No. 26-97

In the Supreme Court of the United States

ARIELLA HELLMAN, ON THEIR OWN BEHALF AND AS NEXT FRIEND OF THEIR CHILD, E.H., ET AL.,
Petitioners,

v.

KATHERINE CRAVEN, CHAIR, MASSACHUSETTS BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Massachusetts has chosen, as a matter of state law, to provide more generous special-education services to private-school students than those required by federal law. At the same time, the Commonwealth's constitution prohibits public money from being used for the purpose of "maintaining or aiding" any private school—secular or religious. To balance these competing commitments, a Massachusetts regulation requires that private-school students receive their publicly funded special-education services at a public school or other neutral location.

The question presented is whether the challenged Massachusetts regulation violates the substantive component of the Due Process Clause of the Fourteenth Amendment.

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INTRODUCTION

Since adopting the Nation's first comprehensive special-education law in 1972, Massachusetts has offered state-funded special-education services to all school-aged children with disabilities. To comply with the state constitution, a regulation requires that any private-school students receive these public services at a public school or other neutral location. The court below rejected Petitioners' challenge to that longstanding regulation, explaining that it does not unlawfully burden Petitioners' right, recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to send their children to private school. Petitioners now ask this Court to revive their substantive due process claim, but they are unable to demonstrate any error in the First Circuit's decision—much less an error warranting this Court's attention.

Most importantly, Petitioners' claimed split of authority among lower courts is illusory. The premise of their question presented is that the First Circuit held that the unconstitutional conditions doctrine does not apply to the *Pierce* right. But the court held no such thing. Instead, the court applied the doctrine and held—correctly—that the challenged regulation is not unconstitutionally coercive. That decision does not conflict with any case Petitioners cite—including the half-century-old Michigan Supreme Court decision that they hold up as the clearest indication of a supposed split.

Moreover, even if Petitioners had identified some disagreement among the lower courts, this case is predicated on a state-law dispute that makes it a poor vehicle for resolving that conflict. The central premise of Petitioners' unconstitutional conditions argument

is that Massachusetts law guarantees children a statutory right to receive special-education services *in their regular classrooms*. But Petitioners are misreading the relevant state statute—as the First Circuit explained. The parties' fundamental disagreement about the meaning of state law was front-and-center in the proceedings below; indeed, Petitioners' lead argument in the Court of Appeals was that "[t]he district court misread the [state] special education statute." Pet. C.A. Br. 15. A case that features such a central state-law dispute is not fit for this Court's review.

Accordingly, the Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, offers federal funds to States on the condition that they provide special-education services to certain children with disabilities. Under the statute, public-school students have an individual, "substantive right to a 'free appropriate public education'" (or "FAPE"). *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017); *see* 20 U.S.C. § 1412(a)(1). To secure that right, schools work with each eligible student and their parents to develop an Individualized Education Program ("IEP") that is "specially designed" to meet the child's "unique needs." *Id.* at 399 (emphasis omitted); *see* 20 U.S.C. § 1401(14), (29).

Under the IDEA, private-school students are "not entitled by law to the panoply of services available to disabled public school students under the rubric of free and appropriate public education." *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 17 (1st Cir. 2002)

(rejecting substantive due process, equal protection, and free exercise challenges to IDEA's provision of lesser benefits to private-school students), *cert. denied*, 543 U.S. 988 (2004). More specifically, "[n]o parentally-placed private school child with a disability has an *individual* right to receive … the special education and related services that the child would receive if enrolled in public school." 34 C.F.R. § 300.137(a) (emphasis added). Instead, the IDEA merely requires that States spend, *in the aggregate*, a proportionate share of the State's IDEA funds on services for eligible private-school students. 20 U.S.C. §§ 1412(a)(10)(A), (a)(10)(C)(i). In doing so, the IDEA "does not require a school district to provide on-site services to a disabled child who is voluntarily enrolled in private school," but instead gives States discretion as to where to provide such services. *Russman v. Board of Educ. of the City of Watervliet*, 150 F.3d 219, 222 (2d Cir. 1998); *see* 20 U.S.C. § 1412(a)(10)(A)(i)(III) ("[S]ervices to parentally placed private school children with disabilities *may* be provided to the children on the premises of private, including religious, schools, *to the extent consistent with law*.") (emphasis added).

2. Massachusetts state law goes beyond the requirements of the IDEA by providing all school-aged children with disabilities—including children whose parents enroll them in private schools—an individual right to certain special-education services "[i]n accordance with the regulations, guidelines, and directives of" the Department of Elementary and Secondary Education ("Department"). *See* Mass. Gen. Laws ch. 71B, § 3. Under Chapter 71B, every school district must "identify the school age children residing therein who have a disability" and, for each such student,

must "diagnose and evaluate" the child's special needs and prepare an IEP. *Id.* The statute defines "school age child with a disability" as "a school age child in a public or non-public school setting" who, "because of a disability consisting of a developmental delay or any intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof, is unable to progress effectively in regular education and requires special education services." *Id.* § 1.

While Massachusetts provides greater benefits for private-school students with disabilities than the IDEA requires, it is also subject to a provision of the state constitution that restricts the use of public funds to support private schools. Originally ratified in 1855 and amended in 1917 and 1974, this "Anti-Aid Amendment" now reads, in relevant part:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any … primary or secondary school … which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both.

Mass. Const. amends. Art. 18, § 2, as amended by Arts. 46 and 103. *See generally Caplan v. Acton*, 92 N.E.3d 691, 697-701 (Mass. 2018) (detailing the history of the amendment).

