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 of Superintendent of Public Instruction,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM 12

MARCH 3, 2024 COUNSEL FOR RESPONDENT

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U.S. Const. Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV § 1

[…] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tourvania Education Code §502(a)

Services provided by private, nonsectarian schools and agencies, as well as services provided by public schools and agencies, shall be made available to provide the appropriate special education and related services required by the individual child.

Tourvania Education Code §502(b)

As used in part (a), "nonsectarian" means 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.

Tourvania Education Code §502(d)(ii)(1)

When a nonpublic school applies for certification, it cannot petition for a waiver of the nonsectarian requirement.

20 U.S.C. § 1400(d): Purposes

The purposes of this chapter are--

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1411(a)(1) Purposes of the Grant

The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.

20 U.S.C. § 1412(a)

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

20 U.S.C § 1412(a)(10)(A)(i)(III)

Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

20 U.S.C § 1412(a)(10)(A)(vi)(II)

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

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

The Individuals with Disabilities Education Act

The Federal government passed the "Education for All Handicapped Children Act of 1975", later amended and renamed the "Individuals with Disabilities Education Act" (IDEA), to ensure children with disabilities have access to a free public education where their unique individual needs are met. *See* 20 U.S.C. § 1400(d). To accomplish this end, the law provides funding for states to use to properly accommodate and provide an education for children with all sorts of disabilities in public school. 20 U.S.C. § 1411(a)(1). In order to receive funding under this law, states must submit a plan to the secretary that provides assurances the state will comply with a plethora of statutory requirements. 20 U.S.C. § 1412(a). While the statute includes provisions regarding funding for private schools, it states in relevant part, "Such services [...] **may** be provided to children on the premises of private, including religious, schools, **to the extent consistent with the law**." 20 U.S.C. § 1412(a)(10)(A)(i)(III) (emphasis added). If the state chooses to include private schools in the funding program, the law further requires all education and services provided to children at private schools to be "secular, neutral, and non-ideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II).

Tourvania's Implementation of IDEA

In order to qualify for federal funding under the IDEA, Tourvania enacted Tourvania Education Code (TEC) § 502. (R. at 6.) In keeping with provisions of the IDEA, TEC § 502(a) provides, "Services provided by private, nonsectarian schools and agencies, as well as services provided by public schools and agencies, shall be made available to provide the appropriate special education and related services required by the individual child." *Id.* TEC § 502(b) further provides:

> "As used in part (a), "nonsectarian" means 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 nonsectarian requirement is not waivable. (R. at 7); TEC § 502(d)(ii)(1). In addition to complying with 20 U.S.C. § 1412(a)(10)(A)(iv)(II), this provision of the TEC was intended to ensure compliance with the Establishment Clause of the First Amendment of the United States Constitution. (R. at 2.) Any non-public school that does not meet the requirements of TEC § 502 will not receive certification from the state, and will thus be ineligible to receive IDEA funds. (R. at 7); TEC § 502(d).

The Present Action

This case was brought by two Orthodox Jewish families, the Flynns and the Klines, and two Orthodox Jewish private schools. (R. at 1.) The Flynns have a five-year-old daughter, H.F., who is autistic. (R. at 8.) Due to their religious beliefs, the Flynns feel obligated to provide their daughter with an Orthodox Jewish education. *Id.* Thus, H.F. is currently enrolled at Fuchsberg Academy, a private Orthodox Jewish learning center, where she receives specific therapy for her disability. *Id.* The Flynns pay for this therapy, as well as her tuition for the school, out of pocket. *Id.* Nothing suggests Fuchsberg Academy has ever sought state certification to receive funds. Likewise, the Flynns have never sought a free education for H.F. at a public school where they would not have to shoulder the cost of tuition or her therapy. *Id.*

The Klines also have an autistic daughter, thirteen-year-old B.K., and claim their religious beliefs require them to provide an Orthodox Jewish education for her. (R. at 9.) B.K. has been in public school since she was in pre-school and all of her disability accommodations are currently provided for at no extra cost to the Klines. *Id.* Thus, much like the Flynns, the Kline's grievance stems from their desire to have their daughter receive her education in an Orthodox Jewish school of their choice, but also to have the cost of her disability accommodations covered under IDEA. *Id.*

Lastly, the two Orthodox Jewish Schools that are parties to this suit are Joshua Abraham High School, and the Bethlehem Hebrew Academy. *Id.* Both schools offer religious and secular studies and both seek to promote Jewish values, such as love for the state of Israel and passion for Torah. *Id.* Additionally, both schools sought state certification to receive funding under IDEA, and both were denied. (R. at 10.) Each school claims to be in complete compliance with the TEC, except the nonsectarian requirement. *Id.*

SUMMARY OF THE ARGUMENT

The extension of IDEA funds to religious institutions violates the Establishment Clause because the Founders and Supreme Court precedent understood the Establishment Clause as prohibiting the government from giving aid to religious organizations. In *Kennedy*, this Court determined that the Establishment Clause should be interpreted by referencing historical understandings. This court has long recognized that among the Founders, Jefferson and Madison are the most important to look at because of their roles in passing the Virginia Bill for Religious Freedom on which the First Amendment was based. Both of them understood that the government should not give money to religious organizations and this understanding was transferred to the Establishment Clause. Furthermore, the Supreme Court used their

understanding in the cases that constructed the *Lemon* Test which also prohibits the granting of IDEA funds in this case because it will have the effect of promoting religion and will entangle government and religion.

Section 502 of the TEC does not violate the Plaintiffs' rights under the First Amendment's Free Exercise Clause because it does not burden Free Exercise and it is a narrowly tailored and neutral law of general applicability. This Court has recognized that a burden to Free Exercise must be coercive in a way that goes beyond making it more difficult to practice. This is because the Free Exercise Clause is written in terms of what the government cannot do to the individual rather than what the individual may exact from the government. This Court has recognized that choosing not to subsidize a right does not violate that right and that religion cannot act as a veto over state policy that does not prohibit Free Exercise. TEC § 502 does not prohibit free exercise of religion; it only prohibits the state from providing funds to religious organizations as a way of choosing not to subsidize religious education. As a result, the Free Exercise Clause is not implicated.

