No. 24-012

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2024

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

v.

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

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

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BRIEF FOR RESPONDENTS

Team 16
Attorneys for Respondents

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QUESTIONS PRESENTED

1) Whether either the First Amendment or Fourteenth Amendment require Tourvania to include private religious schools in a program that funds special education services for disabled children when the program requires Tourvania to oversee and regulate any school it selects?
2) Whether providing federal funds directly to religious schools is historically understood as an establishment of religion?

STATEMENT OF THE CASE

Statutory Background

In 1975, Congress enacted what is known today as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, which allows a State to request federal funds to help educate children with disabilities. The IDEA was enacted so that all children with disabilities would have access to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1)(A). It was also enacted to prepare children with disabilities for further education, employment, and independent living. *Id.*

For a State to receive funds under the IDEA, it must adhere to various statutory conditions. 20 U.S.C. § 1412(a). The State must provide eligible children with specially designed instruction that meets the needs of a child with a disability, as well as related services to assist the child. 20 U.S.C. §§ 1412(a)(1)(A); 1401(9). The State must also develop and adhere to an individualized education program ("IEP") for each child. 20 U.S.C. § 1401(9)(D). An IEP is a detailed document that addresses the child's education level, specific needs, and evaluation criteria, as well as other aspects of the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i). In addition, each IEP must be reviewed and revised at least annually. 20 U.S.C. § 1414(d)(4)(A)(i).

While the IDEA emphasizes a free appropriate *public* education, a State may also request funding under the IDEA for disabled children who attend private schools. 20 U.S.C. § 1412(a)(10). Doing so, however, requires the states to comply with several additional requirements. *Id.* The IDEA delineates situations where parents choose to place their child in a private school and situations where the child is placed in a private school by a public agency. 20 U.S.C. §§ 1412(a)(10)(A), (B). Overall, the State is only eligible for IDEA funds if it submits a plan that shows that it has the policies and procedures in place to meet all of the IDEA's statutory requirements. 20 U.S.C. § 1412(a).

Tourvania receives IDEA funds. R. at 6. To comply with the IDEA's requirements, Tourvania enacted Tourvania Education Code § 502 (TEC § 502). R. at 6. TEC § 502 largely tracks key provisions within the IDEA and includes a requirement that any institutions receiving funds maintain compliance with the IDEA. R. at 6–7. For a nonpublic school to become eligible to receive funds, it must apply with the Superintendent of Public Instruction to become state-certified. R. at 6. Certification requires a school to meet several requirements as well as submit specific details around the school's curriculum, the school's special educational services, and the credentials of the school's teachers. R. at 7. Only nonsectarian schools can become certified. R. at 6. If a nonpublic school is certified, any funding the school receives must be made pursuant to a contract between the local educational agency ("LEA") and the nonpublic school. R. at 6. That contract must include provisions concerning instruction in the nonpublic school, staffing, IEP implementation, and LEA supervision. R. at 6. In addition, any funding is paid directly from the LEA to the nonpublic school. R. at 6.

Similar to the IDEA, TEC § 502 delineates situations where parents choose to place their child in a private school and situations where the child is placed in a private school by a public agency. R. at 5, 7. TEC § 502 only applies when the LEA decides that alternative placement in a private institution is appropriate. R. at 7. It does not apply to cases where the child's parents decide to pursue alternative placement. R. at 7.

Factual and Procedural History

Petitioner H.F., the daughter of Petitioners Cheryl and Leonard Flynn, is a five-year-old diagnosed with high-functioning autism. R. at 8. H.F. began attending a private Orthodox Jewish school as a pre-schooler. R. at 8. There, she received specialized care including occupational, behavioral, and speech therapy. R. at 8. Currently, H.F. attends the Fuchsberg Academy, also a private Orthodox Jewish school, where she continues to receive specialized care. R. at 8. H.F.'s

parents have always covered the costs of her specialized care. R. at 8. They are also currently paying for Fuchsberg Academy's regular tuition. R. at 8. There is a public school option available to H.F., where she could qualify for more services. R. at 8. The Flynns religious beliefs, however, require them to give H.F. an Orthodox Jewish education and they therefore refuse to consider public school as a viable option. R. at 8. H.F.'s parents have never applied to the Tourvania Central School District ("TCSD") seeking a FAPE for H.F. R. at 8. They also have never allowed the TCSD to evaluate H.F.'s educational needs. R. at 8. Nor has H.F. ever gone without an education or specialized care. R. at 8. Nonetheless, H.F. and her parents claim that TEC § 502's nonsectarian requirement prevents H.F. from receiving a free appropriate public education. R. at 8.