To comply with the Anti-Aid Amendment, the Department promulgated the regulation at issue here, which governs the provision of publicly funded

special-education services to children whose parents have chosen to enroll them in private school ("Regulation"). First issued in 1974 and later amended to substantially its current form in 1978, the Regulation is codified at 603 Code Mass. Regs. § 28.03(1)(e). *See* Pet. App. 108a-109a.

The Regulation begins by recognizing parents' right to send their children to private school while receiving state-funded special-education services. In particular, the Regulation provides that "[n]othing in [the Department's regulations] shall be construed to limit the rights of parents to have their children educated at private schools, completely at private expense," and that "[e]ach school district shall provide special education designed to meet the needs of eligible students who are attending private schools at private expense and whose parents reside in the jurisdiction of the school district." 603 Code Mass. Regs. § 28.03(1)(e), (1)(e)(1).

The Regulation goes on, however, to set certain limitations on the provision of state-funded special-education services for parentally placed private-school students. It instructs that the "school district shall provide to such students genuine opportunities to participate in the public school special education program consistent with state constitutional limitations." *Id.* § 28.03(1)(e)(1). It allows for the evaluation of the student for eligibility for special-education services at a public school or the private school, and requires that a representative of the private school be invited to participate in the evaluation of the student as a member of the IEP team. *Id.* § 28.03(1)(e)(2). It provides that special-education services for private-school students "shall be comparable in quality, scope,

and opportunity for participation to that provided to public school students with needs of equal importance," and mandates that "[p]rograms in which both public and private school students participate may not include classes that are separated on the basis of school enrollment or the religious affiliation of the students." *Id.* § 28.03(1)(e)(4). And finally, in the provision central to this litigation, the Regulation states that "school districts shall ensure that special education services funded with state or local funds are provided in a public school facility or other public or neutral site." *Id.* § 28.03(1)(e)(3). In contrast, "[w]hen services are provided using only federal funds, services may be provided on private school grounds." *Id.*

The Regulation applies only to children whose parents have voluntarily enrolled them in private school. If a school district is unable to provide a FAPE to a child with particularly complex needs, a district may offer (or a court may require the district) to pay for "private placement" at a school that can meet the student's educational needs. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 284-85 (1st Cir. 2008); *see Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 29 (1st Cir. 2019) (discussing "the right to a school placement outside of the normal public-school system when an appropriate education is not otherwise possible" that "arises from the IDEA's guarantee of a FAPE"); *see also* Mass. Gen. Laws ch. 71B, §§ 4, 10 (incorporating this federally mandated private-placement process into state law).[1] When enrolled in

[1] Under Massachusetts law, these private-school placements are a last resort—a "necessary alternative" that is "authorized only when" a public school cannot meet a student's special-education needs within its existing facilities and resources.

private school under these circumstances, a child is considered a "publicly funded student[]" under the IDEA, 603 Code Mass. Regs. § 28.06, which entitles them to "all the rights the child[] would have if served by" the public-school district. 20 U.S.C. § 1412(a)(10)(B).

The Massachusetts Supreme Judicial Court ("SJC") has held that this arrangement does not violate the Anti-Aid Amendment because it "does not, in any way, support the on-going maintenance of private schools by lessening the financial burden of those who have elected a private school education." *Commonwealth v. School Comm. of Springfield*, 417 N.E.2d 408, 418 (Mass. 1981). By contrast, the SJC's decision strongly implies that it would violate the Anti-Aid Amendment to fund on-site educational services for students whose parents choose to enroll them in private schools. *See id.* at 414-16. In particular, the court found it "significant[]," in holding that the private placements in that case did not violate the Anti-Aid Amendment, that they did not involve "the reimbursement of money which is spent for a child who unilaterally enrolls in a private school." *Id.* at 415.

B. Factual Background

Petitioners Ariella and David Hellman are the parents of E.H., a school-aged child who attends Maimonides School, a private Jewish elementary school in Brookline, Massachusetts. Pet. App. 153a-158a. E.H. has ADHD and is eligible for free special-education services through Brookline's public schools. *Id.* Ariella and David have pursued these services, including

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Commonwealth v. School Comm. of Springfield, 417 N.E.2d 408, 410, 415 (Mass. 1981).

by obtaining an IEP from the school district. *Id.* The IEP recommends that E.H. receive two hours of academic support and 30 minutes each of counseling and learning center time per week. *Id.* Consistent with the Regulation, Brookline would provide these services to E.H. for free at "a neutral or public location." *Id.* But because the Hellmans consider transporting E.H. off the Maimonides campus several times per week "unduly burdensome, disruptive, stigmatizing, stressful, inefficient," and expensive, they have "decided to forgo the services financed with state and local funds." *Id.*

Petitioners Josh Harrison and Miriam Segura-Harrison are the parents of H.H., a school-aged child who attends Shaloh House, a private Jewish elementary school in Boston. Pet. App. 158a-161a. H.H. has ADHD, a developmental coordination disorder, and dyslexia, all of which impact his ability to function in a classroom. *Id.* H.H. is eligible for free special-education services through Boston's public schools. *Id.* The Harrisons have pursued these services and have obtained an IEP from the school district, which states that H.H. requires four hours of "self-regulation instruction" along with nearly two hours each of reading instruction, occupational therapy, and psychological services per week. *Id.* Consistent with the Regulation, Boston would provide these services for H.H. at a neutral or public location. *See id.* But because the Harrisons, like the Hellmans, consider transporting H.H. to and from a public or neutral location for these free services to be "impracticable, unduly burdensome, disruptive, stigmatizing, stressful, inefficient, and counterproductive," they have "decided to forgo the services financed with state and local funds." *Id.*

