No. 25-1417

In the United States Court of Appeals for the First Circuit

ARIELLA HELLMAN, on their own behalf and as next friend of their child, **E.H.**; **DAVID HELLMAN**, on their own behalf and as next friend of their child, **E.H.**; **JOSH HARRISON** on their own behalf and as next friend of their child, **H.H.**; and **MIRIAM SEGURA-HARRISON**, on their own behalf and as next friend of their child, **H.H.**,

Plaintiffs-Appellants,

v.

MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION; **KATHERINE CRAVEN**, in the official capacity as Chair of the Board; **MATTHEW B. HILLS**, in the official capacity as Vice-Chair of the Board; **DR. ERICKA FISHER**, in the official capacity as a member of the Board; **ELA GARDINER**, in the official capacity as a member of the Board; **FARZANA MOHAMED,** in the official capacity as a member of the Board**; MICHAEL MORIARTY**, in the official capacity as a member of the Board; **DÁLIDA ROCHA**, in the official capacity as a member of the Board; **PAYMON ROUHANIFARD**, in the official capacity as a member of the Board; **MARY ANN STEWART**, in the official capacity as a member of the Board; **DR. PATRICK TUTWILER**, in the official capacity as a member of the Board; **DR. MARTIN WEST**, in the official capacity as a member of the Board; **RUSSELL D. JOHNSTON**, in the official capacity as Acting Secretary of the Board and Commissioner of DESE; **MASSACHUSETTS BOARD OF ELEMENTARY AND SECONDARY EDUCATION**,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

APPELLANTS' REPLY BRIEF

John C. La Liberte
PIONEER PUBLIC INTEREST LAW CENTER
185 Devonshire Street, 11th Floor
Boston, MA 02110
Tel: (617) 819-1010
Consulting Counsel

Tiffany Stichel
SCHLOSSBERG, LLC
35 Braintree Hill Park, Suite 401
Braintree, MA 02184
Tel: (781) 848-5028

David G. Hodges
Renée D. Flaherty
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
dhodges@ij.org

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Appellees are wrong about the statutory benefit 3

II. Parents plausibly alleged a Due Process claim 6

A. The regulation infringes the *Pierce* right 6

B. *Gary S.* does not control this case 12

C. Parents do not argue the statute confers a constitutional right 14

D. The unconstitutional conditions doctrine applies to unenumerated rights 15

E. Parents plausibly alleged the place restriction is a coercive condition 18

F. The regulation cannot survive rational basis review 21

III. Parents plausibly alleged an Equal Protection claim 24

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Choate,
469 U.S. 287 (1985).....11−12

Blackburn v. Snow,
771 F.2d 556 (1st Cir. 1985).....11, 15, 18

Bloom v. Sch. Comm. of Springfield,
379 N.E.2d 578 (Mass. 1978).....22

Brown v. Hot, Sexy & Safer Prods., Inc.,
68 F.3d 525 (1st Cir.1995).....8

Carson v. Makin,
596 U.S. 767 (2022).....11, 21

Commonwealth v. Sch. Comm. of Springfield,
417 N.E.2d 408 (Mass. 1981).....23

Dep't of State v. Muñoz,
602 U.S. 899 (2024).....9, 10

Dunn v. Blumstein,
405 U.S. 330 (1972).....10, 20

Espinoza v. Montana Dept. of Revenue,
591 U.S. 487 (2020).....10

Foote v. Ludlow Sch. Comm.,
128 F.4th 336 (1st Cir. 2025).....7, 8

Frost v. R.R. Comm'n,
271 U.S. 583 (1926).....16, 17, 18

Garrity v. New Jersey,
385 U.S. 493 (1967).....17

Gary S. v. Manchester Sch. Dist.,
374 F.3d 15 (1st Cir. 2004) 2, 6, 12, 13

Hobbie v. Unemployment Appeals Comm'n of Fla.,
480 U.S. 136 (1987)..... 12–13

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013).....16

Mem'l Hosp. v. Maricopa Cnty.,
415 U.S. 250 (1974).....11

Mitchell v. Helms,
530 U.S. 793 (2000)..... 22–23

Nethersole v. Bulger,
287 F.3d 15 (1st Cir. 2002) 19

Norwood v. Harrison,
43 U.S. 455 (1973).....22

O'Connor v. Pierson,
426 F.3d 187 (2d Cir. 2005).....17

Obergefell v. Hodges,
576 U.S. 644 (2015).....7

Parents for Privacy v. Barr,
949 F.3d 1210 (9th Cir. 2020).....15

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984).....6

Perry v. Sindermann,
408 U.S. 593 (1972).....16, 17

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925).....*passim*

Planned Parenthood Ass'n of Utah v. Herbert,
828 F.3d 1245 (10th Cir. 2016).....17

