No. 24-012

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL FLYNN and LEONARD FLYNN, on their own behalf and on behalf of their minor child H.F.; BARBARA KLINE and MATTHEW KLINE, on their own behalf and on behalf of their minor child B.K.; THE JOSHUA ABRAHAM HIGH SCHOOL; and BETHLEHEM HEBREW ACADEMY,

Petitioners,

v.

TOURVANIA DEPARTMENT OF EDUCATION; and KAYLA PATTERSON, in her official capacity as Superintendent of Public Instruction,

Respondents.

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

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Petitioner's Brief

Team #1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Other Authorities

QUESTIONS PRESENTED

1. Whether § 502 of the Tourvania Education Code violates the Plaintiffs' rights under (a) the First Amendment's Free Exercise Clause, and/or (b) the Fourteenth Amendment's Equal Protection Clause.

2. Whether the extension of IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

Cheryl and Leonard Flynn along with Barabara and Matthew Kline are Jewish Orthodox parents of young children with disabilities. *R.* at 1. Their children attend Joshua Abraham High school and Bethlehem Hebrew Academy respectively. *Id*. Together, the parents on behalf of the minor children and the schools make up the "Plaintiffs" and "Petitioners." *Id*.

The Flynns and the Klines sincerely believe that their religious beliefs compel them to put their children in Orthodox Jewish education programs. *R*. at 8. These schools are meant to immerse their children in the values and beliefs of the Orthodox Jewish faith. *Id.* Both the Joshua Abraham High school and the Bethlehem Hebrew Academy offer secular studies in addition to religious education. *R*. at 9.

These schools do not have sufficient resources to support either child due to their disabilities. *R.* at 8. The Flynn's child H.F. is five years old and was diagnosed with high-functioning autism. *R*. at 8. The Klines' child B.K. was diagnosed with autism at 3 years old, and is now 13. *R.* at 9. Both children require additional resources to adequately support their learning development. *R.* at 8–9. For instance, H.F. received occupational, behavioral, and speech therapy in pre-school, which the Flynns paid for on their own. *R.* at 8. She continues to receive weekly behavioral and occupational therapy for her disability without any public aid. *Id.* B.K. also requires

services to support her development, and the Klines have placed her in a public school since pre-school so she can receive the special education services she needs in order to grow and thrive. *Id.* But the Klines have compromised their religious beliefs in order to procure these essential services for their child, who is "often served non-Kosher food" at her public school. *Id.* Neither family can send their child to an Orthodox Jewish school and receive special education benefits due to Tourvania's Education code. *R.* at 10.

Traditionally, students with disabilities receive additional support via the Education for All Handicapped Children Act of 1975. *R.* at 2. Today, the congressional legislation is known as IDEA, and is meant to "offer states federal funds to assist in educating children with disabilities." *Id*. The overall goal was to "open the door of public education to handicapped children on appropriate terms." *Id*. Contingent upon receiving funds, states are meant to adopt their own procedures to provide individualized instruction for each child. *Id*. The "IEP" or Individualized Education Program is required for each state, and is meant to tailor a plan for each child that is crafted by their parents, teachers, school officials, and local educational agency (or "LEA"). *R.* at 3-4. IEPs are individualized plans, "tailored to the unique needs of each handicapped child," designed to "meet all of the child's educational needs." *R.* at 4.

IDEA allows parents to send their children to private and religious schools and still receive the benefits of the program. *Id.* The program requires LEAs to identify children in private schools with special education needs, and then work with private school officials to craft IEPs. *R.* at 5. These students are not given an individual right to services, but LEAs are mandated to have consultations with private school officials and parents. *Id.* LEAs must create a "services plan" according to the child's needs and the state's local statute. *Id*. To that end, those students who

receive support are statutorily entitled to "equitable services" that are "secular, neutral, and non-ideological." *Id.*

Tourvania has enacted a local statute, Tourvania Education Code §502 ("TEC §502"), with several compliance measures for recipients of IDEA funds. *R.* at 6. The most significant measure at issue here is that LEAs may only receive funding for "state-certified nonpublic schools" which are "nonsectarian." *Id.* In order to be certified, the nonpublic school must send in an application which includes the State's adopted core curriculum; "instructional materials used by general education students; description of the special education and services provided to individuals with exceptional needs;" and the names and copies of the credentials of its teachers with authorization "to provide special education services." *R.* at 7. Finally, a nonpublic school may not petition "for a waiver of the nonsectarian requirement." *Id.* In effect, Tourvania completely bars any sectarian private school from receiving any funds under IDEA. *Id.*

The Flynns and the Klines feel compelled to send their disabled children to nonsectarian schools as part of their religious exercise and to immerse their children in Jewish Orthodox culture. *R.* at 8. The schools they hoped to send their children to, Joshua Abraham High school and Bethlehem Hebrew Academy, each applied for state certification as nonpublic schools. *R.* at 9. Both applications complied with all of the state's requirements except one: the nonsectarian requirement. *R.* at 10. As a result, the applications were denied by the Superintendent. *Id.* The Flynns and the Klines allege that the nonsectarian requirement under TEC §502 violates their rights under the First and Fourteenth Amendments because their applications for federal IDEA funds were denied on the sole basis of their religious status. *R.* at 7. The families feel compelled to choose between providing their children or sacrificing their religious beliefs.

SUMMARY OF ARGUMENT

This court should hold that Tourvania's nonsectarian requirement has violated the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. The Constitution's protection of free exercise of religion has come to extend to public benefits. This applies to the benefits of education, "state need not subsidize private education, [b]ut once a state decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). In determining whether restrictions on public benefits to religious entities implicate free exercise, the court must find that the law is "neutral and of general applicability" to stand. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). If a law is not both neutral and generally applicable, strict scrutiny is required. *Id*.