Although neither family has chosen to avail itself of the full slate of publicly funded special-education services that its district has agreed to provide, the children are not going without services. According to the complaint, E.H. and H.H. both receive some of the special-education services identified in their IEPs on campus at no cost through Gateways, "a nonprofit organization that provides services to students in the Jewish community," funded through a combination of federal funds distributed in accordance with the IDEA's proportionate share framework and private donations. Pet. App. 156a-157a, 161a. The complaint does not specify how many or what percentage of the services identified in the children's IEPs are being met in this manner. *See generally id.* What is clear from the complaint, however, is that the Regulation has not stopped Petitioners from sending their children to private schools. *See generally* Pet. App. 153a-155a, 157a-159a, 161a.

C. Procedural History

1. Petitioners filed this action, seeking a declaration that the Regulation is unlawful and an injunction barring Respondents from enforcing it. Pet. App. 169a. As relevant here, Petitioners asserted that the Regulation violates the substantive component of the Due Process Clause of the Fourteenth Amendment by interfering with their *Pierce* right to send their children to private school. Pet. App. 163a-164a.[2]

[2] Petitioners also claimed that the Regulation violates the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses. Pet. App. 165a-169a. The District Court dismissed these other claims, Pet. App. 48a-51a; the First Circuit affirmed the dismissals, Pet. App. 29a-33a; and Petitioners do not ask this Court to revisit those determinations. The only

2. The District Court granted Respondents' motion to dismiss. Pet. App. 36a-52a. Rejecting Petitioners' substantive due process claim, the court concluded that, to the extent Massachusetts chooses to provide more generous special-education services for private-school students than the IDEA requires, that state-law benefit does not create a fundamental right protected by the federal constitution. Pet. App. 43a-49a.

3. The First Circuit affirmed. Pet. App. 2a-34a. As the court observed, the Regulation does not "bar parents from choosing private school" or "penalize" that choice. Pet. App. 17a. Instead, the court explained, the Regulation merely "defines the terms on which the state will provide publicly funded services to students whose parents choose to send their children to private school." *Id.* For that reason, the court held, the Regulation does not violate or unlawfully burden Petitioners' *Pierce* right. Pet. App. 17a-26a.

a. In reaching that conclusion, the court relied upon this Court's cases distinguishing between unconstitutional "state interference with a protected

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claim now before the Court, therefore, is Petitioners' substantive due process claim under *Pierce*.

Petitioners' amici go further than Petitioners themselves, claiming that the Regulation effectively *denies* parents the right to send their children to private school. *See, e.g.*, West Virginia *et al.* Br. 13; Alliance Defending Freedom Br. 11. But that framing finds no support in Petitioners' complaint; Petitioners' children continue to attend private school and could access special-education services at a neutral location, but they choose not to do so. Amici's argument is also undermined by the undisputed fact that a state may lawfully choose to deny state-funded special education benefits to private-school students altogether. *See* West Virginia *et al.* Br. 21; Council for American Private Education *et al.* Br. 21.

activity" and permissible "decision[s] to fund an alternative activity." Pet. App. 17a. That distinction, the First Circuit explained, "applies with full force" to the *Pierce* right. Pet. App. 18a (citing, *e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("[*Pierce*] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise.")). While parents have a "protected right to choose private education," the state does not violate that right "merely by declining to subsidize the private school option or by offering public services to privately enrolled students on different logistical terms than to publicly enrolled students." Pet. App. 20a.

Applying that principle to the facts of this case, the First Circuit observed that Petitioners' complaint alleged, at most, that they faced "an increased logistical burden"—specifically, that "privately enrolled students must receive publicly funded services at a neutral or public location rather than on the private school campus." Pet. App. 21a. That burden, the court concluded, is a permissible consequence of "how the state chooses to deliver public benefits—not a meaningful intrusion" on the *Pierce* right. *Id.* And that is true, the court added, even though Massachusetts law guarantees an individual entitlement to special-education services for private-school students, because "[s]tate-specific policies do not augment fundamental rights" for purposes of substantive due process. Pet. App. 22a (citation omitted).

b. Turning to Petitioners' argument that Respondents had denied them an "equally available benefit," which has been held unconstitutional in certain cases arising under the Free Exercise Clause, the court both

rejected the state-law premise of this argument and found Petitioners' free exercise cases inapposite in the context of the *Pierce* right.

Petitioners' state-law premise was unavailing, the court explained, because it rested on a misreading of the relevant statutes. Pet. App. 23a. On Petitioners' telling, Massachusetts's prohibition on removing disabled children from their "regular educational environment" unless necessary based on the nature or severity of the child's disability, coupled with Massachusetts's guarantee of services in the "least restrictive environment," Mass. Gen. Laws ch. 71B, §§ 1, 3, grants private-school students a state statutory right to receive special-education services *in their regular classrooms*. Pet. App. 23a. "But that reading misconstrues the statute." *Id.* Instead, state law says only that students with disabilities should be educated, to the maximum extent feasible, with children who are not disabled. Pet. App. 23a-24a. In other words, Massachusetts law "does not mandate that … services be delivered in any particular classroom or physical location," and it "does not guarantee on-site delivery of services"—meaning there is no "equally available benefit" that the Regulation denies to private-school children. Pet. App. 24a.

