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 PLAINTIFFS

Team 18
Counsel of Record

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QUESTIONS PRESENTED

1. Are the rights of religious families and religious schools with disabled children violated under (a) the First Amendment's Free Exercise Clause, and (b) the Fourteenth Amendment's Equal Protection Clause when § 502 of the Tourvania Education Code requires that private schools be nonsectarian to receive funding for disability services with no option to waive this requirement?

2. Is the extension of IDEA certification and funds to provide full disability services to disabled children attending private religious schools consistent with the history and purpose of the Establishment Clause of the First Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution provides 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 Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall make or enforce any law which . . . [denies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Individuals with Disabilities Education Act ("IDEA") provides in relevant part:

> "[A]ll 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. . . . 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. . . . Special 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. § 1400(d)(1)(A), § 1412(a)(10)(A)(i)(III), (vi)(II).

The Tourvania Education Code's ("TEC") implementation of the IDEA provides in relevant part: "Services provided by private, nonsectarian schools and agencies, as well as services provided by public schools and agencies, shall be made available" and "[w]hen a nonpublic school applies for certification, it cannot petition for a waiver of the nonsectarian requirement." TEC § 502(a), (d)(ii)(1).

TEC § 502 further provides that "'nonsectarian' means a private, nonpublic school that is not . . . affiliated with a religious group or sect, whatever might be the

actual character of the education program or the primary purpose of the facility." TEC § 502(b).

STATEMENT OF THE CASE

Petitioners Cheryl Flynn and Leonard Flynn (the "Flynns") are parents of H.F., their disabled five-year-old daughter. R. at 1, 8. Petitioners Barbara Kline and Matthew Kline (the "Klines") are parents of B.K., their disabled thirteen-year-old daughter. R. at 1, 9. Both are Orthodox Jewish families who believe in the importance of providing their disabled children an Orthodox Jewish education. R. at 13.

Petitioners Joshua Abraham High School and Bethlehem Hebrew Academy are private Orthodox Jewish secondary schools. R. at 1. These schools seek funding from the Individual with Disabilities Education Act ("IDEA") to provide special education and related services to disabled Orthodox Jewish children. R. at 9. These schools qualify for these services in every way except that they are religious. R. at 10.

The Flynns and Klines Seek Out Orthodox Jewish Schools

The Flynns and Klines are not alone in looking for religious schooling. Over 3 million children in Tourvania and across the rest of the United States attend religious schools. Ruth Graham, *Christian Schools Boom in a Revolt Against Curriculum and Pandemic Rules*, N.Y. Times, Oct. 19, 2021, https://www.nytimes.com/2021/10/19/us/christian-schools-growth.html#:~:text=In%20the%202019%2D20%20school,Those%20numbers%20are%20now%20growing. As many as 300,000 Jewish children attend Jewish schools in the United States. Mordechai Besser, *A Census of Jewish Day Schools in the United States* 1 (2019), https://avichai.org/wp-content/uploads/2019/11/AVI-CHAI-Census-

2018-2019-v3.pdf. This represents a disproportionately high number of Jewish families choosing religious education. Pew Research Center, *Jewish Americans in 2020* (2021), https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020/.

Joshua Abraham High School and Bethlehem Hebrew Academy are two institutions serving these populations. R. at 1. Petitioner schools are coeducational and provide religious and secular studies. R. at 9. The schools broadly promote the values of students' heritage and encourage them to grow into positive community members. R. at 9. The teachers at these schools are credentialed and use the Tourvania Board of Education core curriculum and instructional materials. R. at 10.

The Flynns and Klines believe they are obligated to provide their daughters with an Orthodox Jewish education. R. at 8-9. Religious families choose private religious schools for some common reasons: immersing their children in their heritage, culture, and values, while receiving an education. R. at 8. For many families, the choice is not particularly difficult; but for the Flynns and Klines, they faced the complexity of ensuring their disabled children were adequately cared for. R. at 8-9.

The Flynns and Klines are Religious Families in Need of Disability Services for Their Disabled Children

The Flynns and Klines both have autistic daughters. R. at 8-9. H.F. and B.K. both require support services to succeed in school. R. at 8-9. These families are not alone. Conservatively, more than 3 million children nationally live with a disability. Natalie A.E. Young & Katrina Crankshaw, *U.S. Childhood Disability Rate Up in*

2019 From 2018, U.S. Census Bureau, March 25, 2021, https://www.census.gov/library/stories/2021/03/united-states-childhood-disability-rate-up-in-2019-from-2008.html. Over 7 million children receive IDEA services. Katherine Schaeffer, *What Federal Education Data Shows About Students with Disabilities in the U.S.*, Pew Research Center, July 24, 2023, https://www.pewresearch.org/short-reads/2023/07/24/what-federal-education-data-shows-about-students-with-disabilities-in-the-us/#:~:text=The%207.3%20million%20disabled%20students,over%20the%20last%20few%20decades.

