

No. 26-97

IN THE
Supreme Court of the United States

ARIELLA HELLMAN, *et al.*,
Petitioners,

v.

KATHERINE CRAVEN, *et al.*,
Respondents.

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

**BRIEF *AMICUS CURIAE* OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The New Civil Liberties Alliance (“NCLA”) is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state’s depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation’s elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This

¹ No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* S. Ct. R. 37.6. Pursuant to S. Ct. R. 37.2, counsel for both parties were notified of NCLA’s intent to file this amicus brief on August 7, 2026.

unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

The government's increasingly common efforts to evade the Constitution's explicit and structural constraints through conditions on government privileges and benefits cause NCLA particular concern. This form of governance, pervasive at both the federal and state level, substantially degrades both Americans' freedoms and the constitutional limitations on governments' ability to exert power. Through conditions attached to purported voluntary transactions, both the federal and state governments have created new pathways to exercise power that often conflict with—or evade—the Constitution's limits and guarantees of liberty. And, too often, courts have been complicit in the exercise, largely due to Americans supposedly “consenting” to violations of their constitutional rights.

The decision below illustrates the problem. While the First Circuit properly held that the parental right identified in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), is fundamental, it then enabled governments to attack the right indirectly by holding that the unconstitutional conditions doctrine does not apply. Now in the First Circuit, unlike other circuits, the government's ransoming of constitutional rights violates the Constitution *only* in the context of the First Amendment. *Hellman v. Mass. Dep't of Elementary & Secondary Educ.*, 171 F.4th 69, 83–84 (1st Cir. 2026). That holding is wrong and threatens the Constitution's limits on power and protections for individual freedom that NCLA has—for years—litigated to vindicate. Accordingly, NCLA has a strong, ongoing interest in this Court's granting

certiorari, reversing the First Circuit's decision, and correcting the lower court's fraught misapplication of the unconstitutional conditions doctrine.

SUMMARY OF THE ARGUMENT

“It is notorious that judicial decisions on conditions are poorly developed and often simply wrong.” Philip Hamburger, *Purchasing Submission* 15 (2021). The decision below demonstrates this point so acutely that it creates a need for this Court to clarify that the Constitution prohibits indirect coercion against, and penalties on, rights beyond those enumerated in the First Amendment.

The Constitution envisions that Congress and the states will generally regulate through enacting binding statutes. But today, governments often assert control through transactions by attaching conditions to the hundreds of billions of dollars they spend granting benefits and to the administration of valuable privileges. Those conditions frequently evade the substantive protections provided by the Constitution.

This situation, when misperceived by courts, allows the government to ignore numerous constitutional rights through purportedly voluntary arrangements with American citizens and entities. But it is important to recognize that more than specific constitutional rights are at risk. Left unchecked, conditions also threaten the Constitution’s structural guarantees like federalism and separation of powers, guarantees necessary to the preservation of Americans’ liberty.

This Court, periodically recognizing at least the most direct threats posed by governmental conditions, has held multiple times that the government is “without power to impose an unconstitutional requirement as a condition of

granting a privilege.” *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 598 (1926). Those holdings, collectively known as the unconstitutional conditions doctrine, prevent government from pressuring Americans into forfeiting constitutional rights in exchange for government privileges or benefits. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). In the doctrine’s absence, our Constitution’s “guaranties, so carefully safeguarded against direct assault” would be “open to destruction” by indirect government action. *Frost*, 271 U.S. at 593.

The First Circuit, however, improperly cabined the rationale underlying the unconstitutional conditions doctrine to the Free Exercise Clause and consequently placed at risk several constitutional guarantees. The First Circuit held that the unconstitutional conditions doctrine does not apply to the parents’ educational decisions even though “the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Despite recognizing the fundamental nature of this parental right, the First Circuit oddly reasoned that “indirect coercion or penalties” on the exercise of non-First Amendment rights are permissible. *Hellman*, 171 F.4th at 83–84 (“a distinct, First Amendment principle that prohibits the state from imposing even indirect coercion or penalties on religious exercise ... does not apply to the parental right.”).