As for Petitioners' analogy to free exercise cases, the First Circuit recognized the *Pierce* right to be more limited in scope than rights under the Free Exercise Clause, which "rest on a distinct, First Amendment principle that prohibits the state from imposing even indirect coercion or penalties on religious exercise." Pet. App. 25a (collecting cases); *see also* Pet. App. 19a n.10 (quoting *Norwood*, 413 U.S. at 461 ("Appellees fail to recognize the limited scope of *Pierce*.")). In

contrast, the *Pierce* right requires only that "a state cannot ban private schooling" or "mandate attendance at public schools," but "it does not require the state to extend public benefits on identical terms to private and public school students to protect the parents' choice of forum." Pet. App. 25a. "[T]he *Pierce* right does not limit the state's authority to maintain and support a public school system—even where doing so creates practical incentives favoring public education." Pet. App. 26a.

The court therefore concluded that because the Regulation does not restrict Petitioners' right to send their children to private school, it is subject only to rational-basis review, which it satisfies as a measure intended to "allow[] Massachusetts to extend special education services to all students while complying with its constitution." Pet. App. 29a.

REASONS FOR DENYING THE PETITION

Petitioners have not identified any compelling reason to grant certiorari. First, there is no circuit split to justify the Court's intervention, because the First Circuit did not adopt a categorical rule exempting the *Pierce* right from the unconstitutional conditions doctrine, as Petitioners suggest. Instead, the court simply held that the challenged Regulation does not violate the *Pierce* right. That holding—the court's actual holding—is entirely consistent with the cases Petitioners cite to assert a putative split. Second, even if Petitioners had identified a split, this case is a poor vehicle for addressing the question presented because the parties have threshold disputes about the meaning of state law that will frustrate clean review of any federal constitutional issues. Third, the First Circuit's decision is correct; the Court decided the narrow

issue in this case by faithfully applying this Court's substantive due process cases. The petition should therefore be denied.

I. There Is No Split of Authority on the Question Presented.

A. Petitioners Misconstrue the First Circuit's Decision.

Petitioners' claimed circuit split rests on a wholly inaccurate characterization of the First Circuit's holding. According to Petitioners, the First Circuit "held that the principle that government may not deny a benefit because of the exercise of a constitutional right"—*i.e.*, the unconstitutional conditions doctrine—"'does not apply to the parental right' recognized in *Pierce*." Pet. 2 (quoting Pet. App. 25a). But the First Circuit made no such holding; nowhere in its opinion did it say that the unconstitutional conditions doctrine is categorically inapplicable to the *Pierce* right. *See generally* Pet. App. 17a-26a. Rather, the court determined that the Regulation here did not run afoul of that doctrine, because it did not constitute a "direct and substantial interference" with the parental right to send children to private school. *See* Pet. App. 25a.

Nor did the First Circuit hold more specifically that the unconstitutional conditions doctrine only applies in the First Amendment context. *Contra* Pet. 23. The "crux of Petitioners' argument" below was that the Regulation violates their rights under *Pierce* because it denies their children a generally available benefit "simply because their parents [have] exercise[d] their fundamental right to enroll their child[ren] in private school[s]." Pet. App. 24a. In

rejecting this argument, the First Circuit observed that every case Petitioners cited arose in the context of a free exercise claim. Pet. App. 24a-25a. Here, however, Petitioners did not bring a free exercise claim—after all, the Regulation and the Anti-Aid Amendment draw no distinction between religious and secular private schools. Pet. App. 25a. So, the First Circuit reasoned, any decisions discussing the First Amendment's heightened protection against government interference with religious exercise are simply inapplicable. *Id*.

Nothing in that discussion holds, as Petitioners and amici suggest, that state government may freely burden recipients of a benefit outside of the First Amendment context. Instead, to resolve Petitioners' unconstitutional conditions claim, the First Circuit turned to a long line of decisions from this Court and the lower courts that specifically discuss and apply the *Pierce* right. Those decisions, the court explained, make clear that the Constitution "does not require the state to extend public benefits on identical terms to private and public school students to protect the parents' choice of forum." Pet. App. 25a. Applying those decisions, the court concluded that the Regulation does not interfere with the fundamental right to enroll children in private school because that right, as it has actually been articulated and understood, allows states to "offer[] public services to privately enrolled students on different logistical terms." Pet. App. 20a; *see* Pet. App. 26a.

B. Properly Read, the First Circuit's Decision Does Not Conflict With Any Case That Petitioners Cite.

Without Petitioners' mischaracterization of the First Circuit's holding, any putative split evaporates. According to Petitioners, five courts have concluded that the unconstitutional conditions doctrine applies to the *Pierce* right to enroll children in private schools. As just explained, however, the First Circuit did not say anything to the contrary. And even on their own terms, petitioners' five cases arose under different facts and circumstances that make their holdings irrelevant here.

1. Petitioners point to a 1971 Michigan Supreme Court decision as the primary source of the alleged split. There, the court considered the constitutionality of a state Attorney General opinion interpreting a provision of the Michigan Constitution that prohibits "public monies" from being "appropriated" to "directly or indirectly" "aid or maintain any private … school." *Traverse City Sch. Dist. v. Attorney Gen.*, 185 N.W.2d 9, 13 (Mich. 1971). The Attorney General had interpreted the provision to bar private-school children from receiving state-funded special-education services *at all*, including at a public-school location. *Id.* at 28. The Michigan Supreme Court held that this all-out prohibition violated the free exercise and equal protection provisions of the United States Constitution. *Id.* at 18, 28.