R.S.W.W., Inc. v. City of Keego Harbor,
397 F.3d 427 (6th Cir. 2005).....17

Regan v. Taxation with Representation of Washington,
461 U.S. 540 (1983).....26

Rodriguez-Cuervos v. Wal-Mart Stores, Inc.,
181 F.3d 15 (1st Cir. 1999) 24, 25

Saenz v. Roe,
526 U.S. 489 (1999).....16

Sherbert v. Verner,
374 U.S. 398 (1963)..... 10, 12−13, 20

Thomas v. Rev. Bd. of the Indiana Emp. Sec. Div.,
450 U.S. 707 (1981)..... 12−13

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017).....20, 23

Washington v. Glucksberg,
521 U.S. 702 (1997)..... 7−10, 18

Wisconsin v. Yoder,
406 U.S. 205 (1972).....8

Wolman v. Walter,
433 U.S. 229 (1977).....22

Zobel v. Williams,
457 U.S. 55 (1982).....11

STATUTES

M.G.L. c. 71B, § 1 .....*passim*

M.G.L. c. 71B, § 2 5

M.G.L. c. 71B, § 3 .....1, 3, 4, 13, 23, 25

RULES AND REGULATIONS

603 CMR § 28.03(1)(e).....8

603 CMR § 28.03(1)(e)(3).....1, 18

603 CMR § 28.03(e)(4).....13

OTHER AUTHORITIES

1972 Mass. Acts 692 1

INTRODUCTION

In their very first sentence, Appellees introduce an error that they rely upon throughout their brief. Appellees claim the regulation challenged in this case "authorizes the provision of special-education services to children whose parents choose to place them at a private school." Resp. 1, 5, 8. But it is not Appellees' regulation that authorizes the services. It is a Massachusetts statute—not the regulation—that entitles ***all*** children with special needs to special education services, "to the maximum extent appropriate," in their "regular educational environment" unless provision of the services is impracticable. M.G.L. c. 71B, §§ 1, 3.[1] The regulation, by contrast, hollows out that guarantee with a "public or neutral" place restriction for disabled children whose parents enrolled them in private school. 603 CMR § 28.03(1)(e)(3). Unlike every other beneficiary of the entitlement, these children are forbidden from receiving services in their classroom, their schools, and even on their school grounds, for one reason: their parents exercised their constitutional right, recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to enroll them in private school.

[1] The Massachusetts legislature enacted "a flexible and uniform system of special education program opportunities for ***all*** children requiring special education." 1972 Mass. Acts 692, https://tinyurl.com/4eu3bn6y (emphasis added). Notwithstanding this language, Appellees later restricted and diminished the entitlement solely for parentally placed private-school students. Resp. Add. 84.

Parents plausibly alleged the regulation's "place" restriction turns on the exercise of this fundamental right and nothing else. Appellees try to save the regulation by analogizing it to the Individuals with Disabilities in Education Act's ("IDEA") differential provision of special education services to public- and private-school students, which this Court upheld in *Gary S. v. Manchester School District*. 374 F.3d 15 (1st Cir. 2004). But IDEA is different from Massachusetts law. IDEA, a federal law, entitles only public-school students to special education services. Op. Br. 6, 24. By contrast, Massachusetts statutorily entitles public- *and* private-school students to the *same* guarantee: "a special education program to meet [their] needs." *Id*. at 5. Massachusetts thus created *one* benefit—on the same terms, with the same services—for public- and private-school students alike. And it was this exact distinction—between services provided to all and services provided to some—that this Court emphasized in *Gary S.* when it held IDEA's guarantee of services only for public-school students to be constitutional. That is, providing public benefits *solely* to public-school students is an entirely different matter than when "public benefits, *available to all*," are denied or reduced when a person exercises a right. 374 F.3d at 19 (emphasis in original). This case, unlike *Gary S.*, concerns services that *are* "available to all." Appellees' attempt to transpose IDEA onto Massachusetts law is thus unavailing.

With Appellees' distortions cleared away, the path for this Court is clear. It should reverse the district court's dismissal of this case. To do so is not to "break new ground," as Appellees insist. Resp. 26. Instead, it is to stand on firm legal footing and affirm that when government extends a benefit to all with one hand, it cannot, with the other, diminish the benefit solely for those who exercise a constitutional right.

ARGUMENT

This argument proceeds in three parts. In Part I, Parents describe the statutory benefit to which they are entitled. In Parts II and III, Parents demonstrate they plausibly alleged the "place" restriction turns on the *Pierce* right under, respectively, the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[2]

I. Appellees are wrong about the statutory benefit.

Before getting into the constitutional arguments, it is important to address Appellees' and the court's mischaracterization of the benefit provided by the statute, a premise upon which Appellees' entire brief rests. The statute—not the regulation—entitles all children to services in the "least restrictive environment," which is the child's "regular educational environment." M.G.L. c. 71B, §§ 1, 3. The services must be provided in that environment, "to the maximum extent appropriate," unless it is

[2] Parents addressed their Privileges or Immunities Clause argument elsewhere. Op. Br. 53-54.