To determine whether a law is neutral and generally applicable, this Court will look at the text of the statute as well as the context surrounding its passage and application. The text of TEC § 502 does not refer to a religious practice and makes no mention of religious conduct whatsoever. Furthermore, there is nothing in the facts to demonstrate that the context surrounding TEC § 502's passage and application lacks neutrality. Finally, the law fulfills a compelling government interest because fulfilling obligations under the Establishment Clause is a compelling state interest. It may also fulfill the compelling government interest in desegregation because the limited history of aid to religious schools shows that they were used to

continue segregation, and a policy refusing to subsidize them is a policy that refuses to enable neo-segregation.

Lastly, TEC § 502 does not violate Plaintiffs' right to Equal Protection under the Fourteenth Amendment because the law does not single out an inherently suspect class for different treatment. The law distinguishes based on school choice for the families, and religious affiliation for the schools. Religious affiliation has never been classified as inherently suspect, and neither history nor lack of political representation for the class justifies declaring it such here. Therefore, the law must only satisfy rational basis review.

This Court should defer to the legislative judgment to exclude religious institutions from receiving public funds because doing so is necessary to comply with the Establishment Clause, and for qualifying for federal funding under IDEA. Both clearly qualify as legitimate state interests and the law is rationally related to both as without the exclusion, the Establishment Clause would be violated and Tourvania would not meet the federal requirements of IDEA.

ARGUMENT

I) PROVIDING IDEA FUNDS TO RELIGIOUS PRIVATE SCHOOLS WOULD VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The extension of IDEA funds to religious institutions violates the Establishment Clause because the Founders and Supreme Court precedent understood the Establishment Clause as prohibiting the government from giving aid to religious organizations. The Establishment Clause of the First Amendment to the Constitution says, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. In the case of *Kennedy v. Bremerton School District*, the Supreme Court stated that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct.

2407, 2428 (2022). The historical understanding of the Founders and Supreme Court precedent both recognize that the Establishment Clause prohibits aid to religious organizations.

A) The understanding of the founders demonstrates that the Establishment Clause prohibits aid to religious institutions.

The extension of IDEA funds to religious institutions violates the Establishment Clause because the Founders understood the Establishment Clause as prohibiting the government from giving aid to religious organizations and the history of aid to religious schools portrays an attempt to undermine Supreme Court precedent. Whenever stating the history behind the Establishment Clause, this Court has cited the opinions of Jefferson and Madison. *Everson v. Bd. of Educ*., 330 U.S. 1 (1947); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Walz v. Tax Com. of N.Y.*, 397 U.S. 664 (1970). As a result, their historical understandings are most important to this Court.

This Court has long recognized that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the [Virginia Statute for Religious Freedom]." *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). The Virginia statute was adopted in the context of opposing another bill titled "A Bill Establishing a Provision for Teachers of the Christian Religion." The bill sought to levy a property tax that would support religious ministers.[1] Patrick Henry, A Bill Establishing A

[1] It should be noted that the support was not for an established church but for all Christian denominations. The bill specifically said that they would preserve with the liberal principle of toleration by "abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians." Patrick Henry, A Bill Establishing A

Provision for Teachers of the Christian Religion (1784), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://liberalarts.tamu.edu/pols/wp-content/uploads/sites/20/2020/09/Henry-Madison-Sundry-letters.pdf

After the bill was proposed, James Madison wrote Memorial and Remonstrance against Religious Assessments. Within the text, he argues vehemently for a separation of religion and government. On the topic of financial support for religious institutions he says, "Who does not see that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance against Religious Assessments (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.

Madison's Memorial and Remonstrance was very popular in the state of Virginia. As a result, the bill was scrapped, and soon after the general assembly saw the proposal of the Virginia Bill for Religious Freedom. Thomas Jefferson wrote the bill and was very clear about giving money to religious institutions. The preamble of the bill said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." The bill itself stated, "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." Thomas Jefferson, Virginia Bill for Religious Freedom (1786), https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082. As this Court has recognized, the principle of preventing the government from using

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Provision for Teachers of the Christian Religion (1784), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://liberalarts.tamu.edu/pols/wp-content/uploads/sites/20/2020/09/Henry-Madison-Sundry-letters.pdf

taxpayer money to aid religious organizations was carried over into the Establishment Clause. *Everson*, 330 U.S. at 15-16.

Additionally, it is worth noting that Madison vetoed a bill during his presidency that reserved a certain parcel of land owned by the United States for use by a Baptist Church. He did so because the bill "comprizes a principle and precedent for the appropriation of funds of the United States, for the use and support of Religious Societies; contrary to the Article of the Constitution which declares that Congress shall make no law respecting a Religious Establishment." Letter from James Madison to the House of Representatives (Feb. 28, 1811), https://founders.archives.gov/?q=%20Author%3A%22Madison%2C%20James%22%20From%20James%20Madison%20to%20the%20House%20of%20Representatives%2C%2028%20February%201811&s=1111311111&r=2&sr=. Madison in his Detached Memoranda provided additional reasoning for preventing government funds from aiding religious institutions. He states that "the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical Corporations [is an evil which ought to be guarded against] . . . The *growing* wealth acquired by them never fails to be a source of abuses." James Madison, Detached Memoranda (Jan. 31, 1820), https://founders.archives.gov/documents/Madison/04-01-02-0549.