Tourvania's Education Code ("TEC") §502 allows for IDEA funds providing services for disabled school children to go to both public and private nonsectarian schools. R. at 6; TEC §502(a). The IDEA was created by Congress, in part, to ensure that disabled children had access to a free appropriate public education ("FAPE"), allowing disabled students to succeed in their education, employment, and independence. R. at 2; 20 U.S.C. § 1400 (d)(1)(A). With these funds, a state must provide special education and related services. R. at 3; 20 U.S.C. § 1401(9). To effectively implement those requirements, the IDEA requires children receiving support to have an individualized education program ("IEP"). R. at 3; 20 U.S.C. § 1401(9)(D). The IEP is a written plan tailored to the disabled students' needs, decided in conjunction with the parents, school officials, and local educational agency ("LEA"). R. at 3-4; 20 U.S.C. § 1414(d)(1)(A)(i). This is the support many children with disabilities receive, and that the Flynns and Klines need. R. at 8-9.

The Flynns and Klines Face a Choice in Finding Disability Services

These services are costly for families like the Flynns if not supported by the IDEA. R. at 8. Disabled children are nearly twice as likely to live in poverty. Young, *Childhood*, supra. 45% of Orthodox Jewish families live below 150% of the federal poverty level, many in expensive cities. Jonathan Hornstein, *Jewish Poverty in the United States: A Summary of Recent Research* 3 (2019), https://cdn.fedweb.org/fed-42/2892/jewish-poverty-in-the-united-states%2520Weinberg%2520Report.pdf. In 2012, the average family paying for special education for a child with a disability could expect to spend $13,826, with some families spending up to $33,498, and that cost has only increased. 22 MARK STABILE & SARA ALLIN, THE ECONOMIC COSTS OF CHILDHOOD DISABILITY 84 (2012) https://files.eric.ed.gov/fulltext/EJ968438.pdf.

The IDEA expressly provides for the possibility of services, if a state wishes, going to sectarian schools. R. at 4-5; 20 U.S.C. § 1412(a)(10)(A)(i)(III). Those services must be equitable and neutral if provided. R. at 5; 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Tourvania's statutory compliance measures, however, only allow for nonsectarian private schools to receive IDEA support alongside public schools. R. at 6; TEC §502(a). Otherwise qualified religious schools cannot petition for a waiver of the nonsectarian requirement. R. at 7; TEC §502(d)(ii)(1).

Currently, the Flynns pay for H.F.'s services out-of-pocket in order to stay at an Orthodox Jewish school. R. at 8. The Klines have considered the cost of services on the one hand and pain of compromising their religious beliefs on the other and see themselves between a rock and a hard place. R. at 9. For B.K., accessing full IDEA

funding has meant attending public public school, eating non-kosher food, and not receiving services on many holidays. R. at 9 n.4. Joshua Abraham High School and Bethlehem Hebrew Academy would qualify to provide the necessary services through IDEA, but for TEC's nonsectarian requirement. R. at 7, 10; TEC §502(d)(ii)(1).

Procedural History

Believing sincerely in how critical it is to send their disabled children to Orthodox Jewish schools, the Klines and Flynns, joined by the two Orthodox Jewish schools attempting to receive certification, brought suit against the Tourvania Department of Education and Superintendent of Public Instruction Kayla Patterson ("Respondents"). R. at 1. The United States District Court for the District of Tourvania agreed that Petitioners' Free Exercise and Equal Protection rights under the First and Fourteenth Amendments were infringed upon by Tourvania, and amounted to unlawful discrimination. R. at 2. The District Court additionally rejected Tourvania's Establishment Clause concerns under the First Amendment, calling Respondent's argument "overly simplistic." R. at 15. Respondents appealed to the United States Court of Appeals for the Eighteenth Circuit which reversed. R. at 20. Petitioners timely filed a Petition for Writ of Certiorari to this Court which was granted for the October Term, well into the new school year. R. at 21.

SUMMARY OF THE ARGUMENT

Tourvania Violates the Free Exercise and Equal Protection Clauses by Excluding Petitioners from Services Available to All

This Court should reverse the judgment of the Eighteenth Circuit. Disabled children deserve a high-quality education on par with their peers; that basic truth

should not change because those disabled children and their parents cherish their sincerely held religious beliefs. To suggest otherwise is to treat these families differently—worse—because of the exercise of their religion. Such conduct by the State of Tourvania is unconstitutional.

A violation of the Free Exercise Clause of the First Amendment, in tandem with the Equal Protection Clause of the Fourteenth Amendment, exists when a statute discriminates on the basis of religious status. Here, an evaluation under strict scrutiny of Tourvania's discriminatory withholding of benefits is necessary because the relevant statute is not neutral and generally applicable as dictated by the seminal case *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990). The inclusion of the nonwaivable sectarian requirement in TEC § 502 singles out nonsecular families and students needing disability services and sectarian schools looking to provide them based solely on the fact that they are religious. Providing a clear exemption to nonsectarian schools while excluding religious ones ensures that it is not neutral, not generally applicable, and therefore subject to strict scrutiny. The statute then fails strict scrutiny for one key reason: its means of achieving its stated interest is not narrowly tailored.

Tourvania asserts that to extend the IDEA funds to nonsecular schools would have it run afoul of the Establishment Clause—while this could be a compelling interest in another case, here it is not at issue. If it were, Tourvania must prove that its pursuit of this interest is narrowly tailored. Yet, in any case, it fails. The State cannot burden religious exercise by exacting overburdensome or underinclusive

measures to curb the potential violation of its compelling interest. The nonwaivable sectarian requirement for certification as an eligible school to receive funds is not the least restrictive means of achieving its interest. Religious families and schools are substantially burdened in their free exercise of religion when they are made to choose between their sincerely held beliefs or services that make the lives of their disabled children easier. Ergo, TEC § 502 fails strict scrutiny and violates the Free Exercise and Equal Protection Clauses alike.

