No. 24-012

Assigned Team No. 13

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents,

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

BRIEF OF PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

A. STATEMENT OF THE FACTS 2

B. PROCEDURAL HISTORY 5

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. § 502'S NONWAIVABLE NONSECTARIAN REQUIREMENT VIOLATES THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE AND THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE. 7

A. § 502 is subject to strict scrutiny as it burdens religious expression by requiring disabled children, their parents, and schools to choose between compromising their beliefs or receiving public benefits. 7

i. § 502 REQUIRES STRICT SCRUTINY AS IT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE AND IMPLICATES ADDITIONAL CONSTITUTIONAL RIGHTS. 10

ii. CHARACTERIZING § 502 AS A USE-BASED RESTRICTION NEITHER LOWERS THE STANDARD OF REVIEW NOR IS APPLICABLE HERE. 14

B. § 502 violates Equal Protection by treating religious families and schools differently than the non-religious. 16

C. § 502 is not justified by any compelling interest, nor is the program narrowly tailored to meet any such goal, assuming such an interest was present. 18

i. THERE IS NO COMPELLING INTEREST IN PROTECTING AGAINST A NON-VIOLATION OF THE ESTABLISHMENT CLAUSE. 18

ii. A CATEGORICAL REJECTION OF ANY OTHERWISE ELIGIBLE RELIGIOUS SCHOOL IS NOT NARROWLY TAILORED. 20

II. AN OPTION TO EXTEND SPECIAL EDUCATION FUNDS UNDER THE INDIVIDUALS WITH DISABILITIES ACT TO PRIVATE, SECTARIAN SCHOOLS DOES NOT RUN AFOUL OF THE HISTORICAL PRACTICES AND UNDERSTANDINGS OF THE ESTABLISHMENT CLAUSE. 21

A. The extension option comports with the Establishment Clause's historical understandings, as it does not nationalize religion, intrude on the liberty of conscience, nor compel or coerce religious worship. 22

B. The extension option comports with the Establishment Clause's historical practices, as it is comparable to other sectarian school aid programs present at the founding. 28

C. Even assuming all historical practice evidence was irrelevant, this Court's jurisprudence supports the constitutionality of 20 U.S.C. § 1412(a)'s extension of IDEA funds to private, sectarian schools. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

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

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.,
508 U.S. 520 (1993). 11, 17, 20

City of New Orleans v. Dukes,
427 U.S. 297 (1976). 7, 17

Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter,
492 U.S. 573 (2014). 22

Emp. Div., Dep't of Hum. Res. of Oregon v. Smith,
494 U.S. 872 (1990). 10, 11

Espinoza v. Montana Dep't of Revenue,
140 S. Ct. 2246 (2020). ....passim

Everson v. Bd. of Ed. of Ewing Twp.,
330 U.S. 1 (1947). 21, 28, 34, 35

Fulton v. City of Philadelphia, Pennsylvania,
593 U.S. 522 (2021). 7, 20

Groff v. DeJoy,
600 U.S. 447 (2023). 22

Kennedy v. Bremerton School District,
597 U.S. 507 (2022). 22, 23, 29

Lee v. Weisman,
505 U.S. 577 (1992). 23, 27

Lemon v. Kurtzman,
403 U.S. 602 (1971). 21, 22

Locke v. Davey,
540 U.S. 712 (2004). 14, 18

Lyng v. Northwest Indian Cemetery Protective Assn.,
485 U.S. 439 (1988). 7

McDaniel v. Paty,
435 U.S. 618 (1978). 11, 18

Mitchell v. Helms,
530 U.S. 793 (2000). 34

Pierce v. Society of Sisters,
268 U.S. 510 (1925). 11, 27, 28

Sch. Dist. of Abington Twp., Pa. v. Schempp,
374 U.S. 203 (1963). 31

Shurtleff v. City of Bos., Massachusetts,
596 U.S. 243 (2022). 33

Town of Greece, N.Y. v. Galloway,
572 U.S. 565 (2014). 22

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017). 8, 9, 14, 19

Walz v. Tax Commission,
397 U.S. 664 (1970). 22

Wisconsin v. Yoder,
406 U.S. 205 (1972). 11

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986). 26, 34

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993). 34, 35

Statutes

20 U.S.C. § 1400. .... 2, 26

20 U.S.C. § 1401. .... 2, 27

20 U.S.C. § 1412 .... passim

20 U.S.C. § 1414. .... 3, 27, 33

Tourvania Education Code § 502.......... 3, 4, 28

Regulations

34 C.F.R § 300. 27

Constitutional Provisions

U.S. Const. amend. I 7, 21

U.S. Const. amend. XIV 7, 16

Secondary Sources

A Bill Establishing A Provision For Teachers Of The Christian Religion, Monticello Digital Classroom.......... 31

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Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 976–91 (2013)... 17

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Legislative Materials

1 ANNALS OF CONG. (1789) (Joseph Gales ed., 1834). 25

QUESTIONS PRESENTED

1. Does § 502's denial of special education funds to otherwise eligible families and schools because of their religious status violate (a) the Free Exercise Clause and/or (b) the Fourteenth Amendment's Equal Protection Clause?

2. Does § 1412's incentive-neutral, non-coercive option to extend IDEA funds to private, sectarian schools for secular education purposes violate the historical practices and understandings of the Establishment Clause?

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Individuals with Disabilities Education Act ("IDEA" or "the Act") provides states with federal funds to assist in special education. 20 U.S.C. § 1400 et. seq. The purpose of the act is "to ensure that all children with disabilities have... a free appropriate public education that... meet[s] their unique needs and prepare[s] them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A). States must provide a free appropriate education to "all eligible children," which includes special education needs and other "related services." *Id.* § 1401(9), 1412(a)(1). Such services may include, *inter alia*, "speech-language pathology and audiology services, physical and occupation therapy, counseling, recreation, orientation and mobility services, and diagnostic medical services." *Id.* §1401(26).

The Act requires that any IDEA-funded program must conform to an individualized education program ("IEP") made in conjunction with parents, teachers, school officials, and a representative of the local educational agency ("LEA"). R. at 3–4. The IEP is highly detailed and narrowly tailored, considering, among other factors, the "concern of the parents for enhancing the education of their child" and the "academic, developmental, and functional needs of the child." R. at 4.