Given this history, it is clear that the Founders' historical understanding of the Establishment Clause prohibits the government from giving money to religious institutions because doing so constitutes aid to religion, and allowing government money to flow into religious institutions is dangerous. As Justice Jackson noted in his dissenting opinion in *Everson v. Board of Education*:

> [T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets

> up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom.

Everson v. Bd. of Educ., 330 U.S. 1, 26 (1947). It is therefore unsurprising that this Court noted in *Lemon* that "We have no long history of state aid to church-related educational institutions" and such aid represents "something of an innovation." *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971). The history of this country shows why that "innovation" occurred: resistance to desegregation after *Brown v. Board of Education*. The reason behind the establishment of private religious schools and the attempt to give them government money was part of an attempt by white Americans to avoid sending their children to integrated public schools. *See* ANDREW SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM 213-28 (2022). As a result, there is no history of using government money to support religious schools, and the little history that does exist shows that giving money to these institutions was simply a way to continue racist practices that would otherwise violate the Constitution.

In the case at hand, IDEA is a system in which government money is directly given to private educational institutions that apply, and it is clear that the educational institutions here are religious. As a result, they are the very kind of institution that the Founders intended to prohibit the government from aiding through taxpayer money. Giving IDEA funds to religious institutions appropriates government funds to support religious institutions as prohibited by the Establishment Clause. This prohibition goes to the heart of religious freedom because even if the money were to go to all religions equally, non-religious individuals would have been compelled "to furnish contributions of money for the propagation of opinions which [they] disbelieve[]." Even if that were not the case, allowing the program to extend these funds to religious schools perpetuates a system that was created to undermine Supreme Court precedent. The granting of tax-exempt status along with government subsidies to a class of institutions that have opposed

desegregation demonstrates the accuracy of Madison's concern that the wealth of religious organizations never fails to be a source of abuse. Consequently, the extension of IDEA funds to religious institutions violates the Establishment Clause because the Founders understood the Establishment Clause as prohibiting the government from giving aid to religious organizations, and the history of granting such aid shows that it fundamentally undermines other Constitutional concerns.

B) The Historical Understanding of the Supreme Court shows that the Establishment Clause prohibits aid to religious institutions.

The extension of IDEA funds to religious institutions violates the Establishment Clause because the Supreme Court's precedent understood the Establishment Clause as prohibiting the government from giving aid to religious organizations. This Court has a long history of precedents starting with *Everson v. Board of Education* and ending with *Lemon v. Kurtzman* that illuminate the historical legal understanding of the Establishment Clause.

In *Everson v. Board of Education*, the court considered a statute that allowed parents to be reimbursed for the money that they expended for the transportation of their children to and from religious schools via buses. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Everson established that a statute must have a secular purpose. Since the statute's purpose was to provide for the safe transportation of school children and the religious schools met the secular educational requirements of the state, it was considered constitutional. *Id.* at 18.

In *Engel v. Vitale*, the state of New York adopted a program of brief, neutral, and voluntary daily classroom prayers in public schools. *Engel v. Vitale*, 370 U.S. 421, 422 (1962). This Court stated that "[n]either the fact that a prayer [is] neutral nor the fact that [it] is voluntary can serve to free it from the limitations of the Establishment Clause." *Id.* at 430. This is because allowing the government to act religiously has historically led to the entanglement of policy and

religious orthodoxy which causes the two to encroach upon one another, and after they are entangled, there is nothing stopping that authority from encroaching further. *Id.* at 429-36

In *Sch. Dist. of Abington Twp. v. Schempp*, this Court considered public school policies in Maryland and Pennsylvania that allowed reading from the bible at the opening of each school day. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205-12 (1963). The court found that these practices were unconstitutional because "if [the primary effect of a practice] is the advancement or inhibition of religion then the enactment exceeds the scope of . . . the Constitution." *Id.* at 222.

The three tests determined in the previously mentioned cases were combined in the 1971 case *Lemon v. Kurtzman*.[2] The case considered the constitutionality of state statutes from Rhode Island and Pennsylvania which provided taxpayer-funded aid to church-related schools with regard to instruction in secular matters. *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971). To determine the constitutionality of a statute this Court stated three considerations must be made: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13. The Court found that taxpayer-funded aid fostered excessive entanglement because it would likely require varying measures of control and surveillance that creates an intimate and continuing relationship between church and state. *Id.* at 621-22.

[2] It should be noted that Lemon's predecessors, Lemon, and Lemon's progeny were deeply rooted in history. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Com. of N.Y., 397 U.S. 664 (1970); Lee v. Weisman, 505 U.S. 577 (1992).

This Court recognized in *Comm. for Public Educ. & Religious Liberty v. Nyquist*, "insofar as [] benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973). Here, the purpose of IDEA is to make sure that children with disabilities receive the assistance that they require to succeed in school. However, the parents are seeking to use public money to assist them in sending their children to sectarian schools and the schools are seeking monetary assistance to further their mission of religious education. As a result, the inevitable effect will be to advance those religious institutions by assisting them in the propagation of their beliefs.

Furthermore, this Court, when looking at entanglement, noted in *Walz v. Tax Commission of New York* that tax exemption did not violate the Establishment Clause because it created only a minimal and remote involvement between church and state that was far less than taxation of churches since taxation would call for official and continuing surveillance leading to an impermissible degree of entanglement. *Walz v. Tax Com. of New York*, 397 U.S. 664, 674-75 (1970). Here, the nonsectarian requirement minimizes involvement between religion and government because if there was no such requirement, then the state would need to continue official surveillance of these religious institutions to ensure compliance with state policy. As a result, the extension of IDEA funds to religious institutions violates the Establishment Clause because the funds will have the primary effect of aiding religion, and granting the funds fosters excessive entanglement of religion and government. Consequently, the extension of IDEA funds to religious institutions violates the Establishment Clause because the Supreme Court's precedent understood the Establishment Clause as prohibiting the government from giving aid to religious organizations.