Here, Tourvania's nonsectarian requirement is biased, and not generally applicable. The federal government and the state want to give children "equitable services" which are "secular, neutral, and non-ideological." *R.* at 5. But despite those interests, it doesn't apply a neutral rule. Tourvania categorically excludes religious schools from receiving IDEA funds, regardless of their educational character. Whereas secular private schools that might not be in accordance with state standards receive individualized determinations. If religious groups are excluded and all others are free to apply, the requirement cannot be construed as neutral. Furthermore, this sole exclusion is underinclusive as it creates a potential exemption system for ideological private schools. Insofar as they have a broad goal of giving children equitable services, but only deny religious schools, their law isn't furthering their interest in a generally applicable manner. Thus, the denial of public benefits against religious groups is impeding their free exercise.

Tourvania's nonsectarian requirement also violated the equal protection clause by treating religious schools and parents as a class. This Court has held that "[j]ust as we subject to the most

exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize government classifications based on religion." *Emp't Div. v. Smith,* 494 U.S. 872, 886 n.3 (1990). The equal protection clause serves to strike down legislation that creates "invidious . . . classifications that disadvantage a suspect class. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In determining whether a group qualifies as a suspect class, this Court has looked a "history of purposeful unequal treatment" or a relegation "to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). This Court already recognized in New Orleans v. Dukes that religion is an "inherently suspect distinction." This is because of a history of discrimination against religious individuals. This means that laws that create classifications of religious people that are treated differently are "suspect" and deserving of strict scrutiny.

Here, Tourvania's nonsectarian requirement solely bans religious schools from receiving funds. All religious schools that have been excluded and none can even waive the requirement to be evaluated individually. Because other schools get the benefit of being examined by state officials and religious schools are categorically excluded, Tourvania is necessarily creating an unequal class of religious schools and thus, parents.

Violation of both free exercise and equal protection triggers strict scrutiny which Tourvania cannot satisfy. The government must "advance interests of the highest order and be narrowly tailored in pursuit of those interests." *Carson*, 142 S. Ct. at 1997. Any interest in avoiding violation of the establishment clause has been foreclosed. his type of neutral benefit program in which "public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id*. Even if the state had an interest in promoting "equitable services", it could not be furthered by a sole exclusion of religious groups.

Finally, any interest is not narrowly tailored as the state could simply do individualized examinations of all schools regardless of their religious character. Given that the requirement does not pass strict scrutiny, it must be struck down.

Finally, *Locke v. Davey* is not controlling on this issue. *Locke v. Davey*, 540 U.S. 712, 721 (2004). First, Tourvania's requirement is fundamentally a status-based exclusion whereas Washington's ban only prevented using state funds to get a theological degree. Second, Washington espoused an interest in not funding the direct training of clergy, but students could still attend religious schools *Id.* at 725. Here, Tourvania simply excludes all religious schools regardless of their educational character. This court is not bound by Locke v. Davey, and should strike Tourvania's nonsectarian requirement on both free exercise and equal protection grounds.

This Court should also find that permitting religious schools to receive IDEA funding does not violate the Establishment Clause. This Court found in *Kennedy* that we should evaluate the Establishment "by reference to historical practices and understandings," and that interpretation must "faithfully reflect the understanding of the Founding Fathers." *Id.* at 535–536. The clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id.* at 535.

Here, Tourvania's funding of religious schools does not violate the Establishment Clause. First, funding flows to schools via parents' individual determinations meaning it doesn't implicate establishment. If funds go to religious schools, it is because of parents; choices not the state's. Furthermore, the funding is to support special education, which is secular, regardless of the school it's located in. Meaning that the state would not be funding religious activity, and thus the Establishment Clause would not be implicated. Second, even if the funding does implicate the Establishment Clause, it is still permissible because of this nation's historical support of religious

schools and evidence of the founders' beliefs on this issue. In addition, this Court's long precedent has supported the extension of funds to religious institutions time, and time again.

ARGUMENT

I. TOURVANIA'S NONSECTARIAN REQUIREMENT VIOLATES THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE AND THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

A. The nonsectarian requirement is an exclusion that violates the free exercise clause.

This Court has long established that when a state denies "a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior . . . the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). In education, the Court in *Espinoza* was clear, "[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." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). Here, the state of Tourvania's "nonsectarian" requirement imposes a categorical ban against religious entities from receiving IDEA funds. This requirement is discriminatory and violates the free exercise clause.

Law that implicates religion must be "neutral and of general applicability." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). If a law does not satisfy these requirements, it triggers strict scrutiny. Which means it must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. Tourvania's exclusion of religious institutions and inclusion of schools that have similar educations is neither neutral, nor generally applicable, and must be struck down.

1. The nonsectarian requirement is not neutral.

This Court held recently in *Kennedy* that "a government policy will not qualify as neutral if it is specifically directed at . . . religious practice." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2422 (2022). In ascertaining neutrality, a court can look at evidence of discriminatory intent in the passing of the legislation or the text itself. Here, the Tourvania Education Code is explicit in its categorical exclusion of religious schools. The nonsectarian requirement says that "services provided by private, nonsectarian schools and agencies, as well as services provided by public schools and agencies, shall be made available." *R.* at 6. The state's definition of a nonsectarian school is:

> a private, nonpublic school that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility; and, whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group. *Id*.

The text of the statute is clear in its singular application to religious institutions. Funds for children with disabilities will go to all schools except for those that are "sectarian." In *Lukumi*, the Court held that the ordinances at issue were not neutral because they "imposed[d] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. This case is no different. The burden imposed on sectarian schools is without regard to the actual nature of the school's education. Decisions to withhold funds are made explicitly based on its religious affiliation.

2. The nonsectarian requirement is not generally applicable.

The state's nonsectarian requirement also fails the general applicability test. This requirement was created to constrain laws that target religious groups through categorization. A policy "will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exceptions." *Kennedy,* 142 S. Ct. at 2422. Regardless of whether an exception has been granted or not, "the creation of a formal mechanism for granting exceptions renders a policy not generally applicable." *Fulton v. City of Phila*., 141 S. Ct. 1868, 1879 (2021). This is because it "invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*.

