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;
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,
Docket No. 24-012

BREIF FOR PETITIONERS,

Team 11
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QUESTIONS PRESENTED

Does Section 502 of the Tourvania Education Code ("TEC §502") violate the Free Exercise and Establishment Clauses of the First Amendment by denying certification to otherwise qualified religious schools, thereby preventing eligible students with disabilities from receiving specialized instruction from a generally available public benefit program?

STATEMENT OF THE CASE

A. Procedural History

This Writ of Certiorari originates from a complaint brought forward by Cheryl Flynn and Leonard Flynn on behalf of their minor child H.F.(the "Flynns"); Barbara Kline and Matthew Kline on behalf of their minor child B.K. (the "Klines"), and the Joshua Abrams High School and the Bethlehem Hebrew Academy (collectively, "Petitioners") against the Tourvania Department of Education and Kayla Patterson, in her official capacity as Superintendent of Public Instruction (collectively, "Respondents"). R. at 21. The complaint alleges that TEC §502 restricted their free exercise of their Orthodox Jewish religious beliefs by denying them IDEA funding solely because of their religion. *Id.* This allegation constitutes a violation of the First Amendment of the United States Constitution. U.S. Const. amend. I.

On October 1, 2023, the United States District Court for the District of Tourvania rejected the Respondents' motion for summary judgment. R. at 16. On appeal by the Respondents', the United States Court of Appeals for the Eighteenth Circuit vacated the previous decision and remanded to the District Court to enter summary judgment in favor of Respondents. R. at 20.

Petitioners petition for certiorari was granted by this Court to dispute the grant of summary judgment. R. at 21.

B. Factual History

Cheryl and Leonard Flynn are the parents of H.F., a five-year-old diagnosed with high-functioning autism. R. at 8. The Flynns' religious beliefs mandate providing H.F. with an education that fosters her Jewish identity and values. *Id.* Barbara and Matthew Kline similarly seek an Orthodox Jewish education for their thirteen-year-old daughter, B.K., who was diagnosed with autism at age three. R. at 8-9.

The Joshua Abraham High School and Bethlehem Hebrew Academy are Orthodox Jewish secondary schools with dual missions: upholding their religious traditions while offering quality education services. R. at 9. Both schools sought certification under TEC §502 to access funding under the Individuals with Disabilities Act ("IDEA"). R. at 10.

The IDEA ensures children with disabilities access to a "free appropriate public education" ("FAPE"), including special education and related services. R. at 2. However, both the Flynn and Kline families have faced significant barriers in finding special education that aligns with their deeply held and religious beliefs. R. at 8-9. The Flynns previously enrolled H.F. in a Jewish preschool but paid out-of-pocket for necessary therapies. R. at 8. The Klines have kept B.K. enrolled in public school but allege it is unsuitable due to their secular holidays and lack of sensitivity to their religious practices. R. at 9.

The Joshua Abraham High School and Bethlehem Hebrew Academy, as part of their missions, seek to provide specialized services mandated by the IDEA to students with disabilities.

R. at 10. Despite demonstrating compliance with core requirements, including descriptions of the state-approved curriculum, qualified special education teachers, and copies of relevant credentials, they believe that they were denied certification under TEC §502 solely due to their religious character. R. at 10. Their applications could not comply with the 'nonsectarian' requirement. R. at 10.

TEC §502's 'nonsectarian' requirement has created a direct conflict for the Flynn and Kline families. It effectively excludes sectarian institutions, even those demonstrating the capability to provide IDEA-mandated services. The Petitioners' assert that their religious beliefs compel them to provide a faith-based education for their children with disabilities. However, TEC §502 forces them to make an unconstitutional choice between upholding their faith and securing their children's right to essential, government-funded educational services.

SUMMARY OF THE ARGUMENT

This Court should reverse the Appellate Court's grant of summary judgment for Respondents. TEC §502's nonwaivable 'nonsectarian' requirement violates both the Free Exercise and Establishment Clauses of the First Amendment and thus cannot withstand constitutional scrutiny.

The Free Exercise Clause protects the fundamental right of individuals to freely practice their religion. TEC §502 forces families to choose between their deeply held religious beliefs and securing essential educational services for their children with disabilities. This creates an undue burden on religious exercise. Respondents cannot demonstrate an important compelling government interest that justifies this severe infringement on Petitioners' rights, particularly considering their consequent hardships.

Furthermore, TEC §502 violates the Establishment' Clauses mandate of government neutrality towards religion. By categorically excluding otherwise eligible religious schools from receiving IDEA funding, the law expresses hostility towards religion and discriminates against families seeking a faith-based education for their children. TEC §502's clear discriminatory effect, regardless of the precise Establishment Clause Test applied, demonstrates unconstitutionality.