The Act recognizes that some families will elect to place their children in private, even sectarian schools, and notes that states "may" provide such services using IDEA funds "to the extent consistent with law." 20 U.S.C. § 1412(a)(10)(A)(i)(III). To be consistent with law, the Act requires that all private

school aid be for "secular, neutral, and non-ideological" purposes. *Id.* § 1412(a)(10)(A)(vi)(II). If found to be consistent with law, then LEAs must spend IDEA funds "proportionate" to the amount that a similar student would receive at a public school under an identical IEP. *See Id.* § 1412(a)(10)(A)(i)(II). Finally, LEAs must conduct an annual review of the of the IEP and IDEA services, reviewing and revising them as necessary before disbursing any funds. *See Id.* § 1414(d)(4)(A)(i).

Section 502 of the Tourvania Education Code ("TEC"), the state's statute for IDEA fund disbursements, limits IDEA-eligible private schools to only those deemed "nonsectarian." TEC § 502(a). The TEC defines "nonsectarian" as meaning any "private, nonpublic school" that is not "owned, operated, controlled by," or "affiliated" with a "religious group or sect." TEC § 502(b). Such designations hold firm regardless of "whatever might be the actual character of the education program or the primary purpose of the facility." *Id.* Unlike the other requirements of § 502, an applicant "cannot petition for a waiver of the nonsectarian requirement." TEC § 502(d)(ii)(1).

Tourvania's code, along with the nonwaivable nonsectarian requirement, also demands that private schools–in order to be certified and thus be eligible to be contracted with by LEAs–maintain compliance with the IDEA, have all staff and administrators be certified, permitted, or otherwise licensed, and provide details of the general and special education plans and materials–suited to the Tourvania-adopted core curriculum, instructions and services provided to those with exceptional needs, and a list and proof of all credentialed teachers. TEC § 502(d). The Superintendent of Public Instruction must receive all applications, conduct an initial

and onsite validation review, and finally decide to certify, conditionally certify, or deny the applications. TEC § 502(d)(i). However, the Superintendent is permitted no discretion on the issue of the nonsectarian requirement. *See* TEC § 502(d)(ii)(1).

Plaintiffs include two sets of Orthodox Jewish parents representing their disabled children, as well as two Orthodox Jewish secondary schools ("petitioners"). R. at 1. The religious beliefs of the families, the Flynns and the Kleins, "obligate them to give their [children] an Orthodox Jewish education." *Id.* at 8. Each family represents opposite ends of the range of harms from religious exclusion. The Flynns were "forced to forgo" IDEA benefits that their daughter would have received at a public school in order to keep their daughter enrolled at a private religious school they felt necessary so as to not "compromise their religious beliefs." *Id.*

The Kleins, meanwhile, were compelled to leave their daughter at a public school so as not to "sacrifice" the IDEA benefits that their daughter "needs to address her disability." *Id.* at 9. As a result of this "continue[d] compromise," the Klein's disabled daughter is further isolated from her non-disabled sibling, having to forgo the Orthodox Jewish education that her sibling receives and that which her parents "wished" to afford her, if not for the nonsectarian requirement of her vital funds. *Id.* As an additional offense to their religious concession, the Kleins' daughter has, at the public school, struggled academically, received accommodations that are irrespective of her beliefs, and has been "often served non-kosher food." *Id.* Both families feel that the requirements of Tourvania's provisions forced them "between a rock and a hard

place," having to "compromise their religious beliefs…in order to receive the special education funding other disabled children receive." *Id.* at 8-9.

As for the two private schools, the Bethlehem Hebrew Academy and the Joshua Abraham High School, each applied to be certified nonpublic schools able to provide the "special education and related services envisioned by the IDEA to disabled Orthodox Jewish children." *Id.* at 9. Although both schools satisfied all secular requirements of § 502, both were denied due to their sectarian nature and could not petition for a waiver of the nonsectarian requirement. *Id.* at 10. By meeting all the other certification requirements except for the nonsectarian requirement, the schools allege that they were denied certification "solely because they are Orthodox Jewish institutions unwilling to compromise their religious beliefs." *Id.*

B. PROCEDURAL HISTORY

United States District Judge Rebecca Jacobs denied Respondents' motion for summary judgment through an opinion order on October 1, 2023, holding that Tourvania's categorical ban on religious aid violated the Free Exercise and Equal Protection Clauses and that § 1412's extension option did not impermissibly entangle the federal government with religion. *Id.* at 12-16. Respondents appealed to the Eighteenth Circuit, which subsequently reversed the District Court's order and remanded the case with directions to enter judgment in favor of the Respondents, holding § 502's nonwaivable, nonsectarian requirement was a permissible law of general applicability. *Id.* at 19-20. Plaintiffs then petitioned for certiorari, which this Court granted.

SUMMARY OF ARGUMENT

§ 502 of Tourvania's Education Code proscribes the disbursement of IDEA funds to private, sectarian schools and requires parents of disabled children and schools to choose between adequate educational opportunities for their child and their sincerely held religious beliefs, thereby triggering strict scrutiny. Such an exclusion is not a neutral law of general applicability, targeting religious beliefs and burdening parents and private schools based only on their religious status. As such, this regulatory scheme violates free exercise and equal protection.

§ 502's nonwaivable, nonsectarian proscription fails strict scrutiny for two reasons: (1) Tourvania's interest in protecting against improbable Establishment Clause violations is not a compelling government interest, (2) even assuming that interest is sufficiently compelling, Tourvania's blanket prohibition of all sectarian schools fails to be narrowly tailored to meet any such interest.

As to their second contention, 20 U.S.C. § 1412(a)'s extension of IDEA funds to private, sectarian schools does not violate the historical practices or understandings of the Establishment Clause. The Framers understood the Establishment Clause to be violated in cases where state action (1) nationalized a particular religion, (2) coerced or compelled its citizens to engage in religious worship, or (3) intruded upon its citizens' natural right to a "liberty of conscience," none of which are implicated under 20 U.S.C. § 1412(a). Additionally, § 1412(a) does not violate the historical practices of the Establishment Clause as it involves public aid for sectarian schools

in a manner akin to, if not less religiously intertwined, than that of other forms of aid offered at the time of the founding.

Because § 502's nonwaivable, nonsectarian requirement violates the Free Exercise Clause, and given that § 1412(a)'s extension does not violate the Establishment Clause, the Court of Appeals erred by reversing the District Court's denial of Respondent's motion for summary judgment. Therefore, this Court must reverse the Court of Appeals and remand for further proceedings.