Tourvania's nonsectarian requirement creates an unequal categorization system. Religious schools are categorically excluded, while secular private schools receive individualized assessments. The very nature of IDEA is that the state creates a tailored plan for the child, and for the school. Local Education Agencies or "LEAs" are statutorily required to find disabled children in private schools and work together with school representatives to create a plan. *R.* at 4. When a nonsectarian private school wants to become certified to receive state funds, the Superintendent of Public Instruction carries out a tailored evaluation process. *Id.* They examine the school's curriculum to ensure it aligns with the state's secular interests and look at the teacher's credentials, among other pertinent information, to decide on certification. *Id*. But sectarian schools never receive the opportunity to have their curriculum and teachers evaluated. The creation of an examination process for nonsectarian private schools serves functionally as a mechanism for individualized exceptions.

The federal government has espoused an interest in giving children who attend private schools "equitable services" to those in public education. *R*. at 5 This means education that is "secular, neutral, and non-ideological." *Id*. This was an underlying interest for the government in giving states IDEA funds, and extends to the state's interest. But applying the nonsectarian category is underinclusive of those goals. The state's definition of "sectarian" only excludes schools that run, are owned by, or give profit to religious bodies. Nonsectarian private schools can still maintain ideological goals or other practices that are not religious. For example, a private school could explicitly endorse and teach views on politics, race, class, etc. They merely need to avoid being owned or run by a religious group to bypass the nonsectarian requirement. Afterwards, they receive an initialized assessment by the superintendent, that may or may not result in funds. Regardless, they had the opportunity to receive funds despite their education being contradictory to the values of public education. This is an opportunity not afforded to religious institutions.

Even if every ideological private school was denied accreditation, the mere existence of a separate process of evaluation is an exemption mechanism. This allows the state to pick and choose when they want to ban schools that do not align with their view of an "equitable" education.

This Court evaluated a similar problem in *Carson v. Makin*. The state of Maine gave parents tuition assistance for students who lived too far from public schools. *Carson v. Makin,* 142 S. Ct. 1987, 1998 (2022). But the condition was that the student could not attend a sectarian private school. *Id*. Chief Justice Roberts struck down Maine's requirement, as he found it was not generally applicable considering their interest in only paying for a "rough equivalent" of a public education. *Id*. at 1999. He argued that the requirement was underinclusive of the state's goals due to wide disparities in secular private schools' educational programs. *Id*. The difference between public education and secular private education was so wide that the only consistent similarity was

that they were nonsectarian. *Id*. The vast differences reflected that the requirement was underinclusive, as many private schools did not match the state's values. No matter how Maine formulated its interest, the severe disparity in education meant that any requirement was superficial. The only interest that could possibly be reflected in funding secular private schools and not religious schools would be in banning sectarian funding. When "the definition of a particular program can always be manipulated to subsume the challenged condition" . . . it reduces the First Amendment to a "simple semantic exercise." *Id*. Maine – like Tourvania – crafted a requirement that allowed secular private schools to contradict the values of public education but still banned religious schools from any consideration. Similarly, Tourvania's requirement should also be struck down on these grounds.

Like the variance in educational quality, the difference between public and nonsectarian private schools' ideological character can be vast. If the state's interest is in only funding "equitable" education, it cannot create discriminatory categories. This Court recognized in *Lukumi* that neutrality and general applicability are interrelated. A "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi,* 508 U.S. at 531. The instant case is no different. The nonsectarian requirement creates an unjust category that targets religious groups and permits similarly situated private schools.

This form of categorization burdens free exercise for parents, students, and religious schools. The Court has recognized this as an important area, as "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). The "choice between these very different forms of education is one -- very much like the choice of whether or not to worship – which our Constitution leaves to the individual parent. It is no proper function of the

state or local government to influence or restrict that election." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, W. concurring). It is no one's fault that students have disabilities that affect their chance to learn. But it is solely because of the state that parents are forced to choose between their child's education, and their sincere religious beliefs. To compel that choice is to violate the deeply held principles of the free exercise clause.

B. The nonsectarian clause creates a religious classification that violates the equal protection clause.

The core of this Court's equal protections jurisprudence is that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985). Regarding religion, this Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship" *Bd. of Educ. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, S. concurring). "Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize government classifications based on religion." *Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

Here, the state of Tourvania treats schools and parents that are religious differently than it treats those who are secular. The presumptive banning of sectarian private schools is categorical, whereas private secular schools have a detailed review process to determine whether they meet state standards. To treat religious and nonreligious private schools differently, without regard to their true educational quality, is a violation of the equal protection clause and is subject to strict scrutiny.

1. Religious groups are a protected class under the equal protections clause, deserving of strict scrutiny

The Court has long recognized that religious groups are protected under the equal protections clause of the Fourteenth Amendment. Footnote 4 of *Carolene Products* infamously sets out that "statutes directed at particular religious [minorities] . . . call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co*., 304 U.S. 144, 152 n.4 (1938). To respect the legislative process, Courts have typically reserved applying the equal protections clause when a statute creates "invidious . . . classifications that disadvantage a suspect class. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In determining the characteristics of a suspect class, the Court should look to a "history of purposeful unequal treatment" or a relegation "to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

In *New Orleans v. Dukes* this Court held that religion is an "inherently suspect distinction" *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This is because of the significant history of discrimination against religious groups over the last century. Furthermore, this history extends to discrimination worldwide, and is only growing. Pew Research found that between 2007 and 2017, "government restrictions on religion – laws, policies and actions by state officials that restrict religious beliefs and practices – increased markedly around the world." *A Closer Look at How Religious Restrictions Have Risen Around the World*, Pew Research Center's Religion and Public Life Project (2019). This trend is indicative of the greater need for protections against religious discrimination. Without such, "[w]ho knows what kind of havoc legislatures could potentially wreak in the absence of those deterrents?" Calabresi & Salander, Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers, 65 Fla. L. Rev. 909.

Even if this Court were to disagree about the history of religious discrimination, it may still find that an invidious class has been created. This Court held that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 273 (1986). This Court has reiterated this belief to protect 'historically powerful' classifications such as Caucasian Americans and men.