The Appellate Court's decision disregards the material facts in dispute and the serious constitutional violations caused by TEC §502. This Court should reverse the summary judgment and affirm the District Court's correct denial of Respondent's motion.

ARGUMENT

I. TEC §502 VIOLATES THE FREE EXERCISE CLAUSE AND EQUAL PROTECTION CLAUSE BECAUSE THE NONWAIVABLE NONSECTARIAN REQUIREMENTS CONSTITUTES A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE AND THEREFORE CANNOT SURVIVE STRICT SCRUTINY.

The lower court erred when it instructed the District Court to enter summary judgment in favor of Respondent. As stated under the Federal Rules of Civil Procedure, to prevail on a motion for summary judgement, a party must show no genuine issue to material fact, and they are entitled to judgement as a matter of law. *Fed. Civ. P. 56(a).* The standard of review for this court is de novo. The premise of this petition for certiorari stems from Petitioner's claim, which states a violation the Free Exercise and Equal Protection clauses in the United States Constitution. That "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*" U.S. Const. amend. I. The Free Exercise Clause is made applicable to the states, their subdivisions, and municipalities through the Fourteenth Amendment Equal Protection Clause. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940); *see also* U.S. Const. amend. XIV ("No state shall make

or enforce any law which shall abridge the privileges and immunities of citizen of the United States.").

Respondents violated Petitioners' First Amendment right to free exercise of their religion when they were denied IDEA funds solely because of their religion. The Free Exercise Clause of the First Amendment "protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibition." *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) (citing *Lyng v. Northwest Indian Cemetary Protective Assn*., 485 U.S. 439, 450 (1988)). "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." *Carson*, 142 S. Ct. at 1997 (citing *Espinoza v. Montana*, 140 S. Ct. 2246, 2255 (2020)).

The nonwaivable nonsectarian requirement constitutes a substantial burden on religious exercise for petitioners by forcing them to choose between their religious beliefs and accessing crucial funding for their children's education. TEC §502 explicitly defines "nonsectarian" as "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 insure the benefit of a religious group." TEC §502(b).

Providing an Orthodox Jewish education is fundamental to the Petitioners' religious beliefs and being denied access to special education funding for religious schools inhibits their ability to fulfill this obligation. The denial of such a fundamental right penalizes Petitioners for their religious identity and preference for religious education, and therefore violates the Free Exercise Clause.

A. Tourvania Department of Education's nonwaivable nonsectarian school requirement is a violation of the Free Exercise Clause and is subject to strict scrutiny.

TEC §502 is subject to strict scrutiny because the denial of IDEA funds to Petitioners, which are generally available to public, solely because of their "sectarian" status, imposes a burden on their fundamental right to free exercise of religion. This Court has repeatedly held that a state violates the Free Exercise Clause when it "excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt the liberties of religion and expression may be infringed by the denial of or placing of condition upon a benefit or privilege.").

A law that denies a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion, and therefore, triggers strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). For a regulation to survive strict scrutiny, the regulation must be narrowly tailored to further a compelling government interest and must be the least restrictive means of achieving that interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-532 (1993). The burden on religious exercise results from the withholding of an otherwise available public benefit. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

When a state applies a categorical ban based on religious status, the ban will be analyzed under strict scrutiny. In *Ezpinoza v. Mont. Dep't of Revenue,* a state program which granted tax credits to those donating to organizations awarding scholarships for private school tuition prohibited families from using such scholarships at religion schools based on the state's no-aid provision in its Constitution. 140 S. Ct. 2246, 2252 (2020). This Court determined that the 'no-aid'

provision placed a categorical ban on religious status and was subject to strict scrutiny. *Id.* at 2255. Further, this Court held the 'no-aid' provision would not survive strict scrutiny because it singles out schools based on their religious character and declared the State's "interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear its weight'." *Id.* at. 2261.

A law is subject to the "most rigorous" scrutiny when it denies a public benefit to an otherwise eligible recipient based solely on their religious affiliations. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, Petitioner was a daycare center and preschool that operated on church property that wished to participate in a state funded program that offered reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. 582 U.S. 449, 453 (2017). Despite being more qualified than other organizations that applied, Petitioners were denied funds by Respondent because of a strict policy of denying grants to any applicant owner or controlled by a church, sect, or other religious entity. *Id* at 455. Petitioners filed suit claiming violations of the Free Exercise Clause and the court upheld that violation, stating Respondent's policy discriminates against otherwise eligible recipients by forcing them to choose between the public benefit and remaining a religious institution. *Id.* at 465. The Court held that when the state conditions a benefit in this way, which imposes a penalty on the free exercise of religion, it must be subject the "most rigorous" scrutiny, one in which this policy does not survive and is therefore unconstitutional. *Id.* at 454.