Petitioner B.K., the daughter of Petitioners Barbara and Matthew Kline, is a thirteen-year-old diagnosed with autism. R. at 9. Like the Flynns, the Klines also assert that their religious beliefs obligate them to give their children an Orthodox Jewish education. R. at 8. Nonetheless, B.K. is not currently enrolled in a private Orthodox Jewish School. R. at 9 n.4. Instead, B.K. is attending a public school where she is receiving the special education and related services that she needs. R. at 9 n.4. The Klines claim that TEC § 502's nonsectarian requirement has prevented them from placing B.K. in an Orthodox Jewish school while obtaining IDEA funding. R. at 9. They also claim that in doing so, TEC § 502 has forced them to compromise their religious beliefs. R. at 9.

Petitioners Joshua Abraham High School and Bethlehem Hebrew Academy are private Orthodox Jewish secondary schools. R. at 9. Both schools sought to qualify for IDEA funding as certified nonpublic schools. R. at 9. Both schools, however, integrate religion into their curriculums and mission statements. R. at 9. Specifically, 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." R. at 9. Similarly, Bethlehem Hebrew Academy also prioritizes incorporating Torah teachings into its curriculum. R. at 9. The schools allege that their application packages complied with the principal requirements of TEC § 502.[1] R. at 10. They, however, did not comply with the statute's nonsectarian requirement. R. at 10. Accordingly, the Superintendent of Public Instruction denied both applications. R. at 10.

The Petitioners filed a complaint in the United States District Court for the District of Tourvania against the Tourvania Department of Education, which oversees the distribution of IDEA funds within Tourvania, and against the Superintended of Public Instruction, Kayla Patterson ("Respondents"). R. at 2. The Petitioners alleged that TEC § 502's nonsectarian requirement violated the Free Exercise Clause of the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment by denying IDEA funding to private religious secondary schools solely based on their religious affiliation. R. at 1–2. The Respondents filed a motion for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure. R. at 2, 10. The Respondents argued that the State need not give IDEA funding to private religious schools. R. at 2. Moreover, the Respondents claimed that granting religious schools IDEA funds would violate the First Amendment's Establishment Clause. R. at 2. The district court denied the Respondents' motion for summary judgment. R. at 2. In its view, TEC § 502's nonsectarian requirement violated the Free Exercise Clause, and providing IDEA funding to religious entities did not violate the Establishment Clause. R. at 14–15.

[1] It is unclear whether both institutions complied with TEC § 502(d)(ii)'s requirement that the applications include a description of the special education, and designated instruction and services provided to individuals with exceptional needs, as the schools did not specifically mention those requirements in their allegations. R. at 10.

The Respondents appealed the district court's decision to the United States Court of Appeals for the Eighteenth Circuit. R. at 17. The Eighteenth Circuit unanimously vacated the district court's denial of summary judgment and remanded the case, directing the district court to enter summary judgment in favor of the Respondents. R. at 20. In its view, "Tourvania's nonwaivable nonsectarian requirement [did] not substantially burden [Petitioners'] exercise of their religion." R. at 18. Furthermore, the Eighteenth Circuit concluded that TEC § 502 was neutral and generally applicable and therefore did not need to be justified by a compelling governmental interest. R. at 19–20. This Court subsequently granted writ of certiorari on two issues. R. at 21.

SUMMARY OF THE ARGUMENT

First, Tourvania's IDEA compliance program does not violate the Free Exercise Clause, as it has not denied Petitioners any generally available public benefit. The benefit at issue here is that of a free appropriate *public* education. Petitioners do not contend that TEC § 502 has denied them the benefit of such a public education, as Tourvania does in fact provide a free appropriate public education to all children. Instead, Petitioners argue that federal funding should be set aside for their children to pursue a private religious education in accordance with their religious beliefs. TEC § 502, however, does not impose a categorical limitation against a parent's ability to place their child in a private religious school. It merely denies funding in one specific scenario: when a local education agency determines placement in a private institution is appropriate for the disabled child's educational needs. TEC § 502 then imposes contractual requirements and certification criteria to ensure that such a private education meets the standards imposed on public schools. The religious education that Petitioners seek is nothing like a public

education. Instead, they seek an education that promotes their religious ideals. This Court has recognized that a State need not subsidize any private education, let alone one tied to religion.

Moreover, even if the Free Exercise Clause is implicated, TEC § 502 passes scrutiny. The IDEA's statutory requirements necessitate that a State get involved in overseeing and regulating any institution that it funds. Tourvania's interest in avoiding state entanglement in religion justifies its decision not to fund private religious institutions.

As to Petitioners' Equal Protection Claim, since the claim implicates religious discrimination, it should be analyzed under this Court's Free Exercise framework.