Additionally, Tourvania discriminates against disabled children and the schools who are seeking to provide them a special education when it prohibits them from receiving funds to do so. This court should apply heightened levels of scrutiny in its evaluation of TEC § 502 because of its targeting of religious and disabled individuals. Tourvania violates the Equal Protection Clause through its nonwaivable nonsectarian school requirement. It does not pass strict scrutiny in relation to its religious classification because, like with the violation of the Free Exercise Clause, it is not neutral, not generally applicable, and is not narrowly tailored to achieve its proffered compelling interest. TEC § 502 also fails under a heightened level of scrutiny related to its discrimination of the disabled children and their schools. Tourvania has no important government purpose here as a violation of the Establishment clause does not exist, nor is the unfavorable treatment of disabled children and their schools substantially related to such a violation were it to exist. If the Court determines that a heightened level of scrutiny is not warranted in regard to this classification, the statute still fails under a rational basis review. Tourvania

lacks a legitimate governmental goal and the denial of government funded disability services is not a rational means of achieving any goal, legitimate or otherwise.

Extending IDEA Funding Here is Consistent with the History and Purpose of the Establishment Clause

To get away with this discrimination, Tourvania misdirects this Court to the Establishment Clause. The Free Exercise Clause exists in tension with the Establishment Clause, which limits government endorsement of religious activity, but the Establishment Clause is not implicated in this instance. While Tourvania may wish it could hide behind the Establishment Clause to protect its otherwise unconstitutional conduct, its limited applicability provides no respite for a passive hostility toward religion as seen here for two key reasons.

First, this Court analyzes the applicability of the Clause by looking to history and tradition at the time of the Framing to today; the States and Federal Government have long intermingled with and supported religion in many aspects. Where the Clause has been implicated is when this support is impermissibly preferential to religion, a situation not seen here with an otherwise generally available public and private benefit.

Second, even looking beyond history and tradition, at the specific circumstances Tourvania takes issue with, the neutrality of IDEA funding going to supporting disabled students in religious institutions is clarifying. The point of the IDEA along with the implementation of a FAPE through an IEP in coordination with a LEA, is educational support for the child. This is surely individualized and nuanced, but any religious involvement or benefit is ancillary at most. Thus, the Establishment

Clause is not a barrier to IDEA funding going to supporting disabled students at religious schools.

Accordingly, the Eighteenth Circuit was incorrect in its analysis of the issues at hand, and deprived the families and schools of their constitutional protections. This Court should reverse the judgment below.

ARGUMENT

I. TEC § 502 Violates the First and Fourteenth Amendments Because it Substantially Burdens and Targets Religious Disabled Students and Sectarian Schools Wanting to Provide Special Education.

Burdening the rights of religious individuals and institutions by compelling or prohibiting any religious conduct or beliefs violates the First and Fourteenth Amendments. A law that regulates individuals and institutions by expressly prohibiting them from accessing publicly available benefits based on their religious status is a clear violation. Laws challenged under both Amendments must be neutral and generally applicable to avoid a review under strict scrutiny. They are not neutral nor generally applicable when they target specific religious individuals and institutions, inflicting overburdensome restrictions that do not extend to similarly situated secular individuals and institutions, triggering strict scrutiny. Such a regulation fails strict scrutiny when it is not narrowly tailored to achieve a compelling government interest through the least restrictive means.

Here, Tourvania's TEC § 502 does exactly this. The statute is Tourvania's statutory scheme for the IDEA that fails to comply with constitutional standards in its execution. TEC § 502 restricts federally granted IDEA funds from reaching religious schools by including an impermissible waiver of the requirement that

schools be nonsectarian in order to receive them. R. at 6-7. The IDEA expressly permits the provision of funds to sectarian institutions and the Free Exercise and Equal Protection Clauses command it. R. at 6-7; 20 U.S.C. § 1412(a)(10)(A)(i)(III)). A blanket prohibition on religion cannot constitute the least restrictive means.

Not only does TEC § 502 discriminate against religious individuals and institutions, it also targets disabled individuals in violation of the Equal Protection Clause. This Court has suggested that a heightened level of scrutiny may be employed when discrimination exists toward disabled individuals. To meet this standard, a government must show that the statute is substantially related to an important government purpose. Again, Tourvania cannot do so because it lacks any such purpose. If this Court determines that rational basis review is required in this case, Tourvania still fails this standard. A statute must be a rational means of achieving a legitimate governmental goal. Tourvania cannot do so when no legitimate goal exists and rejecting disabled students and the schools that want to provide them a special education is not rational.

This Court should affirm the holding of the Eighteenth Circuit and find that TEC § 502 is not neutral, not generally applicable, and does not satisfy strict scrutiny in relation to the Free Exercise and Equal Protection Clauses. Additionally, it should find that Tourvania impermissibly discriminates against disabled individuals in violation of the Equal Protection Clause and has no justification for doing so because its statute does not meet any level of scrutiny that this Court could apply.

