

No. 26-97

IN THE
Supreme Court of the United States

ARIELLA HELLMAN, ET AL.,
Petitioners,

v.

KATHERINE CRAVEN, ET AL.,
Respondents.

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

**BRIEF OF COUNCIL FOR AMERICAN
PRIVATE EDUCATION AND AGUDATH
ISRAEL OF AMERICA AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The Council for American Private Education (“CAPE”) is a national coalition of organizations and state affiliates serving private elementary and secondary schools. Its member organizations represent approximately 70 percent of private-school enrollment nationwide. The community CAPE represents is both substantial and diverse. According to the U.S. Department of Education’s most recent Private School Universe Survey, close to five million students attend roughly 30,000 private elementary and secondary schools in the United States—nearly one in ten American schoolchildren and roughly one in four of the Nation’s schools. U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Statistics, *Characteristics of Private Schools in the United States: Results From the 2023–24 Private School Universe Survey 2* (2026) [hereinafter *Characteristics of Private Schools*]. That numerical breadth encompasses significant institutional diversity. CAPE brings together organizations representing Catholic, Orthodox Jewish, Islamic, Quaker, Episcopal, Lutheran, Seventh-day Adventist, and other religious groups, as well as schools organized around distinctive educational philosophies—from Waldorf pedagogy to specialized, experiential, and other non-traditional models. While those organizations differ

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund its preparation or submission. Counsel for all parties were timely notified under Rule 37.2 of *amici*’s intent to file this brief.

substantially in theology, pedagogy, institutional mission and approach, CAPE nevertheless brings them together around shared commitments to opportunity, choice, pluralism and excellence in education.

Founded in 1971 to provide a coherent voice for private education, CAPE seeks to “preserve and promote educational pluralism so that parents have a choice in the schooling of their children.” That commitment extends beyond protecting individual parental choice. CAPE regards a diverse educational landscape as a public good and works to foster communication and cooperation both within the private-school community and with the public sector to improve educational opportunities for all of the Nation’s children.

CAPE’s commitment to educational pluralism reflects the constitutional principle recognized in *Pierce v. Society of Sisters*. There, this Court rejected the State’s asserted power to “standardize its children” by requiring them to accept instruction from public teachers alone. 268 U.S. 510, 535 (1925). The freedom protected by *Pierce* allows families and communities to sustain genuinely different educational institutions—institutions through which they may transmit distinct beliefs, values, traditions, and approaches to education rather than conform to a single state-preferred model.

This case directly implicates that interest. Massachusetts has chosen to extend special-education entitlements to all eligible children regardless of public or private school attendance. The decision below nevertheless permits the State to impose materially more burdensome conditions on those entitlements when parents exercise their constitutional right to choose

private education. And because the First Circuit subjected that burden only to rational-basis review, the decision below leaves the fundamental liberty recognized in *Pierce* with little practical protection against governmental measures that make its exercise more difficult.

That result matters profoundly to CAPE and the diverse institutions it represents. CAPE's members do not speak with one voice on questions of faith, pedagogy, or educational mission—and that is precisely the point. Their differences exemplify the pluralism *Pierce* protects. But such institutional diversity depends on there being meaningful protections for the parental choices that sustain it. The petition should therefore be granted to ensure that *Pierce* remains a meaningful guarantee of fundamental parental liberty, rather than a right whose exercise may be burdened subject only to the most deferential form of judicial review.

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions, Agudath Israel represents and advances the interests of the Orthodox Jewish community on legal issues affecting religious liberty, education, and the rights of religious institutions. Agudath Israel regularly participates in legislative, administrative, and judicial proceedings—including as *amicus curiae*—to protect those interests.

Jewish education is of particular importance to Agudath Israel and its constituents. Orthodox Jews regard the religious education of their children as

both a religious obligation and an essential means of preserving Jewish faith and identity. The overwhelming majority of Agudath Israel's constituents accordingly send their children to Orthodox Jewish day schools, of which there are approximately 750 nationwide educating more than 250,000 students. For those families, choosing a Jewish day school is not simply a preference among educational providers; it is an exercise of deeply held religious conviction protected by the constitutional liberty of parents to direct the education and upbringing of their children.