For a law to pass the strict scrutiny test, it must be drawn in narrow terms and protect a compelling government interest. In *Church of Lukumi Babalu Aye*, members of a religious group applied and received licensing, inspection, and zoning approvals to establish a church which

included a ritual of animal sacrifice. 508 U.S. 520, 526 (1993). In response to this, Respondents held an emergency meeting and passed ordinances that prohibited animal sacrifice. *Id.* The Petitioners claimed their First Amendment rights were violated when they were not permitted to practice their religion. *Id* at 528. The Court held the ordinances violated the Free Exercise Clause because they were not neutral, in that they had as their object the suppression of religion, nor of general application, in that they pursued the cities government interest only against conduct motivated by religious beliefs. *Id.* at 531-32. They were not drawn in narrow terms and were not passed to protect a compelling government interest. *Id.*

Like *Ezpinoza*, where this Court declared a categorical ban on religious exercise to be subject to strict scrutiny, Tourvania Education Department also places a categorical ban on those who are otherwise qualified from receiving IDEA funds just because of their religious status. TEC §502 singles out schools based on their religious character by including a provision with a nonwaivable nonsectarian requirement, which, like *Ezpinoza*, places an extreme burden on the families with disabled children who wish to send them religious school and further requires the religious schools to "bear the weight" of the denial of a public benefit. Therefore, denial of IDEA funds to Petitioners creates a categorical exclusion based solely on religious identity, and subjects TEC §502 to strict scrutiny.

Like *Trinity*, where Petitioners were forced to choose between their religious convictions and receiving a public benefit, here Tourvania Department of Education is forcing families to choose between essential funding for their disabled children's education and sending their children to an Orthodox Jewish school, which is a "critical feature" in their freedom to exercise religion. By forcing families to make these decisions, Tourvania Department of Education is denying

Petitioners a public benefit solely because of their religious affiliations with the school they desire their children to attend, which is a deprivation of a fundamental right to free exercise of religion. Therefore, TEC §502 is subject to strict scrutiny, as the denial of IDEA funds, solely due to religious status, is a direct penalty on the free exercise of religion.

Like *Lukumi*, where this Court subjected the ordinances to the "strictest scrutiny" because they were not drawn in narrow terms and did not protect a compelling government interest, the denial of IDEA funds similarly does not protect a compelling government interest. Rather, it simply discriminates against those seeking freedom to exercise their religion while obtaining funding for their disabled children. Additionally, the Court in *Lukumi* further stated that the 'government interest' was only against conduct motivated by religious belief, which is exactly what the Tourvania Board of Education is doing under TEC §502's nonwaivable nonsectarian requirement; the denial of IDEA funds is only against those who wish to utilize it at religious schools. Therefore, there was no legitimate government interest when denying Petitioners IDEA funds solely because of their religion and TEC §502 will fail strict scrutiny.

Overall, TEC §502 places an undeniable categorical exclusion on the families and schools with religious affiliations solely based on religion. This kind of categorical exclusion subjects the law to strict scrutiny, which it will only survive if the regulation is narrowly tailored to further a compelling governmental interest while being the most restrictive means of achieving that interest. Additionally, the denial of IDEA funds deprives Petitioners of a fundamental right to free religious exercise which also subjects a regulation to strict scrutiny.

B. Tourvania Department of Education's denial of IDEA funds will not pass strict scrutiny because it is neither religiously neutral nor generally applicable.

Tourvania Department of Education's denial of IDEA funds will not survive strict scrutiny, as it was neither generally applicable nor religion-neutral when it barred any sectarian schools, even those determined eligible under all other requirements of the TEC §502, from receiving aid. Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling government interest if it is neutral and of general applicability. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dept. Of Human Resources of Ore. V. Smith*, 494 U.S. 872, 879 (1990))*; see also Trinity Lutheran Church of Columbia, Inc, v. Comer*, 582 U.S. 449, 460 (2017) ("In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have to be careful to distinguish such laws from those that single out the religious for disfavored treatment.").

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny" – specifically, strict scrutiny – and "will survive scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. Neutrality and general applicability are interrelated, and the failure to satisfy one requirement likely indicates that the other has not been satisfied. *Id.* at 531. The minimum requirement of neutrality is that the law is not discriminatory on its face. *Id*. The neutrality and general applicability in programs that provide public benefits ensure that the government does not exclude members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. *Everson v. Bd of Educ*., 330 U.S. 1, 16 (1947).