Second, providing State funds directly to religious schools is historically understood as an establishment of religion. Concerns around government-funded religion go back to our Founding Fathers and continue to the present day. To address those concerns, this Court has drawn a distinction between funding that goes directly from a State to a religious school and funding that does so through a recipient's private choice. TEC § 502 specifically extends IDEA funds directly to private schools pursuant to a contract. Furthermore, under TEC § 502, a state official determines whether a private school qualifies for certification and a state agency places each individual student. Eliminating TEC § 502's nonsectarian requirement would risk religiously coercive school selections, in violation of the Establishment Clause.

ARGUMENT

I. TEC § 502 does not violate the First Amendment's Free Exercise Clause.

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. The First Amendment applies to the States under the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). On one hand, the Establishment Clause of the First Amendment "commands a separation of church and state."

Cutter v. Wilkinson, 544 U.S. 709, 719 (2005). On the other hand, the Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson v. Makin*, 596 U.S. 767, 778 (2022). Together, the clauses reflect the general principle that "[this Court] will not tolerate either governmentally established religion or governmental interference with religion." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).

There are some cases where a State can act without violating the Free Exercise Clause, even though it is not required to do so under the Establishment Clause. *See Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2254 (2020) (recognizing room for a "play in the joints" between the two Clauses). This reflects this Court's understanding that an overly rigid application of the Clauses could defeat their basic purpose. *Walz*, 397 U.S. at 669. This is nowhere more apparent than when state aid funds religious instruction. *See, e.g., Locke v. Davey*, 540 U.S. 712, 725 (2004) (Free Exercise Clause not violated by State's refusal to fund devotional theology instruction).

Tourvania acted within the confines of the Free Exercise Clause when it enacted TEC § 502. A State's actions violate the Free Exercise Clause if they "den[y] a generally available benefit solely on account of religious identity." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). TEC § 502, however, has not denied the Petitioners any generally available benefit. It simply extends IDEA funding to schools that offer the equivalent of a public education. *See Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 17 (1st Cir. 2004) (IDEA benefits are not generally available and are "earmarked solely" for students in public schools) Under TEC § 502, the generally available benefit of a FAPE is still available to the Petitioners. Moreover, TEC § 502 only reaches situations where an LEA determines placement

in a private institution is appropriate. TEC § 502(e). It does not extend to situations where the child's parents choose to place their child in a private school. *Id.*

Furthermore, even if TEC § 502 does deny religious schools a generally available benefit, it is justified by Tourvania's interest in avoiding state entanglement in religion. Under strict scrutiny, a State's actions may be justified if they advance "interests of the highest order" and are "narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (internal quotation marks and citations omitted). TEC § 502 is a regulatory measure that ensures Tourvania remains in compliance with the IDEA. To fund religious schools while adhering to the IDEA's statutory requirements, Tourvania would be required to entangle itself in the operations of those religious schools.

A. Petitioners have not been denied a generally available public benefit.

The Petitioners' Free Exercise claim is that Tourvania has denied them IDEA funding and thus restricted the free exercise of their Orthodox Jewish beliefs. R. at 7. This argument relies on several assumptions that are blatantly false. First, it assumes that IDEA funding is a generally available public benefit that private religious institutions are entitled to. IDEA funding, however, is only available to States that meet the IDEA's statutory requirements. *See* 20 U.S.C. § 1412. Within those requirements, the IDEA explicitly provides that a State need not provide funding when the State has made a FAPE available to a child. 20 U.S.C. § 1412(a)(10)(c)(i). This reflects the actual benefit that the State is providing: not funding but instead access to a free appropriate *public* education.

Second, the Petitioners' argument assumes that TEC § 502 categorically excludes religious institutions from receiving funding. TEC § 502, however, is explicitly limited in that "[t]he provisions of this code apply only when the LEA, not the child's parents, decide that alternative placement in a private institution is appropriate." TEC § 502(e). It leaves open the

possibility that the school or family may receive funding in cases when the parents choose to place their child in a private school.

Third, the Petitioners' argument fails to recognize that TEC § 502 only provides funding to private schools when students "are deemed to be enrolled in public schools for funding purposes." TEC § 502(c) (internal quotation marks omitted). The idea that a private religious school with a religious mission could be considered a public school ignores the First Amendment's absolute prohibition against promoting religion in public schools. *See Epperson v. State of Ark.*, 393 U.S. 97, 106 (1968) ("State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion. This prohibition is absolute.") (internal quotations marks and citations omitted).

This Court recently decided three cases invalidating State actions for violating the Free Exercise Clause: *Trinity Lutheran*, *Espinoza*, and *Carson*. All three of these cases, however, involved State actions that denied religious institutions a generally available public benefit. *See Trinity Lutheran*, 582 U.S. at 466 (State required religious institution to "renounce its religious character in order to participate in an otherwise generally available public benefit program"); *Espinoza*, 140 S. Ct. at 2255 ("[State's] no-aid provision bar[red] religious schools from public benefits"); *Carson*, 596 U.S. at 780 (religious institutions "disqualified from … generally available benefit"). This case should be distinguished in that the Petitioners here have not been denied any generally available public benefit.