A. TEC § 502 is not a neutral and generally applicable law because it denies funding to sectarian schools but not nonsectarian schools contrary to the IDEA and is therefore subject to strict scrutiny.

TEC § 502 is not a neutral law because it targets and rejects religious disabled children and religious schools from receiving special education funding based solely on their religious affiliation. In excluding Petitioner families and schools from IDEA funding, Tourvania violates the Petitioner's right to freely exercise their religion. The Free Exercise Clause protects against unequal treatment and the "imposition of special disabilities on the basis of religious views," like "penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 450-51, 461 (2017) (finding that discrimination against free exercise was "not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant") (cleaned up); *see Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (holding that States cannot "hamper [their] citizens . . . free exercise of their religion" and "consequently, cannot exclude individual . . . members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.") (cleaned up). However, here, TEC § 502 does both.

While the Eighteenth Circuit erroneously reasoned here that Petitioners have only "religious based preferences, which [are] simply not tantamount to the substantial burdening of [their] religious exercise," R. at 19 (emphasis omitted), the concurring opinion by Justice O'Connor in *Smith* suggests otherwise. She emphasizes, "because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the

belief itself, must be at least presumptively protected by the Free Exercise Clause." *Smith*, 494 U.S. at 893; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 532 (1993) (holding that "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons").

The denial of funds to the Flynns and Klines forces them to choose between either educating their children according to their sincere belief that a religious education is paramount to their identities, or receiving special education funding. Taking one without the other is a substantial penalty. *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty., Maryland*, 915 F.3d 256, 260 (4th Cir. 2019) ("A substantial burden exists where a regulation 'puts substantial pressure on [the plaintiff] to modify its behavior.'"). Further, the statute explicitly prohibits the waiver of the nonsectarian requirement, effectively denying the plaintiff schools the ability to apply to be certified and access to IDEA funds. R. at 7. As the Court in *Trinity* stated succinctly, the church in seeking a grant that was generally available was "asserting [its] right to participate in a government benefit program without having to disavow its religious character." 582 U.S. at 463. So too here.

Similarly, the respondents in *Carson v. Makin* excluded nonsectarian schools from receiving funding from their program that provided assistance in paying private-school tuition. 596 U.S. 767, 768 (2022). Respondents in that case argued that their refusal to extend funds to Petitioners (and presumably all others similarly situated) was a use-based prohibition rather than a status-based one. *Id*. at 771. This

Court rejected that argument. *Id*. Respondents here take a similar stance and this Court should reject it once again. The outright denial of the ability to receive funds as outlined in TEC § 502 is directed exclusively at sectarian educational institutions, thereby hampering the exercise of religion by nonsecular families with disabled children as prohibited by *Trinity*. Moreover, Petitioners here respectively seek to receive and provide a dual curriculum consisting of both religious *and* secular studies which makes them eligible to receive the IDEA funding *if not for* the requirement that schools be nonsectarian no matter the "actual character of the education program or the primary purpose of the facility," which is nonwaivable. R. at 6, 9; TEC § 502(a)–(b), (d)(ii). This Court has repeatedly held that this is impermissible. *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2255 (2020) (holding that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'penalt[ies] on the free exercise of religion'") (citing *Trinity*, 582 U.S. at 460-61). That the funds might be used to further religious studies is therefore immaterial to neutrality. A statute that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (cleaned up) (emphasis in original). Likewise, a statute that singles out religious conduct is not neutral. *See Lukumi*, 508 U.S. at 538. Thus, though the statute does not target any specific religion, it categorically denies all sectarian schools and their disabled students, but not nonsectarian schools, and is not neutral.

TEC § 502 is not generally applicable because it allows nonsectarian private schools to become state-certified nonpublic schools in order to receive the IDEA funds, but explicitly rebuffs all sectarian private schools from even applying due to its nonwaivable nonsectarian requirement provision. The concepts of neutrality and general applicability are intertwined such that "a failure to satisfy one requirement is a likely indication that the other has not been satisfied." Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419 (2012) (quoting *Lukumi*, 508 U.S. at 531). A law that is not neutral "invariably will fail" to be generally applicable. Shaman, *supra* at 420. TEC § 502 singles out and categorically bans religious schools from receiving funding by requiring that LEAs enter into contracts only with state-certified nonpublic schools R. at 6; TEC § 502(d). The only way to be eligible to become a state-certified nonpublic school is for the school to be nonsectarian. R. at 6; TEC § 502(a). When a system of exemptions on a discretionary basis exists within a state statute, it "may not refuse to extend that system to [religious] cases . . . without compelling reason." *Smith*, 494 U.S. at 884 (cleaned up); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (holding that providing a "mechanism for individualized exemptions" for secular conduct but not for religious conduct fails the principle of general applicability); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (holding that a state must provide religious exemptions when it has a system of discretionary exemptions). Here, exemptions toward private nonsectarian schools exist on a discretionary basis. R. at 6; TEC § 502(d)(i). The superintendent has the sole power to "certify, conditionally certify, or deny

certification" after validation reviews so long as the school complies with § 502(d)(ii) and the IDEA. R. at 6-7; TEC § 502(d)(ii), (ii). Because this exemption exists, TEC § 502 must include an exemption to nonsecular schools as well for compliance with precedent. Petitioner schools are eligible according to the provisions of TEC § 502, but are denied solely because the statute contains the nonwaivable nonsectarian requirement. Consequently, the statute is not generally applicable.