That view does not comport with this Court’s unconstitutional conditions decisions, and it is an extremely dangerous notion. This Court has never

held that the unconstitutional conditions doctrine is limited to the First Amendment. Indeed, it has explicitly held the opposite. *Koontz*, 570 U.S. at 604. The First Circuit nevertheless ignored this authority and failed to identify *any* support for its holding that the unconstitutional conditions doctrine applies only to the First Amendment. The opinion seemingly authorizes unlimited government incursions on parental rights unless the government directly bans private schooling. The decision also invites indirect, but no less effective, violation of numerous other constitutional guarantees.

This Court should therefore grant review. The First Circuit relied on the lack of direct Supreme Court precedent to limit (and ignore) this Court's unconstitutional conditions doctrine. Yet five circuit courts have already applied this Court's reasoning to hold that fundamental parental rights cannot be subject to such infringements. Just as importantly, whether parental (and other) rights are impervious to indirect and incremental abridgements is an extremely significant question. Moreover, there would be substantial costs to leaving the decision below intact. The opinion would surely be invoked by governments to burden and evade *any* constitutional right or guarantee not already explicitly within the scope of the unconstitutional conditions doctrine.

ARGUMENT

I. GOVERNMENT CANNOT EVADE THE CONSTITUTION THROUGH CONDITIONS ON BENEFITS AND PRIVILEGES

A. Allowing Governments to Purchase the Surrender of Rights Threatens Multiple Constitutional Principles

The United States came into being due to the Founders' willingness to endure the hardships of war and establish a new nation in support of their belief that humans are "endowed ... with certain unalienable Rights," and that the purpose of a legitimate government is "to secure these rights." The Declaration of Independence para. 2 (U.S. 1776). Consequently, the Constitution they authored designed the branches and established the limits of government to protect individual rights and liberties.

The Constitution "envision[s] that Congress," and the states, will typically "regulate by enacting binding statutes." Hamburger, *supra*, at 5. But increasingly, rather than regulating through these means, Congress and executive agencies control people's conduct through conditions by pressuring Americans, the several states, and other entities into surrendering constitutional guarantees when they accept valuable government benefits or privileges. *Id.* ("the government nowadays often regulates by placing conditions on its largess[.]").

To conceptualize the scope of the problem and the breadth of rights at issue, consider just the federal government's budget. The federal government spends around \$4.5 trillion dollars each year. *Id.* at 6. Just

one federal agency, the Department of Health and Human Services, spends almost \$138 million per *hour* mostly to grant and manage benefits. *Id.* And dozens of federal agencies constantly make rules governing such benefits or privileges. That kind of buying power can create numerous and incredibly tempting incentives. Then carry the problem further, to state and local governments because, as evinced by the present matter, state agencies also condition benefits on the supposedly “voluntary” restriction of constitutional guarantees.

Indeed, legislative and executive branches often find themselves unable to resist opportunities to attempt to limit rights while they establish ever more government programs, agencies, and powers. Over time the government has brandished conditions on benefits and privileges to diminish Americans’ liberties “in almost all aspects of their lives, including education, health, publishing, science, religion, and sex.” *See id.* at 6–7. Government-imposed conditions limit political speech, reproductive ability, physical liberty, due process, privacy, and a multitude of other rights. *Id.* at 2–3.

Conditions attached to entitlements, grants, and other forms of government appropriation are therefore “pervasive” in their “reach, digging deep into society and personal experience.” *Id.* at 7. These conditions have already displaced the proper, constitutional balance of power between the federal government, the states, and the American people—and the problem continues to worsen.

Left unchecked, Congress and state governments could use their spending power to

“evade the Constitution’s processes and structures.” *Id.* at 5–6. A principle allowing the government to obtain through a condition an end that it could not obtain directly imperils the Constitution’s limits on government power by authorizing lawmaking outside its prescribed, limited pathways. *Id.* at 5, 249 (conditions can create “an unconstitutional pathway for control” and “sidestep[] the Constitution’s regulatory process.”).