II) DENYING IDEA FUNDS TO RELIGIOUS PRIVATE SCHOOLS DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

TEC § 502 does not violate the Plaintiffs' rights under the First Amendment's Free Exercise Clause because it does not burden Free Exercise and it is a narrowly tailored and neutral law of general applicability. The Free Exercise Clause of the First Amendment to the Constitution says, "Congress shall make no law prohibiting the free exercise [of religion]." U.S. CONST. amend. I. In the case of *Employment Division v. Smith*, the Supreme Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

A) TEC § 502 does not violate the First Amendment because it does not burden the Free Exercise of Religion.

TEC § 502 does not burden Free Exercise because there is no obligation to fund religious exercise. Government action constitutes a burden whenever it coerces individuals into acting contrary to their religious beliefs in a way that goes beyond making it more difficult to practice. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

In the case of *Sherbert v. Verner*, the Supreme Court considered whether the state could deny unemployment benefits to Sherbert, a Seventh-Day Adventist, because they could not find work due to their refusal to work on Saturday. *Sherbert v. Verner*, 374 U.S. 398, 400-401 (1963). The state already permitted Sunday worshipers to refuse work on Sunday while receiving unemployment benefits. The Court ruled in favor of Sherbert because their ineligibility for benefits derived solely from the practice of their religion, and placed pressure upon them to forego that practice because it forced them to choose between a government benefit and her religious practice. *Id.* at 404. As a result, the pressure burdened religious freedom in such a way that the law must be justified by a compelling government interest which the state was unable to provide. As a result, this Court decided in favor of Sherbert.

The Court noted that the decision did not violate the Establishment Clause because it merely extended the required neutrality between religions and did not have any involvement of religious organizations with secular institutions. *Id.* at 409-10. Justice Douglas in his concurring opinion also noted that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 412. Consequently, the decision did not declare the existence of a constitutional right to government benefits on the part of all persons whose religious convictions are the cause of their unemployment. It only held that the eligibility provisions cannot constrain a worker to abandon his religious convictions.

In *Lyng v. Northwest Indian Cemetery Protective Association*, this Court decided whether the government's decision to build a road through land sacred to certain Native American tribes violated the Free Exercise Clause. *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 440 (1988). The Court determined that while the decision to build the road would burden Free Exercise, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Id.* at 447-52. As a result, the Court ruled against the native tribes.

In *Regan v. Taxation with Representation*, a nonprofit corporation applied for tax-exempt status and was denied because it appeared that a substantial part of its activities consisted of lobbying, which is not permitted by § 501(c)(3). *Regan v. Taxation with Representation*, 461 U.S. 540, 541 (1983). The nonprofit argued that the refusal of its tax-exempt status was a violation of its First Amendment rights. *Id.* at 545. However, the Court stated that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Consequently, the Court ruled against the non-profit.

In the case at hand, the Petitioners are arguing that denying their access to funds violates their First Amendment rights. However, as *Sherbert v. Verner* makes clear, the Free Exercise Clause is designed as a protection against coercive government action and is not something that entitles religion to government funds. As a result, the Petitioners are not entitled to IDEA funds. Furthermore, the legislature by creating the non-sectarian requirement decided that it would not subsidize religious education. Under *Regan v. Taxation with Representation*, that decision does not infringe on Free Exercise merely because the government is not funding religious organizations. Finally, the Petitioners are attempting to veto the legislature's decision that does not prohibit Free Exercise. The Petitioners Flynn and Kline are still able to send their children to religious schools. The Petitioners Joshua Abraham High School and Bethlehem Hebrew Academy are still able to provide religious instruction. Consequently, the non-sectarian requirement does not burden Free Exercise.

B) TEC § 502 is a neutral law of general applicability that is narrowly tailored to serve a compelling state interest.

The statute is a neutral law of general applicability because the non-sectarian requirement applies equally and does not single out a religious practice nor is there evidence that the law was adopted as a result of hostility. Furthermore, it is narrowly tailored to fulfill a compelling government interest because it fulfills the obligations placed on the state by the Establishment Clause. In *Oregon Employment Division v. Smith*, this Court considered whether the denial of unemployment based on religious drug use violated the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990). The Court determined that "[i]t is a permissible reading of U.S. CONST. amend. I to say that if prohibiting the exercise of religion is not the object of [a law], but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. As a result, the Court ruled that drug use

laws were neutral and generally applicable and that the denial of benefits based on those laws did not violate the First Amendment.

In *Church of Lukumi v. Hialeah*, the court clarified when a law is neutral. In *Lukumi*, a city council adopted an ordinance against the slaughter of animals after learning that a Church following the Santeria religion was moving into the town. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524-528 (1993). The Court said that one must first look at the text of a law to determine facial neutrality, but that even if there is facial neutrality the context behind the law may show impermissible hostility that violates neutrality. *Id.* at 533-34. In *Lukumi*, the court determined that reference to "sacrifice" and "ritual" indicated a lack of facial neutrality because "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* However, the Court said that such references were not conclusive. That being said, when the court looked at the events preceding the enactment of the ordinances and their effect it became clear that the city council's actions of adopting these ordinances were motivated by hostility against the Santeria religion. *Id.* at 535-542. Consequently, the Court ruled that the ordinances impermissibly violated the Free Exercise Clause.

In the case at hand, the text of TEC § 502 does not refer to a religious **practice**. There is no mention of religious conduct whatsoever. Instead, it prohibits the **state** from performing a certain action: giving funds to religious institutions. Consequently, it is facially neutral. Furthermore, the statute's non-sectarian requirement is not hostility toward religion. To argue hostility requires the assumption that it is permissible for the government to give funds to religious institutions. However, the Establishment Clause prohibits the government from giving those funds.

That being said, if this Court determines that the Establishment Clause is not violated then the Court has stated previously that when reviewing a law for neutrality "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." *Id.* at 540. The Petitioners have the burden of showing a lack of neutrality and the record is silent on all of these factors. As a result, the Petitioner cannot demonstrate hostility.