This case therefore directly implicates Agudath Israel's interests. Massachusetts has chosen to extend special-education entitlements to eligible children attending both public and private schools. Yet, as Petitioners allege, the Commonwealth administers those entitlements on materially different terms when parents exercise their constitutional right to enroll their children in private schools—including religious schools like the Jewish day schools attended by Petitioners' children. The question whether government may burden receipt of an otherwise available educational entitlement because parents have chosen private religious education is of substantial importance to Agudath Israel and the families it represents.

Agudath Israel's interest also extends beyond the particular Massachusetts program at issue. State constitutional restrictions on aid to private and religious institutions have long been invoked to limit public benefits and services available to children attending nonpublic schools. This Court's decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,

582 U.S. 449 (2017), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson v. Makin*, 596 U.S. 767 (2022), have substantially limited the use of such provisions to discriminate against religious schools and their students. *Hellman* presents an important related question: whether a State may invoke a broader public/private distinction to impose materially less favorable conditions on an educational entitlement because parents exercised their fundamental right to choose private education.

The decision below threatens to diminish the constitutional protection afforded that choice. The freedom to select a religious school is of little practical security if government may make the exercise of that freedom the basis for burdening entitlements that the State has already chosen to extend to the child. That concern is especially acute for Orthodox Jewish families, for whom religious schooling lies at the center of family and religious life, and warrants this Court’s review.

SUMMARY OF THE ARGUMENT

For families who choose private education, this Court’s decisions in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson v. Makin*, 596 U.S. 767 (2022), removed significant barriers to participation in state educational-benefit programs. *Espinoza* directly concerned a state constitutional “no-aid” provision—commonly known as a Blaine Amendment²—that prohibited public aid to schools

² “Blaine Amendments” take their name from Congressman James Blaine, who in 1875 proposed a federal constitutional

controlled by any “church, sect, or denomination.” 591 U.S. at 470. *Carson* involved a related statutory restriction: Maine made tuition assistance available for attendance at private schools but limited the program to “nonsectarian” schools. 596 U.S. at 774-75. In both cases, this Court held that a State could not make otherwise available educational benefits turn on a family’s decision to choose religious education. But while *Espinoza* and *Carson* resolved the constitutional problem presented by restrictions directed at sectarian or religious schooling, they did not address state constitutional provisions that go further, by prohibiting aid to private education more broadly, whether religious or secular.

This case presents that next question. In its current form, Massachusetts’s anti-aid provision draws a facially neutral line between public and private institutions. But that neutrality obscures its origins. The provision began as a restriction aimed at preventing Catholic schools from sharing in public support during a period of intense anti-Catholic nativism. When Massachusetts later amended that provision, it resolved the inequality not by making Catholic institutions equally eligible for public support, but by eliminating support for private institutions across the board. The result was equality through exclusion. What began as a barrier principally directed at Catholic education thus became a broader restriction on

amendment barring public-school funds from schools under sectarian control. See, e.g., *Espinoza*, 591 U.S. at 498-99 (Alito, J., concurring). Although the federal proposal failed, similar “no-aid” provisions were adopted in numerous state constitutions. *Id.*

private education more generally. That history, together with the fact that the burdens imposed by the provision continue to fall predominantly on religious educational choice, warrants careful scrutiny.

