No. 19-229

IN THE

Supreme Court of the United States

C.D., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, M.D. AND P.D.; M.D.; P.D.,

Petitioners,

v.

NATICK PUBLIC SCHOOL DISTRICT; BUREAU OF SPECIAL EDUCATION APPEALS,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The courts of appeals have divided on how to enforce the mainstreaming mandate of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412(a)(5)(A). The First Circuit allows educators to pick their preferred placement for a student, so long as they have considered several options. In contrast, under the test exemplified by *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989), and *Oberti by Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993), school districts must educate the student in regular classes whenever they can provide a "free appropriate public education" (FAPE) in that environment using the full range of supplementary aids and services and curriculum modifications. The First Circuit here "eschew[ed]" that approach. App. 16a. But only that approach is faithful to the statute's language, the Department of Education's regulations, and this Court's admonition that school districts must educate children with disabilities in the regular classroom "whenever possible." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (citation omitted).

Natick tries to paper over the split by contending that all courts apply the same statute and consider the same factors about a student's placement. But the question is *how* to enforce the IDEA's mainstreaming mandate. Unlike the court below, other circuits require school districts to do more than *consider* mainstreaming; they must *prefer* it. The First Circuit's outlier approach alone abdicates judicial review. It requires this Court's intervention.

Natick's "vehicle" arguments are misplaced. Natick argues that petitioners forfeited the question presented—but the First Circuit found otherwise, and *decided* the question. Natick then tries to show that the outcome would have been the same under *Daniel R.R.* Not so. Finally, Natick identifies an issue that would remain for remand if this Court were to grant certiorari and reverse.

Natick does not dispute that the question presented is important. This case is a clean vehicle for resolving it. Certiorari should be granted.

ARGUMENT

I. The courts of appeals are divided on how to enforce the IDEA's mainstreaming mandate

A. The First Circuit alone refuses to apply meaningful judicial scrutiny to enforce the IDEA's mainstreaming directive.

The *Daniel R.R.* test, which the Second, Third, Fifth, Tenth, and Eleventh Circuits follow, requires educators to mainstream a student if they can provide a "free appropriate public education" (FAPE) using the whole range of supplementary aids and services and curriculum modifications. Pet. 16–17, 19–25. The *Daniel R.R.* test thus requires mainstreaming if educational benefits can be achieved in regular classes—rather than permitting educators to select the placement that they prefer. And the test from *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), which the Fourth, Sixth, and Eighth Circuits follow, requires mainstreaming if the district can feasibly bring into the regular classroom those services that otherwise make a separate special education environment superior. Pet. 17, 25–26.

The First Circuit, in contrast, allows educators to "choos[e] a placement" that they think is superior, App. 17a–18a (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992–93 (1st Cir. 1990))—that is, "more appropriate," *Roland M.*, 910 F.2d at 993. The First Circuit does not ask, or require school districts to ask, whether the whole range of aids, services, and curriculum modifications can produce a FAPE in regular classes. Pet. 16–19.

All courts recognize that educators are the experts in educational methodology. But only the *Daniel R.R.* test correctly reflects *Congress'* choice of mainstreaming in regular classes whenever a FAPE is possible there.

B. 1. Natick claims that there is no split because all circuits "apply the statute." Opp. 1. That is like saying that there is no split because all circuits ask the same legal question, even though they answer it differently. The courts split over *how*—not *whether*—to "apply the statute."

Natick next contends that all circuits conduct "balancing" and "an individualized and fact-specific inquiry." Opp. 14. Again, however, the question is *how*, not *whether*, to conduct that inquiry—that is, whether the statute, rather than educators, determines the appropriate balance between mainstreaming and removal from regular classes. The *Daniel R.R.* test adheres to the IDEA's text by requiring regular classroom placement whenever aids, services, and curriculum modifications can produce a FAPE there. The First Circuit alone allows educators to pick "an appropriate" option, so long as they have considered several. App. 17a–18a; Pet. 18.