impracticable due to the "nature or severity" of the disability. *Id.* § 1. Yet Appellees redefine a child's "regular educational environment" to mean "a classroom with children who are not disabled," totally unrelated to where a child goes to school every day. Resp. 44 n.19. This matters because Appellees contend that Parents seek something the benefit does not provide as its default: services in their schools. *Id.*

As shown above, the statute's plain text refutes this reading. The statute then reinforces the most natural reading of a child's "regular educational environment"—*i.e.*, the place where she normally attends school—in at least two ways. First, before a child receives *any* services, the statute mandates that "every child shall be presumed to be appropriately assigned to a *regular* education program and presumed not to be a school age child with a disability or a school age child requiring special education." M.G.L. c. 71B, § 3 (emphasis added). Thus, even before the government determines a child needs special education, the statute tells us the place she is being educated is the place providing her "regular education." Second, once a child is found to be disabled, the statute allows the child to be removed from that environment "only" "when the nature or severity" of the child's disability makes education in that environment impracticable. *Id.* § 1. Therefore, the statute provides "only" one circumstance in which a child "may" be removed from her regular educational environment and receive "special classes" or "separate schooling." *Id.*

Of course, this does not mean the statute requires *all* services be provided at school—for example, it doesn't mandate in-school services "when the nature or severity" of a child's disability necessitates removal from school. And Parents don't claim otherwise. They merely argue that the statutory default is for a child to receive services in school, and preferably, in class. *See id.* § 2 (detailing the many ways that services can be tailored for recipients, from home instruction to classroom modifications to long-term residential care). Appellees' alternative reading of the statute—that a child's regular educational environment is any Massachusetts classroom so long as it's not in her private school—is nonsensical. It would mean that for Parents' children, the only way they could ever receive services in their regular educational environment would be by removing them from their schools and placing them in regular classes in public schools—*i.e.*, by forcing them to become *public* school students. All to say, Appellees' insistence that the statute allows *some* children[3] to be categorically excluded from services—not because of the "nature or severity" of their disabilities, which the statute references, but due to where their parents send them to school, which the statute does not—is risible.

[3] It is only children whose parents enrolled them in private school who cannot receive services in their schools. Public-school students and students whom the government placed in private schools—including the same schools where parents place their children—can receive services in their schools. *See* Op. Br. 6-8.

Finally, Appellees say correcting their mischaracterization of the benefit is precluded by the Eleventh Amendment. Resp. 44 n.19. This is erroneous. That amendment bars a party from suing a state in federal court for violating state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (holding a state-law claim brought into federal court under pendent jurisdiction violates the Eleventh Amendment). It does not ban Parents from arguing that a court misconstrued state law, particularly since Parents do not allege they are entitled to relief because the regulation violates a statute or that this Court needs to order the state to "conform" with state law. *Id.*

II. Parents plausibly alleged a Due Process claim.

Parents plausibly alleged the regulation violates the Due Process Clause because it diminishes their children's statutory entitlement to special education services for no reason other than their exercise of their *Pierce* right. Op. Br. 17-39. Below, Parents show Appellees' responses to these allegations—the regulation doesn't infringe a fundamental right, *Gary S.* controls, the statute doesn't confer a fundamental right, the unconstitutional conditions doctrine is inapplicable, and the regulation satisfies rational basis—are unavailing.

A. The regulation infringes the *Pierce* right.

Appellees' argument that the regulation "neither implicates, nor violates, a 'fundamental right'" is incorrect. Resp. 21. Appellees contend Parents seek to

vindicate a right to special education services and that they must establish that right according to the Supreme Court's test in *Washington v. Glucksberg*, 521 U.S. 702 (1997). But *Glucksberg* only applies in cases where a court is asked to "break new ground" in the field of constitutional rights, not cases involving well-established rights. *Id.* at 720.

This case concerns such a right. As Appellees begrudgingly concede, parents have a fundamental right to direct the education of their children, including by sending them to private school. Resp. 21. But Appellees then assert this case does not involve the *Pierce* right, but a hyper-specific "right to state-funded special-education services at a location of one's choosing." *Id.* at 30. This assertion clashes with this Court's recent ruling that parental rights cases should not be defined "with microscopic granularity" but by whether they come "within the broader, well-established parental right to direct the upbringing of one's child." *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 348 (1st Cir. 2025). Thus, *Meyer* "did not define the parents' asserted liberty interest as the right to allow their child to learn German before the eighth grade." *Id.* "Nor did *Pierce* describe the parental interest at stake as the right to send one's child to religious school." *Id.*[4] Instead, the cases stand for

[4] The Supreme Court employs the same methodology. *See*, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (explaining while it was appropriate to define the *Glucksberg* right "in a most circumscribed manner, … it is inconsistent with the approach this Court has used in discussing other fundamental rights … .").

something more expansive: the "liberty of parents and guardians to direct the upbringing and education of [their] children." *Pierce*, 268 U.S. at 534-35.