Petitioners might claim hostility against religion in general. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022). However, as this Court determined in *Lukumi* "[t]he Free Exercise Clause, U.S. CONST., amend. I, protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43.

Again, there is no mention of religious conduct whatsoever. Instead, TEC § 502 prohibits the state from performing a certain action: giving funds to religious institutions. Furthermore, it is worth considering that giving religious institutions taxpayer money treats secular organizations unequally and unfavorably compared to religious organizations. Secular educational organizations must file 990 forms to receive tax-exempt status alongside meeting state educational requirements. Religious educational organizations are tax-exempt without having to file 990 forms and often argue that they should not be required to fulfill state educational requirements. IRS, *Annual Exempt Organization Return: Who Must File*,

https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file; Nomi M. Stolzenberg & David N. Myers, *Private Religious Schools Have Public Responsibilities Too*, THE ATLANTIC (Sept. 18, 2022), https://www.theatlantic.com/ideas/archive/2022/09/private-religious-schools-have-public-responsibilities-too/671446/. As a result, the non-sectarian requirement ensures equity between religious and secular organizations. Even though religious organizations may not access state money, those same organizations are tax-exempt without having to jump through the procedural hoops that similarly situated secular organizations do. Consequently, TEC § 502 is a neutral law of general applicability.

However, if this court were to determine that TEC § 502 is not a neutral law of general applicability, then the Court must apply strict scrutiny. TEC § 502 meets strict scrutiny because it fulfills a compelling government interest. It fulfills a compelling government interest because it fulfills the obligations that the state has to uphold under the Establishment Clause. This Court in *Widmar v. Vincent* stated that the state's "interest in complying with . . . constitutional obligations under the Establishment Clause may be characterized as compelling." *Widmar v. Vincent*, 454 U.S. 263, 263 (1981). Furthermore, as stated earlier, aid going to religious schools has historically been a way to avoid integration. *See* ANDREW SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM 213-28 (2022). Integration has long been deemed to fulfill compelling government interests such as remedying past discrimination and promoting diversity. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007). Therefore, the non-sectarian requirement fulfills the compelling

government interest in integration by preventing neo-segregationists from receiving and using government money to avoid integration.[3]

Furthermore, TEC § 502 is narrowly tailored to fulfill that interest because it is the least restrictive alternative. The alternative is ending the program entirely. Consequently, TEC § 502 meets the requirements of strict scrutiny. Therefore, the statute is a neutral law of general applicability that is narrowly tailored to fulfill a compelling government interest.

III) DENYING IDEA FUNDS TO RELIGIOUS PRIVATE SCHOOLS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court should conclude Tourvania has not violated the Equal Protection Clause of the Fourteenth Amendment by denying IDEA funds to religious private schools. The Fourteenth Amendment states, in relevant part, "No state shall [...] deny to any person within its jurisdiction the equal protection of its laws. U.S. CONST. amend. XIV, § 1. This amendment was passed after the civil war to prevent states from denying equal rights to newly freed black Americans. National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)* (Jan. 12, 2024) https://www.archives.gov/milestone-documents/14th-amendment. The Fourteenth Amendment requires similarly situated individuals to be treated alike under the law. *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) quoting *Plyler v. Doe,* 457 U.S. 202, 216 (1982). A law that violates this core principle does not violate the Constitution if the distinction

[3] It should be noted that this court has ruled that religion cannot be used as a justification to receive benefits while the institution violates federal policy. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (noting that "denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets" and that "governmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

is rationally related to a legitimate state interest. *See, e.g.*, *Cleburne,* 473 U.S. at 440; *McGowan v. State of Md.,* 366 U.S. 420, 425-6 (1961); *Johnson v. Robison,* 415 U.S. 361, 376 (1974). Heightened judicial scrutiny is only applied when the premise for the distinction is based on a historically suspect classification such as race, gender, alienage, or nationality. *Cleburne,* 473 U.S. at 440; *see also McLaughlin v. State of Florida,* 379 U.S. 184, 192 (1964). Even when a law distinguishes on the premise of a suspect class, the heightened judicial scrutiny is only proper if the purpose of the law is to discriminate. *Washington v. Davis,* 426 U.S. 229, 239 (1976)*; see also* Clay W. Crozier, "*Purposefulness" Throughout the Doctrines: The Importance of Masterpiece Cakeshop and its Contribution to Constitutional Analysis,* 36 Regent U. L. Rev. 59, 62-4 (2023-2024).

This Court should conclude the appropriate level of scrutiny for all plaintiffs is rational basis, and that the state's refusal to use public funds for religious private schools is related to the state's interest in complying with the federal IDEA statute and the Establishment Clause of the First Amendment of the United States Constitution.

A) The law's denial of IDEA funds to the Flynns and the Klines receives rational basis review because the distinction is based on school choice, and the exclusion is rationally related to a legitimate state interest.

This Court should conclude that the Flynns and the Klines are treated differently under the law because of school choice and that making this distinction is rationally related to a legitimate state interest of complying with the requirements of IDEA.

The Fourteenth Amendment does not forbid states from treating different classes of people in different ways. *Johnson,* 415 U.S. at 374. In fact, it gives states wide latitude when enacting laws that affect some groups of citizens differently than others. *McGowan,* 366 U.S. at 425. When the legislature makes such a distinction, "that judgment should be given every conceivable circumstance which might suffice to characterize the classification as reasonable."

McLaughlin, 379 U.S. at 191. The constitution is only violated if the statute requires different treatment for a class of people on the basis of criteria wholly unrelated to the objective of the statute. *Johnson,* 415 U.S. at 374 .