Application of the anti-aid provision here raises an additional and distinct constitutional concern. Massachusetts was not required to extend individual special-education entitlements to children attending private schools, but the Legislature chose to do so, creating a system designed to provide such opportunities to all eligible children. Yet the anti-aid provision operates to diminish that entitlement when parents exercise their constitutional right under *Pierce* to choose private education. As detailed in the petition, the Place Restriction prevents parentally placed private-school students from receiving state or locally funded special-education services on site, at their own schools, burdening access to those services through lost instructional time, schedule disruption, transportation costs, and the stigma associated with having to leave one's classroom to obtain special services. The First Circuit acknowledged that burden but held it constitutionally irrelevant, reasoning that protection against "indirect coercion or penalties" is a "distinct, First Amendment principle" that does not apply to the parental right. Pet. App. 25a (quotations omitted). In doing so, the decision below treats *Pierce* as fundamental in name, but second-class in constitutional effect.

That diminished protection is particularly troubling because *Pierce* safeguards more than isolated parental preferences. It safeguards educational pluralism by preserving a meaningful role for families,

religious communities, and private institutions alongside the State in the education and development of the Nation’s children. That pluralism limits the ability of political majorities to use public institutions to impose a single religious, moral, cultural, or ideological vision on the next generation, while allowing minority communities to preserve and transmit their own traditions and convictions.

The *Pierce* right is also deeply intertwined with First Amendment freedoms. Although *Pierce* was decided before the Free Speech and Free Exercise Clauses had been incorporated against the States, this Court has since recognized that parental educational choice implicates interests at the core of the First Amendment—including religious exercise, the transmission and receipt of ideas, and association with institutions formed to inculcate particular values. Indeed, the First Circuit itself has recognized that “*Pierce* would probably be decided today on First Amendment grounds.” *Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 10 n.5 (1st Cir. 2007) (citing *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 n.5 (1st Cir. 1995)). And this Court’s decisions in *Yoder* and *Smith* confirm that when parental liberty and First Amendment freedoms intersect, the Constitution affords greater protection, not less.

The First Circuit’s treatment of the *Pierce* right therefore warrants this Court’s scrutiny. The decision below subjects burdens on the *Pierce* right—one of this Court’s oldest fundamental liberties, and one that is deeply intertwined with First Amendment freedoms and central to educational pluralism—to

mere rational-basis review. That diminished protection is especially troubling where the burden is justified by a state anti-aid provision with a history that itself warrants careful scrutiny. Certiorari should therefore be granted both to scrutinize the continued operation of Massachusetts’s anti-aid provision and to ensure that the *Pierce* right receives constitutional protection commensurate with the parental liberty and First Amendment freedoms it safeguards.

ARGUMENT

I. THIS CASE PRESENTS THE NEXT CONSTITUTIONAL QUESTION IN THE CONFLICT BETWEEN STATE ANTI-AID RESTRICTIONS AND EDUCATIONAL CHOICE

The constitutions of more than 30 States contain so-called Blaine Amendments—state anti-aid provisions that, in their most common form, prohibit public support for “sectarian” schools. *See, e.g., Espinoza*, 591 U.S. at 499 (Alito, J., concurring). Those provisions grew out of a nineteenth-century political climate marked by nativism and hostility toward Catholic immigrants. At the time, a large influx of Irish and German immigrants had significantly increased the Nation’s Catholic population, provoking fears among native-born Protestants that Catholicism would undermine the religious and cultural norms they associated with American identity. *See, e.g., Kyle Duncan, Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 *Fordham L. Rev.* 493, 504 (2003) [hereinafter *Duncan*]. Those

concerns soon crystallized into organized political opposition—the American Party, or Know-Nothings, rose to prominence in the 1850s on a nativist and anti-Catholic platform aimed specifically at curbing the political influence of Catholics and other immigrants. See Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 Yale L.J.F. 529, 539 (2022) [hereinafter *Bindas*]. In the school-funding context, the distinction between “sectarian” and “nonsectarian” education largely tracked the divide between Catholic and non-Catholic schools; “it was an open secret that ‘sectarian’ was code for ‘Catholic.’” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

Public education was viewed by the nativists as a primary means for countering the threat posed by Catholic and other European immigrants. The common school could do what immigration restrictions and political exclusions could not: shape children themselves by instilling a common language, civic identity, and set of cultural and religious norms. Professor Stephen Carter has thus observed that the common-school movement “simply cannot be understood except as an effort to Protestantize the immigrant children.” Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 Seton Hall L. Rev. 1194, 1199 (1997). Catholic and other private schools frustrated that objective by enabling immigrant families to preserve distinct religious, linguistic, and cultural traditions. Anti-aid restrictions therefore served as one tool for privileging the common-school system over those competing institutions.

