802 F.3d at 609; *see* 20 U.S.C. § 1415(f)(3)(D). Those exceptions apply (1) when the complaint concerns the district's misrepresentations, *see* 20 U.S.C. § 1415(f)(3)(D)(i), and (2) when a district fails to give the parent information it was required to provide, *id.* § 1415(f)(3)(D)(ii). Congress did not include any other equitable exceptions, such as an exception for continuing violations. *See id.* § 1415(f)(3)(D).

Congress's choice to enact some equitable exceptions, and not others, has meaning. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). Thus, Congress foreclosed the application of the continuing

violation doctrine to the IDEA's statute of limitations by not including that exception in the IDEA itself.

Tennessee Valley Authority v. *Hill*, 437 U.S. 153, 188 (1978) is instructive. There, this Court concluded that the fact that Congress had included a limited number of hardship exemptions to the Endangered Species Act, but not an exemption for federal agencies, meant that the Court "must presume that these were the only 'hardship cases' Congress intended to exempt." *Id.* So too here. In updating the IDEA, "Congress was also aware of certain instances in which exceptions to the [limitations period] would be necessary," yet it chose not to codify an exception for continuing violations. *Id.* The court thus "must presume that these were the only [equitable exceptions] Congress intended to" provide for. *Id.* To read the statute otherwise would be to read into the clear language of the statute, a third, "unwritten exception" to the statute of limitations, even though "a reviewing court's task is to apply the text of the statute, not to improve upon it." *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 508-509 (2014) (internal quotation marks and brackets omitted).

Unsurprisingly, the U.S. Department of Education disagrees with the Eighth Circuit's interpretation. After the 2004 amendments, the Department of Education issued guidance to states on how to interpret the statute. *See* 71 Fed. Reg. 46,540. The Department explained that since the exceptions to the new IDEA limitations period contained in the statutory text were so clear, it declined to respond to comments suggesting that additional exceptions be recognized. *Id.* at 46,697. It explained that "because the Act and these

regulations prescribe specific limitation periods" they "supersede common law" exceptions. *Id.* And in response to a commenter's suggestion that the Department adopt regulations allowing for "extensions of the statute of limitations when a violation is continuing," the Department demurred. *Id.* It explained that the statute "provides explicit exceptions to the timeline for requesting a due process hearing"—and "[t]hese exceptions do not include when a violation is continuing." *Id.*

The legislative history further bolsters a plain-text reading of the IDEA. The Senate Report made clear that "[t]he committee d[id] not intend that common law determinations of statutes of limitation override" the statutory scheme. S. Rep. No. 108-185, at 40 (2003). And the Report further emphasized that the amendments were meant only to "provide[] for exceptions to the timeline in limited instances." *Id.*

This interpretation makes sense. To begin, it is not uncommon for Congress to make clear that it intends for liability for certain acts to continue each day a violation persists. *See, e.g.*, 20 U.S.C. § 6083(f)(1) (banning schools and libraries from permitting smoking specifies that "[e]ach day a violation continues shall constitute a separate violation"); 7 U.S.C. § 1636b(a)(2) (including "Continuing violation" section in livestock packing statute specifying that "[e]ach day during which a violation continues shall be considered to be a separate violation"); 49 U.S.C. § 11901(a) (providing, in rules for rail carriers offering transportation under the jurisdiction of the Surface Transportation Board, that "[a] separate violation occurs for each day the violation continues"). If

Congress intended for that to be the case here, it "could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010).

It is not hard to imagine why it did not. Had Congress wanted the continuing violation doctrine to apply to claims under the IDEA, it would not have needed to codify the specific-misrepresentations or withholding-information exceptions. If the Eighth Circuit were correct that a child-find violation occurs anew every day until the student receives services, it would not be necessary for parents to ever invoke the codified exceptions to make their claims timely—the two-year timeframe to bring suit would start fresh every day until the student was identified for services. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.*, 534 U.S. at 31 (internal quotation marks omitted). Because the Eighth Circuit's view would render the two codified exceptions "superfluous, void, or insignificant," it is not correct. *Id.*

2. In reaching the opposite conclusion, the Eighth Circuit did not consider any of this. *See* Pet. App. 16a–18a. Instead, the only support for its conclusion was a "*cf.*" citation to a products liability case that did *not* find a continuing violation. *See id.* at 18a. To start, that case has no bearing on the availability of a continuing violation exception in the IDEA context. Plus, it noted the availability of the continuing violation exception under *California* law, not federal law. *See Mirapex*, 912 F.3d at 1134–35. The court in *Mirapex* also did not even apply the exception. *See id.* at 1135.