ARGUMENT

I. § 502's nonwaivable nonsectarian requirement violates the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause.

No law or act of a government can impede the free exercise of religion, whether by outright prohibition or indirect coercion. U.S. Const. amend. I; *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 450 (1988). Nor may the government treat an individual or institution differently based on their religious affiliation. U.S. Const. amend. XIV; *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). The government may not, even incidentally, burden religious expression unless it does so through a neutral law of general applicability or is armed with compelling government interest and a law narrowly tailored to fit that interest. *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021).

A. § 502 is subject to strict scrutiny as it burdens religious expression by requiring disabled children, their parents, and schools to choose between compromising their beliefs or receiving public benefits.

When a government "excludes religious observers from otherwise available public benefits," this Court has "repeatedly held" that such conduct "violates the Free Exercise Clause." *Carson v. Makin*, 596 U.S. 767, 778 (2022). Although a State is not required to fund specialized private education services, once they decide to do so, they "cannot disqualify some private schools solely because they are religious." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

For instance, this Court struck down a categorical prohibition on giving aid to religious organizations as a "clear infringement on free exercise." *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449, 466 (2017). In *Trinity Lutheran*, a church applied for reimbursement under a law that gave benefits to institutions that installed playground surfaces made from recycled tires. *Id.* at 454–55. Despite meeting all requirements for reimbursement–going so far as to be one of the most qualified applicants—the church was "deemed categorically ineligible to receive a grant" due to its religious nature. *Id*. at 456. This Court rejected the defendant's contention that plaintiffs remained capable of free exercise despite the denied grant and held that the blanket religious rejection of otherwise available public benefits "plainly… punished the free exercise" of religious expression. *Id*. at 462.

Only three years later, this Court reinforced the same prohibition on religious-based exemptions to public benefits in *Espinoza v. Montana Department of Revenue.* 140 S. Ct. at 2262–63. In that case, a Montana constitutional provision barred the extension of any direct or indirect aid to sectarian organizations, including tax-funded scholarships, despite the statute conferring unrestricted freedom for students to

apply their earned scholarships where they desired, whether religious or private. *Id.* at 2251–52. While striking down the provision of the Montana constitution, this Court emphasized the applicability of *Trinity Lutheran* while highlighting the facially discriminatory nature of a religiously targeted exclusion. *Id.* at 2255. (identifying an express religious exclusion as "confirm[ing] that the provision singles out schools based on their religious character").

Only two years after *Espinoza* was issued, this Court again took notice to reaffirm the anti-exclusionary principles of both *Trinity Lutheran* and *Espinoza*, the combination of which was "suffic[ent] to resolve" the issue at hand in *Carson v. Makin*. 596 U.S., at 780. This Court decided the case primarily by applying strict scrutiny to a provision of the Maine constitution, which instituted a nonsectarian requirement to a system of tuition assistance payments. *Id.* For this Court, it was "unremarkable" to "conclude that the Free Exercise Clause did not permit [a State] to expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 779 (quoting *Trinity Lutheran*, 582 U.S. at 462).

§ 502 falls squarely into this line of Free Exercise cases and is subject to strict scrutiny in that it forces families and schools to either abandon their religious convictions or be denied benefits for which they are otherwise qualified. The requirement operates as an additional step to be eligible for educational funds, analogous to the one struck down in *Carson.* Yet § 502 manages to go even beyond

that found in *Carson*, excluding any school with a religious affiliation, no matter if the school meets all secular requirements and is religious only in a nominal sense.

The rigidity of Tourvania's definition of nonsectarian, as well as making such a requirement nonwaivable, further characterizes this scheme as "disqualify[ing] some private schools" from benefits "solely because they are religious." The statute allows for no consideration of an otherwise eligible applicant. The only effect of the nonsectarian requirement is to "single out schools based on their religious character" and "disqualify[] them from a public benefit solely because of" those beliefs. Here, a rejection for aid due to a family's or school's faith, despite meeting all other requirements, "punishe[s]" those beliefs and unconstitutionally denies their unalienable right to free exercise.

Nestling snuggly under the control of *Carson*, it is "unremarkable to conclude" that § 502 "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." Here, both schools met all the requirements for the special education funds yet were denied for a singular reason: their religious identity.

i. § 502 REQUIRES STRICT SCRUTINY AS IT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE AND IMPLICATES ADDITIONAL CONSTITUTIONAL RIGHTS.

Although a "valid and neutral law of general applicability" may be able to supersede individualized beliefs in some circumstances, *see Emp. Div., Dep't of Hum. Res. of Oregon v. Smith,* 494 U.S. 872, 879 (1990), a law that burdens religious practice is nonetheless subjected to the "most rigorous" of strict scrutiny if it fails to

be "religiously neutral" or imposes burdens only on religious practices rather than applying generally to the public. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.,* 508 U.S. 520, 532, 542–46 (1993). In addition to neutrality and general applicability, the lowered standard set out in *Emp't Div. v. Smith* only applies when the law has merely an "incidental" burden on religious expression. *Id*. at 531.

For a law to be considered religiously neutral, it cannot target religious beliefs. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). While the Free Exercise Clause "forbids" even "subtle departures from neutrality," any neutrality inquiry must "begin with the text" of the law at issue. *See Lukumi,* 508 U.S. at 533–34. As a "minimum requirement" for neutrality, a law must "not discriminate on its face." *Id*. at 533. If the "object of a law" infringes upon religious beliefs, the "law is not neutral." *Id*.

Even if it were in pursuit of a legitimate interest, a government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. The "precise evil" that the general applicability requirement is "designed to prevent" is when society "impose[s]" a burden or exclusion "upon [those affiliated with a religion] but not upon itself." *Id*. at 545–46.

Additionally, the Free Exercise clause "bars application of a neutral, generally applicable law to religiously motivated action" in conjunction with other constitutional rights. *Emp't Div. v. Smith*, 494 U.S., at 881. One such right is that of "parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children." *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Here, § 502, both facially and substantively, targets religious institutions, as they are the sole victims of the nonwaivable nonsectarian requirement. It is a stretch of logic to suggest that a statute titled after based upon, and solely affecting religious institutions could be neutral to religion. § 502 is the opposite of a neutral law, going so far as to identify and isolate religiously affiliated institutions from pools of otherwise qualified schools. Rather than impose a neutral effect on everyone, the nonwaivable nonsectarian requirement goes out of its way to target religion and affects only those institutions.