The broader assimilationist project, however, did not stop at funding. By the early twentieth century, some States sought more directly to control both what children learned and where they learned it. Nebraska, for instance, barred the teaching of foreign languages to young children in an effort to prevent instruction in “foreign tongues and ideals” before they could “learn English and acquire American ideals.” *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). And Oregon went further, mandating attendance at public schools. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). That measure was strongly supported by the Ku Klux Klan, which had made opposition to Catholic institutions a central part of its political program in Oregon and viewed compulsory public schooling as a means of curbing Catholic parochial education. See Richard F. Duncan, *Why School Choice Is Necessary for Religious Liberty and Freedom of Belief*, 73 Case W. Res. L. Rev. 1055, 1064 n.42 (2023). Ultimately, this Court invalidated both efforts, rejecting the use of state power to impose educational conformity at the expense of parental liberty. As *Pierce* explained, “[t]he fundamental theory of liberty” forecloses “any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.” 268 U.S. at 535. “The child is not the mere creature of the state”; parents retain the right and duty to direct their children’s upbringing and education. *Id.*

State anti-aid provisions proved more enduring. Unlike the laws invalidated by *Meyer*, *Pierce*, and others, laws prohibiting aid to religious schools did not directly compel public-school attendance or regulate

what children could be taught. Parents remained legally free to choose a private or religious education; States generally refused to extend public support to that choice.

Over time, however, the constitutional stakes changed. Modern school-choice programs made scholarships, tuition assistance, and similar benefits available for private education, but conventional anti-aid provisions were invoked to withhold those benefits when families selected religious schools. *See, e.g., Bindas, supra*, at 547-48. The resulting tension between educational-choice programs and state anti-aid provisions reached this Court in *Espinoza* and *Carson*. In *Espinoza*, the Court held that although a State “need not subsidize private education,” once it chooses to do so, it may not disqualify schools from participation solely because of their religious status. 591 U.S. at 487. *Carson* then rejected the related distinction between religious status and religious use, holding that a State likewise may not exclude schools because they would use the benefit to provide religious instruction. 596 U.S. at 786-89. Together, those decisions substantially foreclosed the conventional sectarian/nonsectarian anti-aid provisions as a basis for denying otherwise generally available educational benefits.

Neither decision, however, addressed the broader anti-aid provision at issue here. Massachusetts’s anti-aid amendment does not merely prohibit public funding of religious schools; it restricts aid to private institutions more generally. That facial neutrality, however, should not obscure its lineage. Massachusetts’s public/private distinction grew out of the same

anti-immigrant and anti-Catholic animus that drove conventional sectarian/nonsectarian anti-aid restrictions. That “shameful pedigree” warrants closer scrutiny. *Espinoza*, 591 U.S. at 482 (quoting *Mitchell*, 530 U.S. at 828-29).

Application of the provision here raises an additional concern about the constitutional status of the *Pierce* right itself. Massachusetts has not merely declined to subsidize private education; it has affirmatively extended special-education entitlements to all eligible schoolchildren, regardless of whether they attend public or private school. Yet the anti-aid amendment is invoked to burden receipt of that entitlement when parents exercise their constitutional right to choose private education. The decision below acknowledged both the fundamental character of the *Pierce* right and the existence of that burden, but nevertheless subjected it merely to rational-basis review. In practical terms, the court treated *Pierce* as a second-order fundamental right—one recognized as fundamental, but denied the protections ordinarily associated with that status.