This Court has consistently refused to usurp the wisdom of a state's legislature so long as the law is rational and not invidious, arbitrary, or capricious. For example, in *McGowan*, this Court upheld the conviction of seven defendants indicted for violating a law that prohibited retail sales of most goods on Sunday. *McGowan*, 366 U.S. at 422. The law had a plethora of exemptions, such as allowing the sale of tobacco, some food items, gasoline, etc. *Id.* at 423. The state had many similar statutes that prohibited a wide array of labor and recreation on Sunday, but that had seemingly random exceptions for specific activities, such as sports, and sometimes exceptions that only apply to specific counties. *Id.* at 423-4. The gravamen of the defendants' claim was that the distinction the law makes between goods that could and could not legally be sold was not rationally related to the object of the legislation. *Id.* at 425. This Court deferred to the judgment of the legislature, stating, "It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day[.]" *Id.* at 426. Thus, convicting the defendants of a crime for selling items on Sunday when other people in the State are able to freely operate their business did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 428; *see also Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (where, for substantially the same reason, this Court upheld the conviction of a Pennsylvania man that violated a statute banning the sale of certain items on Sunday while exempting the sale of other items).

Just because religion is involved does not mean it is the class the legislature is distinguishing for different treatment. This was seen in *Johnson* where this Court upheld the decision of the Administrator of Veterans Affairs to deny education benefits for a religious conscientious objector that performed alternative civilian service in lieu of active duty service.[4] *Johnson,* 415 U.S. at 364. This Court applied rational basis review to determine, "whether there is some ground of difference having a fair and substantial relation to at least one of the stated purposes justifying the different treatment accorded veterans who served on active duty in the Armed Forces, and conscientious objectors who performed alternative civilian service." *Id.* at 376. The court also noted that commonalities between two groups is not sufficient to invalidate a statute when characteristics unique to only one group rationally explain the distinction between the groups. *Id.* at 378. When comparing those that serve active duty and those that perform alternative civilian service, Congress considered that active duty military members are subjected to mental, physical, economic, and family hardships that are not shared by civilians. *Id.* at 380.

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[4] "Title 50 U.S.C. App. § 456(j) exempts from military service persons 'who, by reason of religious training and belief,' are opposed to participation in 'war in any form.'

32 CFR § 1622.14 (1971) directed local Selective Service Boards that '(i)n Class I—O shall be placed every registrant who would have been classified in Class I—A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.'

Further, § 456(j) and 32 CFR §§ 1660.1—.12 (1972) authorized local Selective Service Boards to order I—O conscientious objectors to perform alternative civilian service contributing to the maintenance of the national health, safety, or interest." *Johnson*, 415 U.S. at 363 n.1.

The court concluded this distinction formed a rational basis for excluding those that perform alternative civilian service from receiving the education benefits, regardless of the reason they elected alternative instead of active duty service. *Id.* at 381-2.

Here, the Court should defer to the judgment of the legislature and hold that the distinction is based on school choice, and the decision to treat private religious schools differently is rationally related to the state's interest in complying with the federal IDEA statute, and the Establishment Clause. Despite the fact that religion is the driving force behind the Flynns and the Klines' desire to send their kids to private religious schools, the law is not concerned with the religious affiliation of the families that receive funds. This is obvious from the fact that the Klines have been sending B.K. to public school where the cost of her disability needs is covered by IDEA. B.K. is undoubtedly one of many religious students in secular schools that benefits from funding provided by IDEA. Conversely, if any non-religious students attended a religious school, that student would not be entitled to funding. This is analogous to the distinction this Court made in the *Johnson* case where the law was not concerned with the religion of the individual, but with whether they were an active duty veteran. Likewise, the Tourvania law is not concerned with the religion of the families or students, but with the religious affiliation of the schools where the funds ultimately go. And thus, just like the law in *Johnson,* TEC § 502 should be given rational basis review.

The interest served by TEC § 502 is two-fold: complying with the Establishment Clause of the United States Constitution, and complying with the federal requirements of IDEA so that the state qualifies to receive funding to distribute. The Establishment Clause issue is discussed at length above, but to summarize, the state cannot fund religious institutions without running afoul of the First Amendment. Thus, the distinction is directly related to the state's legitimate interest

in passing constitutional legislation. Furthermore, in order to receive any federal funding at all, the state must comply with all of the requirements of IDEA, including that of all services being "secular, neutral, and non-ideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Religious schools, by their very nature, provide non-secular, ideological services to their students, which is why the Flynns and the Klines want to send their children to such a school in the first place. Thus, Tourovania cannot provide funding to religious schools and still be in compliance with IDEA. It goes without saying that the state has a legitimate interest in ensuring schools are properly equipped to provide disabled students a quality education. Therefore, because Tourvania will not qualify for funding without distinguishing between religious and non-religious schools, doing so is directly related to a legitimate state interest.

The Tourovania legislature made the decision to make a benefit available to families that use public/secular private schools and not make it available to families that choose non-secular private schools. That distinction is directly related to the state's legitimate interest in receiving federal funding under IDEA, and complying with the Establishment Clause. Accordingly, this Court should conclude TEC § 502 infringes neither the Flynn's nor the Kline's constitutional right to equal protection.

B) The law's denial of funds to the schools receives rational basis review because religion is not a historically suspect class and the law was not enacted for the purpose of discriminating against religion.

This Court should conclude religion is not an inherently suspect class that requires strict scrutiny, that any discrimination against religion is incidental and not intentional, and that the law rationally related to the legitimate state interest of complying with the IDEA requirements and the Establishment Clause.