1. Petitioners have not been denied a FAPE.

The benefit that the IDEA provides is not the funding to send a child with disabilities to a school of the family's choosing. Nor is it to help pay the salaries of the educators and administrators at a private school. Instead, the IDEA was enacted "to bring previously excluded handicapped children into the public education systems of the States." *Bd. of Educ. of Hendrick*

Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 189 (1982). The public benefit that is offered under the IDEA is exactly that: a free appropriate public education. 20 U.S.C. § 1400(d)(1)(A).

Congress has explicitly defined what a FAPE entails. 20 U.S.C. § 1401(9). A FAPE requires that the student receive both special education and related services, that the FAPE be provided at no cost to the student, that it be under public supervision, that it meet State standards, and that it be in conformity with the student's IEP. *Id.* Given the wide range of disabilities that children can suffer from, the IDEA recognizes that the needs of students can vary greatly. *See Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 394 (2017) (discussing IEP requirement). As a result, the IDEA "cannot and does not promise any particular educational outcome." *Id.* at 398 (internal quotation marks and citations omitted). Instead, The IDEA focuses on student progress in the form of academic and functional accomplishments as well as integration into regular classrooms. *Id.* at 399–400.

Here, the Petitioners concede that there are public school options available that provide adequate educational services for disabled children. R. at 8, 9 n.4. Petitioners instead contend that they are constitutionally entitled to IDEA funding to send their children to a private religious school since sending their children to a public school would violate their religious beliefs. R. at 8–9. Neither the IDEA nor TEC § 502, however, offer the general benefit of a subsidized private education, even in cases where a family's religious views dictate one. *See Espinoza*, 140 S. Ct. at 2261 ("A State need not subsidize private education."). In addition, this Court's precedent has not extended to situations where religious institutions claim entitlement to a subsidy. *See, e.g., Trinity Lutheran*, 582 U.S. at 463 ("Trinity Lutheran is not claiming any entitlement to a subsidy."). The IDEA and TEC § 502 are simply statutory carveouts that guarantee public

educational services to disabled children, which Tourvania has provided.

The focus of the Free Exercise Clause is appropriately on the actions taken by the State. *See Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988) ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."). Tourvania has not penalized the free exercise of religion or coerced the Petitioners into abandoning their religious beliefs. The Petitioners are free to pursue their religious education outside of normal education hours. *See Locke*, 540 U.S. at 721 n.4 (noting that students not forced to choose between religious belief and government benefit when they are free to use funding for secular option and pursue religious education separately). The Petitioners may also choose to pursue private schooling at their own cost, just like any family. *See* TEC § 502(e) (only applying to LEA-placed, and not parent-placed, schooling); *see also Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 190 (2d Cir. 2014) ("The Free Exercise Clause . . . has never been understood to require government to finance a subject's exercise of religion."). Indeed, the Petitioners' schools are free to continue as private religious schools that integrate their faith into their curriculums. R. at 9. The Petitioners simply do not have a constitutional right to federal subsidization of these pursuits. *See Gary S.*, 374 F.3d at 20 ("[I]t would be unreasonable and inconsistent to premise a free exercise violation upon Congress's mere failure to provide to disabled children attending private religious schools the identical financial and other benefits it confers upon those attending public schools.").

2. TEC § 502 does not categorically exclude religious institutions from receiving funding.

On one hand, when a State adopts a policy that categorically excludes religious institutions from any and all types of aid, that policy may raise First Amendment concerns. *See*

Espinoza, 140 S. Ct. at 2261 ("[State's] no-aid provision imposes a categorical ban—broadly and strictly prohibiting *any* type of aid to religious schools.) (internal quotation marks and citations omitted); *Trinity Lutheran*, 582 U.S. at 454 (policy categorically excluded religious institutions). On the other hand, when a State prohibits a specific form of funding, their actions may be constitutional. *See, e.g., Locke*, 540 U.S. at 725 (constitutional for State to prohibit funds from being used to pursue vocational religious education).

TEC § 502 does not categorically exclude religious institutions from obtaining funding under the IDEA. Instead, it only applies in cases where the LEA, and not parents, place a child in a private school. TEC § 502(e). Tourvania's policy is nowhere near as sweeping as the policy in *Trinity Lutheran*, which was an "automatic and absolute exclusion" against religious institutions. *Trinity Lutheran*, 582 U.S. at 462. TEC § 502 explicitly leaves open the possibility for parentally-placed children to obtain funding under the IDEA. Indeed, this court has "long recognized the rights of parents to direct the religious upbringing of their children." *Espinoza*, 140 S. Ct. at 2261 (internal quotation marks and citations omitted). TEC § 502 simply does not apply when a parent exercises their right to choose whether to send their child to a private school. Tourvania treats all parentally-placed children equally, whether religious or non-religious. Both fall not under the application of TEC § 502, but the conditions imposed by the IDEA. *See* 20 U.S.C. § 1412(a)(10)(A) (Children enrolled in private schools by their parents).