Both aspects of this case warrant scrutiny: the troubling lineage of the restriction Massachusetts invokes and the diminished constitutional status the decision below effectively assigns to the right that restriction burdens.

II. MASSACHUSETTS'S PUBLIC/PRIVATE ANTI-AID PROVISION GREW OUT OF THE SAME ANTI-CATHOLIC ANIMUS AS CONVENTIONAL BLAINE AMENDMENTS

Massachusetts's anti-aid provision appears as Article XVIII of the Amendments to the Massachusetts Constitution. As ratified in 1855, that provision provided:

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.

Mass. Const. amend. art. XVIII (1855). The significance of that language becomes clear in light of the political and religious context in which it was adopted.

Article XVIII arose from the same anti-Catholic nativism described above. *See Caplan v. Town of Ac- ton*, 479 Mass. 69, 78-79 (2018). The rapid growth of Massachusetts's Irish-Catholic population generated widespread hostility toward Catholics and fears about their increasing influence in public life. That hostility repeatedly manifested itself in public and sometimes

violent forms. For instance, in 1834, an anti-Catholic mob set fire to the Ursuline convent in Charlestown, Massachusetts, destroying it. *See Duncan, supra*, at 506 n.48 (citing Philip Hamburger, *Separation of Church and State* 216 (2002)). Popular anti-Catholic traditions persisted as well: in cities and towns throughout Massachusetts, the annual observance of “Pope-Night” featured the public parading and burning of an effigy of the Pope. *See* Cornelius Chapman, *The Know-Nothing Amendments: Barriers to School Choice in Massachusetts* 4 (Pioneer Institute 2009). And by the early 1850s, rumors were spreading of a “papal plot” to extend Catholic influence throughout the Massachusetts government. *See Caplan*, 479 Mass. at 78.

Those broader anti-Catholic anxieties soon found expression in disputes over education and public funding. As the Catholic population grew, so too did fears that Catholics would acquire political influence and seek a share of public funds to support their schools. Those concerns gained political force in 1854, when the Know-Nothings swept to power in Massachusetts on an anti-immigrant and particularly anti-Catholic platform, capturing both the governorship and the legislature. *See, e.g., Caplan*, 479 Mass. at 79. Soon after, the Know-Nothing government advanced Article XVIII, and Massachusetts voters ratified the provision in 1855. *Id.*

The debates surrounding Article XVIII’s passage confirm the anti-Catholic motivation behind the provision. Delegates feared that Massachusetts’s growing Catholic population might eventually obtain sufficient political power to claim a share of the public

funds used to support the Commonwealth's common schools. One delegate described the concern directly: "some new sect may outvote the Protestants, and claim the school fund." 1 *Debates in the Massachusetts Constitutional Convention of 1853*, at 615 (1853) [hereinafter *1853 Debates*]. Another stated that "[e]very-body knows" the proposal "appears to be aimed at one class of our citizens, one denomination of religion." *Id.* "[N]obody," he continued, had expressed concern that public funds might be used for "Protestant sectarianism"; Article XVIII instead had been discussed "in relation to the support of Catholic schools." *Id.*

That distinction reflected the character of the common-school system itself. The publicly supported common schools were predominantly Protestant in character, incorporating Protestant Bible reading and prayer. Defenders of the system openly embraced that character. One declared, "We teach Protestantism, and believe it to be right, and we glory in that belief." *1853 Debates, supra*, at 621. Another predicted that "Catholics will become Protestants through the influence of these schools." *Id.* at 622. Article XVIII thus preserved public funding for "common schools" that were predominantly Protestant in character, while principally foreclosing Catholic schools from claiming a share of those same funds, through its prohibition on aid to schools maintained by a "religious sect."