As that description makes clear, Petitioners go too far in calling the Michigan ban on services for private-school students "materially identical" to Massachusetts's Regulation. Pet. 18. Unlike Michigan's complete ban, the Regulation here provides only that

private-school students must receive their state-funded special-education services at a public or other neutral location. Indeed, the Michigan Supreme Court explicitly declared that Michigan's anti-aid amendment would be constitutional if interpreted to allow private-school students to receive services at a public-school location—the *exact* scenario presented in this case. 185 N.W.2d at 28, 29 (holding no equal protection violation "so long as" private-school students have access to services at the "public school"). There is clearly not a split between the First Circuit and the Michigan Supreme Court when the Michigan Supreme Court expressly stated that it would reach the same outcome as the First Circuit on the facts of this case.[3]

2. The four remaining cases that Petitioners cite likewise do not support their claimed circuit split. Pet. 18. These cases were all brought under 42 U.S.C. § 1983 by public-school teachers challenging the constitutionality of school district "patronage policies" requiring employees to enroll their children in the public schools where they worked. *See Barrett v. Steubenville City Schs.*, 388 F.3d 967, 968 (6th Cir. 2004) (public-school teacher denied permanent position due to son's attendance at private Catholic school); *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844, 848-49

[3] Even if the two decisions were somehow in conflict, the fact that Petitioners' principal case is a 1971 state-court decision is telling. "[I]t is to be doubted that a contrary opinion rendered 30 or 40 years ago, without any indication that it has current vitality," is enough to demonstrate that there is a "live conflict that should be resolved" through certiorari. Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.4(d), at 4-17 (11th ed. 2019). Rather, such a "stale" conflict "may suggest that the disagreement is not a recurring and important one." *Id.*

(5th Cir. 2003) (teacher not promoted to assistant principal because her children attended private school); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479, 1481 (11th Cir. 1984) (teachers warned of termination if they enrolled children in private school); *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1355 (9th Cir. 1997) (principal reassigned for choosing to homeschool his children). Given the harsh employment sanctions imposed on parents who chose to send their children to private school, these decisions concluded, there could be "no question" that the challenged patronage policies interfered with the *Pierce* right. *Stough*, 744 F.2d at 1480.

There is no conflict between these other decisions and the First Circuit's holding. None of the four decisions suggested that a policy like the Regulation would unconstitutionally burden the *Pierce* right. By the same token, nothing in the First Circuit's decision calls into question these other decisions' holdings that it violates the *Pierce* right to fire public-school teachers who choose to enroll their children in private school. Nor is there a split on the underlying methodology—because, again, the First Circuit did not hold that the unconstitutional conditions doctrine is inapplicable to the *Pierce* right. The cases simply reached different outcomes on different underlying facts.

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At bottom, the First Circuit's decision is in complete harmony with the Michigan Supreme Court case and the cases from the Fifth, Sixth, Ninth, and Eleventh Circuits that Petitioners cite. The First Circuit correctly held that the Regulation does not interfere with the *Pierce* right—in other words, that there is no unconstitutional "condition" placed on the right to

enroll children in private school. The other cases cited by Petitioners, meanwhile, involved irrefutable conditions on the *Pierce* right in the form of policies banning private school children from receiving special-education services at all or policies banning parents of private school children from working in a public-school district. There is no tension or confusion between these decisions—and, thus, no split of authority that would warrant intervention by this Court.

II. This Case Is a Poor Vehicle for Resolving Petitioners' Asserted Constitutional Question.

Even if the question presented warranted this Court's attention, this case is a poor vehicle for adjudicating that federal question because it is premised on, and intertwined with, a disputed question of state law. Petitioners maintain, as a central premise of their substantive due process claim, that Massachusetts law requires students to receive special-education services in their own regular classrooms. Pet. 7-8, 10-11. Petitioners base that argument on statutory language requiring school districts to provide services in the "least restrictive environment," Mass. Gen. Laws ch. 71B, § 3, a phrase defined to include a requirement that children not be removed from their "regular educational environment" unless "the nature or severity of the disability of a child is such that education in regular classrooms with the use of supplementary aids and services, cannot be achieved satisfactorily," *id.* § 1. *See* Pet. 7-8, 10-11. Petitioners posit that Respondents are violating these provisions by requiring that private-school students receive their state-funded special-education services away from their regular classrooms. *See* Pet. 7-8.

As an initial matter, to the extent Petitioners' claim boils down to a contention that Respondents are violating state law, that claim is not properly addressed to a federal court. As Respondents argued below, this Court's precedents make clear that a federal court cannot instruct state officials on how to comply with state law. *See* Resp. C.A. Br. 44 n.19. Such a claim is barred by the Eleventh Amendment, since "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

And to the extent Petitioners have embedded their state-law arguments inside a federal substantive due process claim, the interpretation of Massachusetts law that lies at the heart of that federal claim is incorrect. As Respondents explained below, state law does not require students to receive special-education services in their usual classrooms. *See* Resp. C.A. Br. 35-37. Rather, the least-restrictive-environment requirement of Chapter 71B means only that, to the "maximum extent appropriate," children with disabilities should be "educated with children who are not disabled." Mass. Gen. Laws ch. 71B, § 1. While the statute also says students should not be removed from their "regular educational environment" unless necessary, that phrase likewise does not mean a private-school student's own usual classroom; instead "regular education" is defined to mean "the school program and pupil assignment which normally leads to college preparatory or technical education or to a career," in other words, a classroom with children who are not disabled. *Id.* The First Circuit agreed with Respondents' interpretation of state law, thus rejecting a

premise underlying Petitioners' federal constitutional claims. Pet. App. 23a-24a ("Properly understood … the 'least restrictive environment' requires that schools, to the maximum extent appropriate, educate students with disabilities alongside nondisabled peers in a program that normally leads to college, technical education, or a career. But it does not mandate that those services be delivered in any particular classroom or physical location."). And this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017).