Accordingly, that case in no way supports the availability of the continuing violation doctrine under the IDEA.

In any event, products liability cases are not good analogues for IDEA cases. Unlike products liability statutes, the IDEA is not a statute that is primarily designed to provide damages; it is designed to provide educational services. *See Sch. Comm. of Town of Burlington* v. *Dep't of Educ. of Mass.*, 471 U.S. 359, 370–371 (1985) (explaining that IDEA provides for reimbursement, not "damages"); *accord Polera* v. *Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002) ("The purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy—as contrasted with reimbursement of expenses—is fundamentally inconsistent with this goal."). Whereas products liability suits can satisfy their compensatory purpose years after a violation has occurred, if years have passed since a violation of the IDEA, the statute's goals of providing students with educational services can no longer be satisfied. That the continuing violation doctrine can apply in products liability cases is thus not a reason to apply it to IDEA cases.

III. THE DECISION BELOW WILL HAVE GRAVE, NEGATIVE CONSEQUENCES.

Allowing the decision below to stand will lead to troubling consequences for schools, the IDEA, and the more than three million public school students who

live in the Eighth Circuit.[5] Because this case is a clean vehicle to address an important question, the Court should grant certiorari.

1. The Eighth Circuit's rule will delay the resolution of disputes under the IDEA. Under the Eighth Circuit's view, the statute of limitations on a child-find claim—like the one at issue here—begins running anew every day that a school district does not identify a student for services, regardless of when a parent knew that that failure to identify was wrongful. *See* Pet. App. 17a–18a. That allows a parent to sit on a claim for years before filing a complaint. *See* Perry A. Zirkel and Peter J. Maher, *The Statute of Limitations Under the Individuals with Disabilities Education Act,* 175 Ed. Law Rep. 1, 2 (2003) (noting purpose of statutes of limitations is "to penalize dilatoriness").

That outcome cannot be squared with the goals of the IDEA. "The general policy under the IDEA is to resolve educational disputes as *quickly as possible*." *Powers* v. *Indiana Dep't of Educ., Div. of Special Educ.*, 61 F.3d 552, 556 n.3 (7th Cir. 1995) (emphasis added). During the debates on the statute that preceded the IDEA, Senator Williams explained that because "delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development," "it is expected that

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[5] In 2017, the most recent year for which there is data, 3,381,860 K-12 students attended public schools in Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, and Arkansas. *See* Nat'l Ctr. for Educ. Stat., *Digest of Education Statistics: Enrollment in public elementary and secondary schools, by region, state, and jurisdiction: Selected years, fall 1990 through fall 2029*, https://tinyurl.com/y5j9wryr (last visited Dec. 31, 2020).

all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved." 121 Cong. Rec. 37,416 (1975). And even before the 2004 amendments added the two-year statute of limitations, federal courts of appeals had recognized that the purposes of the IDEA's predecessor statute demonstrated "the propriety of a relatively short statute of limitations." *Spiegler* v. *District of Columbia*, 866 F.2d 461, 466–467 (D.C. Cir. 1989) (discussing time-limit for petitioning district court for review of decision of administrative agency under the predecessor statute).

In passing the statute of limitations, Congress aimed to *end* the long delays that had previously plagued IDEA litigation. In fact, the House Report noted that in the absence of a statute of limitations, "[l]ocal educational agencies [we]re often surprised by claims from parents involving issues that occurred in an elementary school program when the child may currently be a high school student." H.R. Rep. No. 108–77, at 115. This "unreasonably long threat of litigation" was a motivating force behind Congress's choice to add a statute of limitations. *Id.* By applying a rule that will result in protracted delays, the Eighth Circuit effectively undid Congress's attempt to fix this problem and reintroduced the prospect of long waits in IDEA cases.