So, Appellees are wrong to claim this case involves a new right rather than the *Pierce* right.[5] They are also mistaken in arguing that the place restriction does not "implicate [that] fundamental right." *Glucksberg*, 521 U.S. at 722. To recap, the statute guarantees *all* children with special needs to services in their "regular educational environment" "to the maximum extent appropriate" unless the "nature or severity" of their disabilities render the provision of services impracticable. M.G.L. c. 71B, § 1. Yet the place restriction subverts that guarantee by barring disabled children from receiving services in their schools because their parents exercise their "rights" to educate them at private school. 603 CMR 28.03(1)(e). This is discrimination based on a right. It is no different from excluding children from

[5] Appellees are also wrong that "the protocol challenged in *Foote* was far closer to the core of parents' right to direct the upbringing and education of their children" than the one here. Resp. 31. *Foote* took place in a public school, and courts have long held that public education is unique, and parental rights are different, even limited, in public school compared to private school. *See Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State," yet even this "paramount responsibility" was "made to yield" in *Pierce*.); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) (noting that the rights of parents are "fundamentally different" and less expansive in a public school compared to a private one). If there is any doubt that the "core" of parents' rights is "closer" here than in *Foote*, it is dispelled by the fact that this case doesn't take place in public school.

services in their schools if their parents exercised their right to marry, to vote, or to procreate.

Appellees justify their discrimination based on the *Pierce* right by citing two cases for the apparent proposition that there is no constitutional problem with restrictions based on the exercise of a right. Resp. 27-29. However, their efforts are unavailing because those cases concerned the *scope* of well-established rights, not restrictions based on the exercise of a right. In *Glucksberg*, the Supreme Court held that a right to "refuse lifesaving hydration and nutrition" did not cover a "a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 723. In *Department of State v. Muñoz*, the Court ruled the "right to marriage" did not extend to a right for one's nonresident spouse to receive a resident visa. 602 U.S. 899, 910 (2024). Here, by contrast, the scope of the right is clear: It is for Parents to send their children to a private school. *See Pierce*, 268 U.S. at 535 (holding parents "have the right, coupled with the high duty," to educate their children, including by sending them to private school). The problem is that Appellees condition the benefit on the surrender of that right. Thus, the analogy to *Glucksberg* and *Muñoz* is mistaken. They would only apply here if they held that even though a person was statutorily entitled to a benefit, the right to marry or refuse medical treatment was not violated by a regulation that diminished the full enjoyment of the benefit solely

to those who exercised that right. But those decisions do not hold that and are therefore inapposite.

Having failed to analogize this case to *Glucksberg* and *Muñoz*, Appellees then turn to the notion, undisputed by Parents, that government has no obligation to subsidize a right.[6] Resp. 30-31. But they then do something curious. Appellees cite the first part of the Supreme Court's admonition in *Espinoza v. Montana Department of Revenue*—"[a] State need not subsidize private education"—while relegating the second part to a footnote: "But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 591 U.S. 464, 487 (2020).[7]

Appellees' choice is telling. After all, Parents do not argue Massachusetts *had* to create this benefit or even extend it to disabled private-school students in the first place. They simply argue that once it created the benefit, it was subject to the

[6] Appellees cite several cases for this principle. None apply here. *See* Op. Br. 22-23, 27-29.

[7] Appellees fault Parents for sometimes invoking cases involving Free Exercise rights. Resp. 38-39. Parents use those cases to demonstrate a general principle: the state may not discriminate based on exercise of a right. Longstanding caselaw holds that a law that imposes "a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s]" the exercise of a right and is subject to strict scrutiny. *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). This is a principle the Supreme Court has applied to a variety of rights, including the right to travel, speech, and free exercise, and the right against self-incrimination. Op. Br. 20. There is no reason—certainly none that Appellees proffer—why it would be permissible for government to "penalize" the exercise of some fundamental rights, *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972), but not others.

"principles governing any such public benefit program." *Carson v. Makin*, 596 U.S. 767, 785 (2022). Thus, just as no one made Alaska share its oil wealth with its residents, *Zobel v. Williams*, 457 U.S. 55 (1982), or Arizona provide its residents with medical benefits, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974), or Maine establish a voucher system for rural residents, no one "forced" Massachusetts to provide a benefit for all disabled children. *Carson*, 596 U.S. at 785. But once it did, it could not "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because" they exercised a constitutional right, *id.* at 779, including the *Pierce* right.

Finally, it should not escape this Court's notice that if Appellees' unsound framing of the *Pierce* right were adopted, it would endanger other rights. By casting the denial or diminishment of an entitlement for exercising one constitutional right as a nonexistent right to a subsidy, the government could "manipulate[]" other constitutional rights "out of existence." *Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985) (citation omitted). But there is no basis for such an "inconceivable" rule of law, *id.*, and the Supreme Court has repeatedly rejected efforts by states to redefine benefits in this manner. *See, e.g.*, *Carson*, 596 U.S. at 784 (holding government may not "recast a condition" for providing an education benefit and thereby reduce the First Amendment "to a simple semantic exercise" (citation omitted)); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (explaining a "benefit … cannot be defined in a

way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled"). In short, there is a right at stake here—the well-established right of parents to send their children to private school.