While every applicant is subject to the nonsectarian requirement, that is not what neutrality under the First Amendment demands. If that were the case, any general law that excluded religion would be considered neutral, going against the holdings of *Carson, Espinoza*, and *Trinity Lutheran*. A law cannot be neutral if its sole effect targets religious beliefs and only those beliefs. The nonsectarian requirement here has no purpose other than to identify and exclude religious affiliations from a general program. To hold such a scheme neutral would be to sanction any targeted religious exception to public benefits.

The categorical religious exemption of § 502 takes the concerns identified in *Emp't Div. v. Smith* and *Lukumi* to an extreme. The entirety of any burden imposed by the nonsectarian requirement is placed only on religious entities, demanding all religious schools suffer so that the state might avoid other First Amendment issues. With this statute, Tourvania seeks to "impose the burden" of § 502 upon religious schools but "not upon itself."

Further, just as a law cannot exclusively burden a religious group, a law cannot selectively give benefits to the public while excluding the religious. The concepts are two sides of the same coin of equity, with a lack of burden being a benefit and a lack of benefit being a burden. Whether the burden imposed on religious schools is the further separation of church and state or the denial of eligible benefits, § 502 cannot be described as generally applicable: in any case, the religious are being singled out and treated differently than the general public.

Even if the Tourvania statutes could be described as generally applicable, having such an individualized exemption scheme that bars any consideration of religious hardship–let alone the required "compelling reason" to deny such exemptions–is fatal to any veneer of general applicability the government sought to impose over Section 502.

Indeed, Tourvania's statute doesn't even attempt to display anything other than hostility to religious considerations, expressly ignoring the actual educational character or primary facility purpose of an applicant and categorically pre-denying any attempted religious hardship exception. Such a rigid opposition to religion as a targeted group is the final nail in the coffin of strict scrutiny for the nonsectarian requirement.

Furthermore, even if this religiously-targeted exclusion was held neutral and generally applicable to all persons, it demands strict scrutiny by forcing parents to abandon their preferred methods of raising their children in order to receive critical

public aid. By conditioning the reception of disability funding on the nonsectarian nature of the school, Tourvania has placed a wealth condition on the ability of parents to raise their children in a way required by their faiths. To uphold such a religious exclusion would limit the rights of parents to freely direct the education of their children to only those who can afford to enjoy such a constitutional right.

ii. CHARACTERIZING § 502 AS A USE-BASED RESTRICTION NEITHER LOWERS THE STANDARD OF REVIEW NOR IS APPLICABLE HERE.

While *Espinoza* and *Trinity Lutheran* both reinforced the holding that religious exclusions from public benefits violate the free exercise clause, both cases also distinguished the legal provisions at issues as being "status-based" restrictions. *See Espinoza,* 140 S. Ct. at 2258; *Trinity Lutheran*, 582 U.S., at 464. In *Locke v. Davey*, this Court upheld a narrow denial of a scholarship being used to pursue a devotional theology degree with a major in pastoral ministries. 540 U.S. 712, 712. In distinguishing this restriction, the fact that students were not "require[d] to choose between their religious beliefs and receiving a government benefit" was critical. *Id.* at 720–21. Further, this was a limited restriction on a particular "use" of funds, which was of an "essentially religious" nature. *Id.*

Though several attempts have been made under this apparent status/use distinction to achieve a lowered standard of review, this Court has repeatedly denied any such scrutinous relief. *See Carson*, 596 U.S., at 789 ("*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits.") Further, *Locke*

made no mention of the standard of review used, rather holding that Washington had a compellingly "historic and substantial state interest in not funding the training of clergy." *Id.* at 722.

Although the prohibition on status-based discrimination is recognized to offend free exercise, it is "not a permission to engage in use-based discrimination." *Id.* at 788 (noting that, although Espinoza and Trinity Lutheran were decided as status-based discriminations, "those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause"). This use-status distinction "lacks a meaningful application not only in theory but in practice as well." *Id.* Further, the very attempt to make a status-use distinction "by scrutinizing whether and how a religious school pursues its educational mission" would raise "serious concerns about state entanglement with religion and denominational favoritism." *Id.* at 787.

Even if the distinction between status and use had any legal implications for the First Amendment, such a distinction must be a "narrow focus" on a "particular use" that is an "essentially religious endeavor." *Id.* at 788–89. Even if there are concerns about how an institution may use generally available funds, this is not enough to change a categorical exclusion into a use-based restriction. *See Id.* at 786. ("[S]trict scrutiny triggered by status-based discrimination could not be avoided by arguing that "one of its goals or effects [was] preventing religious organizations from putting aid to religious uses."").

Though the provisions at issue here are the already-condemned status-based discriminations, any attempts by Tourvania to defend their burden of religion with concerns about the religious use of the funds do not change the analysis. As is discussed *infra* Section I(C), § 502 fails under strict scrutiny, and seeking to nominally give more substantive depth to a status-based exclusion does not change that. Further, Tourvania cannot have its cake and eat it too. It cannot take the stance that this religious discrimination is justified by avoiding Establishment Clause implications while at the same time violating those very protections by "scrutinizing whether and how a religious school pursues its educational mission."

The nonwaivable nonsectarian requirement is the quintessential example of status-based discrimination, making no attempts to implicate any use-based restrictions. Facially and functionally, this provision instills a single criterion onto otherwise eligible schools: religious or not. The statute expressly ignores any consideration of how the funds might actually be used, and even a school that is entirely secular–save for being nominally affiliated with a religion–will be denied simply due to that status. Without any implication for the use of the funds and a singular focus on the sectarian labeling of schools, Tourvania's provisions are exactly the type of "status-based discrimination" that is subject to "the strictest scrutiny."

B. Section 502 violates Equal Protection by treating religious families and schools differently than the non-religious.

The Equal Protection Clause guarantees that no person may be deprived of their rights on the basis of identity. U.S. Const. amend. IVX. When a law classifies people based on "inherently suspect distinctions such as race, religion, or alienage,"

it is subjected to strict scrutiny. *Dukes*, 427 U.S. at 303. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice" *Lukumi,* 508 U.S. at 542.