2. The Eighth Circuit's rule will cause delays that will harm students, schools, and school districts. Most fundamentally, "[w]aiting many years to bring actions on behalf of a child, * * * jeopardize[s] that child's

education." *G.L.*, 802 F.3d at 609 (citing H.R. Rep. No. 108–77, at 115).

These delays will also "create[] distrust between school administrators and parents," since administrators worry that parents may at any point sue over never-before-expressed grievances from years past. *Id.* (citing H.R. Rep. No. 108–77, at 115). In fact, the House Report that accompanied the 2004 amendments noted that "an unreasonably long threat of litigation hanging over a local educational agency forces them to document every step they take with every child, even if the parents agree with the action, because they could later change their mind and sue." H.R. Rep. No. 108–77, at 115. And this "fear of far-removed litigation raises the tension level between the school and the parent," "breeds an attitude of distrust between the parents and school personnel and has the effect of requiring school personnel to document conversations, rather than working cooperatively to find the best education placement and services for the child." *Id.* at 115–116.

Long delays also prevent schools from addressing systematic issues with their administration of special education programs. Years-long delays between a district's initial violation and its ultimate resolution may mean that "local educational agency officials may be unaware that there is a problem." *Id.* at 115. And "[i]f the local educational agency officials do not know specifically what the issue is, they cannot remedy the problem." *Id.* That means that in the meantime, the school and school district could be unknowingly underserving more students than it would have had the complaint been filed sooner. *Cf. VanDenBerg*, 252 F.

Supp. 2d at 792 (noting that a goal of the IDEA is the "prompt resolution of disputes" about provision of services (internal quotation marks omitted)).

Long delays between a violation and the filing of a complaint also make it harder for districts to engage in long-term planning. If cases can be brought years later, districts will have no possibility of repose. *See* Zirkel & Maher, *supra*, 75 Ed. Law Rep. at 2 (noting that a key purpose of statutes of limitations is "repose"); *see also* H.R. Rep. No. 108–77, at 115. Instead, they will have to plan for the possibility that they could be on the hook for violations that took place over a decade earlier, perhaps when a student who is now in high school was in elementary school—an outcome that Congress aimed to avoid. *See* H.R. Rep. No. 108–77, at 115.

Allowing a court to second-guess educators' decisions years after the fact undermines their status as professionals. Educators and administrators have "difficult responsibilities" and must make tough calls about whether students qualify for services, often with limited time and resources. *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 62–63 (2005) (Stevens, J., concurring). Making it so those decisions—unlike the judgments of other professionals—can be second-guessed in court a decade later undermines their status as professionals. *Cf. id.* ("[W]e should presume that public school officials are properly performing their difficult responsibilities under [IDEA]."). A rule that undermines the sense that they are experts with special knowledge and skills may make the profession less desirable and make it harder to recruit and retain talented teachers. *See* Richard M. Ingersoll &

Gregory J. Collins, *The Status of Teaching as a Profession*, *in* Schools and Society: A Sociological Approach to Education 199, 207, 211 (Jeanne H. Ballantine et al., eds., 6th ed. 2018), *available at* https://tinyurl.com/y28mbaob ("Professionals are considered experts in whom substantial authority is vested, and professions are marked by a large degree of self-governance.").

Beyond these IDEA-specific concerns, allowing the rule below to stand will usher in the kinds of harms that all statutes of limitations exist to prevent. Accepting the applicability of the continuing violation theory in IDEA cases would mean that by the time a claim is adjudicated, it may be the case that "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli* v. *SEC*, 568 U.S. 442, 448 (2013) (internal quotation marks omitted); *see also* Lynn M. Daggett et al., *For Whom the School Bell Tolls but Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act,* 38 U. Mich. J.L. Reform 717, 722 (2005) (noting that statutes of limitations serve purposes of "imposing finality on the litigation system, giving potential defendants an end to their potential liability, and avoiding litigation of disputes involving stale evidence"). And those concerns are heightened in the education context, where teachers and schools are responsible for teaching a new cohort of students every year.

