No. 20-905

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

BRIEF OF MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Minnesota Association of School Administrators (MASA) is a private nonprofit member service organization representing more than 900 educational administrators throughout Minnesota. As advocates of a world-class education for Minnesota's learners, MASA's members serve as the leading voice for public education in the state and empower leaders through high quality professional learning, services, and support. MASA is committed to engaging with state and federal policymakers to support student success, foster innovation within the education system, and create a world-class workforce.

MASA and its members have a strong interest in the Court's consideration of this petition. Nearly 30,000 professionals work diligently in Minnesota's schools every day to directly serve over 125,000 Minnesota K-12 students receiving special education services.[2] Tens of thousands more teachers take seriously their obligation to identify and support students who may need special education services. The Eighth Circuit's decision adopting a "continuing violation" doctrine for claims under the Individuals with Disabilities Education Act (IDEA) risks diverting their attention, and limited school resources, from

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[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] Minn. Dep't of Education, Special Education Fact Sheet (Aug. 27, 2019), https://tinyurl.com/y28k8cyh.

providing students with needed services to mitigating litigation risk that never ends. Allowing a continuing violation regime will not only contravene the text of the statute, it will generate perverse incentives to transform what should be a collaborative relationship between parents and schools into an adversarial one, as parents will have every incentive to look backwards and cast blame on their partnering schools for the results of difficult choices made in good faith. Devoting scarce resources to prepare for more litigation will only delay what matters most: receipt of services by students—contrary to the IDEA's goals. The Court's review is urgently needed to restore uniformity to the law and forestall these consequences for school districts in Minnesota and throughout the Eighth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Identifying, locating, and evaluating children with disabilities is hard. Yet teachers, school psychologists, and other education professionals understand that it is one of the most important things they do. Timely interventions can result in an inflection point that changes the course of a child's life. So they strive, in collaboration with parents, to identify children who may need special education services, to evaluate them, and to develop a plan that will provide them a free appropriate public education.

Solutions are not straightforward, and there are rarely definitive diagnostic tests with clear results. Experienced professionals may disagree with one

another, and with parents, about whether pre-referral interventions have worked; whether a child should be evaluated for special services; whether the evaluation indicates that the child has a disability; whether the proposed individualized education program will serve the child well; and a host of other questions. Available information often points in different directions, and may shift over time, with parents, teachers, and other professionals making judgment calls in real time on close questions with uncertain answers.

You don't need to assume ill intent on the part of any parent, teacher, or school district to understand that hindsight is 20/20. What was agreed to be the right call years earlier might come to seem like the wrong one a few years down the road, but only after the approach has been tried. But to ensure that children receive the services they need when those services can help them the most, and to preserve the collaborative parent-school relationship at the core of the IDEA, the Act does not permit such clarity of hindsight to prompt litigation about close calls made years earlier. Instead, since the 2004 amendments, the Act has made clear that due process complaints must be brought within two 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)(C), subject only to two express exceptions not applicable here.

MASA agrees with Petitioner (Pet. 10-18) that the Eighth Circuit's atextual expansion of the two-year limitations period via the "continuing violation" doctrine creates a circuit split, upends the settled understanding of the 2004 IDEA, and is wrong on the

merits. MASA writes separately to explain why review is needed now.

The IDEA sets up a system intended to foster collaboration between parents and educators to decide close questions regarding what is appropriate for a particular child in real time, whether that is pre-referral services, referral for evaluation, or another course of action. The two-year statute of limitations is key to making that collaborative process work as Congress intended. If there is no limit to the prospect of litigation based on a hindsight-driven examination of past decisions, which gives parents every incentive to second-guess already hard choices, the system Congress intended will break down. Students' services will be delayed and resources will be diverted to protecting against future litigation (and defending an onslaught of unexpected suits given the Eighth Circuit's opening of the floodgates). Parents and teachers will be postured as adversaries rather than allies, and there is a risk of overidentification of students as disabled when it is not appropriate simply to avoid the prospect of future litigation.

Adding insult to injury, at a time when school districts already struggling to cope with a pandemic can ill afford to cover the bill, the continuing violation doctrine imposes immense administrative and resource burdens. The recordkeeping required to protect against never-ending liability diverts educators from providing services to completing paperwork—contrary to one of Congress's express goals in the IDEA to focus on activities that foster student learning. On top of the administrative burden, the Eighth Circuit's decision will impose direct

financial costs, magnifying litigation costs and unnecessary, avoidable compensatory education judgments. Congress adopted a statute of limitations period in 2004 precisely to avoid these sorts of harms, and the Eighth Circuit's evisceration of that limit, in conflict with other courts of appeals, cries out for this Court's attention.