The protection of religious identity was of particular importance leading up to and during the enactment of the Fourteenth Amendment. *See generally* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 976–91 (2013) (outlining the history of religious discrimination and efforts to combat it from the time of the Founders up to the Civil War, as well as the considerations thereof in the drafting of the Equal Protection Clause).

Here, the Flynns and the Klines are forced to make difficult choices under the same Tourvania law that places no such burdens on non-religious families. Because of their faith and the associated sincerely held beliefs relating to the upbringing of their children, the families here are being denied the benefits of a law that they would otherwise be enjoying if not for their religious identity. Bethlehem Hebrew Academy and the Joshua Abraham High School are similarly treated to a much more exacting, if not insurmountable, requirement to be certified than any other non-religious school.

No other secular institution is asked to renounce its core identity in order to receive special education funds, yet because the schools here happen to be associated with a religion, they are asked to abandon a defining tenant of themselves before they may compete on equal footing with other schools. Such a heightened and exclusionary

set of requirements based on mere religious identity is the very evil that the Equal Protection Clause prohibits.

C. § 502 is not justified by any compelling interest, nor is the program narrowly tailored to meet any such goal, assuming such an interest was present.

A law that excludes members of the public from otherwise available benefits based on their religious status is subject to the "strictest scrutiny." *Espinoza*, 140 S. Ct. at 2257. For such a law to survive, a State must advance "interests of the highest order" in ways that are "narrowly tailored" to pursue those interests. *McDaniel*, 435 U.S. at 628. Additionally, such an interest must be "historic and substantial," even if the standard of review is below strict scrutiny. *See Locke,* 540 U.S. at 725. It is "clear" that there is no such historical interest "against aiding [religious] schools." *Espinoza,* 140 S. Ct. at 2258–59. ("Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy.").

Here, as Tourvania's aid program does not infringe upon the Establishment Clause, there is no compelling interest in having protections against potential violations beyond the guarantees of the Establishment Clause. Even if this was an appropriate state interest to pursue, § 502 is in no way tailored to defend against sources of Establishment Clause violations. Rather, it acts as a blanket exclusion of any religiously affiliated school. Finally, a policy of denying aid to religious schools has no historical backing but was instead a practice that was common and accepted.

i. THERE IS NO COMPELLING INTEREST IN PROTECTING AGAINST A NON-VIOLATION OF THE ESTABLISHMENT CLAUSE.

An interest in separating church and state "more fiercely" than already prescribed by the Establishment Clause "'cannot qualify as compelling' in the face of the infringement of free exercise." *Carson*, 596 U.S. at 781; *Espinoza*, 140 S. Ct. at 2260; *Trinity Lutheran*, 582 U.S., at 466 (explaining how a "policy preference for skating as far as possible from religious establishment concerns…cannot qualify as compelling" in light of a "clear infringement on free exercise"). Thus, the government cannot justify restricting religious practices based on First Amendment concerns unless an actual violation of the Establishment Clause occurs. *See Carson*, 596 U.S. at 781.

As is discussed *infra* Section II, there is no violation of the Establishment Clause when an LEA places a disabled student at a private religious school after determining that it would be in their best interests. As such, the prohibition on any religious school from being certified, despite being otherwise qualified under all secular requirements, serves no purpose other than to give the government a legal berth away from Establishment Clause concerns. Such a justification for a law infringing the free exercise of religion has been categorically denied by this Court, and this is yet another instance of a discriminatory state seeking to have the protections of the Constitution cannibalize each other.

Fear of a theoretical constitutional violation on the one hand cannot justify committing an actual constitutional violation on the other. Just because Tourvania may fear the mere "risk" that a government official might "appear to favor" any religiously affiliated entity does not permit them to put the religious convictions of

families and schools to the proverbial dagger of conditional funding. Tourvania is asking this Court to ignore the victims of free exercise violations to search for the theoretical boogeyman of Establishment Clause concerns.

ii. A CATEGORICAL REJECTION OF ANY OTHERWISE ELIGIBLE RELIGIOUS SCHOOL IS NOT NARROWLY TAILORED.

Even if the pursuit of further separation of church and state was a valid justification to discriminate against religion, the law must also be "narrowly tailored" to achieve such an interest. *Lukumi,* 508 U.S. at 546. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541.

In this case, the categorical exclusion of any school "affiliated with a religious group… whatever might be the actual character of the education program" is the strict scrutiny equivalent of using a chainsaw when a scalpel is needed. R. at 6. If the state wishes to avoid conflict with the Establishment Clause, then it may proscribe state action that *actually* offends the Clause. However, the state may not label an entire population as undeserving of a public benefit simply out of fear of an *improbable* violation. For Tourvania to solve the problem of Establishment Clause concerns by prohibiting any religiously affiliated institution from IDEA funds, regardless of its eligibility and the secular purpose of the aid, it steps beyond lawful discretion and into impermissible restraints of free exercise. Simply put, Tourvania's blanket exclusion of sectarian affiliations attempts to get rid of a spider by burning down the entire house. Such a strategy can hardly be described as "narrowly tailored."

II. An option to extend special education funds under the Individuals with Disabilities Act to private, sectarian schools does not run afoul of the historical practices and understandings of the Establishment Clause.

The First Amendment delimits federal government action surrounding religion: "Congress shall make no law respecting an establishment of religion…." U.S. Const. amend. I. Facially, the Clause proscribes Congress from enacting legislation regarding the establishment of an official state religion; however, this Court has held that the Establishment Clause also prohibits state and federal actors, in their official capacity, from abridging religious liberty of conscience through ordinances or other state action.[1] *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947).

This Court's Establishment Clause jurisprudence has waded through various tests since *Everson*, with significant criticisms. David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 Tex. Wesleyan L. Rev. 71, 74 (2004) ("While the Court has developed multiple tests to determine whether an act or symbol violates the Establishment Clause, it has never adopted a clear test."). The most prominent test attempted by this Court was the *Lemon* Test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The test dictated that state action (1) "must have a secular… purpose," with (2) "its principle or primary effect… neither advance[ing] nor inhibit[ing]

[1] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion." Everson, 330 U.S. at 16.

religion," and (3) it "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

However, a series of recent decisions by this Court definitively rejected the *Lemon* test and set forth a new approach. *Kennedy v. Bremerton School District*, 597 U.S. 507, 510 (2022). In *Town of Greece, N.Y. v. Galloway*, this Court, for the first time, declared that the Establishment Clause must be interpreted by "reference to historical practices and understandings." 572 U.S. 565, 576 (2014) (quoting *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (2014) (Kennedy, J., concurring)). Eight years later, this Court recognized its abandonment of the *Lemon* Test in favor of the historical practices and understandings approach, *Kennedy*, 597 U.S. at 510. Finally, in *Groff v. Dejoy*, this Court explicitly abrogated the *Lemon* test in favor of the *Town of Greece* approach. 600 U.S. 447, 460 (2023). Presently, this Court gauges the "line... between the permissible and the impermissible" by asking whether state action "accord[s] with history and faithfully reflect[s] the understanding of the Founding Fathers." *Id.* at 536 (cleaned up).