The Court in *Wygant* found that the equal protection clause was violated by the Jackson Board of Education's policy to lay off primarily White teachers to promote racial equity. *Id*. Even though Caucasians represented a demographic majority, and seldom were subject to historical discrimination, the Court struck down this policy.

Similarly, the Court in *Miss. Univ. for Women v. Hogan*, analyzed a university policy of denying male students from enrolling in their nursing program due to history of past discrimination against women. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982). Despite a lack of historical discrimination against men, this Court found that this "does not exempt it from scrutiny or reduce the standard of review." *Id*. at 724 The Court went as far as doing its analysis "free of fixed notions concerning the roles and abilities of males and females." to avoid misapplying the equal protection clause *Id*. at 725.

While the history of discrimination against religious-identifying people is indicative of suspect classification, lack of history has not prevented this court from defending historically 'powerful' groups. Regardless of this Court's historical views, the equal protection clause applies to religious groups. And here, the nonsectarian requirement creates a class of purely religious schools, parents, and students that discriminate against their faith.

2. The nonsectarian requirement creates an impermissible religious class, triggering strict scrutiny

Tourvania's nonsectarian requirement creates a religious class and bars them from receiving public benefits. The Tourvania Education Code is explicit in that its requirements apply to all religious schools. Any school that is "owned, operated, controlled by, or formally affiliated with a religious group or sect" or benefits a religious group is categorically denied funds. *R.* at 6. Regardless of the actual characteristics of the education provided, these schools are not even allowed to petition for a waiver of the requirement. The specific schools involved here met all of the principal requirements of the Tourvania Education Code, except the nonsectarian requirement. This is to treat religious schools as a class, by applying a policy solely to them. Whenever "a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation." *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 596, 15 S. Ct. 673, 695 (1895).

This discriminatory treatment is at the heart of what the 14th amendment was passed to prevent. Class-based legislation "leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the Constitution which followed the late civil war had rendered such legislation impossible for all future time." *Id.*

As with violations of the free exercise clause, legislation that embroils "the Constitution's demand for equal protection must survive a daunting two-step examination [of] strict scrutiny. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

C. The non-sectarian requirement cannot satisfy strict scrutiny.

Any law that "targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." C*hurch of Lukumi*, 508 U.S. at 546. In such cases, "government action must advance interests of the highest order and be narrowly tailored in pursuit of those interests." *Carson,* 142 S. Ct. at 1997.

The state could put forth three main interests in creating the nonsectarian requirement. First, the state could espouse a goal of students receiving what the statute calls "equitable services", which entails "secular, neutral, and non-ideological" education. *R.* at 6. Second, the state could be interested in avoiding potential establishment clause violations that entail lengthy litigation. Third, the state might argue that it has an interest in avoiding the religious use of state funds. These interests are neither compelling, nor narrowly tailored, as this Court has ruled repeatedly.

First, the interest in giving each student in private school the equivalent of a public-school education was rejected by this Court in *Carson*. Maine articulated a similar interest in giving a "rough equivalent" of a public education which was necessarily secular. *Carson* 142 S. Ct. at 1998. The Court found that their interest was not compelling because it was too broad and did not justify its sole denial of religious schools. Most private schools did not align with what the state deemed to be a public education, and yet, the state still singled out secular schools. *Id.* The Court cannot rely on "broadly formulated interests, Courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881.

Here, the state still allows nonsectarian private schools who do not align with the values of nonideological education to receive funds. This Court held that a law cannot be regarded as

protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi,* 508 U.S. at 547. That is certainly the case here.

The second principal interest the state could espouse in the nonsectarian requirement is in avoiding establishment clause litigation. This question has long been settled by the Court. The state would be apportioning funds to religious institutions based solely on the independent decisions of parents to enroll their children there. This type of neutral benefit program in which "public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson,* 142 S. Ct. at 1997. Even if the state wanted to ensure the separation between church and state "more fiercely than the Federal Constitution", that "interest cannot qualify as compelling in the face of the infringement of free exercise." *Espinoza*, 140 S. Ct at 2260.

Lastly, an interest in preventing religious use has been summarily rejected by this Court. This argument is predicated upon a distinction between use and status, but that distinction is no longer supported. The Court in *Carson* held that despite its recent precedent discussing status-based discrimination, use-based discrimination was no less offensive. *Carson*, 142 S. Ct. at 2001. Drawing a line between a school that has a religious status and a school that is engaging in religious activities would embroil the state in the same problem it deals with now. Instead of discrimination against religious organizations, the state would discriminate against specific denominations. This is because the state would have to draw the line between which schools are actually 'engaging' in religious activities regardless of their affiliation. Line-drawing of this nature would likely embroil delineations based upon denomination. This is why the Court found that "any attempt to give effect

to such a distinction . . . would raise serious concerns about state entanglement with religion and denominational favoritism." *Id*.

Overall, even if the state had a compelling interest, it has not created the least restrictive method of achieving it. The state already has a procedure for every nonsectarian private school in which they apply for accreditation and the superintendent individually inspects them. If the state wants to maintain certain standards for the schools it gives funds to, it can do so through individualized determinations, as it already does with nonsectarian private schools..

The supreme law of the land "condemns discrimination against religious schools and the families whose children attend them . . . [their exclusion] is odious to our Constitution and cannot stand." *Espinoza*, 140 S. Ct at 2262-63.

D. *Locke v. Davey* is not controlling.

The last example of the use-based approach to avoid constitutional violation is in *Locke v. Davey*. *Locke v. Davey*, 540 U.S. 712, 721 (2004). This Court espoused in *Locke* that if state money was directed at a citizen who decides how to use the money, then certain narrowly tailored uses could be excluded. In that circumstance, the Court found that Washington's scholarships for college students could come with a ban on using the money to major in "devotional theology." *Id*. at 719. This particular exclusion was narrow, and does not provide wide application to other states' nonsectarian requirements. Here, *Locke* is not controlling, and has already been cast out by this Court.