ARGUMENT

I. Prompt Dispute Resolution Frees Education Professionals To Work Collaboratively With Parents To Make Timely And Difficult Judgment Calls About Appropriately Addressing A Student's Needs.

A. IDEA "requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009); 20 U.S.C. § 1412(a)(1)(A). Parents may refer their child for evaluation to determine if the child is eligible for special education services. 20 U.S.C. § 1414(a)(1)(B). Regardless of any parental referral, however, school districts must affirmatively "identif[y], locate[], and evaluate[]" all "children with disabilities residing in the State." *Id.* § 1412(a)(3)(A). This is known as the "child find" obligation. *Forest Grove*, 557 U.S. at 245.

Although it places "paramount importance" on "properly identifying each child eligible for services," *id.*, the Act does not presume that referral for evaluation is always the appropriate choice for a child

who is struggling. Rather, Congress found that "the education of children with disabilities can be made more effective by ... providing incentives for … early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children." Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, § 101, 118 Stat. 2647, 2649-50; 20 U.S.C. § 1413(f) (permitting States to set aside up to 15% of their federal funding for "early intervening services … for students … who have not been identified as needing special education or related services but who need additional academic and behavioral support").

The Act also recognizes that not every child who is referred for evaluation will or should be found eligible for special education services. *See* 20 U.S.C. § 1414(b) (procedures for evaluation and eligibility determination). In fact, Congress was concerned that some student populations, such as English language learners and students of color, were being overidentified as needing special education services. Pub. L. 108-446, § 101, 118 Stat. at 2650-51 (finding "apparent discrepancies in the levels of referral and placement of limited English proficient children in special education" and "[m]ore minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population").

B. Recognizing that whether to refer a student for evaluation, and whether to classify a student as disabled are difficult, context- and child-specific questions, one of Congress's priorities was to ensure

that parents, teachers, and schools work together, collaboratively, to find the answers. *See* Pub. L. 108-446, § 101, 118 Stat. at 2649-50 (finding that "strengthening the role and responsibility of parents" makes special education more effective, and "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways"). To that end, parental consent is required before a child may be evaluated for a disability or provided services, 20 U.S.C. § 1414(a)(1)(D)(i), the eligibility determination must be made by "a team of qualified professionals and the parent," *id.* § 1414(b)(4), and parents must be included on the team that develops a student's individualized education program, *id.* § 1414(d)(1)(B).[3]

Beyond the formal points in the process where the IDEA requires parents to be consulted, school districts and teachers will necessarily have many informal conversations with parents about their child's progress, issues, and the posssibiliity of special support or a referral for evaluation. *See, e.g.*, Pet. App. 4a-5a (describing two conversations with parents regarding options for the student in this case).

It will often be the case that parents and teachers disagree about how to best help a student who appears to need more support. For example, parents may

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[3] Federal law permits school districts to override a parent's decision to refuse consent for an initial evaluation, if consistent with state law, and certain procedures are followed. 20 U.S.C. § 1414(a)(1)(D)(ii)(I). Minnesota law, however, does not permit school districts to override a parent's written refusal to consent to an initial special education evaluation. Minn. Stat. § 125A.091, subd. 5(a).

initially resist labeling their child as disabled. *See* Susan Etscheidt, et al., *Parental Refusal to Consent for Evaluation: A Legal Analysis with Implications for School Psychologists,* 49 Psych. in Schools 769, 771 (2012) (finding parents sometimes refused consent to evaluations due to "the stigma of disability designation" or concerns about "placement predetermination," among other reasons). Or educational professionals might believe that pre-referral interventions are working, making an evaluation unnecessary, while the parent disagrees. *Cf.* Todd A. Gravois & Sylvia Rosenfield, *A Multi-Dimensional Framework for Evaluation of Instructional Consultation Teams*, 19 J. App. Sch. Psych. 5, 24-25 (2002) (finding that a particular pre-referral strategy resulted in only 21% of potential cases being referred for evaluation, compared to 87% of cases when it was not used). When teachers, schools, and parents are committed to open dialogue and working together, they can often reach an agreement on next steps. If not, the IDEA provides dispute resolution processes, including mediation (before or after any complaint is filed), 20 U.S.C. § 1415(e), and the filing of a due process complaint—if it is filed within two years, *id.* § 1415(f).

C. Congress's addition of a two-year statute of limitations in 2004, after seeing how its scheme was working in practice, is integral to making this collaborative system work and to meeting Congress's goal to ensure that each student receives the education that is "appropriate" for them. Three key goals served by the statute of limitations will be thwarted if the

Eighth Circuit's continuing violation end-run is left standing.

