No. 24-012

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

TEAM NO. 14
COUNSEL FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Does a substantial burden of the Free Exercise Clause and/or the Equal Protection Clause exist when a state complies with a neutral and generally applicable federal statute that gives states the right to withhold federal funds from religious institutions?

II. May Tourvania fund individualized IDEA programs at pervasively religious schools without violating the Establishment Clause?

STATEMENT OF THE CASE

Respondents Tourvania Department of Education and Superintendent of Public Instruction Kayla Patterson ("Tourvania") oversee education in Tourvania. Record ("R") at 2. Like all educators, their top priority is providing the best possible education to their students. Adhering to federal and Tourvania laws and regulations is also a core concern for these dedicated public servants. They are particularly aware of the importance of the services they provide to students with disabilities. To best serve this diverse population, Tourvania accepts funds from the federal government for the express purpose of educating students with disabilities. R. at 2. These funds are authorized by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., which Congress enacted "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that includes special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

IDEA funds are not unconditional; states must pledge to comply with numerous statutory conditions, including guaranteeing a FAPE for all eligible children with disabilities in the state. 20 U.S.C. § 1412 (a)(1)(A). A FAPE is delivered via an individualized education program ("IEP"), a written document tailored to the needs of each child and formulated by a qualified representative from the local educational agency ("LEA") with input from parents/guardians, teachers, and other relevant experts. R. at 8-9. Congress, recognizing the unique nature and circumstances of each state, does not require a state to provide a FAPE if doing so would contradict state law. 20 U.S.C. § 1412(a)(1)(B).

IDEA benefits may extend into private schools, including religious schools, to the extent consistent with the law. 20 U.S.C. § 1412(a)(10)(A)(i)(III). Additional federal statutes made

clear that no child with a disability placed in a private school by their parents "has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a). The IDEA tasks LEAs with locating students with disabilities in private schools and providing those children with a share of special education and related services after consulting with private school representatives. 20 U.S.C. § 1412(a)(10)(A)(vi)(II).

Tourvania enacted its own educational statutes in Section 502 of the Tourvania Education Code ("TEC § 502"). Subsection (a) extends "appropriate special education and related services" to students in private, nonsectarian schools and agencies. R. at 6. Tourvania's LEAs fund services for eligible children in private schools, provided the schools are state-certified. R. at 6. To treat all children equally and avoid the constitutional pitfalls that occur when government and religion mix, Tourvania only allows nonsectarian schools to be certified. A nonsectarian school is statutorily defined as a:

> [P]rivate, nonpublic school...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.

TEC § 502(b). This requirement is not waivable. TEC § 502(d)(ii)(1).

Petitioners are two families and two schools upset with the policies Tourvania enacted to maintain the wall separating church and state. Cheryl Flynn and Leonard Flynn ("the Flynns") are the parents of a five-year-old daughter, H.F., who was diagnosed with high-functioning autism. R. at 8. Barbara Kline and Matthew Kline ("the Klines") are the parents of a thirteen-year-old daughter, B.K., who was diagnosed with autism at age 3. R. at 8. Both families practice Orthodox Judaism. R. at 1.

H.F. attended an Orthodox Jewish preschool and received occupational, behavioral, and speech therapy. R. at 8. She now attends the Fuchsberg Academy, an Orthodox Jewish learning center where she receives 15 hours per week of behavioral therapy and 45 minutes per week of occupational therapy. *Id.* The Flynns acknowledge that their daughter might qualify for additional services if she attended a public school, but she has never been evaluated by Tourvania educational personnel. *Id.* B.K. has attended a public school for ten years since she was diagnosed with autism. R. at 9. The Klines wish to send her to an Orthodox Jewish day school but feel she needs the special services she is receiving in her public school. *Id.*

Joshua Abraham High School and the Bethlehem Hebrew Academy are Orthodox Jewish day schools. R. at 9. Both schools are co-educational secondary schools that offer a dual curriculum of religious and secular studies. *Id.* Joshua Abraham's mission is "to promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning, and to develop a love for the State of Israel." *Id.* Bethlehem Hebrew's similar focus includes promoting a passion for Torah in its students. *Id.*

The Klines, the Flynns, and the two schools ("Petitioners") claim TEC § 502 does not comply with the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. R. at 7. Petitioners ignore centuries of American jurisprudence and claim Tourvania's federally authorized action to uphold the barriers between religion and government violates their free exercise of religious beliefs. *Id.* Petitioners erroneously contend that TEC § 502 treats disabled children who wish to attend religious schools, and the schools themselves, differently than it treats other students with disabilities and special educators. *Id.*

Tourvania counters by pointing out that (1) Congress clearly stated that IDEA funds must be used for "secular, neutral, and nonideological" services and (2) that IDEA funding cannot reach religious schools without violating the First Amendment's Establishment Clause. R. at 2; 20 U.S.C. § 1412(a)(10)(A)(vi)(II). The district court brushed aside Tourvania's efforts to avoid subsidizing religious education and denied its motion for summary judgment. The Eighteenth Circuit correctly vacated the ruling and found that Tourvania's nonwaivable nonsectarian requirement does not substantially burden Petitioners' religious exercise. R. at 18. The Eighteenth Circuit properly recognized Tourvania's adherence to the Constitution and remanded the case, directing the district court to enter summary judgment on behalf of Tourvania. *Id.*

For these reasons, and as explained in more detail below, Tourvania respectfully requests that this Court continue to protect the foundational barriers between church and state erected by the Framers and affirm the Eighteenth Circuit's grant of summary judgment.

SUMMARY OF THE ARGUMENT

When drafting our nation's Constitution, one of the fundamental principles the Founders made explicitly clear was "a wall of separation between Church & State." Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), 36 *The Papers of Thomas Jefferson* 258 (Barbara B. Oberg, ed., 2009). That's why the first two clauses of the First Amendment to the Constitution address religion. The Establishment Clause forbids Congress from enacting any law that would establish a national religion or demonstrate governmental preference for one religion over another. U.S. Const. amend. I. The Free Exercise Clause protects citizens' right to practice their religion as they wish, so long as the practice does not run afoul of a compelling governmental interest. *Id.*; *see Prince v. Massachusetts*, 321 U.S. 158 (1944). This case asks

whether the separation of church and state extends to the education of special-needs students. The answer is a resounding ***yes***.