2. Natick contends that all circuits "consider the aids and services which a child with a disability may require to benefit from regular education placement." Opp. 17. But the IDEA—under *Daniel R.R.*—requires more than just *considering* aids and services. It requires educators to conclude that the full range of aids, services, and curriculum modifications cannot produce a FAPE in regular classes. Only then may they remove the student from regular classes—and even then, they must still mainstream the student "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); Pet. 16–17.

In any event, the decision below does not even require school districts to *consider* aids and services. The First Circuit rejected Petitioners' challenge because Natick had considered two nonmainstream options. *Infra* pp. 9–10. And Natick's sole, decades-old First Circuit case (Opp. 17) does not require considering the whole range of supports or services or curriculum modifications, either. *See Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992). The court there merely upheld the decision to mainstream a student who was making progress "with minimal resource room support," "minimal classroom modifications," and other targeted support services. *Id.* at 53.

3. Natick contends that *Oberti* and *Greer ex rel. Greer v. Rome City School District*, 950 F.2d 688, 692 (11th Cir. 1991), show that there is no split because both decisions upheld district court rulings "where there was no specific articulation." Opp. 18. Natick's point is difficult to follow, but the bottom line is that the district and circuit courts in both cases asked, "can education in the regular classroom with the use of supplemental aids and services be achieved

satisfactorily?" and, if not, "Is the child mainstreamed to the maximum extent possible?" *Greer ex rel. Greer v. Rome City Sch. Dist.*, 762 F. Supp. 936, 942 (N.D. Ga. 1990) (applying *Daniel R.R.* test); *accord Oberti by Oberti v. Bd. of Educ.*, 801 F. Supp. 1392, 1401 (D.N.J. 1992) (citing *Greer*, 950 F.2d at 696; *Daniel R.R.*, 874 F.2d at 1048). Had the First Circuit asked those questions here, it would have reached a different result. *Infra* pp. 9–10.

C. Natick notes that this Court has denied review of the question presented before. But none of those cases was a suitable vehicle.

1. All those petitions came before the First Circuit here "eschew[ed] the *Daniel R.R.* test" and adopted an outlier standard. App. 16a. Four of the five petitions did not even *cite* a First Circuit case. *See* Pet., *Solana Beach Sch. Dist. v. K.D. ex rel. K.D.*, 568 U.S. 1026 (2012) (No. 12-232), 2012 WL 3613468; Pet., *R.H. ex rel. Emily H. v. Plano Indep. Sch. Dist.*, 562 U.S. 1216 (2011) (No. 10-436), 2010 WL 3823808; Pet., *Beth B. v. Van Clay*, 537 U.S. 948 (2002) (No. 02-172), 2002 WL 32134980; Pet., *Hudson ex rel. Hudson v. Bloomfield Hills Pub. Schs.*, 522 U.S. 822 (1997) (No. 96-2022), 1997 WL 33557825. And the petition in the fifth case quoted *Roland M.* for a general proposition, but otherwise focused exclusively on the differences between the *Daniel R.R.* and *Roncker* tests. Pet. 21, *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Holland*, 512 U.S. 1207 (1994) (No. 93-1804), 1994 WL 16099739.

2. Several of the petitions did not even raise the question presented here. *See* Pet. 6, *K.D.*, 2012 WL 3613468 (conceding that court "did not address the issue of the 'least restrictive environment'"); Pet. at i,

12, *R.H.*, 2010 WL 3823808 (questions and asserted split centered on mainstreaming "at the preschool level" "when there are no regular public preschool classes"); Pet. at i, *Hudson*, 1997 WL 33557825 (different questions touching on mainstreaming requirement). And the petition in *Holland* presented five questions, each relying on a particular assertion about the facts, but not the general question of how courts should approach the mainstreaming mandate. *See* Pet. at i–iii, 1994 WL 16099739.