First, and foremost, the IDEA seeks to get services to students who need them as soon as possible. *See* H.R. Rep. No. 108-77, at 116 (2003) (noting "the child's education is usually jeopardized" when claims are delayed); *Forest Grove*, 557 U.S. at 245 ("[F]ailure to provide a FAPE" must be "remedied with the speed necessary to avoid detriment to the child's education."). By making it unnecessary to file a complaint within two years so long as it relates to an obligation that can be described as "continuing"—as many IDEA obligations arguably are, including the basic duty to provide a FAPE—the Eighth Circuit's decision will slow down the provision of necessary services to students when the school district makes a mistake. Parents will have an open invitation to seek redress any time they come to regret choices made years earlier. Permitting such endless litigation opportunities restores the precise situation Congress sought to avoid by adopting a statute of limitations: claims "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. Given that the "administrative and judicial review of a parent's complaint often takes years," *Forest Grove*, 557 U.S. at 238, delay in starting that process—and thereby in providing services—harms the central goal of the IDEA to provide timely services when needed.

Second, just as having no federal limitations period "raises the tension level between the school and the parent" and "breeds an attitude of distrust

between the parents and school personnel," so, too, does the continuing violation doctrine, which effectively provides a perpetual end-run around the statute of limitations. *See* H.R. Rep. No. 108-77, at 115. Congress intended for parents and school personnel to "work[] cooperatively to find the best education placement and services for the child." *Id.* at 116. But that effort is made more difficult when any change of mind, whether by the parent or the school district, raises litigation risk for decisions made years before.

There is nothing nefarious about parents changing their minds regarding the proper approach for their child. They could have received new information, or the course of events following a decision might have convinced them that they should have done something different at the outset. Such changing views are to be expected when dealing with difficult decisions and substantial uncertainty regarding the best way to support a child's education. But it is only human nature for such a changed opinion to color how a person sees the past. And if a parent can sue over long-past decisions—including ones they agreed with—school personnel will be forced 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." *Id.* at 115.

This is a problem not only because of the administrative burden, *see* pp. 14–15, *infra*, but also because the risk of litigious second-guessing changes the nature of the parent-school interaction. When one party is on guard and documenting every jot and tittle of an interaction, the relationship will necessarily feel

more adversarial and less trusting. It is difficult for parents and education professionals to engage in open dialogue seeking solutions if a teacher or school psychologist feels she must choose each word carefully and document everything, lest a momentary doubt come back to haunt her during litigation years later.

School personnel may change their views over time, too, about whether a student should be evaluated, or the best approach to provide them support. Over time, a student can present an evolving set of educational challenges. Congress intended that professional educators continuously evaluate their students' evolving abilities and needs. *See* 20 U.S.C. § 1414(a)(2) (requiring periodic reevaluation). Under the shadow of the continuing violation doctrine, however, a school district may worry about litigation risk when new information prompts a changed view about whether a student should be evaluated for a disability. If, in years one to three, parents and teachers had collaboratively decided that a child did *not* need to be evaluated—but it was a close question—will the school's changing view prompt a parent to reconsider whether the year one decision was correct, and possibly sue? A school district in the Eighth Circuit cannot ignore the possibility, and that may chill open dialogue with parents about the need to reconsider a course of action when warranted. This is yet another hit to the collaborative parent-school model the IDEA seeks to achieve.[4]

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[4] The fact that students' needs and abilities are not static shows yet one more reason why the Eighth Circuit's "continuing

Third, the increased litigation risk created by the continuing violation doctrine may lead to school districts over-identifying children as disabled, contrary to one of the IDEA's core goals. If education professionals believe that an evaluation is unwarranted, but it is a close question, the most litigation-protective strategy would be to go ahead with a formal evaluation, even if that is not the most "appropriate" course of action in the educator's professional judgment. Besides the cost of formal evaluations, however, a large majority of students who are referred for evaluation tend to be identified as disabled—about 70%. *See* Gravois & Rosenfield, *supra*, at 25; Amanda M. VanDerHeyden, et al., *Development and Validation of a Process for Screening Referrals to Special Education*, 32 Sch. Psych. Rev. 204, 204 (2003). That strong correlation between referral for evaluation and identification as disabled makes sense. But it also means that conducting more formal evaluations may lead to overidentification of