Heightened scrutiny is only required if the class is defined by race, gender, alienage, or national origin. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

Whether a class distinction calls for heightened scrutiny turns on whether there is a history of discrimination against that particular group in this country and how much political power the group has. *Id.; see also McLaughlin v. State of Florida*, 379 U.S. 184, 192 (1964); *Korematsu v. U.S.*, 323 U.S. 214, 215 (1944); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). There must also be discriminatory intent behind the law before heightened scrutiny is appropriate. *Washington v. Davis*, 426 U.S. 229 (1976). Mere awareness of a discriminatory result is insufficient unless the law was enacted at least in part to achieve said discrimination against a particular group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

This Court described how to determine what is and is not a suspect classification in *Cleburne*, 473 U.S at 432. In that case, the Cleburne Living Center (CLC) was denied a special use permit to open a group home for the mentally disabled. *Id.* at 436-37. CLC filed a lawsuit claiming Texas violated the Equal Protection Clause of the Fourteenth Amendment and the Court of Appeals for the Fifth Circuit determined the mentally disabled are a "quasi-suspect" class, thus requiring heightened scrutiny. *Id.* at 437-38. This Court reversed that determination on the grounds that heightened scrutiny is only appropriate when there is a history of discrimination against the class in question and the legislature is unlikely to be rectified by legislative means. *Id.* at 440. The Court went on to note the copious amounts of legislation, both state and federal, that has been enacted for the benefit and protection of the mentally disabled. *Id.* at 443. This legislative action also demonstrates that the mentally disabled are far from politically powerless, thus lessening the need for judicial interference. *Id.* at 445. Therefore, the court held that the mentally disabled are not an inherently suspect group and the law must only survive rational basis review to satisfy the Equal Protection Clause. *Id.* at 446; *see also*

McLaughlin, 379 U.S. at 191-2 (where this Court held that race based classifications are inherently suspect); *Graham*, 403 U.S. at 372 (where this Court applied strict scrutiny to a law that singled out non-citizens for less favorable treatment).

This Court has already applied rational basis review to an Equal Protection Clause claim where the state singled out religion as a class for different treatment in *Locke v. Davey*, 540 U.S. 712 (2004). There, the state of Washington established a scholarship program to help students pay for college, but expressly prohibited using scholarship funds to pursue a degree in devotional theology. *Id.* at 715. Davey makes several constitutional arguments, including that the Equal Protection Clause protects discrimination on the basis of religion. *Id.* at 718. While it is never expressly stated that religion is not a suspect class, this Court must have come to that conclusion because rational basis scrutiny is used to resolve the Equal Protection claim. *Id.* at 720 n.3. The court says rational basis is the appropriate standard because it had already determined that the state had not violated the Free Exercise Clause. *Id.* If religion were a suspect class, heightened scrutiny would be required regardless of the compliance with the First Amendment. Thus, this Court implicitly held that religion is not a suspect class and does not trigger heightened scrutiny.

Even if the distinction is based on a suspect class, that alone is not enough; it must have been the purpose of the legislature to discriminate against the group. This rule led the court in *Davis*, 426 U.S. at 229, to determine the state action did not violate the Equal Protection Clause. There, the challenged rule required individuals that wanted to become police officers to pass a test designed to gauge verbal ability, vocabulary, reading, and comprehension. *Id.* at 234-35. The claim was that this test disqualified a disproportionately high volume of black applicants, thus effectively functioning as a race based distinction. *Id.* at 233. This Court stated that a disparate impact was not enough to prove a violation of the Equal Protection Clause. *Id.* at 239. In

addition to demonstrating a disparate impact, proof of purposeful discrimination was also required. *Id.* at 238-39. This Court went on to conclude that no such discriminatory purpose was present and that the evidence demonstrates that the purpose of the test was to ensure the department employed qualified and capable officers. *Compare Davis*, 426 U.S. at 246 (concluding the law had no discriminatory purpose), *with Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 541-2 (1993) (where this Court determined city ordinances that burdened the practice of religion were enacted for the express purpose of suppressing religion).

Even if the legislature enacts a law knowing it will have a discriminatory effect on an identifiable class of people, the Equal Protection Clause is only violated if the law was enacted, at least in part, to accomplish that discrimination. This rule preserved the veteran's hiring preference policy in *Feeny* where a woman claimed the law unfairly favored men because the majority of veterans are men. 442 U.S. at 259. While the law did not literally prevent civilians from being hired, if a qualified veteran had applied, it all but guaranteed that veteran would be hired[5]. *Id.* at 264. At the time, women were largely excluded from the military, resulting in 98% of veterans in the state being male. *Id.* at 270. Even though the legislature must have known the hiring policy would almost exclusively benefitted men, to the detriment of women, this Court held the law did not violate the Equal Protection Clause because, "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. [...] It implies that

[5] All applicants were scored based on their performance on a competitive examination, their training, and experience. Candidates are then ranked by their scores, but the law required all veterans to be ranked, in order of their respective scores, above all other candidates. Thus, a civilian candidate with a perfect score would be ranked below ten veteran applicants with lower scores. *See Feeney,* 442 U.S. at 263.

the decision maker [...] selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of," its adverse effects upon an identifiable group." *Id.* at 279.

Here, this Court should conclude that even though TEC § 502 distinguishes between qualified schools based on religious affiliation, the law must only satisfy rational basis review because religion is not a historically suspect class. To date, this Court has only acknowledged four inherently suspect classifications: race, gender, alienage, and national origin. There was a prime opportunity in *Locke* to declare religion is an inherently suspect class; this Court declined to do so there, and should do so here as well. Just as the court in *Cleburne* noted there is little to no history of societal discrimination against the mentally disabled, this Court should consider there is even less historical evidence of discrimination against religion. The very first amendment to the constitution ever ratified expressly prohibits such discrimination. The lack of historical discrimination against religion is especially apparent when compared to the plight of other classes that have been deemed historically suspect, such as the race based classification made in *McLaughlin*. Thus, history weighs against concluding religion is an inherently suspect class.