Thus, more than individual rights are at issue. Conditions also threaten the Constitution’s structural guarantees like federalism and the separation of powers, guarantees that effectuate the Constitution’s promises of limited government and ordered liberty. *Id.* at 11 (“conditions serve as irregular pathways of government control,” evading “the Constitution’s legislative and judicial avenues for power, its separation of powers, its federalism, and its procedural rights.”); *id.* at 6 (federal grants to state and local governments exceed \$550 billion per year).

In short, conditions threaten to render ineffective the Constitution’s design for limiting government power and preserving individual liberty.

While courts have a long way to go to bring the use of government conditions under appropriate constitutional constraints, this Court has at least already broadly recognized the most blatant misuse of government conditions. A century ago, the Court acknowledged that the Constitution’s protections would be meaningless if the government could manipulate them “out of existence.” *Frost*, 271 U.S. at 594. And 60 years before that, this Court stated that if a constitutional “inhibition can be evaded by the form of the enactment, its insertion in the

fundamental law was a vain and futile proceeding.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866). The Court has not narrowly applied this reasoning, instead recognizing that if government could “compel the surrender of one constitutional right as a condition of” receiving a government benefit or privilege, it could “compel a surrender of all.” *Frost*, 271 U.S. at 593–94.

The First Circuit opinion below, however, looses governments to deploy conditions to render any rights, other than those protected by the First Amendment, mere considerations to be traded for generally available benefits and privileges. *Infra* Part II.

B. The Court’s Unconstitutional Conditions Doctrine Addresses and Limits the Quid Pro Quo Problem

This Court has often held that the government is “without power to impose an unconstitutional requirement as a condition of granting a privilege.” *See, e.g., Frost*, 271 U.S. at 598. Those holdings make up the unconstitutional conditions doctrine, which forbids government from conditioning a benefit or privilege on the beneficiary’s waiver of a constitutional guarantee. *See Koontz*, 570 U.S. at 604; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415–16 (1989) (the unconstitutional conditions doctrine ensures that the government does not “grant a benefit on the condition that the beneficiary surrender a constitutional right.”). The doctrine protects rights “by preventing the government from coercing people into giving them up.” *Koontz*, 570 U.S. at 604. And it has enjoyed consistent support from this Court. Sullivan, *supra*,

at 1416 (“Consensus on the doctrine’s existence has survived major divisions and shifts of temperament on the Court.”).

The broad principle animating the unconstitutional conditions doctrine is even older than the doctrine itself. In *Wayman v. Southard*, Chief Justice Marshall explained that it is “a general rule, that what cannot be done *directly* from defect of power, cannot be done *indirectly*.” 23 U.S. (10 Wheat.) 1, 50 (1825) (emphasis added). Later, in *Cummings v. Missouri*, the Court applied this principle to void a requirement that clergy swear a loyalty oath or face government disqualification. 71 U.S. (4 Wall.) 277, 288 (1866) (reasoning that “what cannot be done directly cannot be done indirectly.”). *Cummings* observed that “[t]he Constitution deals with substance, not shadows.” *Id.* at 325. If only the form of the government’s attempt to evade a constitutional limit determined its constitutionality, our Constitution’s “guaranties, so carefully safeguarded against *direct* assault” would be “open to destruction” by *indirect* government action. See *Frost*, 271 U.S. at 593 (emphasis added).

The Supreme Court’s earliest decisions in this area addressed conditions attached to corporate privileges, not the First Amendment. States often conditioned the privilege of operating within their borders on agreements not to remove suits to federal courts or on payment of various charter fees. *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. (20 Wall.) 445 (1874) (removal); *Barron v. Burnside*, 121 U.S. 186 (1887) (removal); *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 7 (1910) (charter fee). Each time,

the Court struck the condition down. *See Frost*, 271 U.S. at 597–98 (collecting cases and observing “the same principle has been reiterated many times and never departed from.”). And in each case, the Constitution prevented states from imposing the limitation on rights through direct regulation. *See id.* While the Court had not yet invoked the phrase “unconstitutional condition,” the crux of the decisions rested on the general principle that government was “without power to impose an unconstitutional requirement as a condition for granting a privilege.” *Id.* at 598; *see United States v. Butler*, 297 U.S. 1, 68 (1936) (“the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.”).