TEC § 502 is not a neutral or generally applicable law because it specifically elects to exclude private sectarian schools because of their religious status while providing exceptions to nonsectarian schools, regardless of their secular or nonsecular status. R. at 4-5. Thus, the statute is subject to strict scrutiny.

B. TEC § 502 fails strict scrutiny because Tourvania not apply the least restrictive means to achieve its compelling state interest.

A law must be evaluated under the "most rigorous of scrutiny" when it is not neutral or generally applicable. *Lukumi*, 508 U.S. at 546. To appease this standard, a state must demonstrate that it has a compelling interest, one of the highest order, and its means of achieving such interest is narrowly tailored. *Id.*; *Kennedy*, 597 U.S. at 525. TEC § 502 cannot satisfy an evaluation under strict scrutiny because it is not the least restrictive means of achieving its interest. Tourvania's reason for enacting this statute is its belief that extending IDEA funds to sectarian institutions would violate the Establishment Clause of the First Amendment. Given that a statute would be unconstitutional and therefore unenforceable if it did violate this provision, it could be a compelling interest if it did not consequently infringe on another provision of the Constitution. R. at 14; *see Carson*, 596 U.S. at 781 (holding that "[a] State's

antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."). Even if extending services to religious schools raised a colorable Establishment Clause issue, though it does not, TEC § 502 is not sufficiently tailored to pass strict scrutiny regardless.

Failure to narrowly tailor a statute is enough to render it invalid. *Lukumi*, 508 U.S. at 546. To be narrowly tailored a statute must not be overbroad, nor shall it be underinclusive, targeting only religious conduct but not secular conduct that might infringe on the same interest. *Id*. at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."). To support a claim that a statute is narrowly tailored, it must also use the least restrictive means to execute its compelling interest. *Id*. (holding that for the statute to be considered narrowly tailored it should have pursued "narrower ordinances that burdened religion to a far lesser degree"). Here, the exception carved out for nonsectarian institutions does not cause a harm that would be relevant to the government's compelling interest. As a result, the over/underinclusive requirement of narrow tailoring is moot. The issue here exists when religious conduct of Petitioners is being substantially burdened by their exclusion from TEC § 502. *See Jesus Christ, Inc.*, 915 F.3d at 260.

The Flynn family has to pay out of pocket for disability services that their daughter receives at her Jewish Orthodox school when they should be receiving IDEA funds. R. at 8. In order to receive adequate disability services for their daughter, the Klines have had to forgo a religious education for their daughter and have her attend a secular public school to avoid having to be burdened by the cost themselves. R. at 9. If TEC § 502 allowed certification of sectarian schools, neither family would be faced with the choice between receiving proper services or their religious beliefs. These families should not be forced to compromise what should be, and is recognized as, an immutable characteristic essential to their very identities.

Had Tourvania incorporated the exact IDEA statutory provisions that include sectarian schools as permissible recipients of funds, the parties could have avoided this situation entirely. A more narrowly tailored method of satisfying the government's interest using the least restrictive means is available. Thus, Tourvania's deviation from this available measure demonstrates that its interest is not narrowly tailored and therefore fails strict scrutiny.

C. Tourvania's statute violates the Equal Protection Clause of the Fourteenth Amendment because it does not satisfy the levels of scrutiny required regarding religious and disability-based classifications.

The Fourteenth Amendment protects against disparate treatment of a class of people over another. U.S. Const. amend. XIV. No matter the level of scrutiny it must satisfy, Tourvania must have a good reason to justify discriminating against religious disabled children and their schools. It does not.

This Court has held that an interplay between the Free Exercise Clause and the Equal Protection clause exists. *See Espinoza*, 140 S. Ct. at 2255; *see generally Smith*, 494 U.S. 872. Laws that specifically target religious conduct are subject to the highest scrutiny. *Lukumi*, 508 U.S. at 546; *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (highlighting the importance of heightened scrutiny when evaluating laws that impact educational choices based on religious beliefs). The specific provisions of TEC § 502 that exemplify this violation of the Equal Protection Clause are subsections (a), (b), and (d), which provide that schools must be nonsectarian, define "nonsectarian", mandate specific requirements for private schools to become state-certified, and prohibit the waiver of this nonsectarian requirement. R. at 6; TEC § 502(a-b), (d). The prohibition of religiously affiliated private schools from becoming certified raises equal protection concerns. Because TEC §502 explicitly singles out religious institutions, in the context of the Equal Protection Clause, like that of the Free Exercise Clause, it is once again not neutral, not generally applicable, and does not satisfy strict scrutiny due to its failure to narrowly tailor its mechanism to achieve its interest by the least restrictive means.