By 1917, the controversy over public support for religious institutions remained unresolved. Due to Article XVIII's "rather uncertain language," Massachusetts had continued to appropriate substantial

sums to private educational and charitable institutions, causing growing public dissatisfaction. *See, e.g., Caplan*, 479 Mass. at 79 (quoting *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35, 39 (1978)). At the same time, Catholic institutions received almost none of those funds. During the 1917 Constitutional Convention, delegate Roland Sawyer reported that, since 1860, approximately \$19 million had been appropriated to private institutions, including approximately \$10 million to educational institutions. Catholic institutions had received only \$49,000 of the total—and “not one cent” of the educational appropriations. *See* 1 Debates in the Massachusetts Constitutional Convention 1917-1918, at 181-82 (1919) [hereinafter *1917 Debates*]. Another delegate emphasized the resulting disparity: Catholics had “paid their share of the nineteen million dollars appropriated to private institutions,” while their own institutions had “received comparatively nothing.” *1917 Debates, supra*, at 92-93.

Nor was equal access to those appropriations a realistic political alternative. Delegate Sawyer observed that the political “temper” of Massachusetts was such that an appropriation to a sectarian institution would not “get by any Legislature or get by the Executive Chamber in any Governor’s year.” *1917 Debates, supra*, at 182. At the same time, the campaign for a stronger religion-specific prohibition had gained new political force. Sawyer traced that resurgence to the election of Massachusetts’s first Catholic governor in 1913, which “certain forces in the State” regarded as “a great menace,” helping to build support for the anti-sectarian amendment. *Id.* at 183-84. He placed

the movement in the same line as earlier political movements directed against Catholic citizens, invoking both the Know-Nothings and the American Protective Association—the latter associated, as another delegate explained, with the view that “a Catholic, holding allegiance to the Pope, cannot be a good American citizen.” *Id.* at 78, 184-85.

Against that backdrop, Catholic representatives did not principally demand that Massachusetts begin funding their institutions. They instead demanded equal treatment. As Martin Lomasney recounted, their position was: “if you are going to pass any amendment pass one that applies to all. Why should our denomination be singled out, when we have not been receiving this money?” *1917 Debates, supra*, at 293. Their governing principle, he explained, was “equal rights for all, special privileges for none.” *Id.*

The difficulty was that the religion-specific proposal then under consideration did not appear equal to them. Delegate Frederick Anderson, one of its leading proponents, later acknowledged that Catholic participants believed the proposed prohibition—which was directed at institutions under “sectarian or ecclesiastical control”—would exclude “all Catholic schools and institutions from public aid,” while leaving outside its reach some institutions that were “virtually but not formally Protestant.” *1917 Debates, supra*, at 163-64. They therefore regarded the formulation as “unfair” and discriminatory. *Id.*

The public/private distinction emerged simply as the compromise solution. Under Lomasney’s approach, Anderson explained, “all Catholic and non-Catholic sectarian schools and institutions would be

covered by the term private,” and “a prohibition of appropriations to all private institutions would solve the problem beyond all question.” *1917 Debates, supra*, at 164. Anderson ultimately endorsed the resulting proposal as “the very best solution of this whole controversy” because it was a “true compromise.” *Id.*

And, as was made clear to the Catholic delegates, the alternative to that compromise was not equal inclusion. Anderson warned the Convention that, if the broader public/private solution were rejected because of opposition from private institutions, “it may be necessary to urge upon the people the next best thing, the old anti-sectarian amendment,” emphasizing that “tens of thousands of citizens” would not allow the issue to rest. *1917 Debates, supra*, at 164-65. In other words, the Catholic delegates confronted a choice between a broader prohibition applicable to all private institutions and the continued pursuit of a religion-specific prohibition that they believed would exclude Catholic institutions while permitting some Protestant-associated institutions to remain eligible for public support. Faced with that choice, some delegates chose the former.

The resulting compromise prohibited aid not only to religious schools, but also to “any other school” or educational institution that was “not publicly owned and under the exclusive control, order and superintendence of public officers or public agents.” Mass. Const. amend. art. XVIII, § 2, as amended by art. XLVI. *See also 1917 Debates, supra*, at 172-73 (delegate Anderson expressly explaining that “any other school” meant the “private, non-sectarian school”).