When Congress enacted the IDEA, it unequivocally stated that "[s]pecial education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be ***secular, neutral, and nonideological***." 20 U.S.C. § 1412(a)(10)(A)(vi)(II) (emphasis added). There is no ambiguity about the words "secular, neutral, and nonideological"; they mean that special education services ***must not*** be religious in nature. Tourvania, therefore, specified in its education code that private-school providers of IDEA services must be nonsectarian. Petitioners erroneously challenge the statute on free-exercise grounds, failing to recognize that Tourvania in no way impedes the exercise of their religious beliefs.

Petitioners claim that Tourvania's proper refusal to authorize IDEA funding for Petitioners' chosen religious schools somehow inhibits the free exercise of their religious beliefs—a claim that fails under every analysis. Interpreting the Free Exercise Clause, this Court held in *Employment Division v. Smith* 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." *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990). TEC § 502 is just such a law. It requires that private schools that receive public funding be nonsectarian—precisely what the text of the IDEA itself requires—and it applies generally and equally to all faiths. As this Court noted in *Everson v. Board of Education of Ewing*, public tax dollars cannot be used to subsidize religious practices. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Ed. of Ewing*,

330 U.S. 1, 16 (1947). Yet this is exactly what Petitioners seek to accomplish: providing funding to the religious schools of their choice via the IDEA.

Individuals may not dictate the terms under which federal funds are awarded. This Court "has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the federal government." *Bowen v. Roy*, 476 U.S. 693, 695 (1986). In *Bowen*, this Court held that "[n]ot all burdens on religion are unconstitutional." *Id.* Moreover, the government may place restrictions on the receipt of such benefits, even if those restrictions touch upon religion. "The liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

The federal circuit courts broadly agree that there is no constitutional obligation to provide IDEA funding to religious schools. The First Circuit held that a disabled student was "not entitled by law to the panoply of services available to disabled public school students under the rubric of free and appropriate public education." *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 17 (1st Cir. 2004). The IDEA "do[es] not target religiously motivated conduct and is 'generally applicable' in that it does not selectively burden religious conduct." *Id.* at 18. Similarly, the Fourth Circuit observed that "absent from the IDEA is any requirement that schools provide religious or cultural instruction" for a student with Down syndrome whose parents unilaterally placed him in an Orthodox Jewish school. *M.L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017). Parents who unilaterally elect to enroll their children in a religious school do so with the knowledge that they will forgo certain benefits available through the public school system. "Under our Establishment Clause precedent, the link between government funds and

religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Furthermore, no burden on religion exists here because TEC § 502 neither restricts religious activity nor compels objectionable conduct. It simply prevents government officials from allocating tax dollars to religious institutions. Moreover, a workable solution is available: Petitioner students may obtain a religious education in the schools of their choice, and the public school district can provide the special services and any necessary transportation between the two facilities.

Petitioners also raise a nonviable Equal Protection Clause ("EPC") claim. When challenging a facially neutral statute such as TEC § 502, a proper EPC claim must prove both discriminatory intent and discriminatory impact. Here, neither exists. Petitioners, who bear the burden of proof, present no evidence whatsoever that Tourvania intended to discriminate; indeed, they cannot since the statute applies equally to all students. Nor can they show any appreciable impact. It is no burden on Petitioners' faith to have special services provided in a secular environment and religious instruction provided in a religious school. Both their wishes and the law would thus be satisfied.

Tourvania must also comply with the Establishment Clause by making certain that its government funding does not subsidize religious practices. The IDEA states that special education services "***may be provided***…on the premises of private, including religious schools, ***to the extent consistent with law***." 20 U.S.C. § 1412 (a)(10)(A)(i)(III) (emphasis added). States are thus given the discretion to determine whether funds should be provided to private schools, as well as the responsibility of ensuring compliance with the law in doing so. The IDEA emphasizes that the services must be "***secular, neutral, and nonideological***." 20 U.S.C. §

1412(a)(10)(A)(vi)(II) (emphasis added). Tourvania therefore cannot approve funding to religious schools whose stated missions include "promoting the values of Jewish heritage, developing a love for the State of Israel, and generating a passion for the Torah." R. at 9.

In *Westchester Day School v. Village of Mamaroneck*, the Second Circuit noted that an Orthodox Jewish school permeated secular instruction with religious influence. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 345 (2d Cir. 2007). First-grade students were taught about seasonal changes and their connection to Jewish holidays, and social studies lessons included an application of ethical Judaic principles. *Id.* Funding such religious instruction with public tax dollars would directly contravene the Establishment Clause. "[S]pecial Establishment Clause dangers [exist] where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (citing, e.g., *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976); *Bowen v. Kendrick*, 487 U.S. 589, 614-615 (1988)).

While the mere possibility that aid can be diverted is not enough to trigger an Establishment Clause violation, the present application is no "mere possibility." *Mitchell v. Helms*, 530 U.S. 793, 796 (2000). The appropriate services for students with autism involve individualized, specific attention. Federal law guarantees a FAPE to children with disabilities in a public school. Parents who send their children to Orthodox Jewish schools do so because of the religious focus of the institution. This Court determined that a FAPE is offered when there is publicly funded and supervised educational instruction specially designed to meet the unique needs of a child, and the instruction meets state educational standards, approximates regular grade levels, and works with each child's IEP. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982). The IDEA provides parents a voice in IEP

formulation, but school authorities make the final determination. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 404 (2017) (internal citations omitted).

Justice Souter's insights into the Establishment Clause are enlightening. He astutely noted that it protects religion from government interference because government aid can corrupt religion. *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting). He also observed that supporting religious establishment takes away the private nature of religious worship, and when that is removed, "along with it will go confidence that religious disagreement will stay moderate." *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting). Government involvement in religion can shake the foundations of society. Colonial America's establishment policies led to religious persecution of anyone who worshiped in a way that was contrary to the then-dominant religions. *Everson*, 330 U.S. at 10. Justice Stevens warned that "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

The Eighteenth Circuit properly granted summary judgment to Tourvania. It accurately noted that Petitioners are seeking "special accommodations: *i.e.*, the maximum-available IDEA benefits delivered in the gift-wrapping of an exclusively Orthodox Jewish educational milieu." Citing this Court's holdings in *Zelman* and *Mitchell*, it also recognized that "the denial of religious-based preferences…is simply not tantamount to the *substantial* burdening of religious *exercise*," and that Tourvania's statute is neutral and generally applicable to all recipients of federal student aid.