Even putting aside the question of who is right on the state-law issue, the mere presence of that issue in this case is highly likely to frustrate this Court's review. *See Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) (explaining that the Court often denies certiorari, "even though serious constitutional questions were raised," if "the constitutional issue [is] entangled with nonconstitutional issues that raise[] doubt whether the constitutional issue c[an] be effectively isolated"). The parties' merits briefing will inevitably devote significant attention to their competing interpretations of state law, distracting from any federal issue this Court may wish to decide. For proof, the Court need only look to the proceedings below. Petitioners' lead argument in the First Circuit was that "[t]he district court misread the [state] special education statute," Pet. C.A. Br. 15, and the First Circuit had to devote time to resolving that issue in its opinion, *see* Pet. App. 23a-24a. Taking a case with such a significant state-law dispute is also in tension with the Court's interest in "avoidance of rendering advisory opinions." *Michigan v. Long*, 463

U.S. 1032, 1040 (1983).[4] If this Court reaches a decision on the premise that Petitioners' reading of Massachusetts law is correct, the Massachusetts Supreme Judicial Court may subsequently adopt Respondents' reading—effectively rendering this Court's decision a nullity. For all these reasons, this case presents a poor vehicle for addressing the federal constitutional question presented.

III. The First Circuit's Decision Is Correct.

The Court should deny the petition for the further reason that the First Circuit's decision is correct. That court faithfully applied this Court's precedents regarding substantive due process, which insist upon a "careful description" of the right involved; routinely reject attempts to expand previously identified unenumerated rights; and, with respect to the *Pierce* right in particular, have never expanded the right beyond government efforts to ban private schools or mandate public-school attendance. The First Circuit also properly rejected Petitioners' arguments under the "unconstitutional conditions" doctrine and their invocation of cases arising under the Free Exercise Clause.

A. The First Circuit Correctly Rejected Petitioners' Substantive Due Process Claim.

The First Circuit recognized this case for what it is: a substantive due process case in which Petitioners claim the violation of a right that goes far beyond

[4] To be clear, Respondents are not asserting that the decision below rests upon adequate and independent state-law grounds, but that, for the reasons explained above, the concerns animating that jurisdictional limitation present additional reasons why this Court should exercise its discretion not to grant the writ.

anything this Court recognized in *Pierce* or subsequent cases.

1. This Court has "always been reluctant to expand the concept of substantive due process," because "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Moreover, unlike the procedural component of the Due Process Clause, the clause's substantive component "forbids the government to infringe 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (ellipses omitted). By "extending constitutional protection to an asserted right or liberty interest," therefore, courts, "to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* at 720.

This Court has thus repeatedly rejected efforts to assert a new, expanded, or more detailed conception of a liberty interest that has previously been recognized as fundamental by the Court. In *Glucksberg*, for example, a group of physicians who sought to assist mentally competent, terminally ill patients in ending their lives challenged a state law that forbade knowingly aiding or causing someone to commit suicide. *Id.* at 706-07. Citing *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the plaintiffs asserted a fundamental "right to die" or for individuals to "choose a humane, dignified death." *Glucksberg*, 521 U.S. at 722-23. The Court declined to recognize a fundamental right in these circumstances. Emphasizing its "careful description" requirement, the Court rejected the argument that *Cruzan* stood for a generalized, fundamental "right to die"; instead, the Court

explained, *Cruzan* recognized a more limited constitutional right for competent persons to "refuse lifesaving hydration and nutrition." *Id.* at 723 (quoting *Cruzan*, 497 U.S. at 279). The Court then focused on the actual language and function of the challenged statute, emphasizing that it prohibited others from assisting persons in committing suicide. The Court therefore characterized the fundamental right asserted by the plaintiffs as a "right to commit suicide which itself includes a right to assistance in doing so." *Id.* Finding this asserted liberty interest to be inconsistent with centuries of legal tradition that prohibited suicide and assisting suicide, the Court declined to recognize it as fundamental. *Id.* at 723-24, 728. As a result, the Court subjected the law only to rational-basis review, which it survived. *Id.* at 728-35.

More recently, in *Department of State v. Muñoz*, 602 U.S. 899 (2024), the Court applied *Glucksberg*'s framework to reject, under the Due Process Clause of the Fifth Amendment, a claim that a plaintiff's fundamental right to marry gave her a fundamental liberty interest in having her noncitizen spouse admitted to the country. Starting with *Glucksberg*'s requirement of a "careful description" of the claimed right, the Court rejected the argument that the case involved merely the "fundamental right of marriage," since no one disputed that the plaintiff had such a fundamental right; instead the Court framed the asserted right as something distinct and more specific: "the right to *reside with her noncitizen spouse in the United States*." *Id.* at 910. As the Court explained, that asserted right "involve[d] more than marriage and more than spousal cohabitation—it include[d] the right to have [the plaintiff's] noncitizen husband enter (and remain in) the United States." *Id.* Finding *that* right to be

unsupported by history and tradition, and inconsistent with the Executive Branch's longstanding prerogative to deny visas to non-citizens (including those who are spouses of U.S. citizens), the Court declined to recognize a fundamental right there as well. *Id.* at 910-16.