Neutrality and general applicability of a law are interrelated, and the failure to satisfy one is likely an indication that the other hasn't been satisfied. In *Church of Lukumi Babalu Aye*, this Court held the City's ordinances were not neural, but have as their object the suppression of a religious exercise. *Lukumi*, 508 U.S. at 543. Additionally, each of the ordinances pursues the governmental interest only against conduct motivated by religious belief and violates the requirement that laws burdening religious practice must be of general applicability. *Id*. at 542. Therefore, the ordinances could not withstand strict scrutiny due to their lack of applicability and lack of neutrality. *Id*.

A law will be upheld against the Free Exercise Clause if it is religiously neutral and generally applicable so long as it does not promote or restrict religious beliefs, even if it burdens a religion. In *Employment Div. v. Smith*, respondent employees were fired for ingesting peyote for sacramental purposes and petitioners denied them employment because the use of peyote was criminal under state law. 494 U.S. 872, 883 (1990). Respondents claimed the denial of unemployment compensation for ingesting peyote was a violation of the Free Exercise for restricting religious beliefs. *Id.* The Supreme Court held that there was no violation of the Free Exercise Clause because the controlled substance law was not aimed at promoting or restricting religious beliefs, rather a generally applicable, religion-neutral criminal law that has the effect of burdening a particular religion practice need not be justified, under the Free Exercise Clause, by a compelling government interest. *Id.* at 885.

A regulation that includes neutrality and general applicability in programs that provide public benefits must ensure that the government does not exclude members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. In *Carson v.*

Malkin, Petitioners sought to utilize the State's tuition assistance for parents who lived in school districts that did not operate a secondary school. 142 S. Ct. 1987, 1994-95 (2022). Petitioners were denied assistance solely because the schools they wished to send their children to did not meet the nonsectarian requirement and subsequently filed a claim alleging the restriction violated the Free Exercise Clause. *Id*. The Supreme Court held this was a violation of the Free Exercise Clause because the program operated to identify and exclude otherwise eligible schools from receiving tuition assistance, a public benefit offered eligible families, on the basis of their religious exercise. *Id.* at 2002. There was nothing neutral about the requirement; the state awarded tuition assistance to certain eligible students attending private schools, so long as they were not religious schools. *Id*.

Similar to *Church of Lukumi Babalu Aye*, where the city ordinances were not neutral due to their suppression of religion nor generally applicable as the governments interests were only against conduct by religious belief, Respondent's requirements also provide no neutrality or general applicability. Here, the nonwaivable nonsectarian requirement in the Tourvania Education Code makes it impossible for a child with a disability in a religious school to receive the same funding as they would if they were place in a nonsectarian school, which, like *Lukumi*, creates a lack of neutrality in the requirement because it suppresses religion. Additionally, the Tourvania Education Code lacks general applicability because, like *Lukumi*, the state governments interest in enforcing a nonwaivable nonsectarian requirement was only against religious schools. These sectarian schools could meet all other requirements of the TEC §502, and still be denied funds based solely on religion. Therefore, the nonwaivable nonsectarian requirement lacks a compelling government interest for denying IDEA funds to petitioners solely for their religious beliefs.

Unlike *Employment Div. v. Smith*, where the prohibition on peyote was considered a generally applicable, religion-neutral criminal law because it was a statute that all citizens of the state had to adhere to regardless of their religious beliefs, the present case specifically burdens the religious exercise of the petitioners' by forcing them to choose between funding toward their disabled childrens' education and their religious beliefs. In *Employment Div. v. Smith*, citizens of the state were all subject to denial of unemployment compensation for ingesting peyote which made the law generally applicable and religion-neutral, however, in the present case, the only schools subject to denial of IDEA funds, who have already met all other required criteria outlined in the TEC §502 are those who are sectarian. Therefore, there denial of funds based solely on the school being sectarian does not make the law generally applicable nor religiously neutral.

Like *Carson v. Malkin,* where the public benefit of tuition assistance was neither neutral nor generally applicable because the requirements excluded members due to their faith, the TEC §502 included a provision that prohibited members "of any faith, because of their faith, or lack of it", from receiving the benefits of public welfare legislation. Petitioners were seeking funds for their disabled children, a benefit that was available to the public, for any private or public school which met the eligibility criteria, if it was a nonsectarian school. The nonwaivable nonsectarian requirement, like *Carson*, made it impossible for these families to access the public benefits, of which they were eligible for, without forcing them to choose assistance for their children's education over their religion beliefs. Therefore, the public benefit was neither generally applicable nor religion-neutral because it deliberately excluded members of the public due to their faith.