B. *Gary S.* does not control this case.

Appellees' next argument—that *Gary S.* controls—is likewise unpersuasive. *Gary S.* concerned IDEA and under that law, public-school students are entitled to special education services but parentally placed private-school students are not. Op. Br. 6, 24. Rather, IDEA requires local education agencies to spend a proportionate amount of federal funds on the *group* of parentally placed children without providing any child with an individual entitlement. *Id.* Thus, while a dyslexic public-school student residing in the district is entitled to services for his disability, a dyslexic private-school student from the same district is not.

It was this system—entitling public, but not private, students to services—that parent-plaintiffs challenged in *Gary S.* In rejecting the challenge, this Court explained that because private-school students did not have a statutory entitlement to services under IDEA, they were "not being deprived of a *generally available* public benefit." 374 F.3d at 19-20 (emphasis in original). For that reason, they could have no "legitimate expectancy" that they would "receive the same federal or state financial benefits" as public-school students. *Id.* To illustrate the point, this Court contrasted the "state unemployment benefits [unconstitutionally] denied in *Hobbie,*

Thomas, Sherbert," which "were public benefits, available to all," with the benefits that Congress conferred under IDEA, which were exclusively for public-school students. Since IDEA never provided private-school students with a "cognizable entitlement" to special education services, this Court held, the parents' rights were not burdened by their absence. *Id.*

The situation here is different. In contrast to IDEA, Massachusetts law—not the regulation—provides "public benefits, *available to all*." *Id.* It entitles ***all*** children with special needs to special education services, "to the maximum extent appropriate," in their "regular educational environment" unless provision of the services there is impracticable. M.G.L. c. 71B, §§ 1, 3.

Yet despite this clear distinction, Appellees liken IDEA's differential provision of services to the entitlement here by claiming that services for public- and private-school students under Massachusetts law are not "identical" but are merely "comparable." Resp. 38. Appellees' argument is not rooted in the statute, which says nothing about differential services or entitlements. Instead, it rests entirely on a regulation Appellees promulgated mandating that private-school services be "comparable in quality, scope, and opportunity for participation to that provided to public school students with needs of equal importance." 603 CMR 28.03(e)(4).

This argument is unavailing. To start, an agency regulation cannot redefine a statutory benefit. Op. Br. 38. Moreover, the word "comparable" does not mean "less

than" or "meaningfully different." Read in context, "comparable" is clearly meant to ensure that services for private-school students are the same quality as those of public-school students. Thus, while a dyslexic private-school student might not have the same therapist as a public-school student, no one would conclude the services weren't "comparable." The therapists may be different, but the quality of their services should be the same. Further, the statute provides that the default is for children to be educated, "to the maximum extent possible," in their "regular educational environment." M.G.L. c. 71B, § 1. Yet if "comparable" means what Appellees claim, private-school students will *never* receive services in that environment even though public-school students will almost always receive services there.[8] That is not "comparable."

C. Parents do not argue the statute confers a constitutional right.

Appellees also advance the confused claim that "a state-law provision, without more, cannot create a fundamental right for *substantive* due process purposes," such as "a fundamental right to state-funded special-education services." Resp. 36-37 (emphasis in original). Again, Parents do not allege they have a "fundamental" right to *any* services. Rather, they assert that because their children are statutorily entitled to services in their "regular educational environment,"

[8] *See supra* p. 5 (explaining the statute does not require students to *only* receive services in their schools).

Appellees may not then diminish their services—here, by barring them, and them alone, from *ever* receiving services in their schools, *i.e.*, their regular educational environment—because Parents exercise a fundamental right.

Parents' contention is thus entirely distinct from Appellees' strawman argument that a statutory right is not the same as a constitutional right. And it is distinct from the hodgepodge of cases Appellees offer to support their argument, especially since none concern a statutory entitlement "available to all" that a regulation diminishes solely for those who exercise a constitutional right. *See, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1232 (9th Cir. 2020) (rejecting argument that the Due Process Clause provides a fundamental right to determine bathroom policies of public schools). Again, Parents do not claim a "fundamental right to state-funded special-education services." All they want is for their children's benefits, *to which they are statutorily entitled*, not to be denied or diminished when Parents exercise their *Pierce* right.

D. The unconstitutional conditions doctrine applies to unenumerated rights.

Appellees' next argument—that the unconstitutional conditions doctrine does not apply to unenumerated rights—is unavailing. Resp. 39-44.