First, even if there is a distinction between use and status, Tourvania's requirement is fundamentally a status-based exclusion. While the money from the IDEA program is given with the intention to help disabled students, the money is going directly to the schools themselves. The

determination of whether a school could receive funds is predicated upon its religious status, regardless of how it will actually use the funds. Furthermore, Tourvania's statute is a categorical exclusion of the school itself, whereas in Locke, the student could still attend any school that was religious in nature, it just could not major in "devotional theology." *Id.* at 724.

Second, Washington's interest in Locke was historically compelling and more narrowly drawn. The Court found a "historical and substantial interest in not funding the training of clergy." *Id*. at 725. This tradition was supported by evidence from the framers of the Constitution, and most state constitutions during that era. *Id*. at 722-23. Funding the training of clergy creates a closer question of violating the establishment clause, such that the Court found it compelling. But the state of Washington did not categorically ban all religious schools, rather, it tailored its interest to only devotional majors. Furthermore, the university in question was the entity who chose whether it would construe a major as "devotional" or not. This meant that the state tailored its ban only on programs that self-identified themselves as devotional to avoid issues of legislation that was over or under-inclusive.

Here, Tourvania casts a wider net to all religious schools, regardless of their actual teachings. The state decides whether a school is sectarian or not and applies it to every school under that distinction. Tourvania functionally compels parents to choose between properly educating their children or their faith. This does not comport with the narrow tailoring the Court did in *Locke*. The Court in Locke specifically disfavored requiring "students to choose between their religious beliefs and receiving a government benefit." *Id*. at 720-21. And that is what Tourvania is forcing students to do here.

The "Religion Clauses – the Free Exercise Clause, the establishment Clause . . .and the Equal Protection Clause as applied to religion – all speak with one voice on this point: [a]bsent the

most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (Blackman, H. concurring). Tourvania puts parents of disabled children in an impossible situation. To be compelled to choose between one's faith and a proper education is impermissible. This Court should reverse the judgment of the Court of appeals as Tourvania policy regarding IDEA funding violates the First and Fourteenth Amendment.

II. IDEA FUNDING CAN BE PROVIDED TO SECTARIAN SCHOOLS WITHOUT RUNNING AFOUL OF THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE.

This Court should find that extending IDEA funds to religious institutions does not violate the Establishment Clause of the First Amendment for two reasons. First, IDEA aids individuals as opposed to religious institutions because choosing a school is a family's independent, private choice. Furthermore, IDEA funds the special education of disabled children, not religious activity, so the Establishment Clause is not implicated. Second, even if extending IDEA funds to religious schools does implicate Establishment Clause concerns, it is still permissible under the Establishment Clause because the Founders supported neutral application of the law. The Nation's practices over time reflect accommodation of and support to religious schools, and Court precedent supports the extension.

A. The Extension of IDEA Funds to Religious Schools does not Raise Establishment Clause Concerns.

Extending the provision of IDEA funds to cover private religious schools would not implicate the Establishment Clause because it follows private choice and does not fund religious activity. The earliest cases involving the Establishment Clause are *Quick Bear* and *Bradfield*. *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (affirming the constitutionality of the federal administration of a Native American trust fund which allocated public tribal funds to facilitate the education of Native Americans in sectarian schools); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (affirming the constitutionality of the use of federal funds to construct new hospital facilities in a sectarian institution). However, *Everson* is practically the beginning of the modern Establishment Clause, particularly because it incorporated the clause against the states under the Fourteenth Amendment. *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15 (1947).

In *Everson*, the Court looked at a New Jersey state program that provided reimbursement to parents for the public transportation of students attending public and parochial schools using tax-raised funds. *Id.* at 3. The parochial schools provided both secular education and religious instruction. *Id.* The Court held that this program could be upheld under the Establishment Clause because the state "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18. The principle the Court announced in *Everson* is that "state power is no more to be used so as to handicap religions, than it is to favor them," and a state cannot exclude a member of any religion, because of their religion, or lack of it, "from receiving the benefits of public welfare legislation." *Id.* at 16. Because funding was made as a result of the parent's choice, and not made to effect religious activities, it was permissible under the Establishment Clause.

The Court has further explicated this principle in subsequent cases. There are two main distinctions the Court drew. First, in *Zelman*, the Supreme Court described its long-time,

"consistent distinction" between, on the one hand, programs that concern the private choice of individuals, and on the other, those programs that aid religious institutions directly. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). There is a constitutional difference between state programs that provide benefits for the public welfare and incidentally provide funding to individuals who make an independent choice to attend religious schools, and those programs that provide state aid to religious institutions themselves. A parent's independent choice raises no Establishment Clause concerns because it promotes free exercise and it is not state action. "The link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Second, the Supreme Court has distinguished between the incidental funding of religious education and religious instruction itself in *Locke*. *Id.* at 712. In *Locke*, the state used taxpayer funds for the training of clergy, "an essentially religious endeavor." *Id.* at 721. The present case is different from *Locke* because here, IDEA funds flow to students with disabilities who make a private choice to attend a religious school that offers secular instruction in accordance with the state's education policy for private schools. This sort of neutral accommodation has a long history of support in this Nation's history.

Early state constitutions often permitted the funding of religious schools while "explicitly excluding only the ministry from receiving state dollars." *Locke*, 540 U.S. at 723. Students that choose to attend a sectarian private primary or secondary school as opposed to a secular private primary or secondary school are subject to the same academic requirements of Tourvania's core curriculum in reading, writing, mathematics, and science. *R.* at 7. Students at religious primary and secondary schools are not preparing to become ministers or enter any religious profession, unlike the students training to become clergy in *Locke*. Here, students like B.K. will learn much

of the same information as her secular counterparts pursuant to Tourvania's curriculum requirements, and have the potential to enter any college or career she chooses. IEPs are set by local educational agencies and are therefore inherently secular. IDEA funds special education services tailored to the individual disabled student's needs, which raises no Establishment Clause concerns because it does not disperse funds to any "essentially religious endeavor."