Furthermore, there is nothing resembling a shortage of religious representation in politics. According to Pew Research, all but two United States Presidents, Abraham Lincoln and Thomas Jefferson, have been religiously affiliated. Pew Research Center, *Faith at the White House (Jan. 20, 2017)* https://www.pewresearch.org/short-reads/2021/01/20/biden-only-second-catholic-president-but-nearly-all-have-been-christians-2/. Also according to Pew Research, of the 514 members of congress that responded, 513 are affiliated with a religion. Pew Research Center, *Faith on the Hill (Jan. 3, 2023)* https://www.pewresearch.org/religion/2023/01/03/faith-on-the-hill-2023/. Just as significant political representation led to the court's conclusion that the mentally disabled are not an inherently suspect class, the nearly unanimous religious

representation in congress and among the presidents must forbid the conclusion that religion is an inherently suspect class.

Even if this Court declares religion is an inherently suspect class, there remains the fact that the purpose of TEC § 502 is not to discriminate, but to comply with IDEA and the Constitution. As this Court stated in *Davis*, a law with an incidentally discriminatory effect will not be subjected to heightened scrutiny unless the purpose was to discriminate. While the legislature was almost certainly aware that the law would have a disparate impact on religious schools, this Court in *Feeney* held that mere knowledge or awareness of such an effect is not sufficient. The legislature must have known of the discriminatory effect, and intended it. There is not a modicum of evidence in the record that suggests Tourvania enacted TEC § 502 with a discriminatory purpose. Thus, even if religion is found to be an inherently suspect class, TEC § 502 should only be subjected to rational basis review.

Under rational basis review, this Court should find the law is constitutional. As detailed above, Tourvania must exclude private religious schools from the funding program in order to meet the federal requirements of IDEA, and to comply with the Establishment Clause of the Constitution. Both must be considered legitimate state interests, and the religious exclusion is required to accomplish both. Therefore, this Court should conclude TEC § 502 survives rational basis review, and thus does not infringe private religious school's rights to Equal Protection.

Religion has never been found to be an inherently suspect class. There is not a history of religious discrimination in America, and there is an incredible amount of religious representation in politics. Furthermore, the law was not enacted with a discriminatory purpose. Thus, rational basis review is the appropriate level of scrutiny. Denying public funds to religious schools is directly related to Tourvania's interest in qualifying for federal IDEA funds, and complying with

the Establishment Clause of the Constitution. Therefore, TEC § 502 does not violate the constitutional right to equal protection of the Joshua Abraham High School, or the Bethlehem Hebrew Academy.

CONCLUSION

The extension of IDEA funds to religious institutions violates the Establishment Clause because the Founders and Supreme Court precedent understood the Establishment Clause as prohibiting the government from giving aid to religious organizations. In *Kennedy*, this Court determined that the Establishment Clause should be interpreted by referencing historical understandings. Among the Founders, Jefferson and Madison are the most often referenced by this Court and both of them understood that the government should not give money to religious organizations. This understanding was transferred to the Establishment Clause, and the Supreme Court used their understanding in the cases that constructed the *Lemon* Test. In this case, granting IDEA funds will entangle government and religion as well as have the effect of promoting religion. As a result, the historical understandings of the Founders and the Supreme Court show that granting IDEA funds to religious schools violates the Establishment Clause.

Section 502 of the Tourvania Education Code does not violate the Plaintiffs' rights under the First Amendment's Free Exercise Clause because it does not burden Free Exercise and it is a narrowly tailored and neutral law of general applicability. This Court has recognized that a burden to Free Exercise must be coercive and more than a mere increase in difficulty. Furthermore, it has recognized that choosing not to subsidize a right does not violate that right and religion cannot act as a veto over state policy that does not prohibit Free Exercise. TEC § 502 does not prohibit Free Exercise; it only prohibits the state from providing funds to religious

organizations. As a result, Free exercise is not burdened since the state is simply choosing not to subsidize religious education.

To determine whether a law is neutral and generally applicable, this court will look at the text of the statute as well as the context surrounding its passage and application. The text of TEC § 502 is facially neutral because it does not refer to a religious practice and makes no mention of religious conduct whatsoever. Furthermore, there is nothing in the facts that demonstrates that the context surrounding TEC § 502's passage and application lacked neutrality. Consequently, Section 502 is neutral and generally applicable.

Furthermore, the law can meet strict scrutiny because it fulfills a compelling government interest. First, this Court has recognized that fulfilling obligations under the Establishment Clause is a compelling state interest. Additionally, TEC § 502 may also fulfill the compelling government interest in desegregation because the limited history of aid to religious schools shows that they were used to continue segregation, and a policy refusing to subsidize them is a policy that refuses to enable neo-segregation.

Lastly, TEC § 502 does not violate the Equal Protection Clause of the Fourteenth Amendment because it does not distinguish am inherently suspect class for different treatment. The Klines have not been treated differently as the cost of their child's accommodations are funded by IDEA, and the Flynns have to shoulder the cost only because of the school they chose to send their child to. Similarly, while Joshua Abraham High School and the Bethlehem Hebrew Academy are distinguished by their religious affiliation, religion has never been determined to be an inherently suspect class. The lack of historical discrimination against religion in America combined with the massive political representation the class has demonstrates that heightened scrutiny is not appropriate. Additionally, even though there is a disparate impact on religion, the

law was not enacted with a discriminatory purpose. Thus, this Court should conclude that for all plaintiffs the law must only satisfy rational basis review.

Section 502 of the Tourvania Education code survives rational basis review for the same reason it survives strict scrutiny described above. The purpose of the law is to comply with the Establishment Clause of the First Amendment, as well as allow the state to qualify for funding under IDEA in the first place. There is not a less restrictive way to comply with the law; public funds cannot be provided to benefit religious institutions in this way.

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Eighteenth Circuit and hold that proving public funds to religious schools would violate the Establishment Clause of the First Amendment, and that TEC § 502 does not violate the Free Exercise Clause of the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment.

Respectfully Submitted,

/s/ Team 12