To start, "it has long been settled that government may not condition access to even a gratuitous benefit or privilege it bestows upon the sacrifice of a constitutional right." *Blackburn*, 771 F.2d at 568. If a state could condition access, it

could induce a person's "surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold," and the Constitution's "guaranties … may thus be manipulated out of existence." *Frost v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926). For that reason, "even though a person has no 'right' to a valuable government benefit," it is nonetheless "impermissible" for the government to "deny a benefit to a person because of his constitutionally protected" rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

This language is unequivocal. Nonetheless, Appellees contend that the Supreme Court held in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 604-06 (2013), that the doctrine "only" applies to enumerated rights. Resp. 40. But that is not what the Court said. Instead, it noted the doctrine "forbids burdening the Constitution's enumerated rights"—not that it "only" forbids burdening those rights.[9] To that end, the Court has *repeatedly* applied the doctrine with respect to the unenumerated right to travel,[10] along with other unenumerated

[9] Appellees are correct that the Court cited a right-to-travel case after stating that the doctrine applies to enumerated rights. However, the Court does not describe the right as enumerated or explain why, if it were, the Court previously described it as unenumerated. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("The word 'travel' is not found in the text of the Constitution" even though the "'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.").

[10] Op. Br. 20.

rights.[11] Appellees also cite no cases for the proposition that courts deny people protection from unconstitutional conditions for some rights, including the *Pierce* right. And that's no surprise, as courts invoke the doctrine in cases involving unenumerated rights. *See, e.g.*, *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005) ("The doctrine should equally apply to prohibit the government from conditioning benefits on a citizen's agreement to surrender … a liberty or property interest protected under the Fourteenth Amendment."); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1263 (10th Cir. 2016) (abortion); *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (privacy). Nor do Appellees cite cases (because none exist) holding the Constitution permits government to "produce a result which [it] could not command directly" so long as it only does so with certain rights. *Perry*, 408 U.S. at 597. And indeed, such a rule of law would be perverse. Imagine a law conditioned a benefit on couples not engaging in intimate conduct (right to privacy) and not criticizing the law (Free Speech right). Could the government condition one right but not the other?

In sum, Appellees' argument clashes with a century of precedent warning, "If the state may compel the surrender of one constitutional right as a condition of its

[11] *See, e.g.*, *Frost*, 271 U.S. at 592-93 (unenumerated right to use public highways); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("[A] State may not condition by the exaction of a price" the unenumerated rights to resort to federal courts and engage in interstate commerce.).

favor, it may, in like manner, compel a surrender of all." *Blackburn*, 771 F.2d at 568 (citation omitted). Consequently, Appellees' contention that government may exact a price on a right—particularly one "specially protected by the Due Process Clause," *Glucksberg*, 521 U.S. at 720—is "inconceivable." *Frost*, 271 U.S. at 594.

E. Parents plausibly alleged the place restriction is a coercive condition.

Next, Appellees contend that even if the regulation's place restriction is coercive, it isn't coercive *enough* to be an unconstitutional condition. Resp. 41. Essentially, Appellees argue it's fine for the state to twist someone's arm to surrender their constitutional rights so long as it doesn't twist their arm off. Given the facts Parents alleged in their complaint, this is a strange charge. For example, H.H.'s IEP states he needs occupational therapies and psychological and developmental services. App. 26. To help H.H. get up to speed—*i.e.*, to ensure he does not have trouble getting dressed or acting appropriately in school—his IEP recommends he receive four separate therapies, totaling over nine hours of special education services each week. *Id.*

Yet under the "place" restriction, H.H. cannot receive services in his classes, his school, or even on his school grounds. Instead, the only place H.H. can get services is in a "public or neutral site." 603 CMR 28.03(1)(e)(3). However, H.H.'s parents—like E.H.'s parents—work full-time, so carting him to and from school multiple times per day is not an option. App. 13-14, 23, 27. Moreover, their children

are not entitled to transportation services to the site where the services are provided. *Id.* 24, 28.[12] But even if they were entitled, the time spent traveling to and from their schools is disruptive, stigmatizes children in front of their peers, removes them from and therefore diminishes the schooling that their parents have a constitutional right to provide, and undermines services meant to relieve the children's anxiety, frustration, and need to be "constantly" redirected. *Id.* 22-29.

Appellees' response to the struggles faced by these disabled children and their parents due to their regulation is to minimize them. Appellees state that Parents can "send their children for a few hours per week to a public school" if the services are so important to them. Resp. 42. Appellees then note that because a third-party stepped into the gap and provided some services that Appellees won't, the children aren't really injured at all. *Id.*[13] And it concludes, "[m]ost important[ly]," that the regulation can't be *that* bad because between their children getting services or Parents exercising their *Pierce* right, Parents chose the latter. *Id.* at 43.

All this is remarkably wrong and clashes with the allegations in the complaint, which must be taken as true. *Nethersole*, 287 F.3d at 18. To start, it is "irrelevant"

[12] Appellees imply Parents' children may be entitled to transportation subsidies to take them to locations that Appellees identify, and intimate that the cost of services they require are fully covered by private and federal funds. Resp. 43. None of their assertions are true; none are in the record; and since this is a 12(b)(6) motion, none can be litigated right now. *Nethersole v. Bulger*, 287 F.3d 15, 18 (1st Cir. 2002).