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violation" theory is inapt in the special education context. Even if a student should have been identified as disabled as an eighth-grader, it by no means follows that she necessarily should have been identified as disabled in ninth and tenth grade as part of a single, continuing violation. *See* Pet. 18a. Children's needs and abilities are constantly changing. *See* U.S. Dep't Educ., *42nd Annual Report to Congress on the Implementation of the Individuals with Disabilities Act*, at 67 (2020), https://tinyurl.com/y6kwrmeb (about 10% of students who were identified as disabled "exit" to general education upon reevaluation). Asking generalist judges to make these technical calls based on subjective regrets-laden backwards looking assessments by suffering parents is hardly a guarantee of getting it right, when any child's special education needs in a given year are not static, or even linear.

children as disabled. And such overidentification was a problem that Congress was concerned about for all children, *see* Pub. L. 108-446, § 101, 118 Stat. at 2649-50, but especially for students of color and students for whom English is a second language, *see* 20 U.S.C. § 1412(a)(24) (requiring States to "prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities").

The two-year statute of limitations requires prompt resolution of claims precisely to guard against these sorts of distortions to what should be a collaborative, open process to discuss a child's actual needs in real-time between parents and educators. Engrafting a continuing violation doctrine removes the safeguard that Congress found critical.

II. Defending Against Claims With No Repose Saps School Districts Of Resources That Are Better Used To Provide Services To Students.

Beyond impairing substantive IDEA goals, the continuing violation doctrine adopted by the Eighth Circuit will impose the same sorts of harms that any open-ended limitations period would create: unyielding, never-ending recordkeeping demands; stale evidence and faulty memories that increase litigation costs; and inflated damages claims that raise the stakes of litigation. "Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*

v. SEC, 568 U.S. 442, 448 (2013) (internal quotation marks and citation omitted). Burdening educators with the work required to maintain readiness to defend against long-stale claims, and school districts with the costs of defending such suits, transgresses a central goal of the IDEA: "focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results." Pub. L. 108-446, § 101, 118 Stat. at 2650.

Documenting all interactions related to special education for every student who has ever been discussed as potentially eligible, for all time, will be an enormous burden for teachers. Average general education secondary school class sizes in the Twin Cities region range from 26 to 44 students, depending on the subject. MetroECSU, *Annual Class Size Study*, at 15 (Feb. 2019), https://tinyurl.com/y5ge95a9. Approximately 14% of Minnesota students receive services under the IDEA. *See* Minn. Dep't of Education, Special Education Fact Sheet, *supra* (128,367 special education K-12 enrollment); Minn. Dep't of Education, Schools, Districts and Teachers at a Glance (Jan. 23, 2021), https://tinyurl.com/y68j6h93 (893,875 total K-12 enrollment).

As discussed above, however, about 30% of students who are evaluated are not identified as eligible, meaning they are not provided with special education services at that time, with the agreement of parents and educators. Adding that population to the students receiving services means about 20% of students are referred for formal evaluations. Add to that some number of students for whom teachers

discuss options with parents, but the decision is made not to refer for evaluation, and teachers may have about 6-10 students per class who are in some part of the process, for whom detailed recordkeeping of all conversations with parents will be required. While those students will change out every year, records will still need to be retained (and memories refreshed, if and when a claim is brought). This extra work for overburdened teachers is hardly living up to Congress's goal that the "statute of limitations … allow[] local educational agencies to limit unnecessary paperwork designed to protect them from protracted, long-term litigation." H.R. Rep. No. 108-77, at 116.

The resources required to sustain such a documentation effort are just the start. The Eighth Circuit's adoption of an open-ended limitations period will also almost certainly increase school districts' litigation costs, given the extra costs to locate witnesses who have moved on and track down old records. And it will certainly increase the stakes of litigation, and the costs of judgments, by unnecessarily inflating claims for compensatory education. A compensatory education award covers the cost of the "replacement of educational services the child should have received in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Timely resolution of claims limits the need for backwards-looking compensatory education claims that span years, because the student is more quickly provided appropriate services under an individualized educational program. If there is effectively no limitations period, however—as is the case under the Eighth Circuit's rule—then school districts could be

subject to compensatory damages liability that could have been avoided had the claim been brought sooner, and the student provided appropriate services in the public-school setting. *See* H.R. Rep. No. 108-77, at 116. ("A statute of limitations alleviates unnecessary claims for compensatory education[.]").

At a time when state budgets are exceptionally squeezed, and special education budgets even more so, school districts can ill afford to bear these extra costs. *See* Nat'l Ctr. for Learning Disabilities, *IDEA Full Funding: Why Should Congress Invest In Special Education?*, https://tinyurl.com/y35b34dt (noting that although Congress "promised to cover 40% of the extra cost of special education," it has "never come close to fulfilling that promise," and currently covers 14.6% of the cost). The damaging consequences of the Eighth Circuit's outlier continuing-violation rule warrant this Court's intervention.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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February 3, 2021