3. Tourvania only funds schools that offer the equivalent of a public education.

There are numerous differences between private schools and public schools. *See Carson*, 596 U.S. at 783 (discussing differences). Private schools do not need to accept all students. *Id.* Private schools, unlike public schools, are often not free. *Id.* Private schools have more control over their own curriculums and hiring processes. *Id.* Public schools, however, must comply with

numerous state requirements and are subject to a State's continuous oversight. *See, e.g., East Hartford Education Assn. v. Board of Education*, 405 F. Supp. 94, 95 (D. Conn. 1975) (teacher dress codes); *Weingarten v. Board of Education*, 591 F. Supp. 2d 511, 520 (S.D.N.Y. 2008) (political restrictions).

While Tourvania extends funding to some nonpublic schools, the schools that obtain funding must operate identically to public schools and cannot be said to truly be private institutions. To qualify for funding, the schools must enter into a contract with the LEA and guarantee a requisite level of "instruction, program development, staffing, documentation, IEP implementation, and LEA supervision." TEC § 502(c)(i). The schools must abide by the Tourvania Board of Education-adopted core curriculum. TEC § 502(d)(ii). They must submit their instructional materials and a plan detailing their special educational services for Tourvania to approve. *Id.* The schools must also provide Tourvania with a list of all teachers who will be providing education to disabled students and prove that each is appropriately certified. *Id.* In other words, for a school to obtain funding under TEC § 502, its educational opportunities must mirror that of a public school. It is therefore no surprise that students who receive funding at a nonpublic school under TEC § 502 are "deemed to be enrolled in public schools for funding purposes." TEC § 502(c).

TEC § 502 does not contemplate funding private institutions broadly, whether religious or not. The Petitioners seek not the public education that Tourvania offers, but a specialized, private religious education. R. at 7. They specifically seek funding to give their children an Orthodox Jewish education. R. at 8. Moreover, their schools have missions that prioritize religious practice, namely Torah values and learnings. R. at 9. Such an education cannot meet the constitutional requirements of the public schooling system and thus appropriately falls outside of

the scope of the State's funding. *See McCollum v. Board of Education*, 333 U.S. 203, 211 (1948) (State cannot "utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines or ideals.").

B. Even if the Free Exercise Clause is implicated, TEC § 502 passes scrutiny.

This Court has applied three different standards to cases involving Free Exercise violations. First, this Court has found a special carveout when a State's actions are neutral and of general applicability. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 546 (1993). When both of those conditions are met, courts apply rational basis review. *See, e.g., We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 156 (2d Cir. 2023) (applying rational basis review to Act deemed neutral and of general applicability). Second, when a State precludes a religious institution from receiving merely one form of funding, this Court has found that its actions may be constitutional if the State has a "historic and substantial state interest" in denying the funding. *Locke*, 540 U.S. at 725. After all, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). Third, when a State implements a categorical exclusion to deny a religious institution a generally available public benefit solely based on the institution's religious character, strict scrutiny applies. *Carson*, 596 U.S. at 780. To satisfy strict scrutiny, the regulation "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotation marks and citations omitted).

Under any of these standards, Tourvania has an adequate interest that supports restricting religious institutions from obtaining funding when an LEA decides that placement in a private institution is appropriate. To obtain funding under the IDEA, Tourvania must comply with numerous statutory conditions. *See* 20 U.S.C. § 1412 (State eligibility). Those statutory

conditions would require Tourvania to oversee and immerse itself in a religious school's operations. *See, e.g.*, 20 U.S.C. § 1412(a)(11) (State educational agency responsible for general supervision). Tourvania is justified in acting to avoid such an entanglement in religion.

1. The IDEA necessitates that a State oversee any school it funds.

For a State to qualify for IDEA funding, it must comply with the IDEA's statutory conditions. *See* 20 U.S.C. § 1412 (State eligibility). It must provide disabled students with a free appropriate public education, which includes specially designed instructions and support services. 20 U.S.C. §§ 1401(9), 1412(a)(1). The State must also ensure the education meets state standards. 20 U.S.C. § 1401(9). The mechanism through which a State provides these services is the child's IEP. *See Honig v. Doe*, 484 U.S. 305, 311 (1988) (IEP is "the centerpiece of the statute's education delivery system for disabled children").