3. In each case, the test at issue here was not outcome-determinative. *See* Pet. 6, *K.D.*, 2012 WL 3613468 (if court "had applied its own test correctly, the result would have been different"); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1015 (5th Cir. 2010) ("*Daniel R.R.* does not consider or speak to the circumstances at issue here … .").

In *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002), mainstreaming would have been inappropriate under any standard given the student's "virtually nonexistent" "developmental achievement." If her education *had* been "satisfactory," the court noted, "the school district would [have been] in violation of the Act by removing her." *Id.*

In *Hudson ex rel. Hudson v. Bloomfield Hills Public Schools*, 108 F.3d 112 (6th Cir. 1997), too, the result would have been the same under any standard. On "the undisputed record," "no amount of supplementary [aids] and services would meet [the student's] current needs." 910 F. Supp. 1291, 1305 (E.D. Mich. 1995), *adopted*, 108 F.3d at 113.

Finally, the school district's petition in *Holland* rested on mischaracterizations. For example, the district contended that the student could not "achieve measurable academic progress" in regular classes. Pet. at i–ii, *Holland*, 1994 WL 16099739. But the district court had "found that [the student] received substantial benefits in regular education and that all of her [individualized education program (IEP)] goals could be implemented in a regular classroom" with support and curriculum modification. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1401 (9th Cir. 1994).

II. This case is an excellent vehicle

This case is an excellent vehicle because the First Circuit considered both the *Daniel R.R.* and *Roncker* approaches and rejected them, and the choice of test was outcome-determinative. Pet. 34–36. Natick's contrary arguments are meritless.

A. Even though the First Circuit held that Petitioners preserved the question presented, App. 14a n.8, Natick spends four pages (19–22) arguing otherwise. Natick cannot claim that "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Natick's backup argument (at 21–22) is that this Court would lack factual findings to review about the *Daniel R.R.* factors. That contention is puzzling, given Natick's argument that all courts including the First Circuit consider those same factors. In any event, Pe-

titioners put at issue the relevant considerations under any standard. Petitioners asked Natick about supports and services in regular classes. Pet. 10; *see, e.g.*, 1st Cir. App. RA595–96. But Natick shut down the conversation. *See id.* Natick has only itself to blame for not considering (and articulating its consideration of) the whole range of supports, services, and curriculum modifications. If reversal requires more factfinding as a result, that only confirms that the different standards produce different outcomes.

Finally, Natick contends (at 22) that Petitioners did not challenge the 2014–2015 IEPs' compliance with the mainstreaming requirement. That is beside the point: This case is an excellent vehicle based on the 2012–2013 and 2013–2014 school years.

B. Natick contends (at 23–26) that the result would be the same under *Daniel R.R.*, because the First Circuit noted—after *rejecting Daniel R.R.*'s requirements—that "[t]he district court here verified that Natick and the BSEA had considered … the impact of 'supplementary aids and services.'" Opp. 32 (quoting App. 18a). That cursory reference falls far short of satisfying the *Daniel R.R.* test.

The *Daniel R.R.* test requires school districts to "consider the whole range of supplemental aids and services," including "modifying the regular curriculum to accommodate the child." *Oberti*, 995 F.2d at 1216 (quoting *Greer*, 950 F.2d at 696). The district may remove the student from regular classes only if it cannot provide a FAPE through those efforts. Pet. 19–25. In other words, courts following *Daniel R.R.* require more than *consideration* of *some* aids, services, and curriculum modifications. They require districts to

consider the full range of supplements and modifications, and to rely on them to mainstream students whenever possible.

The First Circuit, in contrast, allows districts to choose a nonmainstream placement so long as they consider several placement options—without requiring school districts to prefer regular classes when they can be supplemented or modified to provide a FAPE. Pet. 16–19. Thus, even assuming that it requires *consideration* of *some* aids and services, the First Circuit still allows educators to choose the placement they view as "more appropriate." *Supra* p. 3. The two tests thus produce different outcomes on the same facts precisely because the First Circuit requires nothing more than throwing some aids and services into the mix of options, whereas the *Daniel R.R.* test requires *mainstreaming* to the maximum extent possible considering the *full range* of aids, services, and curriculum modifications. Only the *Daniel R.R.* approach is faithful to statutory text and purpose.