Thus, with equal inclusion politically unlikely and a religion-specific prohibition still looming, Catholic participants instead pressed for a rule that would apply to all private institutions alike. The result was equality through exclusion: Massachusetts broadened the restriction from religious institutions to all private institutions generally.

At the same time, although Massachusetts's present-day anti-aid provision no longer distinguishes expressly on the basis of religion, it continues to bear most heavily on religious educational choice. Religious schools account for approximately two-thirds of private schools nationwide and educate more than three-quarters of all private-school students. See *Characteristics of Private Schools*, *supra*, at tbl. C-2, at C-3 (reporting 66.7% of private schools and 75.8% of private-school students as religious). Given both its anti-Catholic origins and the predominantly religious choices it continues to burden, the provision's facial neutrality should not insulate it from this Court's scrutiny. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (explaining that "[f]acial neutrality is not determinative" and invalidating ordinances whose formally neutral operation masked impermissible targeting of religious practice).

III. THE DECISION BELOW TREATS THE *PIERCE* RIGHT AS FUNDAMENTAL ONLY IN NAME AND NOT IN CONSTI- TUTIONAL EFFECT

Setting aside its nativist and anti-Catholic origins, the breadth provided by the facial neutrality of Mas-

sachusetts's modern anti-aid provision makes its application here more constitutionally consequential, not less. The provision no longer operates only against the choice of religious schooling. It reaches private educational choice more generally, thus implicating the full scope of the parental liberty recognized in *Pierce*.

Massachusetts was not required to extend special-education benefits to children attending private schools, but the Legislature nevertheless chose to do so. Seeking to remedy past inequities, it created “a flexible and uniform system of special education program opportunities for all children requiring special education,” including children enrolled in private schools. *See, e.g., Bd. of Educ. v. Assessor of Worcester*, 368 Mass. 511, 514 (1975) (quoting St. 1972, c. 766, § 1). But, as detailed in the Petition, the anti-aid provision undercuts that legislative judgment by requiring the Place Restriction, which prevents children voluntarily attending private schools from receiving state or locally funded services on school grounds. The result is to diminish the value of the Legislature’s generally available entitlement for children whose parents exercise their *Pierce* right, burdening access to special education services with disruption, lost instructional time, transportation costs, and stigma.

The First Circuit below recognized the burden that the Place Restriction imposes on parents who exercise their *Pierce* right, but deemed that burden constitutionally irrelevant. In the court’s view, the unconstitutional conditions doctrine is a “distinct, First Amendment principle” that “does not apply to the parental right.” Pet. App. 25a (quotations omitted). The

decision below thus treats the *Pierce* right as fundamental in name, but second-class in constitutional effect.

That result is especially troubling because the *Pierce* right safeguards more than parental choice alone. It protects educational pluralism itself—an essential feature of a free society. By preserving both the existence of independent schools and parents' ability to choose them, *Pierce* ensures that the education and formation of children are not placed exclusively in the hands of the political majority. Otherwise, those who control public institutions could use that authority to entrench their own religious, moral, cultural, or ideological preferences in the next generation. Independent schools provide a counterweight to that power, allowing minority communities to transmit their traditions and convictions even when those beliefs are unpopular, disfavored, or rejected by those who hold political power.

That protection matters because education is not simply the transmission of neutral information. Schools inevitably shape children's values, habits, identities, and understandings of citizenship. A system in which the political majority can effectively channel children into institutions it controls therefore creates a uniquely powerful mechanism for majoritarian conformity. Educational pluralism checks that danger by dispersing authority over the formation of children among families, religious communities, private institutions, and the State. In that sense, *Pierce* protects more than a parent's ability to select a school; it protects the institutional diversity that allows minority beliefs to endure, competing ideas to flourish,

and a genuinely pluralistic society to reproduce itself across generations.