For these reasons, and as explained in detail below, Tourvania respectfully requests that this Court affirm the judgment of the Eighteenth Circuit.

ARGUMENT

I. THE FREE EXERCISE CLAUSE EXEMPTS NEUTRAL AND GENERALLY APPLICABLE FUNDING STATUTES, ESPECIALLY WHEN CONGRESS HAS GIVEN THE STATES LICENSE TO WITHHOLD FEDERAL FUNDS FROM RELIGIOUS GROUPS, AND NO SUBSTANTIAL BURDEN EXISTS WHEN THE GOVERNMENT PLACES CONSTITUTIONAL LIMITS ON THE PUBLIC USE OF TAX DOLLARS.

The First Amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. Const. amend. I. The Founders made clear that they wanted a separation of church and state so that our government would remain free from religious influence or oppression. "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting). Through the Fourteenth Amendment, the First Amendment's Establishment Clause and Free Exercise Clause also apply to the fifty states. *See Smith*, 494 U.S. at 872; *Engel v. Vitale*, 370 U.S. 421 (1962). Religious discrimination, by definition, can only exist when there is prejudice against a certain group of persons based upon the religious beliefs or practices that they share. However, when "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." *Smith*, 494 U.S. at 874.

With regard to education, this Court has held that "[a]uthority over public schools belongs to the State…and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group." *Bd. of Educ. of Kiryas Joel Vill. v. Grumet*, 512 U.S. 687, 698 (1994). A non-sectarian government with a clear separation of church and state cannot spend public funds to subsidize religion at the taxpayers' expense. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever

they may be called, or whatever form they may adopt to teach or practice religion." *Everson*, 330 U.S. at 16. When parents unilaterally elect to enroll their children in a religious school, they accept that they will forgo certain benefits available through the public school system. "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719.

In the present case, Petitioners do not have a viable free-exercise claim because the denominationally neutral Tourvania statute applies equally and without prejudice to all sectarian schools in a manner consistent with the scope of the IDEA.

A. The Free Exercise Clause Doesn't Apply Because Congress's Purpose in Enacting the IDEA Was to Provide Services to Disabled Children, and Tourvania's Statute Precisely Conforms with the IDEA.

The purpose of the IDEA[1] is to offer federal funds to the states to assist in educating children with disabilities and "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that includes special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The FAPE[2] is the core element of the program, laid out in an individualized education plan ("IEP"), a written document that tailors the available services to the unique needs of each classified disabled child, as determined via evaluation by a team of educational and medical professionals. *See Capistrano Unified Sch. Dist. v. S.W. on behalf of B.W.*, 21 F.4th 1125, 1130 (9th Cir. 2021); *cert. denied*, 143 S. Ct. 98 (2022). Support

[1] What is now known as the IDEA was originally enacted as the Education for All Handicapped Children Act of 1975 and reauthorized and renamed in 1990. 20 U.S.C. § 1400 *et seq*.

[2] "A free appropriate public education is defined as special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C.S. § 1414(d). 20 U.S.C.S. § 1401(9)." *M.L.*, 867 F.3d at 490.

services may include speech therapy, occupational therapy, physical therapy, counseling, academic tutoring, mobility assistance, medical services, dedicated teaching aides, and more. 20 U.S.C. §1401(26). "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)(i)(III) (emphasis added). In other words, the state has the responsibility of ensuring that the assignment of funds complies with the law and the discretion to deny funding when it does not.

1. The IDEA gives states authority to withhold federal funds from religious groups.

The IDEA requires that "[s]pecial education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be ***secular, neutral, and nonideological***." 20 U.S.C. § 1412(a)(10)(A)(vi)(II) (emphasis added). Accordingly, TEC § 502 provides that IDEA funding will be made available to nonpublic schools via a contract that requires, among other things, that the nonpublic school be nonsectarian. This fully comports with the plain language of the IDEA, which indicates that the states make the final determination of the allocation of funding.[3] In *Employment Division v. Smith*, this Court held that the First Amendment "bars application of a neutral, generally applicable law to religiously motivated action ***only*** when [it] involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Smith*, 494 U.S. at 874 (emphasis added). Known as the "hybrid right," this rule requires that another constitutional right—in addition to free

[3] This also accords with the well-established principles of the Tenth Amendment, which reserve to the states the right to control education.

exercise—be infringed. This does not occur in the present case. Petitioners do not allege any additional constitutional violation that would qualify as a hybrid-right exception.

The Tourvania statute does not obstruct any constitutional protection; on the contrary, it guarantees equal treatment for all religious beliefs. TEC § 502 is a neutral and generally applicable statute; it does not single out Orthodox Judaism. In fact, it ensures that Orthodox Jewish children will be treated exactly the same as children of any other faith. Tourvania does not target the exercise of religion but merely prohibits funding it with tax dollars in accordance with both the IDEA and the Establishment Clause (as will be discussed in detail in Part II of this Argument).

Individuals may not demand that the administration of federal funds be subject to the terms of their own religious beliefs. Although "the free exercise of religion holds an important place in our scheme of ordered liberty," this Court "has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the federal government. Not all burdens on religion are unconstitutional." *Bowen*, 476 U.S. at 695. The government has the authority to place conditions upon the receipt of benefits. "The liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 399. By maintaining a neutral, non-sectarian requirement for its approval of educational institutions that are eligible for public funding, Tourvania acts within the scope of the IDEA's terms while also correctly balancing the tenets of the First Amendment. "In commanding neutrality the Religion Clauses…do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is ample room…for benevolent neutrality which

will permit religious exercise to exist without sponsorship and without interference." *Grumet*, 512 U.S. at 690.