The TEC §502 will not survive strict scrutiny because it is neither generally applicable nor religion neutral. The Tourvania Board of Education's exclusion of religious schools who are

eligible to receive IDEA funds forces the families to choose between the rights of the parents to direct their children's religious upbringing, and receiving funds to ensure their disabled children get the special education and related services they need. By forcing the parents to make this choice, it is neither neutral nor generally applicable. Furthermore, TEC §502 will not survive strict scrutiny, due to its lack of religion-neutrality and general applicability and should be ruled unconstitutional as a violation of the Free Exercise Clause.

II. BARRING SECTARIAN SCHOOLS FROM RECEIVING STATE FUNDING UNDER TEC §502 VIOLATED THE ESTABLISHMENT CLAUSE.

TEC §502, as applied to barring federal funding for disabled children attending religious schools, is also in contradiction with the Establishment Clause. Broadly, the Establishment Clause bars any direct or indirect government imposition of religion on its citizens. U.S. Const. amend. I ("Congress shall make no law respecting the establishment of a religion."). However, read in conjunction with the Free Exercise Clause, states must be neutral in its relations with religious groups and may not use their power to "handicap religions." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1937). Therefore, a their attempt to maintain the "wall of separation between church and state," *Bd. of Educ. v. Allen*, 392 U.S. 236, 251 (1968), a state must also not "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). The government must remain neutral and not "prefer[] those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

What state action precisely constitutes a violation under the Establishment Clause has been the subjected varying interpretations by this Court. *Lemon v. Kurtzman* first tried to establish a

framework by providing a three-prong analysis whereby a statute must: (1) "have a secular legislative purpose"; (2) not have a "primary effect" that inhibits religion; and (3) not "foster an excessive government entanglement with religion." 403 U.S. 602, 612-13 (1971). However, "this Court has either expressly declined to apply the [the Lemon test] or has simply ignored it." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) ("As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the Lemon test could not resolve them.").

The Court today has settled for "a more modest approach that focuses on the particular issue at hand." *Id*. When the particular issue has involved government subsidies through student-aid programs such as TEC §502, a two-part test requiring (1) religious neutrality and (2) independent private choice has been utilized. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

Foremost, the Respondent's belief that the nonsectarian requirement within TEC §502 is constitutionally required under the Establishment Clause is unfounded. Just as in *Zelman* or *Carson*, allowing public funds to reach religiously affiliated schools through independent choices of private beneficiaries does not offend the Establishment Clause. Moreover, this Court should apply *Zelman*, which has traditionally been applied to government *inclusions*, to programs *excluding* government options to hold that TEC §502 violates the Establishment Clause. The present statute fails *Zelman* by demonstrating religious hostility rather than neutrality by restricting parental choice in educational options only to secular schools. Lastly, the removal of religious options also fails to surpass *Lemon* by lacking a secular purpose, inhibiting religious schooling, and resulting in excessive government entanglement with religion.

A. Removing the nonsectarian requirement of TEC §502 would not offend the Establishment Clause under Zelman.

The Respondents' primary concern is that including sectarian schools within the IDEA funding scheme would violate the Establishment Clause. However, this concern ignores Supreme Court precedent establishing safeguards that allow for government aid to reach religious institutions in permissible ways.

In *Zelman v. Simmons-Harris*, the Supreme Court upheld an Ohio program designed to provide financial assistance to qualifying families. 536 U.S. 639, 662-63 (2002). The contested Ohio Pilot Project Scholarship Program provided two basic kinds of assistance to parents of children in a school district: (1) families could receive a scholarship to be used at any public or private school within the district, and (2) families could receive funds to cover tutoring costs. *Id*. at 645. The Court's analysis emphasized that the "constitutionality of direct aid programs has remained consistent and unbroken." *Id*. at 649. A religiously neutral program providing assistance to a "broad class of citizens" who exercise their own "genuine and independent choice" withstands Establishment Clause challenges. *Id*. at 616-17 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)). When such a program results in the "incidental advancement of a religious mission[] … [the advancement] is reasonably attributable to the individual recipient, not to the government." *Zelman*, 536 U.S. at 617.

The relevant inquiry under *Zelman* is the "class of beneficiaries" to whom government funds are made available. 536 U.S. at 650; *see also Mueller*, 463 U.S. at 399. The proportion of funds flowing to a specific group is irrelevant if the eligibility criteria are themselves neutral.

Zelman, 536 U.S. at 653 ("There are no 'financial incentives' that 'skew' the program toward religious schools … 'where the aid is allocated on the basis of neutral, secular criteria.") (citation omitted); *see also Mueller*, 463 U.S. at 401 (Despite 96% of the beneficiaries being parents in religious schools, the Court focused on the availability of funds to "all parents," including those with children in private sectarian and nonsectarian schools.).