It will also create additional work for already overburdened special education teachers and departments, as well as the general education teachers, counselors, and administrators who share the responsibility of identifying students with special needs. If

districts can be called on to litigate cases years after the initial failure to identify a student, special educators, counselors, and school administrators will be forced to make more extensive documentation of potential violations because of the potential of "far-removed litigation." H.R. Rep. No. 108–77, at 115. Schools and school districts will also need to maintain and secure confidential records for even longer—diverting already scarce resources that could otherwise be used to provide services to students. *Cf. id.* at 115–116 (noting that time spent documenting information in preparation for litigation takes away from "working * * * to find the best * * * services for the child.").

The Eighth Circuit's rule will also increase litigation costs, which will further strain school districts' limited resources. That will be particularly devastating to school finances because the federal funding available under the IDEA does not begin to cover the costs of serving students. *See* Nat'l Conf. of State Legislatures, *Federal Funding for Special Education*, https://tinyurl.com/y4wx7bmc (last visited Dec. 31, 2020). As drafted, the IDEA envisioned that Congress would pay up to 40 percent of the additional costs associated with educating special education students. *See* Nat'l Educ. Ass'n, *Special Education Grants to States (IDEA Part B-611)* (Apr. 4, 2018), nea.org/sites/default/files/2020-06/IDEA-Funding-Gap-FY2017-with-State-Table.pdf. Since 1981, however, Congress has failed to provide full funding, and in recent years it has covered less than 16 percent of the additional costs. *See id.* That has meant that state and local jurisdictions shoulder about $19.5 billion each year in costs associated with the IDEA that

are not covered by federal special education funding. *See id.* Additional strain on school budgets will therefore mean that schools have fewer resources to spend on providing students the services they need.

The Eighth Circuit's rule below further threatens to allow a continuing violation exception to swallow the rule that all claims must be brought within two years. Indeed, as one court put it, "to accept a continuing violation exception to the statute of limitations in IDEA cases would eviscerate the limitations period" because a defective education "fits all too easily into the category of a 'continuing violation.'" *VanDenBerg*, 252 F. Supp. 2d at 792–793. Indeed, in practice "no statute of limitations bar would be enforceable, because every violation would continue past the statutory bar." *Jefferson Cnty. Bd. of Educ.*, 977 F. Supp. 2d at 1124.

2. Resolving the question presented is important because of how many students, schools, and school districts are potentially affected. In 2018-2019, more than 7.1 million students in the United States received special education services under the IDEA. *See* Nat'l Ctr. for Educ. Stat., *The Condition of Education: Students with Disabilities*, https://tinyurl.com/y3l6zh8v (last updated May 2020). All told, approximately 14 percent of all public school students in the United States receive special education services under the IDEA. *Id.* And child-find claims are common IDEA violations. *Cf.* Susan Johns, Ferrara Fiorenza PC, *Child Find Obligation: Why Does It Matter?* (Dec. 27, 2018), https://tinyurl.com/yxb5cfdx (noting that child-find claims are "increasingly common"). Given the large number of students who receive

services under the statute, it is not surprising that district courts across the country frequently encounter the continuing violation issue. *See supra*, pp. 12-13 n.4.

The question also affects other statutes beyond the IDEA. The IDEA statute of limitations applies not just to purported violations of the IDEA, but also to Rehabilitation Act claims that are premised on IDEA obligations, as well. *See D.K.*, 696 F.3d at 244 (citing 34 C.F.R. § 300.507(a)(2)). That means that resolving the question presented has implications for other statutory schemes.

3. This case offers a clean vehicle to address this important question. The question is clearly presented since the ALJ, the district court, and the Eighth Circuit all addressed the timeliness question. *See* Pet. App. at 16a-18a, 44a-46a.

No further percolation is necessary. The statute of limitations has existed for 16 years, and the courts of appeals that have addressed this issue have laid out the case against the Eighth Circuit's atextual reading of the IDEA. *See supra* pp. 10-12. The Court should thus resolve this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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