Petitioners' claim that the non-sectarian requirement is facially discriminatory fails a basic constitutional analysis. "Given the historic and substantial State interest against the establishment of religion, the Supreme Court cannot conclude that the denial of State funding for vocational religious instruction alone is inherently constitutionally suspect." *Locke*, 540 U.S. at 715. The state need not—and, indeed, should not—support every religious milieu. "The First Amendment's…protection of religious liberty does not require deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Smith*, 494 U.S. at 874 (internal citations omitted). Were Tourvania to simply hand over the money as Petitioners demand, the state would effectively surrender control of its educational responsibilities to religious institutions whose mission is "to promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning, and to develop a love for the State of Israel." R. at 9. This Court has prohibited furnishing government aid "to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Grumet*, 512 U.S. at 690.

2. Circuit courts agree that there is no constitutional requirement to provide IDEA funds to religious schools.

In *Gary S. v. Manchester School District*, the parents of a disabled child attending a Catholic school claimed that the IDEA was unconstitutional and violated the Free Exercise Clause and the Equal Protection Clause (among others not relevant here). The First Circuit held that although the student received educational services under federal and state law, he was "not entitled by law to the panoply of services available to disabled public school students under the rubric of free and appropriate public education." *Gary S.*, 374 F.3d at 17. Affirming the district

court's opinion that there was no violation of free exercise rights, the First Circuit agreed that the IDEA "do[es] not target religiously motivated conduct and is 'generally applicable' in that it does not selectively burden religious conduct." *Id.* at 18. The court noted that the student and his parents "[were] not being deprived of a *generally available* public benefit," but "[r]ather, the benefits to which appellants lay claim under the First Amendment are benefits the federal government has earmarked solely for students enrolled in the nation's public schools -- benefits still available for [him] were he sent to a public school, though not otherwise." *Id.* at 19. The circuit court applied rational-basis scrutiny: "A law ordinarily need not be justified by a compelling interest if it is 'neutral' in that it is not targeted at religiously motivated conduct and 'generally applicable' in that it does not selectively burden religious conduct." *Id.* at 17.

In *M.L. v. Smith*, which factually parallels the present case, the Fourth Circuit held that "[a] school satisfies the FAPE requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *M.L.*, 867 F.3d at 490. However, "absent from the IDEA is any requirement that schools provide religious or cultural instruction." *Id.* at 496. The student plaintiff, M.L., was an Orthodox Jewish child with Down syndrome whose parents enrolled him in an Orthodox Jewish school. *Id.* Once the student was classified under the IDEA, his parents demanded that his IEP include provisions for religious instruction and ultimately brought an action to force the school district to place M.L. at the religious school and provide him with services there. *Id.* at 492. The court pinpointed "the crux of this dispute: Is the education proposed in the IEP a FAPE when it does not account for [M.L.'s] individual religious and cultural needs?" *Id.* Answering yes to that question, the court then determined that "a FAPE, to which a child with a disability is entitled, is the education that any student without disabilities would receive." *Id.* The IDEA creates a duty for schools to

provide disabled students with access to the general curriculum, but "the U.S. Supreme Court rejected the argument that a free appropriate public education is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." *Id.* at 490. Religious instruction does not fall within the school's duty. The court pointed out that "[t]he relevant circumstance here is that M.L. is disabled, not that he is of the Orthodox Jewish faith. As the Supreme Court reaffirmed in *Endrew F.*, 'the IDEA cannot and does not promise any particular educational outcome,' and it does not require one that furthers a student's practice of his religion of choice." *Id.* at 499 (internal citations omitted).

Here, Petitioners demand the right to apply federal funds as they see fit, regardless of the public school district's responsibility to assign those funds according to the terms of the federal statute. Moreover, Petitioners have not complied with the basic requirements for establishing that their children need the requested services; the children must first be evaluated by the Tourvania school district in accordance with IDEA procedure. If Petitioners were to prevail, the Court would be setting a dangerous precedent that would allow any plaintiff to claim religious discrimination whenever public funds were not allocated to a religious program. As the First Circuit astutely noted, if it had found a burden on free exercise, "it would follow logically that we should find free exercise violations whenever a state, city or town refuses to fund programs of other types at religious schools, at least insofar as the absence of funding adversely affects students with parents who believe their faith requires attendance at a religious school." *Gary S.*, 374 F.3d at 20-21. But it also emphasized that "it is clear there is no federal constitutional

requirement that private schools be permitted to share with public schools in state largesse on an equal basis." *Id.*

This Court should adopt these standards in the present case. The First and Fourth Circuits draw an appropriate line that conforms with both the IDEA's statutory language and the First Amendment.

3. None of Petitioners' free-exercise case law deals with federal statutes.

Petitioners rely on *Carson*, *Espinoza*, and *Trinity* to suggest that the Free Exercise Clause is entitled to exceptionally broad interpretation, yet not one of those cases involves a federal program. Rather, they deal with state funds only. *Carson* addressed Maine's nonsectarian requirement for tuition assistance in a school district that did not operate its own secondary school, and because the state paid tuition for students at other private schools that were not religious, the Court held that it was not a neutral and generally applicable program. *Carson v. Makin*, 142 S. Ct. 1987 (2022). In *Espinoza*, the Court struck down a Montana statute granting tax credits for donations to organizations awarding private-school scholarships that prohibited the use of those scholarships at religious schools. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). Likewise in *Trinity*, the Court determined that the Missouri Department of Natural Resources erred when it decided that a church could not participate in a grant program for playground refurbishment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). In each case, state funds were involved, and in each case, the Court found animus based on religious identity.

Here, Petitioners fail to show that any such animus exists. Instead, Tourvania is acting within the scope of the IDEA to ensure that "[s]pecial education and related services provided to parentally placed private school children with disabilities, including materials and equipment,

shall be ***secular, neutral, and nonideological***." 20 U.S.C. § 1412(a)(10)(A)(vi)(II) (emphasis added).