There is a long tradition of protecting the personal choice of parents in educating their children. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding a law imposing compulsory attendance at public schools unconstitutional under the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding a law prohibiting teaching any language other than English in any school is unconstitutional under the Fourteenth Amendment); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding a law compelling Amish parents to send their children to formal high school until age 16 unconstitutional under the First and Fourteenth Amendments). All of these cases point to a firmly established judicial recognition of the "high place in our society" that the "values of parental direction of the religious upbringing and education of their children in their early and formative years" occupy. *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972). The choice between public or religious schools is "very much like the choice of whether or not to worship – which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, W. concurring).

Denying IDEA funds to religious private schools merely because they are religious is entirely contrary to these traditions. The Nation's tradition has been to thoroughly protect parents' rights to educate their children as they wish and to send their children to religious schools. The denial of IDEA funds to families who make the personal choice to send their children to a religious

school penalizes them for their judgment on a matter of religious conscience and on their decision about how to raise their children, which is contrary to the Nation's history and traditions. Therefore, the extension of IDEA funds to private religious schools does not implicate the Establishment Clause because it aids individuals who make the independent choice to attend a religious school rather than religious institutions themselves, and it funds the special education of disabled children, not religious activity.

The Court has recognized the "enduring American tradition" of parents' rights to control the "religious upbringing of their children." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2261 (2020). In support of this tradition, the Court protected a parent's right to send his or her child to a religious school in 1925. *See Pierce*, 268 U.S. at 534–535. A necessary aspect of having the freedom to choose one's religion or lack thereof is acknowledging that others have that same freedom. Understanding and tolerating diverse forms of expression has consistently been recognized as an integral aspect of "learning how to live in a pluralistic society." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

B. Even if Extending IDEA Funds to Religious Schools Does Implicate Establishment Clause Concerns, It Is Still Permissible.

1. The History of Schools in the Nation Supports Funding for Religious Schools.

There is a long history in this Nation of nonsectarian, religious public schooling and the provision of public assistance to private religious schools, which supports the extension of IDEA funds to religious schools. The Supreme Court has "long abandoned" the Lemon test and the subsequent "endorsement" test in favor of a historical approach to the Establishment Clause. *Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022). Under this historical approach,

the Court will interpret the Establishment Clause "by reference to historical practices and understandings," and that interpretation must "faithfully reflect the understanding of the Founding Fathers." *Id.* at 535–536. The clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id.* at 535.

In this case, the first consideration under this historical approach must be the history of public and private schooling in the United States and how the government viewed providing public assistance to all schools. At the Nation's founding, public education was sporadic and uncommon. "While some Northeastern communities had already established publicly funded or free schools by the late 1780s, the concept of free public education did not begin to take hold on a wider scale until the 1830s." Nancy Kober & Diane S. Rentner, *History and Evolution of Public Education in the US*, Center on Education Policy (2020), https://files.eric.ed.gov/fulltext/ED606970.pdf. Horace Mann, the leader of the common-school movement in the 1830s, insisted on Bible reading in schools for moral education. Public education was not secular, as daily instruction included nonsectarian protestant Bible readings and prayer. John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 298–299 (2001). https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1913&context=mlr. At the start of the 20th century, "a few state courts had outlawed bible reading in public school, but most courts continued to approve these practices." *Id.* at 304. Throughout much of the Nation's history, then, religion was not strictly kept out of schools, but was even encouraged as part of students' moral education.

Similarly, governments offered financial assistance to private schools, including those affiliated with specific religious denominations, throughout the Nation's founding period and the

early 1800s. *Espinoza*, 140 S. Ct. at 2258. Early state constitutions did not prohibit such aid, but rather actively promoted this policy. *Id.* Local governments provided funding to private religious schools, particularly for the education of economically-disadvantaged children. *Id.* States like New Jersey, Pennsylvania, and Georgia, provided financial assistance to religious schools despite having explicit restrictions on government support for religious clergy. *Id.* Early federal assistance for education was typically not comprised of financial allocations, but consisted of land grants, and these land grants were provided to religious schools as well. *Id.* Until 1848, Congress supported sectarian schools in the District of Columbia, and until the late 19th century, it also funded churches that operated schools for Native American communities. *Id.* Congress allocated significant funds for the education of emancipated black people following the Civil War. *Id.* One way the federal government achieved this goal was through the Freedman's Bureau, whereby Congress provided money to sectarian schools in the Southern States that would educate black people. *Id.*

This history establishes a tradition of government funding of religious schools, as distinguished from government funding for religious training. Providing IDEA funds to religious schools fits within that tradition because it funds education rather than religious training. The private religious school meets all of the Tourvania Education Code's core curriculum requirements, instructional materials, and certifications and credentials of teachers who can provide special education services. *R.* at 7. The school's application was only denied because it is a religious institution, as it meets all the same requirements that secular private schools do. *R.* at 10. "The Constitution neither mandates nor tolerates that kind of discrimination" against religion. *Kennedy*, 597 U.S. at 544. There was no tradition of strict separation between religious schools and government aid, and, in fact, public aid to schools with a component of religious instruction

was often actively encouraged by the government. Therefore, this Court should find that the long history and tradition of public funding to schools with religious elements supports the constitutionality of extending IDEA funds to religious schools under the Establishment Clause.

2. The Founders Would Not Have Objected to the Neutral Application of IDEA Funds.

The Nation's Founders often held different views about the proper separation of church and state, but the larger, historical trend indicates that there was a low barrier erected between them. Because of this, neutral application of IDEA funds to all private schools would be permissive under the Establishment Clause. Throughout the Nation's history, there have been competing interpretations of the proper role of religion in government. "Strict separationists" believe the Establishment Clause established a wall between church and State. Carl Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 Federalist Society Rev. (2021), https://fedsoc.org/fedsoc-review/the-establishment-clause-its-original-public-meaning-and-what-we-can-learn-from-the-plain-text.