An IEP is a highly detailed document that addresses all aspects of both the child's disability and the child's educational needs. *See* 20 U.S.C. § 1414(d)(1)(A)(i) (outlining IEP requirements). These requirements include: complying with drafting procedures, collaboration within a team that includes parents, educators, and a member of the LEA, assessment of the child's educational needs, and evaluation criteria to measure the child's performance. 20 U.S.C. § 1414(d)(1). If the requirements aren't satisfied, state agencies are in charge of holding a due process hearing. *See Endrew F.*, 580 U.S. at 391–392 (citing 20 U.S.C. §§ 1415(f)(1)(A), (g)). Subsequently, the losing party may appeal the decision to state court. *See Endrew F.*, 580 U.S. at 392 (citing 20 U.S.C. §§ 1415(i)(2)(A)).

In other words, the IDEA thrusts a State into an oversight role over any school it funds. Its statutory requirements force a State to evaluate the adequacy of the school's curriculum, staffing, procedures, and general operations. Moreover, religious institutions have a conflicting interest in ensuring their curriculums advance the tenets of their religion. Petitioners specifically

have educational missions that include promoting the values of Jewish heritage and living Torah values. R. at 9. Providing IDEA funding to private religious schools forces a State to evaluate these religious institutions and their operations. *See Carson*, 596 U.S. at 787 ("[S]crutinizing whether and how a religious school pursues its educational mission would . . . raise serious concerns about state entanglement with religion and denominational favoritism.").

2. TEC § 502 is neutral and of general applicability.

When a law is neutral and of general applicability, strict scrutiny does not apply. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–882 (1990)). Neutrality and general applicability are interrelated, but both must be satisfied. *Lukumi*, 508 U.S. at 531. First, a law is not neutral "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533. In determining whether a law is neutral, courts look at the historical background as well as the events leading up to the passage of an act to determine whether there is evidence of discriminatory intent. *Lukumi*, 508 U.S. at 540. Second, a law is not of general applicability if it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (internal quotation marks and citations omitted). A law is also not of general applicability if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534.

TEC § 502 is neutral and of general applicability. There is no evidence that it was passed to restrict religious beliefs or practices. It applies to all religions equally to separate church from state in situations where an LEA determines it is appropriate to place a child in a private institution. TEC §§ 502(b), (e). This is not a case of a law targeting a specific religion for disparate treatment. *See Lukumi*, 508 U.S. at 534 (failing test when act's objective was

suppression of particular religion). Furthermore, even acts that obstruct religious practices may still be neutral and of general applicability. *See Trinity Lutheran*, 582 U.S. at 460–461 (distinguishing neutral and generally applicable laws which incidentally impact religious practices from those that target a religious practice).

3. Tourvania's interest in avoiding entanglement in religion justifies any Free Exercise implications.

TEC § 502 furthers Tourvania's interest in avoiding state entanglement in religion. In enacting TEC § 502, Tourvania attempted to limit its involvement in religious operations. *See Espinoza*, 140 S. Ct. at 2261 ("[A] school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program."). TEC § 502 applies specifically to eliminate Tourvania's involvement in the situation where religious entanglement would be most in question: when a state organization places a child in a private school. In doing so, it is narrowly tailored to keep Tourvania from diving into the weeds of regulating private religious institutions. Otherwise, Tourvania would be required to oversee when placing a child in a religious private institution is appropriate, which institution to select, and whether that institution is providing an adequate education, as discussed above. Such a role would be riddled with risks of religious favoritism and governmental control over religious education. *See Walz*, 397 U.S. at 670 (purpose of Religion Clauses is to mark boundaries to show what constitutes excessive governmental entanglement in religion).

TEC § 502 stands in stark contrast to prior cases involving violations of the Free Exercise Clause. Previously, this Court found that a State violated the Free Exercise Clause when it punished religious exercise. *Lukumi*, 508 U.S. at 535. This Court also found a Free Exercise Clause violation when a State restricted the ability of religious organizations to participate in political affairs. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). TEC § 502 neither punishes

religion nor limits a religious organization's ability to participate in politics. It does not even limit a student's ability to receive IDEA funding for their educational needs in a public school. It instead simply denies the Petitioners funding for their religious practices. *See Locke*, 540 U.S. at 721 (denying funding for what was an "essentially religious endeavor … akin to a religious calling as well as an academic pursuit"); *see also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) (free exercise clause "has never meant that a majority could use the machinery of the State to practice its beliefs").

Furthermore, this Court's precedent surrounding religion in public schools emphasizes the risks of forcing the government to oversee religious institutions. Overwhelming precedent supports that religion has no place in the public school system. *See Epperson*, 393 U.S. at 106 ("State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion"); *Carson*, 596 U.S. at 791 (dissenting opinion) (collecting cases). Neutrality to religion is particularly important in the public secondary school context. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("[This] Court has been required often to invalidate statutes which advance religion in public elementary and secondary schools."). Tourvania is justified in avoiding such entanglements with religion.

II. TEC § 502 does not violate the Fourteenth Amendment's Equal Protection Clause as religious discrimination claims are analyzed under the Free Exercise Clause.