The *Zelman* Court further held that the Pilot Program was "neutral in all respects" because it was "part of a general and multifaceted undertaking" and benefits flowed to a "wide spectrum of individuals." 536 U.S. at 653; *see also Witters*, 474 U.S. 481, 487 (1986) (holding that the Establishment Clause is not implicated when tuition grants are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.").

Zobrest further clarified that the type of aid made available to religious institutions through government programs does not alter the thrust of *Zelman*. 509 U.S. 1 (1993). *Zobrest* involved a federal program allowing sign language interpreters to assist deaf children enrolled in religious schools. *Id*. at 6. The program was intended to be neutrally applied to any qualifying disabled children regardless of the school they attended. *Id*. at 10. Accordingly, the program was upheld since the beneficiaries of the program were the disabled children, not the sectarian schools. *Id*. at 12 ("Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA."). Like *Zelman* and *Mueller*, the focus was on neutrality and the principle of private choice. *Id*.

The Establishment Clause also recognizes a fundamental distinction between funding secular education and supporting inherently religious activities. *Locke v. Davey*, 540 U.S. 712, 721 (2004). In *Locke*, the Supreme Court reaffirmed this distinction by upholding a state scholarship

program in Washington that prohibited the use of public funds for inherently religious instruction, thus precluding students from pursuing 'a degree in theology.' *Id*. at 725. Notably, the program permitted "students to attend pervasively religious schools" as long as they were accredited. *Id.* at 724. The Court emphasized that obtaining a degree to "lead a congregation is an essentially religious endeavor," unlike "[t]raining for secular professions." *Id*. at 72. It was both constitutionally permissible for the program to exclude these 'essentially religious endeavors' while also allowing funding to indirectly reach other religious programs.

Tourvania's current policy in TEC §502, which categorically excludes sectarian schools, fails to utilize the constitutionally permissible mechanisms established by these cases. The Respondents could have structured TEC §502 to mirror the neutral programs upheld in *Zelman*, *Mueller*, and *Zobrest*.

One option would be to provide vouchers directly to parents of children with disabilities. These vouchers would be specifically designated for special education and related services mandated under IDEA. Parents could then redeem these vouchers at the certified school of their choice, secular or religious, with the caveat that the school must offer services that meet the child's individualized education plan. Alternatively, as seen in *Zobrest*, Tourvania could reimburse parents for qualified secular special education services received by their child, even if those services are delivered within a religious environment. *See generally* 509 U.S. 1 (1993). This reimbursement model focuses on the child's secular educational needs and avoids direct funding of the religious institution itself.

By using either a neutral voucher system or a reimbursement model, Respondents could ensure that IDEA funds fulfill their intended purpose of supporting the secular education of children with disabilities. Adopting such an approach would demonstrate neutrality and respect for parental choice -- two key principles highlighted in *Zelman*. The Respondents may argue that even a neutral funding mechanism could lead to indirect support for religious activities in sectarian schools. However, *Zelman* clarifies that when a program is neutral and funds flow pursuant to private choice any incidental benefit is the result of individual choices, not government endorsement. 536 U.S. 639, 617 (2002).

The Respondents may also claim that Tourvania Education Code §502's exclusion is necessary to avoid violating the Establishment Clause as was the case in *Locke*. However, *Locke* is distinguishable. *Locke* involved the exclusion of funding for "devotional theology" degrees, a program with a distinct religious purpose. 540 U.S. at 721. Here, TEC §502 excludes all sectarian schools, regardless of the specific services offered, focusing on the religious affiliation of the school rather than the nature of the services. TEC §502 (a), (d)(ii)(1). As established in *Zelman* and *Zobrest*, incidental funding for secular services in a religious environment does not violate the Establishment Clause. *Zelman*, 536 U.S. 639, 617 (2002); *Zobrest*, 509 U.S. 1, 6 (1993).

In conclusion, Tourvania Education Code §502's blanket exclusion of sectarian schools fails to demonstrate any compelling reason why this was constitutionally required or preferable to a more inclusive approach. By employing a neutral funding mechanism that focuses on secular special education services and empowers parental choice, the Respondents could have broadened eligibility and complied with both the IDEA and the Establishment Clause. While the 'play-in-the-joints' between the Free Exercise and Establishment Clauses allows for some flexibility, states

must exercise caution not to veer too far in one direction and demonstrate overt hostility towards religion in their efforts to avoid violations of the Establishment Clause. Such an approach risks encroaching upon the protections guaranteed by the Free Exercise Clause, as exemplified by TEC §502.