A. The extension option comports with the Establishment Clause's historical understandings, as it does not nationalize religion, intrude on the liberty of conscience, nor compel or coerce religious worship.

Given this Court's rejection of the *Lemon* test in *Kennedy*, a closer examination of the First Amendment's historical influences and discussions is required to determine whether state action offends the Establishment Clause. *See Kennedy*, 597 U.S. at 535-36. As a general matter, the Establishment Clause protects religious liberty "on a grand scale" by prohibiting state action designed to coerce religious

observance, officialize religious dogma, or signal religious favoritism. *See Lee v. Weisman*, 505 U.S. 577, 606-08 (1992) (Blackmun, J., concurring). Indeed, Thomas Jefferson's encouragement of a "wall of separation between Church and State" partially demonstrates the Framers' desire to avoid both a nationalized religion, as had been the case in England, and coerced religious practice, as had permeated within some colonies prior to ratification.[2] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2111-45, 2205 (2003).

However, there is no "Rosetta Stone" or "smoking gun" quote or interpretation that "puts all evidentiary disputes to rest." John Witte Jr. et al., *Forging the First Amendment Religion Clauses, Religion and the American Constitutional Experiment*, 109 (5th ed. 2022) (online ed., Oxford Academic, May 19, 2022), https://doi.org/10.1093/oso/9780197587614.003.0005, (last visited Mar. 1, 2024). Instead, this Court requires the Establishment Clause to be examined by reviewing the historical understandings of multiple Framers, as opposed to just one. *See Kennedy*, 597 U.S. at 535-36. Simply accepting Jefferson's separationist admonition as the sole understanding of the Establishment Clause ignores the philosophies,

[2] Examples of establishment and nationalized religions at the time of the founding included, *inter alia*, Great Britain's (1) official adoption of the Church of England as its state religion, (2) state legislation regarding Church doctrines, clergy, and policies, and the simultaneous placement of the executive as head of the state church. Examples of coerced or compelled religious practice at the time of the founding include *inter alia*, (1) England's criminal proscription of "unlicensed religious meetings" including those of Catholics, Jews, Unitarians, and non-Trinitarians, (2) England's exclusion of non-Anglicans from civil, military, or academic office, (3) Virginia's tax collections for Anglican church buildings, (4) Virginia's prescription of Sabbath Day worship, (4) Virginia's proscription of various immoral behaviors, and (5) Georgia's anti-Catholic immigration policies. *See* McConnell, *Establishment and Disestablishment*, *supra*, at 2212-130.

concerns, and understandings embraced by the several Framers actually present at the Constitutional Convention.[3] *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

John Locke declared that the "liberty of conscience is every man's natural right, equally belonging to dissenters as to themselves; and that no-body ought to be compelled in matters of religion either by law or force." John Locke, *A Letter Concerning Toleration* 63 (4th ed. 1764). In 1785, drawing upon Locke's conviction, James Madison, the Establishment Clause's author, wrote that all men were (1) entitled to worship "according to the dictates of conscience" and (2) should be afforded "equal freedom" to abstain from religious activity. David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 Notre Dame L. Rev. 987, 1018 (1999) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, in THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

The Annals of Congress bear no record of any debate regarding the final version of the First Amendment. John Witte Jr., *Forging*, *supra*, at 108-09. However, the debate surrounding earlier versions of the amendment, which focused on a prospective clause against religious establishment, offers additional perspective as to

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[3] It is crucial to note that Thomas Jefferson himself acknowledged that he was not a major authority on the Constitution's original understanding, when he corrected Joseph Priestley's assertion that Jefferson, "more than any other individual" planned and established the Constitution:

> I was in Europe when the constitution was planned & established, and never saw it till after it was established. On receiving [the Constitution's draft] I wrote strongly to Mr. Madison urging the want of provision for the freedom of religion…. This is all the hand I had in what related to the Constitution.

Thomas Jefferson, *From Thomas Jefferson to Joseph Priestley, 19 June 1802*, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-37-02-0515.

the original understanding of the Establishment Clause. During the constitutional debates,[4] several representatives expressed their understanding that the amendment was designed to preserve the liberty of conscience, proscribe nationalized religion and ban compelled religious worship. 1 ANNALS OF CONG. 729-30 (1789) (Joseph Gales ed., 1834). Elbridge Gerry opposed the ambiguous terms of the amendment and argued that he felt the amendment would be clearer if it proscribed state establishment of "religious doctrine." *Id.* at 730. Daniel Carroll stressed his view that the religious clauses would preserve the "rights of conscience" better than any other proposed amendment, quelling public fears of a more intrusive government. *Id.*

James Madison, the amendment's author, then clarified his view of its proper understanding: "Congress should not *establish a religion*, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* (emphasis added). Madison then explained that the amendment's purpose was to "*prevent* these effects." *Id.* (emphasis added). Benjamin Huntington concurred with Madison's characterization of the amendment's understanding and purpose but expressed fear that its ambiguity could be conveniently interpreted to hurt "the cause of religion." *Id.* From these collective perspectives, with the forerunner proposal to the Establishment Clause being the focal point of these recorded debates, it is apparent that the First Amendment Framer's underlying concerns and original understandings were (1) the prevention of

[4] The first draft of the religion clauses contained three provisions (1) "no religion shall be established by law, nor shall the equal rights of conscience be infringed," (2) "no person religiously scrupulous shall be compelled to bear arms," and "no State shall infringe the equal rights of conscience…." Witte, *Forging*, *supra*, at 105.

nationalized religion, (2), the proscription of government intrusions upon the liberty of conscience, and, by extension of the second, (3) the prevention of other forms of coerce or compelled religious worship.