In C.D.'s case, the choice of test determined the outcome: C.D. performed well at McAuliffe with tutors. Yet the First Circuit never required Natick to show that it had considered whether C.D. could receive a FAPE in regular classes using the whole range of aids, services, and curriculum modifications. Pet. 9–13, 35. The court instead let Natick choose a placement simply because "Natick … had examined three potential placements: the regular classroom, replacement classes, and the ACCESS Program." App. 18a–19a. Considering nonmainstream options is different from considering—and preferring—the whole range of aids and services in the mainstream environment.

Natick nonetheless insists that it "considered regular education, with supports." Opp. 23. But Natick's two record citations are conclusory. App. 35a, 36a. And the First Circuit did not describe any of the aids and services that Natick supposedly considered. That is because Natick did not specifically consider any, much less the whole range. *See* 1st Cir. App. RA595–96 (official dismissing father's question about "general education with support"); *id.* at RA2863 (in IEP, no discussion of supports or curriculum modification as "options [that] were considered and … rejected"). Neither Natick's nor the First Circuit's (at 18a) abstract assertion to the contrary satisfies the requirement under *Daniel R.R.* to "consider the whole range of supplemental aids and services," including "modifying the regular curriculum to accommodate the child." *Oberti*, 995 F.2d at 1216 (quoting *Greer*, 950 F.2d at 696); *see Greer*, 950 F.2d at 692 ("no indication" in IEP that "district considered the option of [the student's] remaining in a regular education class with supplemental services … or curriculum adjustment"). Moreover, the First Circuit, the District Court, and the hearing officer all failed to require Natick to place C.D. in regular classes "to the maximum extent appropriate." Instead, they all permitted Natick to conduct its own balancing to choose a placement. *See* App. 17a–18a, 31a, 38a.

Natick cannot show that the outcome would have been the same, because it did not consider supplementary aids and services as *Daniel R.R.* requires. At the very least, that application of the proper legal standard to the facts could be a question for remand, and poses no obstacle to this Court's review.

C. Natick also contends (at 27–28) that Petitioners are unlikely to prevail on their reimbursement claim. But that too is a question for remand. No court has passed on it, and Natick concedes (at 27) that the determination is *discretionary—i.e.*, not something that this Court would pass on in the first instance.

Natick's argument lacks merit anyway. Natick's main case—in a passage Natick ignores—states that "parents may not be subject to the same mainstreaming requirements as a school board." *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 364 (2d Cir. 2006) (quotation marks omitted). Indeed, "a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the Act." *C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011) (citing cases). When an IEP is inappropriate, parents have a unilateral right to withdraw their child from public school, find an appropriate private placement, and seek reimbursement—even if that placement does "not meet the … definition of a 'free appropriate public education.'" *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 13 (1993).

III. The First Circuit's decision is wrong

The First Circuit shortchanges the IDEA's mainstreaming mandate by deferring to educators on where to draw the line that *Congress* already drew in the IDEA. Pet. 32–34. Natick's arguments miss this point. The question is not whether Natick considered some placement options outside the regular classroom, or the nature of C.D.'s disability. It is whether Natick properly assessed whether C.D. could receive a FAPE in regular classes with supplementary aids

and services and curriculum modifications. By allowing Natick to "choos[e] a placement" without performing this inquiry, the First Circuit failed to guarantee that "removal … from the regular educational environment occurs only when … education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

IV. The question presented is important

Families and educators need guidance. Pet. 30–32. The uncertainty imposes a crushing cost on parents left with no choice but to "chance" private placement "at their own financial risk." *Carter*, 510 U.S. at 15. Natick does not dispute this point. And its own brief—long on the facts and short on the law—itself shows the need for clear guidance from this Court.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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