1. Zelman should be applied by this Court to hold that TEC §502 violates the Establishment Clause.

As the precedent established by *Zelman* demonstrates, the principles of neutrality and private choice are not limited to *including* religious schools in government aid programs. They also extend with equal force to situations where religious options are *excluded*. When Establishment Clause concerns are mitigated by the independent and private choice of recipients, *Locke*, 540 U.S. at 719, any anti-establishment interests in their exclusion are similarly diminished. Moreover, just as neutrality and independent choice are prerequisites under *Zelman's* analysis for student-aid options, their absence is inherently unconstitutional under the Establishment Clause. Therefore, *Zelman* applies to exclusions as it does for inclusions.

TEC §502 fails to adhere to *Zelman's* principles. The explicit exclusion of all sectarian schools, based solely on their religious affiliation, undermines the very neutrality that *Zelman* requires. This categorical exclusion restricts the choices available to parents who genuinely desire a faith-based education for their children with disabilities. By denying access to IDEA funds solely due to a school's religious character, Tourvania's law sends a message of disapproval towards religion and interferes with the genuine and independent choice that *Zelman* deemed essential. *Locke,* 540 U.S. at 719 ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients.").

The Establishment Clause prohibits a "showing of hostility to religion." *Sch. Dist. Of Abington Twp. v. Schempp*, 375 U.S. 203, 225 (1963). The Clause thrives on a foundation of neutrality, ensuring a fair and balanced approach where both religious and secular options can coexist. *Id.* By focusing solely on excluding religious schools, TEC §502 creates greater separation between the government and church than the Establishment Clause requires.

True neutrality, as envisioned in *Zelman*, dictates that parents should be able to select the educational environment they deem best for their child, regardless of whether a school is secular or religious. Under TEC §502, parents yearning for government funding to support their child's disability education within a faith-based environment are offered a stark choice: abandon their religious convictions or forego critical financial assistance. R. at 6-7. This forces families into an impossible situation, directly contradicting the Establishment Clause's principles of neutrality and private choice.

The Establishment Clause thrives on a system where both religious and secular options coexist. *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) ("We continue to ask whether the government acted with the purpose of … inhibiting religion."); *see also Zelman*, 536 U.S. at 617 (stating the issue as "whether the Ohio program nonetheless has the *forbidden* '*effect'* of advancing or inhibiting religion."). TEC §502, by categorically excluding religious schools, restricts this very choice and disproportionately burdens families seeking a faith-based education for their children with disabilities.

Overall, TEC §502's exclusion of sectarian schools contravenes the principles of neutrality and private choice established in *Zelman*. This restricts parental choice and undermines the very purpose of the IDEA, which is to empower parents to make critical decisions concerning their children's education. Accordingly, TEC §502 should be revised to ensure IDEA funds support the

educational needs of all children and respect the fundamental right of parents to determine the most appropriate learning environment for their child.

B. Tourvania Education Code §502 Would Also Fail the Lemon Test Because It Lacks a Secular Purpose, Inhibits Religion, and Creates Entanglement

While recent case law demonstrates a shift away from strict reliance on the *Lemon* test, its framework remains relevant to analyze the impact of TEC §502's nonsectarian requirement on families seeking a faith-based education. To withstand Establishment Clause scrutiny, a governmental action must (1) "have a secular purpose"; (2) have a principal effect that "neither advances nor inhibits religion"; and (3) "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A failure of one of these prongs would result in a constitutional violation under the Establishment Clause. TEC §502 violates all three prongs by denying choice, hindering religious exercise, and creating an unnecessary risk of entanglement.

1. Tourvania Education Code §502's Exclusion Lacks Secular Justification and Discriminates Against Religion.

A legitimate secular purpose is the bedrock of any government action compatible with the Establishment Clause. This neutral purpose must not express a preference for or against any religion. *See Lemon*, 403 U.S. at 616 ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079 (2019) (holding that the requirement of a secular education under the Establishment Clause "aims at preventing the relevant government decision maker … from abandoning neutrality."). However, this does not provide the government a pass to show callous indifference to religious groups. *Sch. Dist. of*

Abington Twp., Pa. v. Schempp, 374 U.S. 203, 225 (1963). A state must take care not to "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Id*.

By categorically excluding religious schools from publicly available government benefits, TEC §502 creates this exact 'religion of secularism'. The nonsectarian requirement signals a potential motive of religious disapproval rather than a neutral objective like ensuring quality education for all. The record underscores that TEC §502's categorical exclusion is not justified by any secular purpose. R. at 6-7. Phrases like 'nonsectarian' demonstrate a bias against religion, not a neutral objective related to service delivery. TEC §502 (a)-(b). Unlike cases where exclusions were based on objective criteria, such as *Locke's* "degree in theology," no compelling reason is provided to substantiate singling out religious schools. *See Bd. Of Educ. v. Allen*, 392 U.S. 236, 244 (1968); *see also Everson v. Bd. Of Educ.*, 330 U.S. 1, 19-20 (1947).