Frost represents one of the Supreme Court’s earliest attempts to unify its unconstitutional conditions decisions. *See* 271 U.S. at 598 (collecting cases). In *Frost*, California attempted to force private trucking companies to submit to common carrier status in exchange for the privilege of using public highways. *Id.* at 590–91. California could not have imposed that requirement through “mere legislative command.” *Id.* at 592. And Justice Sutherland explained why California also could not obtain that unconstitutional end through a condition:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right

in exchange for a valuable privilege which the state threatens otherwise to withhold.

Id. at 593. The government’s power “is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.” *Id.* at 593–94. For this reason, even though the state sought the end through a condition on a government benefit, the effort was nevertheless unconstitutional.

Frost’s reasoning laid the groundwork for what became the unconstitutional conditions doctrine. In *Speiser v. Randall*, one of the first applications of the unconstitutional conditions doctrine to the First Amendment, this Court held that California could not condition a tax exemption on one’s waiver of the right to free speech. 357 U.S. 513, 518–19 (1958). The Court reasoned that “[t]o deny an exemption” (a government benefit) “to claimants who engage in certain forms of speech is in effect to penalize them for such speech.” *Id.* at 518. Although the denial of the free-speech right was effectuated indirectly via a condition, the “deterrent effect [was] the same” as a direct abridgment of speech and therefore unconstitutional. *Id.* at 518, 528–29.

Similarly, in *Perry v. Sindermann*, the modern basis for the unconstitutional conditions doctrine, this Court held that a college’s refusal to renew a professor’s contract due to speech critical of the college constituted an impermissible interference with the professor’s free-speech rights. 408 U.S. 593, 596–98 (1972). Even though the professor lacked a

right to have his contract renewed, this Court explained that to “deny a benefit to a person because of his constitutionally protected speech or associations ... would allow the government to produce a result which (it) could not command directly.” *Id.* at 597 (internal quotation marks omitted). *Sindermann* also reiterated that the unconstitutional conditions doctrine has broad application: “Such interference with constitutional rights,” even though not a direct regulation from the government, was “impermissible.” *Id.* at 597.

Since *Sindermann*, this Court has continued to apply the unconstitutional conditions doctrine to protect various rights from ransom. In land-use cases, permit conditions may “run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” *Koontz*, 570 U.S. at 607. The familiar reason is because *direct* imposition of the relevant condition would run afoul of a constitutional limit. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (“Without question, had the city simply required petitioner to dedicate a strip of land ... for public use ... a taking would have occurred.”). Similarly, this Court has held that the Free Exercise Clause “protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)). Each of these decisions prevents the same constitutional problem: the government’s use of a

benefit to obtain a result it could not directly command.

C. The Unconstitutional Conditions Doctrine Must Apply Well Beyond the First Amendment

Unconstitutional conditions threaten every right; the related doctrine therefore cannot be limited to isolated constitutional provisions. Indeed, this Court applies the unconstitutional conditions doctrine “in a variety of contexts,” *Koontz*, 570 U.S. at 604, and it has not identified a constitutional right exempt from the principle.