[13] *Id.*

whether Parents continue to exercise a right despite a condition being placed upon it. *See Dunn*, 405 U.S. at 340-41 (explaining that "none of the litigants" in a right-to-travel case had been deterred from exercising their rights). Here, Parents are being put to the choice of obtaining a benefit or exercising their rights. Thus, the argument that there is no injury because Parents chose to exercise their rights and thereby forgo the benefit misses the point: When a person's enjoyment of her rights comes "at the cost of automatic and absolute exclusion from the benefits of a public program for which [she is] otherwise fully qualified," she is being coerced not to exercise them. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017).

Further, Appellees' focus on the severity of the coercion is misplaced. Resp. 40. The caselaw is not concerned with whether conditions on a right amount to "outright prohibition[s]" or "indirect coercion or penalties." *Trinity Lutheran*, 582 U.S. at 463. The relevant inquiry is instead whether a condition demonstrates a "*tendency* to inhibit constitutionally protected activity," not the degree to which it does. *See Sherbert v. Verner*, 374 U.S. 398, 404 n.6 (1963) (emphasis added); *Dunn*, 405 U.S. at 341 (explaining it is "irrelevant" whether a right is "merely penalized," "indirectly denied," or "absolutely denied").

Applied here, Appellees could not outright bar Parents from sending their children to private school. But if they did something more subtle, they could achieve the same result. And that is what the regulation threatens to do: It "specifically

carve[s] out" *some* disabled children from fully accessing a "state benefit program" that supports *all* disabled children. *Carson*, 596 U.S. at 780. Appellees then dangle this essential benefit before Parents and tell them that their disabled children can fully access the benefit on one condition: that Parents not exercise their *Pierce* right. The regulation thus forces Parents to choose between the benefit and their *Pierce* right. That is plainly an unconstitutional condition.

F. The regulation cannot survive rational basis review.

Appellees' next argument—that the regulation survives rational basis review because it complies with the state constitution—doesn't pass muster. Resp. 46. As a preliminary matter, the proper standard is strict scrutiny, and the regulation fails it. Op. Br. 31-36. But even if rational basis applied, when a state constitutional provision (or regulation effectuating it) infringes federal law, as here, the argument that "compliance with the constitution is reasonable" is irrational, and Appellees don't even bother arguing otherwise.

Instead, Appellees cite decisions from the Massachusetts Supreme Judicial Court ("SJC") supposedly holding that providing, for example, psychological services to *students* is an impermissible form of financial aid to *schools* under the Massachusetts Constitution. To call this argument a stretch is generous. Moreover, it is refuted by those very decisions. For example, in interpreting the Massachusetts Anti-Aid Clause to bar a textbook loan program *solely* for private-school students,

the SJC cautioned that its decision "does not imply any decision that sundry general benefits not entering into the educational process at elementary and secondary schools are also offensive to the Constitution." *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 584 (Mass. 1978). To that end, the SJC likened school busing provided to public- *and* private-school students, which complied with the Clause, to universal programs providing "subsidized school meals" and the "furnishing of health services." *Id.* at 585. Those services were "comparable" because "the 'aid' involved is quite remote," the child "individually 'consumes'" the aid, and the aid has "no role in the teaching function, the school's essential enterprise." *Id.* So too here: Any "aid" provided to a private school by a student accessing essential services is remote, the child entirely "consumes" the aid, and the aid is not related to the school's "essential enterprise" as an educational provider.[14]

Also relevant, the SJC in a footnote suggested that requiring services to be provided in a "neutral" location was constitutional insofar as it concerned *religious* schools—not *all* private schools. *Id.* at 584 n.21. Thus, to the extent "neutrality" was valid at all, it only applied to services provided at religious private schools. Of course, the cases the SJC cited for that religious "neutrality" proposition have been overruled, *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*,

[14] *Norwood v. Harrison*, 43 U.S. 455 (1973), is inapplicable for similar reasons. *See also* Op. Br. 26-28.

530 U.S. 793 (2000), or are no longer good law because discriminating against religious institutions is "odious to our Constitution." *Trinity Lutheran*, 582 U.S. at 467. Consequently, while there were once *federal* antiestablishment grounds to bar students from receiving services at *religious* private schools, there is no basis today to conclude that banning students from receiving services in *all* private schools rationally furthers the state constitution.

Appellees' reliance on another case fares no better. The SJC's "narrow" focus in *Commonwealth v. School Committee of Springfield* was whether a law violated the Clause because it allowed school committees to "contract" with private schools to provide services that public schools could not. 417 N.E.2d 408, 415 (Mass. 1981). The SJC held the law did not infringe the Clause for a variety of reasons, including that its "purpose" was not "to aid private schools," or "deal *exclusively* with private school placements." *Id.* (emphasis added). Again, the same is true here. *See also* Op. Br. 37 (regarding IDEA). Moreover, to the extent the facts here and in *Springfield* differ, the ones here are *less* like the institutional aid to schools that the SJC upheld. Unlike *Springfield*, there is no contract here between school committees and private schools for the latter to provide services that the school committee cannot. Indeed, *no* private school need be a provider at all; aid can be provided directly to students at school through whatever means or providers the school committees deem appropriate. M.G.L. c. 71B, § 3.