With these historical understandings as a backdrop, the constitutionality of § 1412's extension option to private, sectarian schools becomes clear. First, the option is not akin to adopting a nationalized religion. Rather, it is an option for states to neutrally extend funds to all eligible sectarian schools for the secular purpose of meeting the "unique needs" of disabled students and "preparing them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). This is in no way analogous to adopting a particular faith as a national religion, the criminalization of immoral behavior as defined by that faith, or the involuntary prescription of worship. *See supra* note 2 and accompanying text. Rather, this is the mere, neutral extension of an already publicly and privately available benefit to students voluntarily attending a religious school, as permitted by § 1400(d)(1)(A). *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488, (1986).

Second, the option does not violate the historical understanding of the Establishment Clause as it would not intrude upon the liberty of conscience. As Madison made clear in his remonstrance against Virginia's tax for Christian teachers, an intrusion of that liberty would be to deny every person their right to worship or not worship freely "according to the dictates of conscience." *See* Steinberg, *Gardening*, *supra*, at 1018. Here, the extension option results in no such intrusion upon the right of U.S. citizens to worship or not worship according to the dictates of their own

consciences. If anything, the absence of an extension would run afoul of the Establishment Clause's liberty of conscience understanding by forcing Tourvania citizens to choose between complete care of their child's unique needs and their religious devotion. *See* discussion *supra* Section I.

Given that the parents possess a private right to elect to send their child to a private religious school, *see* Pierce, 268 U.S. at 534-35, the extension option of IDEA funds to public, private nonsectarian, and private sectarian schools alike quells the concerns expressed by many of the Framers by eliminating the risk of government intrusion upon one's ability to worship or not worship freely. Such an option creates a neutral school choice for parents of disabled children by removing the marginal gains in special education assistance between school types, thereby quashing the economic incentive to favor one nonreligious or religious school over another.

Finally, § 1412's extension option is not tantamount to government-endorsed compulsion or coercion of religious worship. Such an extension does not compel parents and their children to worship at sectarian schools. Put succinctly, no provision in 20 U.S.C. §§ 1401, 1412, 1414, and 34 C.F.R § 300 imposes the civil or criminal penalties familiar to and feared by the Framers in 1789.

Furthermore, the historical coercion concerns are equally nonexistent. Defendants may assert that governmental approval of state funds flowing from public coffers to educational instruction at a religious school is a form of coercive government favoritism of that school or faith. *See Weisman*, 505 U.S. at 606-08. (Blackmun, J.,

concurring) ("The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs."). Such an argument fails for two reasons.

First, even assuming such a coercive effect existed, its relevance must be discounted by the retained liberty of conscience that parents retain in their freedom to elect not to send their child to such sectarian schools. *Pierce*, 268 U.S. at 534-35. Second, a coercive, exclusive, and favoritism effect analogous to the one observed in *Weisman*, namely the invitation of a rabbi to offer an invocation at a public-school graduation, is not present as § 1412's option does not signal a governmental imprimatur of a "*particular* religion." The option is not a tacit endorsement of the Jewish faith, the Catholic faith, the Latter-day Saint faith, or any other creed, but rather the mere, neutral extension of an already available public and private school benefit to *all* religious schools, regardless of denomination, provided they can meet the approval standards of IDEA, the IEP, the LEA, and § 502.

B. The extension option comports with the Establishment Clause's historical practices, as it is comparable to other sectarian school aid programs present at the founding.

This Court has recognized great utility in reviewing historical context to compare, analogize, and evaluate present-day state actions against the Establishment Clause. *See Everson*, 330 U.S. at 8 ("it is not inappropriate briefly to review the background and environment of the period in which [the Establishment Clause] was fashioned and adopted."). Recently, this Court formally adopted that

practice by directing courts to discern between the "permissible and the impermissible" of the Establishment Clause by comparing the Framer's "historical practices" against the case before the court. *See Kennedy*, 597 U.S. at 535-36.

It must be noted at the outset that no federal aid programs for educational instruction existed at the time of the Framers. For one, the Articles of Confederation that the Establishment Clause did not grant Congress the authority to tax its citizens, which presumptively would have funded such programs. *Weaknesses in the Articles of Confederation*, Constitution Annotated, https://constitution.congress.gov /browse/essay/intro.62/ALDE_00000049. Second, school systems in the colonial era were localized and not subject to much state or national oversight. *See* Benjamin Justice et al., *The Founding Fathers, Education, and "The Great Contest"* 158-63 (Benjamin Justice ed., 2013). Calls for expanded public education would not arise until later in the eighteenth century. *See id.* at 158-171; *see also* Johann N. Neem, *Democracy's Schools, the Rise of Public Education in America* 8-11 (2017).

However, with what few localized schools that did exist at the time of the Framers, no such thing as nonsectarian public or private schools existed, and state aid of sectarian schools ruled the day. Lloyd P. Jorgenson, *Historical Origins of Non-Sectarian Public Schools: The Birth of a Tradition*, 44 THE PHI DELTA KAPPAN 407, 408 (1963); *see also* Justice, "*The Great Contest*," *supra*, at 160-63. In 1789, the Massachusetts legislature passed a law that established a district school fund and simultaneously encouraged ministers to inspect and oversee these schools, provided they did not bear the title of "School-Master." Justice, *"The Great Contest," supra*, at

161. Between 1789, and until its official disestablishment in 1818, Connecticut, while not explicitly granting state funds to sectarian schools, permitted state resources to "support the general cause of religion, even through schooling." *Id.* at 161-62.

Upon ratification of the Establishment Clause, no rule existed against sectarian school funding through public coffers, and any move towards such a rule was a dynamic, lengthy process. Steven K. Green, *The Bible, the School, and the Constitution* 45 (2012). To the contrary, early schooling operated as a "joint endeavor" between "local officials, businessmen, and religious leaders," with many "private-pay secular, private-pay religious, and denominational charity schools … receiv[ing] a share of whatever public support was available…." *Id.*

Financial and land grants flowed often from state constitutions and legislatures to many schools, religious and nonreligious alike, and such public support to denominational schools "persisted, in diminishing but still significant amounts, until well after the Civil War. Jorgenson, *Historical Origins*, *supra*, at 408. Indeed, public funding and support of private sectarian and private nonsectarian schools constituted the general practice of the late eighteenth to early nineteenth centuries, notwithstanding the Establishment Clause. *Id.* As Professor Bernard Bailyn noted, it is simply a "fallacy" to make any distinction between public education and denominational education during the colonial era. Bernard Bailyn, *Education and the Forming of American Society* 10-11 (1960).