Nor can the diminished protection provided by the First Circuit below to the *Pierce* right be squared with the constitutional interests that right protects. *Pierce* was decided at the dawn of incorporation, before this Court had recognized either the Free Speech or Free Exercise Clauses as applicable to the States through the Fourteenth Amendment. See, e.g., *Mahmoud v. Taylor*, 606 U.S. 522, 586 n.4 (2025) (Thomas, J., concurring) (“The Court decided *Pierce* 15 years before it recognized that the First Amendment’s free-exercise guarantee applies against the States.”); *Asociación*, 490 F.3d at 10 n.5 (“Although *Meyer*, *Pierce*, and *Tokushige* were decided on due process grounds ... each was decided in the 1920s, before the Bill of Rights was incorporated into the Fourteenth Amendment.”). But the liberty interests *Pierce* protects includes conduct at the core of the First Amendment—choosing a school determines who will teach a child, what ideas and values will be communicated, the religious or moral tradition that will shape the child’s development, and the educational community with which the family will associate. Thus, *Pierce*’s substantive-due-process framing should not obscure the First Amendment freedoms that are deeply intertwined with the parental liberty it protects. Indeed, this Court has repeatedly described *Pierce* in terms of its First Amendment overlap. For instance, in *Griswold v. Connecticut*, the Court identified “[t]he right to educate a child in a school of the parents’ choice” as among the rights protected by the First Amendment, explaining that, “[b]y *Pierce v. Society of Sisters*, [] the right to educate

one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." 381 U.S. 479, 482-83 (1965) (further explaining that *Pierce* and *Meyer* stand for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"). And, in *Wisconsin v. Yoder*, the Court linked the *Pierce* right to the Free Exercise Clause, stating that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children." 406 U.S. 205, 233 (1972).

Remarkably, the First Circuit's own precedent undercuts the very distinction on which the decision below rests. The court refused to apply the unconstitutional-conditions doctrine to the burden imposed on Petitioners' exercise of their *Pierce* right because it characterized protection against "indirect coercion or penalties" as a "distinct, First Amendment principle." Yet the First Circuit has expressly recognized that *Meyer* and *Pierce* "would probably be decided today on First Amendment grounds." *Asociación*, 490 F.3d at 10 n.5 (citing *Brown*, 68 F.3d at 533 n.5). The court thus treats *Pierce*'s historical doctrinal label as dispositive, even though its own precedent recognizes that the right *Pierce* protects would today be understood as a First Amendment right entitled to precisely the protection the court withheld.

To be sure, not every exercise of parental liberty has a First Amendment dimension. Decisions about a child's meals, bedtime, or ordinary routines may implicate parental authority without implicating religion or expression. But when parental liberty does

overlap with First Amendment freedoms, this Court's precedents treat that convergence as a basis for greater constitutional protection, not less. *Yoder* held that "when the interests of parenthood are combined with a free exercise claim," more than merely a "reasonable relation to some purpose within the competency of the State" is required. 406 U.S. at 233. And *Smith* confirmed the significance of that combination. In holding that neutral, generally applicable laws ordinarily do not violate the Free Exercise Clause merely because they burden religiously motivated conduct, *Smith* distinguished *Yoder* on the ground that *Yoder* did not involve Free Exercise alone. Rather, it involved the Free Exercise Clause "in conjunction with other constitutional protections," including "the right of parents, acknowledged in *Pierce*[,] to direct the education of their children." *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990). Thus, *Smith* treated the overlap between Free Exercise and the *Pierce* right as the very reason *Yoder* warranted protection beyond that afforded to a free-exercise claim standing alone.

CONCLUSION

The petition should be granted. The state constitutional provision invoked below carries a history that warrants scrutiny, and its application here burdens a fundamental right whose exercise is closely intertwined with First Amendment freedoms. Yet the First Circuit treated that burden as subject only to rational-basis review. Review is warranted to determine whether a State may rely on such a provision to impose substantial indirect burdens on the *Pierce* right while withholding the constitutional protections

ordinarily afforded to fundamental liberties.

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