All to say, it is irrational to permit private-school students placed by the government to get benefits in their schools while forbidding the same for private-school students placed by their parents. The "place" restriction does not advance the state's goal of not aiding private schools, and no case cited by Appellees shows otherwise.

III. Parents plausibly alleged an Equal Protection claim.

Parents plausibly alleged the regulation violates the Equal Protection Clause because it singles out a class of people—parents who exercise their fundamental *Pierce* right—and denies their disabled children a benefit on the same terms as those who are like them in every other relevant respect. Op. Br. 39-53. Appellees' response—the comparators are not similarly situated and Appellees' decision not to subsidize a right does not infringe a right—is inapt. Resp. 48-52.[15]

First, Parents plausibly alleged they are similarly situated to other beneficiaries. App. 29. To recap, Parents alleged their children are "subject to the same standards" as other disabled children. *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21 (1st Cir. 1999). That means, like all other children, they are statutorily entitled to "a special education program to meet their needs" that is

[15] Appellees also argue, "there is no indication that the Regulation is born out of animus toward private-school students." Resp. 48 n.22. But as explained earlier, a party need not show "discriminatory intent … when the equal protection claim is based on an overtly discriminatory classification," as it is here. Op. Br. 45.

provided in their "regular educational environment" "to the maximum extent appropriate." M.G.L. c. 71B, §§ 1, 3. The statute does not delineate, *in any way*, differential treatment for their children compared to other children, and because it doesn't, no "prudent person" would doubt they are "similarly situated in all material respects." *Rodriguez-Cuervos*, 181 F.3d at 21.

Undeterred, Appellees try to gin up differences between a child placed by her parents at a private school and one placed by the government at a private school by claiming the needs of the latter are "extremely complex," but there is no statutory basis for this claim. Resp. 52. There are a variety of reasons why a child may be placed in a private school or a public school different from her residential assignment, and there is no requirement that her needs be particularly challenging—only that her assigned public school cannot meet them. M.G.L. c. 71B, § 3. Thus, while the government's process for placing a child at a private school may differ from a parent's, it does not change the ultimate fact that both children are placed in private schools, that both are entitled to the same benefit under the relevant statutes, and that Appellees deny the benefit only to the child placed in a private school *by her parents*. *Id.* §§ 1, 3.[16]

[16] Appellees claim Parents argue there is a constitutional requirement that their children be treated the same as public-school students. Resp. 50-51. But Parents do not contend, for example, that if public-school students get free busing, private-school students must too. They merely argue that once the state extends a benefit to

Second, Appellees' invocation of *Regan v. Taxation with Representation of Washington* for the claim that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right" misses the mark. 461 U.S. 540, 549 (1983). In *Regan*, the Supreme Court held Congress's decision not to subsidize an organization's lobbying neither infringed nor regulated the organization's First Amendment rights. When Congress "refused to pay for the lobbying," it did not follow that because lobbying is a constitutional right, "the Court must grant a benefit." *Id.* at 545. In other words, unlike cases where government "den[ied] a[n existing] benefit to a person because he exercises a constitutional right," *Regan* concerned the government's decision not to provide a benefit in the first place. *Id.* Here, the Massachusetts legislature *chose* to provide services for all disabled children, only for Appellees to restrict those services for the class of children whose parents exercised their *Pierce* right. There is a world of difference between asserting a right to a *nonexistent* benefit, as in *Regan*, and arguing, as Parents do, that an *existing* benefit to which one is statutorily entitled should not be denied because one belongs to a class of people who exercise a constitutional right. *Regan* does not apply here.

---

all, it may not diminish the benefit to them because they exercised a right. Appellees' characterization is a red herring.

CONCLUSION

For the reasons above, and in Parents' opening brief, this Court should reverse.

Dated: September 19, 2025

Respectfully submitted,

/s/ David G. Hodges
David G. Hodges
Renée D. Flaherty
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
dhodges@ij.org; rflaherty@ij.org

Tiffany Stichel
SCHLOSSBERG, LLC
35 Braintree Hill Park, Suite 401
Braintree, MA 02184
Tel: (781) 848-5028
tstichel@schlossbergllc.com

John C. La Liberte
PIONEER NEW ENGLAND LEGAL FOUNDATION
185 Devonshire Street, 11th Floor
Boston, MA 02110
Tel: (617) 819-1010
john.laliberte@pioneerlegal.org
Consulting Counsel

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 23(a)(7)(B)(ii) because this brief contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: September 19, 2025

/s/ David G. Hodges
David G. Hodges

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 2025, a copy of Appellants' Reply Brief was sent via CM/ECF to all counsel of record.

/s/ David G. Hodges
David G. Hodges