As this Court’s decisions illustrate, the doctrine applies broadly across the Constitution including to the Free Speech Clause, *Speiser*, 357 U.S. at 518; the Free Exercise Clause, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); the Due Process Clause, *Frost*, 271 U.S. at 592–94; and the Takings Clause, *see Dolan*, 512 U.S. at 385–86. The Court also applied the doctrine to the *unenumerated* “right to travel.” *Koontz*, 570 U.S. at 604 (citing *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974)). And it suggested that the doctrine applies to structural constraints on the government’s power such as the Interstate Commerce Clause, *see W. Union Tel. Co.*, 216 U.S. at 18, 26, and the Taxing Clause. *See South Dakota v. Dole*, 483 U.S. 203, 207–08, 210–11 (1987) (observing that Congress’s power to spend and its ability to condition funds are limited). These decisions demonstrate that the unconstitutional conditions doctrine has general application, applying not just to enumerated, individual rights, but also to the Constitution’s structural limits on government power

and unenumerated rights. *See* Hamburger, *supra*, at 6 (“conditions need to be recognized as an irregular mechanism, which threatens the Constitution’s structures of power as well as its rights.”).

The doctrine’s broad application makes sense. As discussed, this Court’s earliest unconstitutional conditions decisions applied the doctrine in general terms. *See, e.g., Frost*, 271 U.S. at 593–94 (“the power of the state ... is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights”); *Home Ins. Co. of N.Y.*, 87 U.S. (20 Wall.) at 457 (“None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution ... , or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others.”). Moreover, since “[t]he Constitution’s limits on government ... are not merely contractual terms,” its guarantees are not altered based on an individual’s or a state’s consent. Hamburger, *supra*, at 154. The government cannot enlarge its power through conditions, and this rule logically applies to numerous constitutional provisions.²

² To be sure, “[s]ome constitutional limits, especially some rights, candidly leave room for the government to act with consent.” Hamburger, *supra*, at 158. But there is much that the government may not do even with consent, *see id.* at 156, and it is this category to which the unconstitutional conditions doctrine responds.

II. THE FIRST CIRCUIT'S DECISION IMPERILS SEVERAL CONSTITUTIONAL GUARANTEES

The limits the First Circuit imposed on the unconstitutional conditions doctrine jeopardizes many rights. The court below recognized that the Petitioners asserted a fundamental right concerning their children's education, but in its view, the "principle that prohibits the state from imposing even indirect coercion or penalties on" a right applies to the First Amendment only, and not to parental or presumably other fundamental rights. *Hellman*, 171 F.4th at 83–84. But the constitutional principles animating this Court's opinions contradict such reasoning, which, left unchecked, would dramatically undermine a panoply of constitutional protections.

The First Circuit's opinion contravenes this Court's unconstitutional conditions precedent. This Court has never held nor even suggested that the rule that government cannot indirectly penalize the exercise of a constitutional right is a "distinct, First Amendment principle." *See id.* This Court itself has applied the doctrine beyond the First Amendment. *See Koontz*, 570 U.S. at 604–05; *supra* Section I.C. Nor did the First Circuit identify any authority from this Court so restricting the unconstitutional conditions doctrine to a single constitutional provision. That is because no such authority exists; hence, numerous other federal courts have applied the unconstitutional conditions doctrine to the selfsame right the First Circuit refused to protect. Pet. at 18–23.

Moreover, Massachusetts could not impose legislation directly requiring parents to frequently remove their children from a private school environment during school hours. *Pierce* forbids that

result. 268 U.S. at 534–35. “A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.” *Koontz*, 570 U.S. at 612. Here, Massachusetts’s inability to impose the Place Regulation through direct legislation confirms the violation of the unconstitutional conditions doctrine, as the state lacks authority to achieve the same end through a condition on a benefit. *See Frost*, 271 U.S. at 593, 599.

If the First Circuit opinion stands, and government benefits may be denied due to the exercise of a non-First Amendment “fundamental right,” *see Hellman*, 171 F.4th at 83–84, important rights are now vulnerable to unending incremental attacks. Consider the rationale’s application to parental rights at issue here. Under the First Circuit’s logic, so long as a state does not directly prohibit private schooling, it may require parents to jump through *any* “increased logistical burden” to exercise their fundamental right to send their children to private school. Such burdening of rights has the same deterrent effect as direct prohibition. *See Speiser*, 357 U.S. at 518. Were it the rule, government could pressure parents out of sending their children to private school through the intentional manipulation of financial pressures. That result is impermissible—the Constitution is not so blind. *See Cummings*, 71 U.S. (4 Wall.) at 325 (“The Constitution deals with substance, not shadows.”).