The Fourteenth Amendment's Equal Protection Clause provides that no State shall "deny to any person ... the equal protection of the laws." U.S. Const. amend. XIV. In regards to allegations of religious discrimination, however, this Court applies its Free Exercise framework to Equal Protection claims. *See Locke*, 540 U.S. at 720 n.3 (Free Exercise clause is primary framework for assessing religious discrimination); *Trinity Lutheran*, 582 U.S. at 466 n.5 (addressing claim under Free Exercise Clause and not Equal Protection Clause); *Espinoza*, 140

S. Ct. at 2263 n.5 (similarly addressing claim under Free Exercise Clause). Therefore, the above arguments as to why TEC § 502 does not violate the Free Exercise Clause also apply to the Petitioners' Equal Protection Claim. In Tourvania, all disabled children, both religious and non-religious, have access to the same benefit of a free appropriate *public* education. If Petitioners' Free Exercise claim fails, so does their Equal Protection Claim, as a matter of law. *See Freedom From Religion Foundation v. Morris Cnty. Bd. of Chosen Freeholders*, 232 N.J. 543, 579 (2018), *cert. denied.* 139 S.Ct. 909 (U.S. March 4, 2019) (No. 18-364) (Free Exercise Clause defines scope of right to religion as incorporated by Fourteenth Amendment's Equal Protection guarantee).

III. Providing federal funds directly to religious schools is historically understood as an establishment of religion.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Under the Establishment Clause, the government cannot pass laws that advance religion. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (States cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another"). This includes "laws that have the purpose *or* effect of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–649 (2002) (internal quotation marks and citations omitted) (emphasis added). The purpose of the Establishment Clause is to prevent governmental sponsorship of religious activity. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 430 (1962) (prescribing form of prayer is governmental sponsorship of religious activity). Furthermore, a State may violate the Establishment Clause even if it acts with the intention of benefiting society. *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (creating separate school district to provide educational services to handicapped religious children violated Establishment Clause).

Previously, this Court has applied the test outlined in *Lemon v. Kurtzmen*, 403 U.S. 602 (1971), to determine whether State conduct would violate the Establishment Clause. Under the *Lemon* test, "government conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect is not to advance or inhibit religion, and (3) it does not foster excessive government entanglement with religion." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004). The purpose of the *Lemon* test was to avoid "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612 (internal quotation marks and citations omitted). Recently, however, this Court has applied a new test. Now, the Establishment Clause "must be interpreted by reference to historical practices and understandings." *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022) (internal quotation marks and citations omitted); *see also Kane v. de Blasio*, 623 F.Supp.3d 339, 359 (S.D.N.Y. 2022) (applying *Kennedy* to Establishment Clause challenge to vaccine mandate and reviewing history of vaccination requirements).

A. Concerns around government-funded religion go back to the founding of our country.

Our country has been concerned with using public funds to support religion since the founding of our country. *See Locke*, 540 U.S. at 722 ("Since the founding of our country, there have been popular uprisings against procuring taxpayers funds to support church leaders."). See also *Espinoza*, 140 S. Ct. at 2285–2286 (BREYER, J., dissenting) (discussing James Madison's and Thomas Jefferson's concerns with taxpayer support of religious education). In the late 1700s, this led to many States passing constitutional provisions that "prohibited *any* tax dollars from supporting the clergy." *Locke*, 540 U.S. at 723. And while some States subsequently weakened their restrictions, in the late 1800s more than 30 States reinforced their stance against funding religious organizations by adopting no-aid provisions that limited the use of State funds

for religious purposes. *See Espinoza*, 140 S. Ct. at 2258–2259 (discussing the "complex" historical record). While *Espinoza* ultimately rejected such a historical argument, that was in the context of a tax credit for donations to an organization that provides scholarships to students who attend private schools. *Id.* at 2259. The Petitioners here seek a different benefit: State funding directly to religious institutions to provide their disabled Orthodox Jewish children with a religious education. R. at 8–9.

Government-funded religious indoctrination is exactly the type of religious entanglement our Founding Fathers sought to avoid. *See Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 795–796 (1973) (history has shown that aid programs can have divisive political effects). The risks associated with funding private religious institutions are exacerbated by educators who see such religious indoctrination as part of their work. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 191 (2012) (teacher at religious school saw their work as a form of ministry). Likewise, Petitioners here claim that a major reason they chose religious schooling for their children was to promote such religious ideals. R. at 8–9. The goal of the Religion Clauses, however, has always been to chart a course of "constitutional neutrality" with respect to government and religion. *Walz*, 397 U.S. at 669. The First Amendment historically safeguards this by adopting a separation of Church and State that is "among the most cherished features of our constitutional system." *Nyquist*, 413 U.S. at 795.