B. Petitioners Seek an Unworkable Accommodation for Religion, Not for Disability.

Even if the Free Exercise Clause were to apply, no substantial burden on free-exercise rights exists here. The government's requirement that recipients of benefits meet certain criteria does not violate the Constitution because "[t]he Free Exercise Clause of U.S. Const. amend. I is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Bowen*, 476 U.S. at 695. In *Bowen*, this Court explained that "[g]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.*

Tourvania neither restricts religious activity nor compels objectionable conduct. Nor does it deny students their funding; it simply requires that the services be provided in a nonsectarian environment in compliance with the IDEA. No substantial burden is created because no imposition on religious exercise occurs; student services can be provided without subsidizing religious indoctrination. Parents do not have to choose between exercising their faith and educating their children; reasonable flexibility is all that's required to comply with the law. This can be accomplished in various ways, and specifically for Petitioners, by transporting the students to the public schools to receive the services and then returning them to their religious schools for other instruction. The Tourvania statute does not denigrate or contravene religious

beliefs; Orthodox Judaism does not require entirely separate facilities.[4] For example, Orthodox Jews can be treated by non-Orthodox medical professionals. Orthodox requirements primarily affect marriage (i.e., intermarriage with non-Jews is not permitted), adhering to a kosher diet, and religious observances. Sending a child to a non-Jewish school is ***not prohibited***—in fact, Petitioner B.K. has been educated in Tourvania for ten years (from ages 3 through 13). R. at 9. Simply put, the scope of the right Petitioners are claiming does not encompass the federal government's entitlement program.

"The Free Exercise Clause, the Court has said, protects against 'indirect coercion or penalties on the free exercise of religion.' Accordingly, this Court's cases have required not only differential treatment, but also a resulting burden on religious exercise." *Espinoza*, 140 S. Ct. at 2292-2293 (Sotomayor, J., dissenting). No coercion occurs under the Tourvania statute. Petitioners may still choose a religious education for their children in all substantive ways. Special education services would simply be provided by the public school district, as and when determined under the proper IDEA evaluation. Furthermore, the public district is substantially better equipped than private schools to provide special education services tailored to the needs of the child.

Parents make a choice to send their children to private schools, religious or otherwise. Many factors weigh into that decision, including, in some instances, the desire to provide a religious education. However, they must necessarily accept that there are differences between those institutions and the public school system, among which is that public schools are funded by the government. "Unlike unemployment benefits that are equally available to all, private school parents can have no legitimate expectancy that they or their children's schools will receive the

[4] Sruli Fruchter, "Attending A Secular College Is Okay," *NY Jewish Week*, February 2, 2018, https://www.jta.org/2018/02/02/ny/attending-a-secular-college-is-okay.

same federal or state financial benefits provided to public schools." *Gary S.*, 374 F.3d at 20. Consequently, "the non-receipt of equal funding and programmatic benefits cannot be said to impose any cognizable 'burden' upon the religion of those choosing to attend such schools." *Id.*

This Court has also held that "a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference." *Bowen*, 476 U.S. at 695. Since Petitioners fail to show any proof of intent to discriminate on Tourvania's part, TEC § 502 meets constitutional requirements. "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* There is no incongruity in upholding the law and providing services to Petitioners. "[B]oth the Supreme Court and the First Circuit have 'consistently refused to invalidate laws which condition a parent's ability to obtain educational benefits on the parent's relinquishment of her right to send her child to private school.'" *Gary S.*, 374 F.3d at 23. Tourvania can provide special services in the public schools by transporting the students back and forth. This is common practice and ultimately better serves each child's unique needs.

C. Where No Free Exercise Violation Exists, Neither Does an Equal Protection Claim.

The Fourteenth Amendment's Equal Protection Clause ("EPC") requires the states to provide equal protection under the law to all persons. U.S. Const. amend. XIV. In order to bring a successful equal protection claim, a plaintiff must prove both intentional discrimination against an identifiable suspect class of persons and an actual discriminatory effect on that group. *See Davis v. Bandemer*, 478 U.S. 109, 113 (1986). When a statute is facially neutral, as Tourvania's

is, a court applies rational-basis review to alleged religious discrimination, and the government need only show a legitimate state interest with a rational connection between the statutory means and goals. *See United States v. Windsor*, 570 U.S. 744 (2013). Notably, the plaintiff bears the burden of proof in rational-basis cases. *Id.*

TEC § 502(a) states, "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." R. at 6. It further defines "nonsectarian" as a "private, nonpublic school that is not owned, operated, controlled by, or formally affiliated with a religious group or sect" and specifies that "the assets of such agency or corporation will not inure to the benefit of a religious group." *Id.* Nowhere does the statute mention Judaism, Christianity, atheism, or any religious beliefs whatsoever. The intent behind Tourvania's statute is to conform with the IDEA and the Establishment Clause by preventing the awarding of tax dollars for religious purposes. Tourvania bears no animus towards Orthodox Jews, nor does it preclude providing special education services for Orthodox Jewish children. It simply requires that such services be "secular, neutral, and nonideological" in accordance with the text of the IDEA. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). In fact, as the Eighteenth Circuit astutely noted, TEC § 502 "assures neutrality because it eliminates the unconstitutional risk that a government official, rather than a private individual, might make the choice about where to direct aid and thereby appear to favor any one religiously-affiliated recipient over another." R. at 20.

A facially neutral statute, by definition, lacks intent, and Petitioners have presented no evidence of discriminatory analysis. Therefore, even if Petitioners can show an unfavorable

impact, their argument fails to satisfy both required prongs of an EPC claim. Moreover, since Petitioners' free-exercise claim fails, there can be no EPC violation.

II. THE SCOPE OF PETITIONERS' REQUESTED AID BREAKS THE PRINCIPLE OF NEUTRALITY AND VIOLATES THE ESTABLISHMENT CLAUSE.

Tourvania accepts federal funds to supplement the special services it offers to eligible students. Accepting these funds means Tourvania must comply with all relevant laws and regulations. Tourvania protects the constitutional rights of every student and teacher by avoiding any government establishment of religion. Comprising the first ten words of the First Amendment, the Establishment Clause has been interpreted as a wall separating church and state. Petitioners are seeking to drill an opening through this wall in order to create a custom program of immersive religious instruction on the public's dime. This cannot be countenanced under the Establishment Clause. The individualized services mandated by the IDEA combined with the intense religious focus of Orthodox Jewish day schools create an unwieldy plan that topples under even the lightest constitutional analysis.

A. Extending IDEA Funds to Religious Schools Violates the Establishment Clause.

The IDEA provides all children with disabilities access to a free appropriate public education. Congress allows private school students access to a FAPE but does not grant parents carte blanche to tailor a custom program. Petitioners' argument—a hypothetical one because no funding has been requested or delivered—demands a blank slate that exceeds the scope of the law and violates the first ten words of the First Amendment: "Congress shall make no law respecting an establishment of religion," commonly known as the Establishment Clause. U.S. Const. amend. I.