Likewise, Petitioners' claim that Tourvania acts in violation of the Equal Protection Clause is also demonstrated by the inclusion of the nonwaivable nonsectarian requirement. R. at 7. While this Court has not settled on a definitive level of scrutiny for disability-based classifications, Justices have expressed that some cases should merit an evaluation under a heightened scrutiny. *See generally City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 456 (1985)

(Marshall, J. concurring in part) (noting that the majority's hesitation to formally use heightened scrutiny is incorrect in light of a facial need for something more than rational basis review). To abide by a level of heightened scrutiny, regulations must be substantially related to an important government purpose. *Cleburne*, 473 U.S. at 441. Tourvania has no such "important" purpose to discriminate against disabled children just because they are religious and might attend sectarian schools, nor is there a constitutionally compelling reason for this denial.

Even if this Court decides that this statute should be evaluated under rational basis, it still cannot meet this level of scrutiny. To pass rational basis review a statute must be a rational means of achieving a legitimate goal. *Id*. at 442. Again, Tourvania has expressed no legitimate goal. Discriminating against religious disabled children and the schools that wish to provide them appropriate disability services is not rational by any means.

While Tourvania might express an interest in ensuring it does not violate any constitutional provisions, it does exactly that by isolating religious families and schools from receiving IDEA funds. Treating these disabled children and the schools wanting to provide them adequate resources less favorably than other children and schools is likewise unconstitutional. Thus, TEC § 502 cannot stand.

II. Tourvania Must Extend Idea Funds to Religious Schools Because Such Action is Traditionally and Institutionally Consistent With the Establishment Clause of the First Amendment.

By relying on the Establishment Clause to deny IDEA funds to Orthodox Jewish schools and families, Tourvania obfuscates the issue, hiding in shadows that do not constitute any real constitutional threat. *See Van Orden v. Perry*, 545 U.S. 677,

704 (2005) (Kennedy J. concurring) (Where the Establishment Clause was not threatened by placing the Decalogue in a courthouse, the Court distinguished a purported threat as "only the shadow" of one). Where the Free Exercise Clause and Establishment Clause are implicated in opposing ways, a "play in the joints" occurs. *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 669 (1970). To shine light on the reality that providing IDEA funding is consistent with the Establishment Clause, this Court looks at the original meaning and history of the Clause. *Kennedy*, 597 U.S. at 510 ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.") (cleaned up). Although this has been true for some time, Respondents may improperly rely on an unworkable, maligned, and oft ignored test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), abrogated in later cases, and finally altogether abandoned in favor of the history and meaning approach. *Rojas v. City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022) ("[T]he *Lemon* test is gone, buried for good, never again to sit up in its grave.").[1]

The "more modest" approach used today provides that, where the Establishment Clause is concerned, the early U.S. supported religious institutions, even religious schools, and was more concerned with neutrality than complete separation. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (explaining that "while the *Lemon* Court ambitiously attempted to find a grand

[1] Justice Scalia once stirringly imagined the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.).

unified theory of the Establishment Clause . . . we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance"). The Eighteenth Circuit improperly focused on and incorrectly defined neutrality in the context of the Clause. Even looking beyond history and tradition, the ideological underpinnings of the Clause support a reading that affirms extending IDEA funding in this instance because of the neutrality of the funding and the nature of the administration of services. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 704 (1994) (recognizing "the principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided [to] religious groups or individuals in turning aside Establishment Clause challenges"). Law and history support a conclusion recognizing the failure of Tourvania's Establishment Clause justification here, but so do the basic facts. This Court should reverse the judgment below in favor of allowing these funds to be provided to religious families and schools supporting disabled children.

A. Because the history of the Establishment Clause allows for broadly applicable State support of religious institutions, those principles support the provision of IDEA funding to Petitioners.

The history and meaning of the Establishment Clause clarify that funding programs that support disabled children at religious schools is constitutional. This Court recognizes that "a page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921). Since the Founding, religion has been an integral part of American society. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."). Indeed, this is a global

historical truth. *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). But the value of history is not merely our interest in the past, but its effects on our present life. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963) (reasoning that "the Founding Fathers believed devotedly that there was a God . . . from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life").

This Court agrees that because of this history, the purpose of the Establishment Clause today requires a softer approach to the distinctions between religion and the State. *Walz*, 397 U.S. at 676. The *Walz* Court recognized that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise." *Id*.

Likewise, using the Establishment Clause as a blunt anti-religious instrument runs contrary to this historical approach. *Van Orden*, 545 U.S. at 699 (Breyer J. concurring) ("[A]bsolutism is not only inconsistent with our national traditions . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."). When the Framers debated the Clause differing views existed, but this is the verbiage and context settled on. DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 262 (2010) ("[T]he establishment clause represented, at most, broad, noncontroversial language on which a majority of the First Congress (and the ratifiers) could agree."). Whatever begat the wording of the Clause was not the purpose envisioned by Respondents today. *See generally Myers v. Loudoun Cty. Pub.*

Sch., 418 F.3d 395, 402 (4th Cir. 2005) (explaining that "[t]he primary evil the Establishment Clause was intended to combat was the practice of European nations compelling [individuals] to support and attend government favored churches") (cleaned up). Accommodating religious individuals in the manner requested by Petitioners is thus consistent with the Clause, and to hold otherwise would mark a "callous indifference to religious groups" that is not neutral, but rather "prefer[s] those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (holding that a New York statute allowing public school children to leave school weekly to attend private religious schools was allowed by the Establishment Clause). This conclusion is the result of centuries of history and policy and must be respected. Petitioners' request is allowed by the Establishment Clause. This conclusion is the result of centuries of history and policy—it must be respected. Petitioners' request is allowed by the Establishment Clause.