Additionally, an examination of rejected state support of religious education provides equal assistance in evaluating the Establishment Clause's historical practices. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the *impermissible* is one which accords with [the] history… of the Founding Fathers."). In 1784, prior to the adoption of the First Amendment, Patrick Henry attempted to pass a motion in the Virginia House of Delegates that would have assessed a tax on the citizenry for the purpose of funding "teachers of the Christian religion." *A Bill Establishing A Provision For Teachers Of The Christian Religion*, Monticello Digital Classroom, https://classroom.monticello.org/media-item/a-bill-establishing-a-provision-for-teachers-of-the-christian-religion/.

Jefferson and Madison vehemently campaigned against the motion, arguing that its blatant sponsorship of purely Christian theology threatened the "unalienable right" of Virginians to worship according to the "dictates of conscience." James Madison, *Memorial and Remonstrance against Religious Assessments*, Founders Online, National Archives, https://founders.archives.gov/documents /Madison/01-08-02-0163. Henry's motion never passed, and in its place, the Virginia Legislature proposed and adopted Jefferson's *Virginia Bill for Establishing Religious Freedom*, which enshrined the "natural rights of mankind" to worship freely without state compulsion. Laurence H. Winer & Nina J. Crimm, *God, Schools, and Government Funding* 91-93 (2015).

Here, the option to extend IDEA disbursements to private, sectarian schools in addition to the already available funds at public and private, nonsectarian schools, is no different from the historical practices tolerated at the time of the Founders. Whether they be land grants, direct financial support, or delegation of educational oversight to ecclesiastical leaders, state and local governments demonstrated a practice of aiding sectarian education and tolerating religious involvement. 20 U.S.C. § 1412 abides by that tradition by providing the option for state and local education agencies to disburse IDEA funds to children of private religious schools. As was similarly done in Massachusetts, Connecticut, and many other localities at the time of the founding, 20 U.S.C. § 1412 authorizes sectarian schools to request and receive public funds for the unique needs of their special education students, provided they engage in the "joint endeavor" with their local education agency to prepare and provide secular, neutral, and non-ideological" services. *See* Green, *The Bible, The School*, *supra*, at 45.

Though Respondents may contend that Madison's *Remonstrance* and Jefferson's *Bill for Religious Freedom* demonstrate a practice of vehemently opposing efforts to tax and divert public funds to religious schools; however, this would misstate the factual similarities between Henry's motion and the present case. Unlike Henry's motion, which called for the explicit taxation and funding of *purely* religious instruction, 20 U.S.C. § 1412 authorizes funds only for secular educational use.

If anything, the eligibility restrictions embedded within IDEA provide for greater protections against any funds being used for purely religious instructions

than what was observed in the permissible historical practices seen across the colonies. 20 U.S.C. § 1412(26) defines the eligible services to be, *inter alia*, "speech-language pathology and audiology services, physical and occupational therapy, counseling, recreation, orientation and mobility services, and diagnostic medical services," purely secular purposes, unlike Patrick Henry's call for direct funding to support Christian theological instruction.

Additionally, before funds can even be disbursed, the LEA must annually coordinate, review, and approve a "services plan" in accordance with the student's IEP, whereby the LEA ensures that all funds will be used for "secular, neutral, and non-ideological" purposes. *See* 20 U.S.C. §§ 1412(a)(10)(A), 1414(d)(1)(A)(i). Finally, LEAs retain the ability to review and revise IEPs should the schools deviate from the agreed-upon services plan, thereby avoiding the impermissible commingling of public funds for religious purposes, which Madison and Jefferson opposed. *See* 20 U.S.C §1414(d)(4)(A)(i). Simply stated, in no way does § 1412(a)'s permissive extension of funds to private, sectarian schools violate the historical practices approved and disapproved by the Framers.

C. Even assuming all historical practice evidence was irrelevant, this Court's jurisprudence supports the constitutionality of 20 U.S.C. § 1412(a)'s extension of IDEA funds to private, sectarian schools.

Assuming, *arguendo*, that all historical practice evidence was irrelevant, this Court's jurisprudence has recognized, by virtue of its own consideration of the historical practices and understandings of the Framers, that such aid is constitutional. *See Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 281, (2022)

(Gorsuch, J., concurring) (noting that, notwithstanding the eventual *Lemon* Test, post-*Everson* decisions "looked primarily to historical practices and analogues to guide its analysis").

This Court has on several occasions upheld federal aid programs to religious schools or attendees, where such programs neither compelled religious worship nor created coercive financial incentives to participate in sectarian education. *See Everson*, 330 U.S. at 17-18 (upholding public reimbursement for transportation costs of students attending religious schools); *Witters*, 474 U.S. at 488 (holding that a generally available aid program, without regard to sectarian-nonsectarian or public-private distinctions does not impermissibly skew the beneficiary towards religion); *Mitchell v. Helms*, 530 U.S. 793, 810, 829-36 (2000) (upholding a federal program that provided educational materials and equipment to religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) ("If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.").

Here, 20 U.S.C. § 1412(a)'s optional extension honors the historical considerations that underpinned this Court's Establishment Clause jurisprudence. First, § 1412 avoids national establishment concerns by containing no provision designating a sectarian school as the approved religious sect of the United States. Second, § 1412 specifically notes that states "may" provide funds to sectarian schools, but it does not mandate such an option be exercised, thus, avoiding any concerns

regarding the federal government compelling a state to tacitly endorse sectarian education. And finally, § 1412's recognition of the parental right to place their child in a sectarian school, while simultaneously permitting IDEA funds to be used at all eligible schools, regardless of sectarian/nonsectarian or public/private status, complies with this Court's recognition of the natural right to "liberty of conscience" by creating a neutral school choice, absent coercive financial incentives. *See Everson*, 330 U.S. at 11 n.10; *Zobrest*, 509 U.S. at 10 ("Because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.").

CONCLUSION

For all the foregoing reasons, this Court should reverse the Eighteenth Circuit, reinstate the District Court's denial of summary judgment against Respondents, and remand the case for further proceedings.

Respectfully submitted,

ASSIGNED TEAM NO. 13
PARTNERS
DEWEY, CHEATHAM, & HOWE PC