1. IDEA requirements preclude the religious immersion practiced in Petitioners' schools.

Tourvania's programs already reach eligible children. Petitioners are reaching further: demanding the funds follow them inside their chosen religious schools. This aid is not statutorily guaranteed for students in private schools but "***may be provided***…on the premises of private, including religious schools, to the extent consistent with law." 20 U.S.C. § 1412 (a)(10)(A)(i)(III) (emphasis added). Tourvania chose to steer clear of state involvement in religious instruction by excluding religious schools from IDEA-certification programs. This decision is in accordance with federal law. Students are not entitled to the same services in a private school as they would receive in a public school. 34 C.F.R. § 300.137(a). The Court confirmed this principle in upholding a Washington regulation barring public scholarship funds from being used to pursue devotional theology degrees. *Locke*, 540 U.S. at 718. Washington ***could*** have allowed those funds to be used for that purpose, but its ***choice*** not to do so comported with the Establishment Clause. Quite simply, "accommodation is not a principle without limits." *Grumet*, 512 U.S. at 706.

Religious schools are not barred from receiving public aid, provided the services and materials are "***secular, neutral, and nonideological***." 20 U.S.C. § 1412(a)(10)(A)(vi)(II) (emphasis added). Petitioners are not seeking a neutral or non-ideological benefit. They are demanding that Tourvania subsidize the schools Petitioners have handpicked ***solely because*** of their sectarian nature. Religious schools are not automatically excluded from public aid programs (*see Mitchell*, 530 U.S. at 793; *Agostini v. Felton*, 521 U.S. 203 (1997)), but acceding to

Petitioners' requests would trample the limits enacted by this Court and the religious protections enshrined in the Constitution.

Prior decisions allowing public aid to reach religious schools relied on the principles of private choice and neutrality. *See, e.g.*, *Mitchell*, 530 U.S. at 809; *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 488-489 (1986); *Mueller v. Allen*, 463 U.S. 388, 397 (1983). Petitioners may argue that their requests are "neutral" because the service is offered to all of Tourvania's eligible students. They are incorrect. The aid Petitioners seek is not solely a "result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. Instead, government officials would be obliged to make specific choices about individual students, including the extent of aid sent to a religious school. That would not be a neutral process and thus would violate the Establishment Clause.

Even so, neutrality is not—and should not be—the sole determining factor in measuring Establishment Clause violations. *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring). A comprehensive analysis also focuses on application to explore whether the aid is used for religious purposes, *id.* at 857 (O'Connor, J., concurring), and begins with the qualification that it's hypothetical since Petitioners have not taken any steps to access the aid they seek. As seen above, this analysis concludes with the determination that the aid ***will*** be used for religious purposes.

Special education programs are offered on a neutral basis, but many of the specific services required—especially for children with autism—are so unique they defy neutrality. Look no further than the plain statutory language for proof. States that accept IDEA funds are required to formulate a plan tailored to each disabled student. 20 U.S.C. § 1401(9)(D). The IEP is a "highly individualized, scrupulously detailed document." R. at 4. As the name suggests, each

student receives a bespoke IEP, jointly produced by numerous stakeholders. Representatives from the local educational agency, consulting with the child's parents, meet to develop the IEP, which is then formalized in a written document that contains statements on present educational performance, annual goals, and the specific educational services that will be provided. Aid programs are designed to implement a FAPE by delivering both "special education" and "related services." 20 U.S.C. § 1401(9). Parents incur no cost for these services, and the instruction can occur "in the classroom, in the home, in hospitals and institutions, and in other settings." 20 U.S.C. § 1401(29)(A). The broad range of "related services" includes developmental, corrective, and other programs (e.g., speech-language pathology, psychological services, physical and occupational therapy, and counseling services). U.S.C. § 1401(26)(B).

This cursory IEP description illustrates a glaring Establishment Clause conflict: how can a state official authorize a program, individualized for an eligible child, in schools whose stated missions include promoting the values of Jewish heritage, developing a love for the State of Israel, and generating a passion for the Torah? They cannot do so without violating the Establishment Clause.

Prior IEP disputes shed light on each plan's specific and individualized elements. A New York student was not provided with a proper FAPE because his IEP offered a spot in a classroom with a 6:1:1 ratio of students to teachers and instructional aides, but the FAPE required a 1:1 ratio. *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167, 194 (2d Cir. 2012). An IEP for a severely autistic boy in Oregon included a personal aide, personal instruction from regular teachers, and small classes made up exclusively of special education students. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 816 (2007). A regional autism specialist was also required to visit his school twice each week. *Id.* A California student displayed a pattern of

aggression towards his female aides and was therefore denied a FAPE when the school district refused to provide him with a male aide. *Meares v. Rim of the World Unified Sch. Dist.*, 269 F. Supp. 3d 1041, 1053 (C.D. Cal. 2016). These highly specific levels of care are necessary to provide the best possible education for a child with autism.

This individualized care could not be offered on a neutral basis at Petitioners' preferred schools, partly because these schools' stated missions include ***stimulating Torah learning, promoting the values of Jewish heritage, and developing a love for Israel***. R. at 9 (emphasis added). The record is silent as to the structure of a day at either school, but similar Orthodox day schools illustrate a split: half the day devoted to Judaic studies, half the day spent on secular instruction. *See generall*y *Sklar v. C.I.R.*, 549 F.3d 1252, 1255 (9th Cir. 2008); *Westchester Day Sch.*, 504 F.3d at 338 (school's effort to provide "synthesis" between Judaic and general studies means nearly all secular classes are "permeated" with religion.).

Westchester Day School attempted the same balancing act as many Orthodox day schools. Westchester Day integrated religion into secular instruction: first-grade students were taught about seasonal changes and their connection to Jewish holidays, and social studies lessons included an application of ethical Judaic principles. *Id*. at 345. This is not a unique approach. Advocates for Orthodox Jewish education endorse integration as the best means of conveying the broad range of instruction. *See* Jack Bieler, *Integration of Judaic and General Studies in the Modern Orthodox Day School*, 54:4 Jewish Education 15 (1985).[5] To be clear, this is a noble endeavor. Religious freedom is a cornerstone of American history. Religious education keeps traditions and customs vibrant in an increasingly secular world. However, precisely what makes this undertaking unique also conflicts with the Establishment Clause.