B. The government may not fund religious activities unless the funding results from the independent and private choice of recipients.

The government may not directly fund religious exercise. Indeed, "[this Court's decisions] have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private

individuals." *Zelman*, 536 U.S. at 649. When the link between government funding and religious training is broken by true private choice, "the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits." *Id.* at 652. Such a link is broken when parents independently choose to use government funds at a religious institution. *See Carson*, 596 U.S. at 772 (constitutional when parents directed funding to private schools). When state aid flows directly from the government to a religious institution, however, the Establishment Clause has been violated. *See Nyquist*, 413 U.S. at 780 (State's direct tuition grants to sectarian schools violated the Establishment Clause).

TEC § 502 deals specifically with cases where an LEA, which is a state agency, determines that placement in a private school is appropriate. TEC § 502(e). When the LEA decides placement is appropriate, TEC § 502 then requires the LEA to enter into a contract with the private school. TEC § 502(c)(i). Under that contract, state funds flow directly from the LEA to the private school. *Id.* Without TEC § 502's nonsectarian requirement, state funds would flow directly to private religious schools based solely on the state agency's evaluations. Direct religious funding of that sort would be a religious endorsement reasonably attributable not to individuals but the government.

Moreover, the funds would likely go directly to the salaries of employees who in some instances personify the beliefs of the churches and are ministers within the meaning of the First Amendment. See *Hosanna-Tabor*, 565 U.S. at 188 (teacher qualified as a minister under the First Amendment). After all, educating people in their faith is core to the mission of a private religious school. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *see Nyquist*, 413 U.S. at 774 (not possible to restrict funds for non-religious uses at religion-oriented

institution with religious mission). Indeed, the Petitioners, Joshua Abrahams High School and Bethlehem Hebrew Academy, have religious missions that include prioritizing a passion for the Torah. R. at 9. Using taxpayer funds to support the Petitioners' religious schools would thus raise antiestablishment interests. *See Locke*, 540 U.S. at 722 (using taxpayer funds to support church leaders raises antiestablishment interests). Furthermore, this Court has been particularly vigilant in monitoring compliance with the Establishment Clause in the context of elementary and secondary schools. *See Edwards*, 482 U.S. at 584 ("[This] Court has been required often to invalidate statutes which advance religion in public elementary and secondary schools."); *Locke*, 540 U.S. at 722 (training students to be members of clergy implicates a State's establishment interests). Public funds simply may not be paid directly from the government to private religious schools as their instruction is necessarily intertwined with their religious goals.

C. State-recommended religious instruction is coercive.

A State may not coerce someone to attend church or engage in religious exercise. *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Indeed, "this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, make a religious observance compulsory." *Kennedy*, 597 U.S. at 536–537 (internal quotation marks and citations omitted). Concerns around coercion are heightened in the context of schools. *See Lee*, 505 U.S. at 592 ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). Coercion need not be direct. *Id.* at 594. A State's actions may be coercive simply for subjecting an individual to religious influences. *See, e.g., Doe v. Beaumont Independent School Dist.*, 173 F.3d 274, 291 (5th Cir. 1999) (coercive for State to invite clergy members into public school for voluntary counseling services); *Warner v. Orange County Dept. of Prob.*, 115 F.3d 1068, 1076 (2d Cir. 1996) (coercive for State to condition probation on participation in an A.A. program with

religious components). The actions, of course, must actually be attributable to the State. *See, e.g.*, *Cole v. Oroville Union High School*, 228 F.3d 1092, 1103 (9th Cir. 2000) (control over graduation ceremony was attributed to State).

The Petitioners specifically take issue with TEC § 502's nonsectarian requirement. Without its nonsectarian requirement, however, TEC § 502 would certainly be coercive. TEC § 502 applies when an LEA places a student in a nonpublic school. TEC §§ 502(c), (e). The LEA's decisions around which private school to place a disabled student in is attributable to Tourvania. *See Lee*, 505 U.S. at 587 (a state official's decisions are attributable to the State). Placing a student in not only a religious institution, but one with a religious mission and one that teaches religious ideals, subjects the individual to immense religious influences. Moreover, a state official, the Superintendent, is in charge of determining whether a private school qualifies for placement. TEC § 502(d). Under the Petitioners' requested rule, an LEA might place a Muslim student in an Orthodox Jewish School that seeks to promote the values of Jewish heritage. Perhaps the State could take on the role of evaluating each individual student's religious needs and compare those needs to the religious offerings of each private institution, but such involvement would certainly be an unconstitutional state entanglement in religion. Tourvania neither wants that role nor is constitutionally permitted to take on that role. *See Cutter*, 544 U.S. at 719 (Establishment Clause "commands a separation of church and state").

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighteenth Circuit should be affirmed.

Respectfully submitted,

Team 16, Attorneys for Respondents

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