1. Government support for religious institutions at the time of the Framing clarify the broad allowances and narrow limits of the Establishment Clause.

Looking more precisely at American law and society at the time of the Framing, the proximity of religion and the State was readily apparent; the First Congress quickly appointed and paid official chaplains, a tradition that has continued until today. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575 (2014). The First Congress also requested a national day of prayer, which President Washington formally proclaimed. *Am. Legion*, 139 S. Ct. at 2087. The governing charter of the Northwest Territory, established in 1787 by the Confederation Congress, started Article 3 like so: "Religion, morality, and knowledge, being necessary to good

government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Ord. for the Gov't of the Territory of the U.S. NW of the River Ohio*, National Archives, July 13, 1787, https://www.archives.gov/milestone-documents/northwest-ordinance. Land in these territories was eventually set aside by Congress at the beginning of the 19th century for schools, including "church-affiliated sectarian institutions." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 862-63 (1995); *see also* CHESTER ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT, FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 163 (1964).

To summarize, "almost universally[,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions." *Rosenberger*, 515 U.S. at 863 (quoting Antieau et al.). The Founders were, presumably, able to "understand their handiwork." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992). Public schools are a comparatively recent innovation in education, and so in the early U.S. a majority of schooling was done by private religious institutions. 8 COLLIER'S ENCYCLOPEDIA *Education Law* 577 (1997).

As for individual states before incorporation, government support for religious institutions was readily allowed and even encouraged by this Court. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (holding that the Virginia Constitution allowed "the votaries of every sect to perform their own religious duties" and providing State funds to "support of ministers, for public charities, for the endowment of churches, or for

the sepulture of the dead"). Even the historically minority interpretation allowed government involvement with religious institutions. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (discussing statements by Jefferson and Madison and concluding that "[i]t has never been thought either possible or desirable to enforce a regime of total separation"). Modern notions of separation developed, in part, out of a now outdated nativist sentiment. *Am. Legion*, 139 S. Ct. at 2095 (Thomas J. concurring), (examining the misguided history or strict separation and concluding "an ahistorical generalization is no substitute for careful constitutional analysis"); *see also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 391-454 (2002).

Eventually, in the middle of the 20th century the Clause was incorporated, but a view still exists on this Court that the Clause should not have been incorporated against the States based on its text and history. *Am. Legion*, 139 S. Ct. at 2095 (Thomas J. concurring). The Court at that time cautioned against its aggressive use to disqualify the religious from public life. *Everson*, 330 U.S. at 16 (warning that "we must be careful . . . to be sure that we do not inadvertently prohibit [a state] from extending its general state law benefits to all its citizens without regard to their religious belief"). Just a few years later, in *Zorach*, the Court explicitly allowed for state support of religious schooling. 343 U.S. at 313-14 (reasoning that "[w]e are a religious people whose institutions presuppose a Supreme Being . . . When the state encourages religious instruction . . . it follows the best of our traditions . . . and accommodates the public service to their spiritual needs."). This history confirms

broad religious activity and institutional support in line with the Establishment Clause.

2. The principles of the Establishment Clause illuminate Respondent's misguided argument, because the Clause allows this kind of support to religious schools.

This Court has applied these historical principles imbued in the Establishment Clause to similar settings and found violations wanting; today, IDEA funds can be used to support deaf students in private religious schools who need a sign language interpreter without implicating the concerns of the Establishment Clause. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Blind students can be given state funds to pursue religious education. *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986). Tax relief can be granted to parents paying to send children to private religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983). Educational books can be given by the State to private religious schools. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968). Many of these instances were allowed even under the now defunct *Lemon* test, in part because a key principle of the Clause extending through history is that it should not be used to exclude religious groups altogether. *Rosenberger*, 515 U.S. at 861 (Thomas J. concurring) ("[O]ne basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.").

What these principles and precedent underscore is that this Clause is not meant to be used to prevent the State from engaging with religious entities, but rather in the limited circumstances of preferential treatment by the State to a faith.

Id. A true issue arises when the State prefers a religion or coerces others to do so, which simply is not the case here. *Doe v. United States*, 901 F.3d 1015, 1020 (8th Cir. 2018) (justifying currency saying "In God We Trust" because "historical practices often reveal what the Establishment Clause was originally understood to permit, while attention to coercion highlights what it has long been understood to prohibit"). Even then, "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690. Thus, historical principles show that the Clause's use by the State to prevent government support for a broad category of services, including around education and disability, cannot stand. So too here.

B. Even if this Court were to view violations of the Establishment Clause with a fact and factor analysis, Petitioners would still prevail because here the IDEA would advance education, not religion.

Although this Court has indicated the proper analysis ought to be focused on history and tradition for the issue at hand, Respondent's concerns fail on the granular level because IDEA funding would be neutral and feasible to implement as such. *See Rosenberger*, 515 U.S. at 839 ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). Different tests have come and gone, but providing disability services to children at any qualified religious school is precisely the type of policy this Court has said respects the Establishment Clause. *Id.* (explaining that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits" to a diverse array of recipients, including religious ones).