Furthermore, the record offers no evidence that inclusion of religious schools would hinder the secular delivery of IDEA-mandated services. The lack of documented problems or concerns raises questions about the true intent of the law – potentially targeting the religious character of schools rather than ensuring a secular educational environment. This exclusion ignores the inherently secular nature of special education services mandated by IDEA. These services, whether provided in a secular or religious setting, focus on meeting the child's unique educational needs as outlined in their individualized education plan ("IEP").

Overall, TEC §502 fails the Lemon test's secular purpose requirement. The record offers no evidence that the categorical exclusion of religious schools advances any legitimate secular goal. This exclusion, unsupported by demonstrable harm, reveals a bias against religion, not a neutral effort to support secular education.

2. TEC §502 Inhibits Religious Freedom by Forcing Families to Choose Between Faith and Education.

TEC §502's primary effect is to inhibit the free exercise of religion by families who seek a faith-based education for their children with disabilities. By denying access to IDEA funds solely on the basis of religious affiliation, the law sends a message of disapproval towards those families and restricts their ability to choose the educational environment they deem best. *See Agostini v. Felton*, 521 U.S. 203, 243-44 (1997) ("An important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived … by the nonadherents as a disapproval, of their individual religious choices.") (quoting *School Dist. v. Ball*, 473 U.S. 373, 390 (1985)).

The Flynn Family's experience, as outlined in the record, illustrates this forced choice. They assert that they would need to "compromise their religious beliefs … in order to receive the special education funding other disabled students receive." R. at 8. Unwilling to do so, H.F.'s education has suffered because the "nonsectarian requirement makes it impossible … to receive the equivalent of a free appropriate public education ("FAPE") at an Orthodox Jewish School." R. at 8. Even families who have not directly faced the agonizing choice (like the Flynns and Klines) may be discouraged from seeking a faith-based education for their children with disabilities due to the law's restrictions. This creates a chilling effect on the free exercise of their religious beliefs.

Forcing parents to choose between their faith and educational development of their children also conflicts with the fundamental goals of the IDEA. Congress designed IDEA to ensure educational opportunities for all children with disabilities, recognizing that a one-size-fits-all approach would not be effective. *Bd. Of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176,189 (1982). The IDEA's emphasis on IEPs demonstrates the

understanding that each child's needs are unique. *Honig v. Doe*, 484 U.S. 305, 311 (1988). By categorically excluding religious schools, TEC §502 thwarts this purpose and undermines the IDEA.

Furthermore, IDEA explicitly allows for participation of children placed in private, even religious schools. 20 U.S.C. § 1412(a)(10)(A)(i)(III). This enshrines the principle of parental choice in determining the most suitable educational environment for their child. TEC §502's blanket exclusion of sectarian schools fundamentally undermines this right. It forces parents, like the Flynns and Klines, to choose between their religious convictions and securing the essential services guaranteed to their children under the IDEA.

3. TEC §502 Creates Excessive Government Entanglement with Religion Because It Forces Intrusive Scrutiny and Burdensome Choices on Religious Institutions.

Excluding sectarian schools from participation in the IDEA funding program also creates an excessive entanglement between the government and religion. To ensure compliance with the 'nonsectarian' requirement, the government would be forced to delve into the religious curriculum and practices of any religious school seeking IDEA funds. This necessitates ongoing monitoring to ensure religious instruction is not seeping into services provided with IDEA funds. Such an intrusion is a clear violation of the Establishment Clause's separation of church and state.

The record in this case, specifically the experiences of Joshua Abraham High School and Bethlehem Hebrew Academy, illustrates the excessive entanglement between government and religion created by TEC §502. R. at 10. Both schools meticulously complied with all secular requirements of the Tourvania Education Code, yet their applications were denied solely due to the 'nonsectarian' requirement. *Id.* To ensure compliance with this requirement, government officials would potentially need to scrutinize the schools' religious character and practices. This not only

necessitates intrusive inquiries into the religious practices of these schools but also creates significant uncertainty and potential for litigation, imposing a substantial burden on religious institutions. Ultimately, TEC §502 forces these religious schools into a difficult choice between their religious identity and vital IDEA funding to serve their students with disabilities.

TEC §502, by categorically excluding sectarian schools, fails all three prongs of the *Lemon* test. It lacks a legitimate secular purpose, inhibits the free exercise of religion, and poses a genuine risk of excessive entanglement. Therefore, even under this traditional Establishment Clause analysis, TEC §502 is unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to reverse the appellate court's grant of summary judgement and affirm the district court's decision to deny Respondent's motion for summary judgement.

Dated: Mar. 4, 2024

Respectfully Submitted,

/s/ Team #11

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