The "neutrality" principle, which espouses the value of nondiscrimination against religion and stood for the proposition that the church and state could have some entanglement without it being excessive, began to take hold in the 1990s. *Id.* If entanglement between church and state was not excessive, meaning it did not advance or inhibit religion or the lack thereof, then there would be no Establishment Clause violation. *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

Programs that provide grants directly to religious institutions were historically more suspect under the Establishment Clause because of excessive entanglement concerns, but in 1997, the Court departed from that categorical rule in *Agostini* when it overruled *Aguilar v. Felton*, 437 U.S. 402 (1985). *See Agostini*, 521 U.S. at 235 (upholding a state education program that sent

public school teachers into sectarian schools to teach disadvantaged children pursuant to a mandate under Title I of the Elementary and Secondary Education Act). The Court found no constitutional barrier to providing public assistance to sectarian schools as long as the program was religiously neutral. *Id.* This means there must be evidence that the program itself discriminates on religious grounds or that the money provided is used to advance religious beliefs in order for a public assistance program to violate the Establishment Clause. In *Trinity Lutheran,* the Court made clear that if a state excludes religious institutions from applying for an otherwise public grant program just because it is a religious institution, that violates the free exercise clause and cannot be justified under the guise of complying with the establishment clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449, 467 (2017).

We will not be able to ascertain directly what the founding fathers would have thought about public funding of religious schools because, as was previously established, there was no widespread government-funded education during the Framer's time. While the Framers might not have considered public funding of schools, there is considerable evidence regarding their views on establishment more generally. The Framers were concerned about "imposing taxes to pay ministers' salaries, and to build and maintain churches and church property." *Everson,* 330 U.S. at 11. They wanted to ensure that the federal government would not provide direct financial support to its favored church, and thus impose its beliefs on the citizens. *Id.* at 8. Financial support to church leaders "was one of the hallmarks of an 'established' religion, and most States that sought to avoid such an establishment around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Locke,* 540 U.S. at 713. Those states explicitly excluded the ministry from receiving tax dollars, but did not bar the use of state money for religious education. *Id.* In *Locke*, the Court observed a "historic and substantial" interest in not

funding the training of clergy or supporting church leaders based on discussion surrounding the Religion Clauses. *Id.* at 725. But in *Espinoza*, the Court found that there was "no comparable historic and substantial tradition" to support the state of Montana's "decision to disqualify religious schools from government aid." *Espinoza,* 140 S. Ct. at 2258. The case at hand is twice removed from the concern of supplying direct aid to the ministry because IDEA is a neutral funding program and does not target any particular religion. *R.* at 2–3. Further, the funds are used only for the purpose of educating a disabled child, and not to advance religion or support any ministry. The education at private, religious schools in Tourvania meets all of the requirements and benchmarks of any other private, secular school. *R.* at 10. And, as the Court has already observed, there is no history or tradition of denying schools from government aid.

James Madison proposed an early version of the neutrality principle, stating that the government should "protect every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property." James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 8 (1785), *reprinted in Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 68 (1947). He disapproved of a Virginia bill that would have forced all citizens of the state to choose a Christian church and then pay a tax to the government in order to support that church and its ministers. *Id.* He disapproved of this bill because it did not allow citizens to enjoy their religion with an equal hand by imposing "peculiar burdens" on those who did not wish to practice their religion in this manner. *Id.* Denying IDEA funds to religious schools applies a peculiar burden on families who wish to practice their religion by sending their children to a religious school where they can be immersed in the religion's culture while still gaining an education determined to be just as adequate as any other private school education by the State. The State has no business in making these private choices for its citizens and should instead remain neutral, which in this case

would require the State to provide IDEA funds to all students who attend a private school meeting the state's educational requirements, or providing IDEA funds solely to children attending public schools. It cannot discriminate against religion and impose a peculiar burden on families for practicing their religion.

When the Fourteenth Amendment was ratified, it is unclear whether the Establishment Clause was understood as an individual right. *Espinoza*, 140 S. Ct. at 2264 (Thomas, J., concurring). Assuming the Clause did create an individual right that could be incorporated against the States, "it only protects against an 'establishment' of religion as understood at the founding, i.e., coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Id.* At the founding, the First Congress of the United States enacted legislation authorizing the "appointment of paid chaplains" to the House and Senate, in the same week it accepted the Establishment Clause of the First Amendment to send to the states. *Marsh v. Chambers,* 463 U.S. 783, 788 (1983). The practice of Chaplains offering daily prayers in Congress has continued to this day. *Id.* The First Congress's constitutional decisions possesses a special authoritative weight due to their proximity to the founding and Bill of Rights, and due to the fact that seventeen of the Constitution's draftsmen were members of the First Congress. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). The First Congress deciding to establish the tradition of daily prayer with paid Chaplains in the House and Senate indicates that the founders of this country did not see any conflict between some entanglement between government and religion, and there was no "wall" erected between them as the separationists have argued.

The very day following the proposal of the First Amendment, Congress asked President George Washington to "proclaim a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favors of Almighty God." *Id.* These

examples indicate a strong history of accommodation of religious belief, even within the highest branches of government. If the Founders of the Nation were willing to allow, and even supported, the public funding of clergymen directly, then there must have been a very low barrier erected between Church and State. Even if the barrier was not intended to be as low as the Founder's actions indicate, the barrier cannot be so high as to bar the state's accommodation of a family's private choice to send their child to a private, religious school because that does not involve direct financial support to religious institutions for religious purposes. Unlike funding clergymen to deliver prayer in the Senate, IDEA merely funds the teaching of Tourvania-approved curriculum to disabled children who independently decide to attend a religious school. *R.* at 7. The program has no religious purpose and only indirectly funds a religious institution after a family has made a private choice of religious conscience. Therefore, the Court should find that under the original understanding of the meaning of the Establishment Clause when it was accepted and sent for ratification in 1789 and the Founders' own views about the proper separation of church and state, the neutral application of IDEA funds to all private schools is permitted under the Establishment Clause.