In fact, hyperbolic concern that the implementation of the funding scheme would favor or otherwise support religious activity is actively anti-neutral and not constitutionally permissible. *Sch. Dist. of Abington Twp.*, 374 U.S. at 306 (Goldberg and Harlan concurring) ("[U]ntutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are . . . prohibited."). This Court has even gone so far as to support religious institutions with benefits that may seem to have the effect of endorsing or advancing that religion. *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh J. Concurring) (agreeing with the dismissal of the Establishment Clause concern while recognizing "accommodations and exemptions 'by definition' have the effect of advancing or endorsing religion to some extent").

1. The benefit derived from the IDEA for the sake of government involvement would be educational in nature, steering clear of the Establishment Clause.

Here, provision of IDEA funds supports parents, children, and educators; any benefit the religious institution derives is not of a religious nature but the general benefit every institution receiving those funds would derive. The text of the IDEA itself recognizes and provides for program participation by families and children in religious schools. R. at 4-5; 20 U.S.C. §1412(a)(10). Tourvania regulations provide that a school "must incorporate provisions concerning instruction, program development, staffing, documentation, IEP implementation, and LEA supervision." R. at 6; TEC §502(c)(i). The applications for certification submitted by Joshua Abraham High School and the Bethlehem Hebrew Academy complied with other requirements in the Tourvania Education Code on curriculum, instructional

material, and teacher credentialing for special education services. R. at 10; TEC §502(d)(ii). These benefits and provisions for other public or private schools, as for Petitioner schools, are not religious in nature. The IDEA is for the benefit of all children, which is why the federal statute even allows for private sectarian participation. 20 U.S.C. § 1412(a)(10)(A)(i)(III).

Tourvania invents some kind of religious entanglement, endorsement, or establishment, because of the level of involvement in IEP implementation and LEA supervision—but again, those points are not the current test or concern the Court primarily looks to in deciding the Establishment Clause issue. Nonetheless, the IEP, reviewed by the LEA, is focused on the child's development and ability to learn in the environment, not on the religion of the child itself, based as simply as on the definitions of the act: special education means "specially designed instruction . . . to meet the unique needs of a child with a disability", whereas "related services" are the support services "required to assist a child . . . to benefit from" that instruction. 20 U.S.C. § 1401(26), (29); *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017).

The Statute's treatment of the focus of the IEP is similarly instructive, focusing on the "child's present levels of academic achievement and functional performance" to create a plan promoting those goals with parents and the school. 20 U.S.C. § 1414(d)(1)(i)(I). Although there are multiple stakeholders in a fact-specific process based on the diversity of possible disabilities, the key metric for success of an IEP for the purposes of a FAPE is academic performance in the general curriculum. *Endrew*,

580 U.S. at 402 (recognizing that meeting a child's "unique needs" means "providing a level of instruction reasonably calculated to permit advancement through the general curriculum"). These services are not designed to confer a religious benefit to a child, but an educational one. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (explaining that access to benefits and services "are individually designed to provide *educational* benefit to the handicapped child") (emphasis added).

2. Respondents confuse the presence of religion with the presence of an Establishment Clause issue when, even if there is religious involvement, here it is minimal.

Petitioners are religious families, the schools are religious, but the benefit provided is a benefit educational in nature—by design and intent. What Tourvania actually hides behind in its concern with providing services to Petitioners is a "false choice premised on a misconstruction of the Establishment Clause." *Kennedy*, 597 U.S. at 543. In fact, IDEA funding is easier than other forms of State funding to religious institutions—even schools—in so far as the funds only go to the services, not the school itself. *Zobrest*, 509 U.S. at 10 (holding that an IDEA funded sign language interpreter could be provided to a child in a religious school in part because "under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers"). This case is directly comparable. The IDEA explicitly provides that the services and materials will be neutral in nature, despite the allowance of allotment to private religious schools. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). The Flynns and Klines want Respondents to help their autistic daughters succeed in school; that the families and schools are religious is ancillary to that primary purpose and therefore constitutional. R. at 8-9; *see Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir.

2001) ("The Establishment Clause limits any governmental effort to promote particular religious views to the detriment of those who hold other religious beliefs or no religious beliefs."). Joshua Abraham High School and Bethlehem Hebrew Academy want to give disabled children a chance to succeed in an education on par with that of other public or nonsectarian private schools. R. at 10. The Orthodox Jewish faith and culture is important to the schools and families, but where the IDEA and Tourvania are actually involved is limited. Religion is present, but it is not dispositive. *See Carson*, 596 U.S. at 781 n.1 (rejecting exclusion of funding for religious schools under the Clause based on religious characteristics or practices).

The history and tradition of the Establishment Clause show this nation's longstanding involvement in religion and willingness to neutrally support religious institutions when such support is given to secular institutions. This has been specifically true in educational contexts, including when support for disabled students is at issue. Further, any additional concerns Tourvania might have cannot trump this conclusion because of the neutral applicability of IDEA funding. IDEA funding and related services focus on educational attainment and do not implicate religion in any way but ancillary. Accordingly, providing IDEA funding to Petitioners would be consistent with the Establishment Clause and should be allowed by this Court.

CONCLUSION

For these reasons, this Court should reverse the judgment below.

/s/ Team 18
Team 18
Counsel of Record