With respect to the *Pierce* right in particular, this Court has emphasized that the right has a "limited scope." *Norwood v. Harrison*, 413 U.S. 455, 461 (1973). It protects "the right of private schools to exist and to operate" but says "nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise." *Id.* at 462. Or, as this Court more succinctly put it in a recent decision, "[a] State need not subsidize private education." *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 467 (2020); *see also Harris v. McRae*, 448 U.S. 297, 317-18 (1980) ("It cannot be that because government may not … prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to … send their children to private schools.") (citations omitted); *Maher v. Roe*, 432 U.S. 464, 477 (1977) ("*Pierce* casts no shadow over a State's power to favor public education by funding it[,] a policy choice pursued in some States for more than a century. … We think it abundantly clear that a State is not required to show a compelling interest for its policy choice … to fund public but not private education.") (citations omitted).

2. The First Circuit correctly applied this caselaw, finding that, while Petitioners' claim implicated the *Pierce* right, the Regulation did not violate that right,

since it "does not bar parents from choosing private school" and does not "penalize that choice." Pet. App. 17a. Instead, the Regulation "merely defines the terms on which the state will provide publicly funded services to students whose parents choose to send their children to private school." *Id.* It is thus fully consistent with this Court's cases, discussed above, which make clear that while States may not unduly interfere with parents' right to send their children to private school, States are not required to fund or facilitate the exercise of that choice, much less on the parents' preferred terms. Pet. App. 20a ("[W]hile parents have a protected right to choose private education, the state does not 'restrict' that right merely by declining to subsidize the private school option or by offering public services to privately enrolled students on different logistical terms than to publicly enrolled students."); Pet. App. 21a ("What the complaint alleges, at most, is an increased logistical burden: privately enrolled students must receive publicly funded services at a neutral or public location rather than on the private school campus. That is a consequence of how the state chooses to deliver public benefits—not a meaningful intrusion on the underlying forum choice protected by … *Pierce*.").

As the First Circuit recognized, under the Regulation, parents retain three options regarding the schooling of their children: (1) enroll their children in public school and "receive the full range of publicly funded services on site;" (2) enroll their children in private school and "access those same publicly funded services at a neutral or public location;" or (3) enroll their children in private school and "opt out of publicly funded services altogether." Pet. App. 21a-22a. The existence of those three choices "preserve[s] the

constitutionally protected choice—public or private schooling—while setting permissible conditions on the administration of public services." Pet. App. 22a.

B. The First Circuit Properly Rejected Petitioners' Arguments Under the Unconstitutional Conditions Doctrine and Free Exercise Cases.

The First Circuit also rightly rejected two efforts by Petitioners to expand the *Pierce* right.

1. The court first rebuffed Petitioners' arguments under the unconstitutional conditions doctrine.[5] Whatever "logistical burden" the Regulation causes, the court concluded, it does not impose a "meaningful intrusion" on the *Pierce* right, since parents retain the options to enroll their children in public school and receive state-funded special-education services on site, choose private school and obtain state-funded services at public locations, or select private school and forego state-funded services. Pet. App. 21a. Whether considered under the rubric of "unconstitutional conditions" or simply the scope of the *Pierce* right itself, the Regulation does not violate substantive due process, since the "limited scope" of the *Pierce* right protects only "the right of private schools to exist and to operate," but says "nothing of any supposed right of private or parochial schools to share with public schools

[5] It bears noting this Court has recently described the unconstitutional conditions doctrine as protecting "enumerated rights" against government coercion. *FCC v. AT&T, Inc.*, 608 U.S. 531, 546 (2026); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 606 (2013). The *Pierce* right, of course, is unenumerated.

in state largesse, on an equal basis or otherwise." *Norwood*, 413 U.S. at 461-62.[6]

And if States can decline to fund private schools altogether, as this Court has said they can, *Espinoza*, 591 U.S. at 467, then *a fortiori* States can provide some funding for the benefit of private-school students—as the IDEA directs, for example—while imposing limits on such funding to comply with state law or other requirements. *Cf.* 20 U.S.C. § 1412(a)(10)(A)(i)(III) (IDEA's grant of discretion to provide services on-site to parentally placed private-school students, "to the extent consistent with law.");[7] *see*, *e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) ("[A] funding condition cannot be unconstitutional if it could be constitutionally imposed directly.").[8]

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[6] *See also*, *e.g.*, Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 San Diego L. Rev. 337, 339-42 (1989) (arguing that government non-funding of private schools is a "simple" case that does not impose an unconstitutional condition on the *Pierce* right, because of the limited nature of the *Pierce* right itself).

[7] If Petitioners' theory of the *Pierce* right and the unconstitutional conditions doctrine were accepted, then the IDEA's grant of lesser benefits to private-school students than public-school students might be called into question, since that statute grants to private-school students services funded from a proportionate share of federal funding, but subject to the requirement—one might call it a condition—that private-school students relinquish due process rights to challenge the quantum or scope of services received. The First Circuit previously rejected such a challenge to the IDEA. *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 17 (1st Cir. 2002), *cert. denied*, 543 U.S. 988 (2004).