There was a period of the Nation's history in which some strict separationists attempted to erect a higher barrier between Church and State than the Founders did. Some of the barriers imposed were reflective of individual bias against certain religions, namely, non-Protestant religions. In the late nineteenth century, there was a movement to pass the Blaine Amendment to the Federal Constitution, which "would have added a provision prohibiting States from aiding 'sectarian' schools." *Espinoza*, 140 S. Ct. at 2259. At the time, the Nation was suffering from "pervasive hostility of the Catholics Church and to Catholics in general," and everyone at the time knew that 'sectarian' simply meant 'Catholic.' *Id.* American public schools had always been

religious, but this meant nonsectarian Protestantism, not Catholicism. John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 298–299 (2001).

Even though the Blaine Amendment failed, a number of states incorporated similar no-aid provisions into their own state constitutions. However, many states that incorporated no-aid provisions in their Constitutions have provided "support to religious schools through publicly-funded vouchers, scholarships, tax credits, and other measures." *Espinoza*, 140 S. Ct. at 2259. This reflects that the barrier some strict separationists advocated for was not so high as to bar all public aid to religious schools. Further, this period in history does not necessarily represent what the Founders thought the Establishment Clause was meant to be.

Since these no-aid provisions were "rooted in bigotry" against Catholics, the Supreme Court stated that they "hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.* In *Espinoza*, the Court expressly rejected Montana's use of the Blaine Amendment language in order to justify state action that treats religious institutions differently from non-religious private or public institutions. Charles J. Russo & William E. Thro, *The Demise of the Blaine Amendment and A Triumph for Religious Freedom and School Choice: Espinoza v. Montana Department of Revenue*, 46 U. Dayton L. Rev. 131, 156 (2021). Further, the mere existence of the Blaine Amendment proposal implies that it was widely believed the Establishment Clause did not bar state government funding to sectarian schools. Otherwise, the amendment would have been superfluous. Therefore, funding to religious schools is consistent with the nation's historical practices and understandings of the Establishment Clause and proper separation of church and state.

Perhaps the clearest example of the Founder's view that the Establishment Clause erected a low barrier between Church and State comes from Fisher Ames, a member of the Massachusetts

ratifying convention and the First Congress. Marc Arkin, *Regionalism and the Religion Clauses: The Contribution of Fisher Ames*, 47 Buff. L. Rev. 763 (1999). He proposed that the First Amendment should read: "Congress shall make no law establishing religion…" *Id.* at 764. This formulation was adopted by the House before it went to the Senate. *Id.* The final version of the clause enacted in the Constitution was born of a compromise between Ames's proposal and an "even more conservative" formulation raised in the Senate. *Id.* at 766. In his writings, Ames was very vocal about his belief that the Bible should be used universally in education as a school book, and should replace written textbooks. *Id.* at 808. He believed reading the Bible in school would help American youth achieve "good grammar and good morals." *Id.* One of the most prominent drafters of the Establishment Clause therefore saw no issue with religion entering public education. In conclusion, funding to religious schools is consistent with the nation's historical practices and understandings of the Establishment Clause and proper separation of church and state.

3. The Court's Precedent Supports the Notion that the Establishment Clause is Permissive of Providing IDEA Funds to Religious Schools.

There is a strong line of Supreme Court cases which determined that neutral government-aid programs that incidentally benefit religious schools, like the IDEA, are permissible under the Establishment Clause. In *Zobrest*, the Supreme Court directly addressed the application of IDEA to a religious school. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In that case, a handicapped child attending a Catholic school needed a sign language interpreter and applied for the provision of those services under IDEA. *Id.* at 3. He was denied due to the state's belief that providing those funds to a Catholic High School would violate the Establishment Clause of the First Amendment. *Id.* at 4. The Supreme Court held that "the IDEA creates a neutral government program dispensing aid not to schools but to any child qualifying as disabled under the IDEA. If a

handicapped child chooses to enroll in a sectarian school, the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education." *Id.* at 13–14. First, the Court reasoned that the family made a personal choice to enroll their child in a sectarian school and were not influenced by any financial incentive under the neutrally-applied IDEA program, so the presence of government aid in a religious institution could not be attributable to any state decision making. *Id.* at 10. Second, the interpreter was being provided to aid the child's education and help him learn, not to advance religion. *Id.* at 14.

Similarly, in *Carson*, the Supreme Court found that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 770 (2022). Finally, in *Espinoza*, the Court addressed states that treat private secular schools and private religious schools differently. *Espinoza*, 140 S. Ct. at 2260. In that case, Montana attempted to justify its decision to withhold funds from private religious schools based on its "interest in public education." *Id.* at 2261. However, it provided funds to private secular schools. *Id.* The Court held that "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." *Id.*

In this case, Tourvania is refusing to allow the provision of IDEA funds for a disabled child trying to attend a religious school, much like the state in *Zobrest* did. The Court held that providing sign language interpretive services under IDEA to students attending religious schools did not violate the Establishment Clause. Providing funds under IDEA for a disabled child's special education needs in a religious school is similarly acceptable under the Establishment Clause. The funds only flow to a religious school when a disabled child and his or her family make a private

choice to attend that school, and those funds are only to be used for the provision of special education for that child based on his or her needs. The funds therefore would flow indirectly to the religious school, and do not directly fund religious instruction or religious leaders. Further, if IDEA funds were sent to all private schools regardless of their secular or non-secular nature, the program and its application would be religiously neutral. The Court has warned that States cannot uniquely burden religious institutions by denying them funds that are publicly available. *See Espinoza*, 140 S. Ct. at 2261; *Trinity Lutheran Church of Columbia, Inc.*, 582 U.S. at 467. That is exactly what Tourvania is doing by denying IDEA funds to any religious school that could otherwise qualify based on the private school requirements.

Therefore, the Court should find that there would be no Establishment Clause violation if Tourvania neutrally applied IDEA funds to religious and secular private schools when families make the private choice to send their children to private school.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,
Team #1
[March 4th, 2024.]