[5]https://www.lookstein.org/curriculum-integration-introduction/integration-judaic-general-studies-modern-orthodox-day-school/.

Petitioner schools' request runs headlong into a problem flagged by this Court: "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U.S. at 842. *Rosenberger* allowed student fees at a public university to go towards printing a student group's newspaper with religious content, partially because it was a ***neutral*** program. The aid was available to all student groups. *Rosenberger*, 515 U.S. at 839-40. Petitioners' requested accommodations are ***not neutral***. State officials cannot make the decision to send direct financial aid to the coffers of religious schools—which is what these services require—without violating the Establishment Clause.

We acknowledge that the mere possibility that aid could be diverted for nonsecular purposes is not sufficient to trigger an Establishment Clause violation. *Mitchell*, 530 U.S. at 796. However, this application is no "mere possibility." Parents who send their children to Orthodox Jewish schools do so because of the religious focus of the institutions. The appropriate services for students with autism involve individualized, specific attention, and federal law guarantees a FAPE to children with disabilities in public schools.

There can be a broad gap between what parents want for their children and what constitutes a FAPE. The IDEA defined a FAPE as:

> [S]pecial education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

U.S.C. § 1401(9). This Court determined in *Rowley* that a FAPE is offered when there is publicly funded and supervised educational instruction specially designed to meet the unique needs of a child, and the instruction meets state educational standards, approximates regular grade levels,

and works with each child's IEP. *Rowley*, 458 U.S. at 188-89. Courts have avoided any single test to determine whether the IEP benefits are adequate, partially because an IEP is not required to guarantee a specific level of benefit. In *Rowley*, this Court acknowledged "somewhat imprecise substantive admonitions" in the IDEA, especially in contrast with "elaborate and highly specific procedural safeguards embodied [in the IDEA]." *Id.* at 205. The IDEA provides parents a voice in IEP formulation, but parents do not have final authority over the outcome. The *Rowley* Court's interpretation found that Congress placed equal emphasis on giving parents and guardians "a large measure of participation" as it did on evaluating an IEP's performance. *Rowley*, 458 U.S. at 205-206. However, this exposes another flaw in Petitioners' logic: what if the IEP determines the child will be best served in another school? Petitioners seek to educate their children in accordance with their Orthodox Jewish beliefs at the specific schools of their choosing. Courts have shied away from enacting uniform rules about IEP standards and progress, given the unique circumstances of each child. At the same time, school authorities are given broad leeway in determining the best approaches for each student. *Endrew F.*, 580 U.S. at 404 (quoting *Rowley*, 458 U.S. at 206).

Tourvania does not claim that every application of public services in religious schools is non-neutral. Courts have granted supervising authorities broad latitude to adjust and remedy potential violations. *See Mitchell*, 537 U.S. at 835 (provided that statutory violations were *de minimis*). Courts have not prohibited religious programs from operating in public institutions, so long as adequate separation between the program's religious and secular aspects exists. *Cf. DeStefano v. Emergency Housing Grp., Inc.*, 247 F.3d 397, 408 (2d Cir. 2001). However, Petitioners fail to meet these fundamental limits in their hypothetical argument. They do not propose any of the "adequate safeguards" against impermissible diversion that this Court has

accepted for other aid programs. *Mitchell,* 530 U.S. at 867. Instead, Petitioner schools' integrated religious environment, combined with the needs of children with autism, results in a non-neutral application of state funds.

2. History and precedent bolster the vital importance of the Establishment Clause.

Thomas Jefferson explained the Establishment Clause in plain language that has endured for over two centuries. Writing to a group of Baptists in Danbury, Connecticut, the third president described religion as a matter "between Man & his God" and that the Establishment Clause built "a wall of separation between Church & State." Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), 36 *The Papers of Thomas Jefferson* 258 (Barbara B. Oberg, ed., 2009).[6]

This Court adopted Jefferson's words as "almost…an authoritative declaration of the scope and effect of the amendment." *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878). This principle remains in force today. Religious groups do not have the power to make government decisions, and states are not allowed to delegate civic authority to a group chosen because of religious reasons. *Grumet*, 512 U.S. at 690 (carving out a school district for the use of a religious sect violates the Establishment Clause); *see also Larkin v. Grendel's Den, Inc.*, 495 U.S. 116, 117 (1982) (Massachusetts law allowing churches and religious schools to prohibit liquor stores within five hundred feet violated the Establishment Clause); *Dumont v. Lyon*, 341 F. Supp. 3d 706, 734 (E.D. Mich. 2018) (government contract with a faith-based adoption agency that rejected same-sex couples violated the Establishment Clause). To navigate the tension between the First Amendment's religion clauses, this Court confirmed the Establishment Clause principle

[6]https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006.

preventing the fusion of governmental and religious functions. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

Tensions between the Establishment and Free Exercise Clauses have been mollified by the "play in the joints" doctrine, a "benevolent neutrality" that exists when there is no governmentally established religion or governmental interference with religion. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). This allows for free exercise without sponsorship or interference. This federalist policy allows states to make their own choices (provided they are not infringing on First Amendment rights) about what they seek to accomplish and promote.[7]

The Establishment Clause protects ***religion*** from ***government*** interference because government aid can corrupt religion. *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting). James Madison warned that a religious establishment weakened beliefs and created "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." *Everson*, 330 U.S. at 67 (quoting Memorial and Remonstrance ¶ 7). Supporting religious establishment takes away the private nature of religious worship, and when that is removed, "along with it will go confidence that religious disagreement will stay moderate." *Zelman*, 536 U.S. at 716 (Souter, J., dissenting).