[8] To be sure, this Court has rejected the suggestion that "if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional

Whatever burden the Regulation imposes, it simply does not inflict an unconstitutional condition on parents' right to send their children to private school. As this Court has noted recently in rejecting an unconstitutional conditions argument, "the Constitution does not forbid every government-imposed choice that has the effect of discouraging the exercise of constitutional rights." *FCC v. AT&T, Inc.*, 608 U.S. 531, 548 (2026) (cleaned up).

2. The First Circuit also rejected Petitioners' attempt to rely upon cases addressing the Free Exercise Clause. As that court recognized, this is not a free exercise case: Petitioners did not make such a claim in their complaint, because the Regulation and Anti-Aid Amendment[9] restrict public resources going to *all* private schools, whether religious or secular. Pet. App. 25a. That is significant, because this Court's free exercise cases apply an antidiscrimination principle that

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rights." *Koontz*, 570 U.S. at 608. But in such cases, the condition itself was unconstitutional, in that it was imposed "on a basis that infringes [petitioner's] constitutionally protected" rights. *Id.* (citation omitted). Here, the Regulation does not impose a condition that infringes Petitioners' constitutionally protected rights, since they have no constitutional right to public funding of the private schools to which they choose to send their children. *Espinoza*, 591 U.S. at 467; *Norwood*, 413 U.S. at 461-62.

[9] Petitioners and amici assert that the Anti-Aid Amendment has an anti-sectarian history. Pet. 8; Council for American Private Education *et al.* Br. 14-20; West Virginia *et al.* Br. 23-26; Glenn Br. 2-12. Since 1918, however, the Amendment has barred aid to *all* private schools, both religious and secular. *See* Mass. Const. amends. Art. 46 (eff. 1918); *Caplan v. Acton*, 92 N.E.3d 691, 700-01 (Mass. 2018) (discussing the 1918 amendment to the Anti-Aid Amendment). The Amendment thus has not discriminated against religious schools vis-à-vis private secular schools for over a century.

is conspicuously absent from any articulation of the *Pierce* right.

A passage from this Court's decision in *Espinoza* illustrates the point: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 591 U.S. at 487.[10] In other words, a State cannot discriminate against religious schools vis-à-vis private secular schools. But a State can express a preference for public over private schooling by providing funding to public schools while providing lesser or even no funding to private schools. As the First Circuit put it, the *Pierce* right "protects the right of parents to send their children to private school, such that a state cannot ban private schooling, or mandate attendance at public schools. But it does not require the state to extend public benefits on identical terms to private and public-school students to protect the parents' choice of forum." Pet. App. 25a (citations omitted). Put another way, the *Pierce* right "does not limit the state's authority to maintain and support a public school system—even where doing so creates practical incentives favoring public education." Pet. App. 26a. The court therefore recognized critical differences between this Court's free exercise cases and its *Pierce* right cases, and appropriately declined to import the doctrinal framework from the former into a case regarding the latter.

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[10] The Regulation does not discriminate against any private schools because they are religious. Rather, for private religious and secular schools alike, students may receive state-funded special-education services, provided they receive them at a public school or other public or neutral site.

C. A Ruling in Petitioners' Favor Would Greatly Complicate States' Efforts to Provide Some Benefits to Private-School Students.

As explained above, Massachusetts has chosen, as a matter of state law, to provide more generous services to private-school students than the IDEA requires. If this Court granted certiorari and ruled in favor of Petitioners, Massachusetts would be put to an agonizing choice: either expend substantial additional funds to send public teachers and other resources to private schools, or cease providing special-education services to private-school students altogether, except in the narrow circumstances where such services are required by the federal IDEA. Petitioners concede that the latter option would not violate the Constitution. *See* Pet. 34 n.13. And Massachusetts may well be compelled to decide, if the Court ruled in Petitioners' favor, that it can no longer afford to provide more generous special-education service to private-school students. The result would be that Petitioners would not receive any additional services, and instead the private-school students whose families currently choose to utilize publicly funded special-education services at a public school or similar site would no longer have access to such services.

Other States beyond Massachusetts will likely be affected as well. Any State providing state-funded services to private-school students in a manner that is not functionally identical to the way such services are provided to public-school services would, on Petitioners' theory, be subject to a claim that they are violating parents' expanded *Pierce* right. The result would be a marked disincentive for States to provide *any*

resources or services to private-school students, beyond what is otherwise already required by federal or state law.

And in turn, courts would be faced with difficult questions about how to apply this expanded conception of the *Pierce* right. Currently, the principle is straightforward: aside from obvious violations of the right—such as terminating public employees for sending their children to private school, *see* pages 17-18, above—the right only prohibits governments from barring the operation of private schools or mandating attendance at public schools. But if this Court were to adopt Petitioners' expanded notion of the *Pierce* right, lower courts would have to wrestle with whether other state action—including action intended to benefit private-school students, such as the Regulation—nonetheless imposes too much of a disincentive to attend private school, or even fails adequately to facilitate attendance at private school. It is difficult to predict at this juncture what that will mean for governments when they make decisions—long understood to be constitutional under *Pierce* and its progeny—to favor public education by funding it while providing lesser, or often no, funding to private schools. What seems certain, however, is that substantial new litigation will ensue, as parents, educators, governments, and courts struggle to determine what this expanded *Pierce* right entails. The Court need not, and should not, go down this path.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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