Nor are the potential harms of the First Circuit’s holding limited to parental rights. After all, the court below suggested that states may impose

burdens through conditions on any right outside the First Amendment. *Hellman*, 171 F.4th at 83–84. Worse, it identified no point at which an indirect burden on a right becomes a penalty. Governments have historically sought to evade various constitutional guarantees when Americans accept benefits. *Supra* Part I. Some financial benefits, for example, have previously been conditioned on beneficiaries waiving their Fourth Amendment right to be free from unreasonable government searches of their homes. *Hamburger, supra*, at 5. Unfortunately, courts largely permitted the exercise, as “the people and their judges have failed to understand the seriousness of the [conditions] problem and the possibility of concrete legal solutions.” *Id.* at 5, 263. If this Court tolerates the trade of government benefits for ongoing surrender of further fundamental rights, the practice will proliferate, guaranteeing piecemeal destruction of the Constitution’s guarantee of liberty.

III. THE IMPORTANT CONSTITUTIONAL ISSUES IN THIS CASE WARRANT CERTIORARI

Certiorari is required here for at least three reasons.

To begin with, the First Circuit relied on the lack of direct precedent from this Court to limit the Court’s holdings. This Court has never explicitly applied the unconstitutional conditions doctrine to the parental right identified in *Pierce*. And the scope of the unconstitutional conditions doctrine is—at best—unclear and unsettled. As it stands, “the doctrine of unconstitutional conditions is riven with inconsistencies.” *Sullivan, supra*, at 1416, and “the case law is all over the map.” *Hamburger, supra*, at 26. This has led to “doctrinal disarray” where lower

courts, as they have on the question presented here, often “divide in deciding identical unconstitutional conditions challenges.” *See* Sullivan, *supra*, at 1417. This does not excuse the First Circuit’s error, as multiple lower courts have charted the correct course through the ambiguity created by this Court’s conditions decisions. But the egregious error evinces the need for this Court’s intervention.

Second, resolving the question presented requires this Court to break little new ground. A holding that fundamental parental rights fall within the unconstitutional conditions doctrine would align with the logic repeatedly employed by this Court. This is why five other circuit courts have already so held. At the same time, such a square holding by the Supreme Court of the land would broadly prevent the conditional erosion of other enumerated or fundamental rights, those most essential to constitutional liberty.

Finally, substantial costs would flow from leaving the decision below intact. The First Circuit held that indirect burdens imposed by the government on constitutional rights are permissible if the right at issue is not a First Amendment right. *See supra* Part II. As discussed, this decision effectively authorizes *any* incursion on even fundamental constitutional rights that are not already explicitly within the scope of this Court’s unconstitutional conditions doctrine. This logic leaves these rights open to “destruction” through “indirect, but no less effective” coercive government action. *Frost*, 271 U.S. at 593. Left to permeate judicial reasoning, the First Circuit’s rationale threatens to allow government to “secure[] submission to an unconstitutional mode of

governance” and facilitate a plethora of “unconstitutional restrictions.” *See* Hamburger, *supra*, at 16. The scope of the potential harm is as broad as the scope of government spending. This Court should act now to cabin the consequences of this decision before it motivates other government abuse.

The potential harm to parental rights is particularly acute. This Court has long made plain that parents—not the state—have the natural and fundamental right to dictate the terms of their children’s upbringing. *Pierce*, 268 U.S. at 535 (“The child is not the mere creature of the state.”). For just as long, governments have perniciously and unjustifiably interfered with that relationship, seeking to render children vassals of the state. In jurisdictions where the unconstitutional conditions doctrine does not apply to parental rights, governments will whittle away the protection this Court has long afforded parents, as Massachusetts has done here. Given the nature of the relationship between parent and child—and its fundamental, natural value—few issues are more important for this Court to resolve.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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