Courts have affirmed these protections when states wade into religious disputes. In *Commack Self-Service Kosher Meats, Inc. v. Weiss*, the Second Circuit struck down as an Establishment Clause violation a New York law mandating the Orthodox definition of "kosher" over other definitions. *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002). Conversely, this Court determined in *Lynch v. Donnelly* that a municipality's inclusion of

[7] Zach Kobokovch, *All Work and No Play: Why the "Play in the Joints" Doctrine Must Be Revived to Preserve State Autonomy*, 29 Geo. Mason L. Rev., 2.

a nativity scene on public land did not violate the Establishment Clause, in part because there was no coordination or communication with religious officials. *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Petitioners are short-sighted in their demands—allowing government programs into their religious schools could bring unforeseen problems that threaten to corrupt the mission and purpose of these schools. Granting Petitioners' request would scuttle the Establishment Clause and its prohibition on government "participat[ing] in the affairs of any religious organizations or groups and vice versa." *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961).

Government involvement in religion fuels the conflict that can shake the foundations of society. Colonial America's establishment policies led to the persecution of Catholics, Quakers, Baptists, and anyone who worshiped in a way that was contrary to the then-dominant religions. *Everson*, 330 U.S. at 10. Historical persecution seems abstract compared to the current religious violence in the Middle East. Religious strife in the Balkans and Northern Ireland led Justice Stevens to warn that removing bricks from the wall separating religion and government increases the risks of religious strife while weakening our democratic foundations. *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

B. The Narrow Facts of Petitioners' Case Law Do Not Apply Here

The district court's ruling relied on recent precedent that does not apply to the facts of this case. Those decisions permitted public programs to reach religious schools because they were deemed sufficiently neutral in both delivery and application. By contrast, Petitioners' application is not neutral in either aspect.

The first brick was removed from Thomas Jefferson's wall separating church and state when the Court allowed private-school students to take public buses to their religious schools. *Everson*, 330 U.S. at 1. The Court's reasoning flows directly to its recent decision allowing state

playground repair funds to reach a religious school. *Trinity*, 582 U.S. at 449. Justice Black's words in *Everson* still resonate seven decades later: "cutting off church schools from these services, so separate…and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment." *Everson*, 330 U.S. at 18. These programs promote public safety. The aid can take the form of a bus ride or a new playground surface, but it is available to all schools. We are not so draconian as to suggest that schools should be excluded from a program to make playgrounds safer. Missouri was not providing funds to Trinity Lutheran Church to modernize its playground with the interest of advancing religion; the state was offering a neutral benefit. Petitioners in the present case ***are*** seeking government funds to advance religion. Delivering this aid would constitute an impermissible non-neutral benefit.

The district court stretched too far in applying *Carson* and *Zelman* to this case. The emphasis on independent choice allowing public funds to reach religious schools ignores the contrast between the IEP process and the highly specific religious focus of Petitioners' schools. The decision also fails to weigh the programs in the appropriate context. This Court emphasized Maine's status as the most rural state in the Union when it allowed a state tuition-assistance program to be used for private-school tuition. *Carson*, 596 U.S. at 773. At the time, fewer than half of Maine's 260 school administrative units operated their own secondary school. *Id.* Nothing in the record shows a similar shortage in Tourvania.

Ohio's pilot program that allowed Cleveland students to use state scholarships for tuition at religious schools was deemed necessary because of the dismal state of the city's public schools. *Zelman*, 536 U.S. at 653. That program helped students avoid the historic underperformance of the Cleveland public school system, described as a "crisis of magnitude" and "perhaps

unprecedented in the history of American education." *Id*. at 644 (internal citations omitted). One in ten Cleveland ninth graders could pass a proficiency exam when the scholarship program was enacted. *Id.* There were significant public-policy reasons for allowing this program to move forward. These reasons do not exist in Tourvania. Petitioners have not even taken the first step of requesting a FAPE.

Any comparison to *Zobrest* fails to consider the circumstances. This Court held that a deaf student in a religious school was entitled to a sign-language interpreter in the classroom, even though that interpreter would be translating religious precepts and beliefs. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 2 (1993). Neither the student's parents nor the school authorities disputed the fact that he would be entitled to the interpreter if he attended public school. *Zobrest v. Catalina Foothills Sch. Dist*., 963 F.2d 1190, 1192 (9th Cir. 1992). This Court held that under the IDEA, an interpreter was a neutral benefit provided to the student, not the school. *Zobrest*, 509 U.S. at 13.

Zobrest went too far. The end result was a "state-employed sign language interpreter …serv[ing] as the conduit for [the student's] religious education, thereby assisting [the school] in its mission of religious indoctrination." *Id.* at 22. (Blackmun, J., dissenting). Even if this Court were to decide against overturning *Zobrest*, the present case still represents an Establishment Clause violation. One sign-language interpreter is a neutral benefit, clearly available to any eligible student. Petitioners' schools are even more "pervasively religious" than the private school in *Zobrest*. In this scenario, state officials would then be required by law to devise a custom-made program providing a FAPE to a student enrolled in a religious school chosen specifically because of its religious curriculum—a clear violation of the Establishment Clause.

Petitioners are making requests that are not rooted in precedent or the Constitution. In *Locke*, this Court held that the states may determine whether public funding can be extended to religious instruction. *See Locke*, 540 U.S. at 712. Petitioners' request is not neutral because it requires government approval to be directed toward a school selected for expressly religious purposes. Nearly 250 years of constitutional tradition have upheld the importance of separating church and state. Avoiding the establishment of religion permits the free exercise guaranteed by the First Amendment, the exact "play in the joints" this Court described. Petitioners rely on prior decisions that were far more neutral than their requested relief. Those decisions should be narrowed to the facts of their respective cases. Petitioners have taken no steps to seek an IEP and are speculating about hypothetical damages. Tourvania complies with the Establishment Clause by separating government from religion and with the IDEA by offering a FAPE to all eligible students.

CONCLUSION

Our democracy's fundamental cornerstone of separation of church and state remains as vitally important today as when it was first incorporated into our Constitution. The government may not fund religious practices at taxpayer expense. The federally funded IDEA therefore mandates that special education services be "secular, neutral, and nonideological." The Eighteenth Circuit correctly held that Tourvania's educational statute, which complies with both the IDEA's language and the First Amendment's religion clauses, imposes no substantial burden on free exercise rights.

Accordingly, Tourvania respectfully respects that this Court affirm the Eighteenth Circuit's grant of summary judgment.

Date: March 4, 2024 Signed: /s/ Team 14
Team 14, *Counsel for Respondents*