THE SUPREME COURT OF THE UNITED STATES

Appeal from a Judgment from the United States Court of Appeals for the Eighteenth Circuit

No. 24-012

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.

Respondents' Brief

Team No. 19

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II. Whether Section 502 violates the Fourteenth Amendment's Equal Protection Clause of the Fourteenth Amendment.

III. Whether the extension of federal Individuals with Disabilities Education Act funds to sectarian schools through Section 502 violates the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

Petitioners include two families, the Flynns and the Klines, who are Orthodox Jewish parents suing on behalf of themselves and their respective minor children, and two private Orthodox Jewish secondary schools, the Joshua Abraham High School and Bethlehem Hebrew Academy. D.C. 1.[1] Respondents include the Tourvania Department of Education and Kayla Patterson in her official role as the Superintendent of Public Instruction of Tourvania. D.C. 2.

I. The Individuals with Disabilities Education Act ("IDEA")

The Individuals with Disabilities Education Act ("IDEA") aims "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that includes special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). IDEA seeks to accomplish this through the provision of federal grants to States. *Id.* § 1411(a)(1). IDEA defines a FAPE as:

> special education and related services that -- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

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[1] Citations to the record are as follows:
"D.C. _" refers to the order from the United States District Court for the District of Tourvania and the specific page number being referenced from the competition problem document.
"C.C. _" refers to the order from the United States Court of Appeals for the Eighteenth Circuit and the specific page number being referenced from the competition problem document.
"O.G.C. _" refers to the Order Granting Certiorari and the specific page number being referenced from the competition problem document.

Id. § 1401(9). To receive federal IDEA funds, States must, among other requirements, "develop[], review[], and revise[]" an individualized education program ("IEP") for each child with a disability. *Id.* § 1412(a)(4). IEPs "must lay out measurable annual goals designed to meet the child's [academic] needs." *Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 64 F.4th 569, 572 (4th Cir. 2023).

IDEA also provides mechanisms by which children with disabilities whose parents enroll them in private schools may still participate in the program carried out under IDEA. *See generally* 20 U.S.C. § 1412 (a)(10)(A). States must also determine "the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities." *Id.* § 1412 (a)(10)(A)(iii)(II).

Finally, special education and related services provided to parentally-placed private school children under IDEA "shall be secular, neutral, and nonideological." *Id.* § 1412 (a)(10)(A)(vi)(II). Regulations promulgated pursuant to IDEA clarify that "[n]o parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a).

II. IDEA in Tourvania

IDEA sets forth conditions that States must follow to receive federal IDEA funds. *See generally* 20 U.S.C. § 1412. To this end, Tourvania has enacted Section 502 of the Tourvania Education Code ("TEC") as a statutory compliance measure:

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

> . . .
>
> (c) An LEA's [local educational agency] placement of one of its students in a nonpublic school allows the LEA to receive state funding for that student . . . .
>
> . . .
>
> (d) LEAs may enter into contracts only with state-certified nonpublic schools.
>
> > (i) To be certified, nonpublic schools must apply with the Superintendent of Public Instruction and meet several requirements.
> >
> > . . .
> >
> > (ii) . . .
> >
> > > (1) When a nonpublic school applies for certification, *it cannot petition for a waiver of the nonsectarian requirement.*

TEC § 502 (emphasis added). The TEC's nonwaivable, nonsectarian requirement, *id.* § 502(d)(ii), reflects a similar nonsectarian requirement mandate found within IDEA. *See* 20 U.S.C. § 1412 (a)(10)(A)(vi)(II).

III. Procedural Facts

Petitioners allege that Section 502 of the TEC violates the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in the United States Constitution. D.C. 7. Petitioners claim that Section 502 violates the Free Exercise Clause on the basis that denying them IDEA funding restricts the free exercise of their Orthodox Jewish beliefs. *Id.* Petitioners additionally claim that Section 502 violates the Equal Protection Clause because it denies disabled Orthodox Jewish students the same opportunity for special

education IDEA funds as the state's other students and their special educators. *Id.* The school Petitioners also allege that they were denied access to federal IDEA funding on the sole basis that they are Orthodox Jewish institutions. D.C. 10.

The United States District Court for the District of Tourvania ruled against the Respondents' motion for summary judgment because the District Court concluded that Section 502 was not a neutral law of general applicability and did not satisfy strict scrutiny. D.C. 14. Additionally, the District Court reasoned that Respondents could certify a nonpublic, sectarian school for funding through IDEA without violating the Establishment Clause of the First Amendment. D.C. 15. Respondents appealed the order from the District Court denying their motion for summary judgment. C.C. 17. The United States Court of Appeals for the Eighteenth Circuit vacated the decision by the District Court. C.C. 20. The Eighteenth Circuit reasoned that Section 502 did not substantially burden Petitioners' free exercise of religion because the provision was neutral and generally applicable, and, therefore, need not satisfy strict scrutiny. C.C. 18-20.

Petitioners subsequently filed a petition for certiorari in this Court from the Order of the Eighteenth Circuit. O.G.C. 21. This Court granted certiorari to decide whether Section 502 violates the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment and whether the extension of IDEA funds to religious institutions violates the Establishment Clause of the First Amendment. *Id.*

SUMMARY OF THE ARGUMENT

I. Section 502 of the Tourvania Education Code ("TEC") does not violate the Free Exercise Clause of the First Amendment. First, the provision is both neutral and generally applicable. Furthermore, even if the provision is deemed neither neutral nor generally applicable, the provision satisfies strict scrutiny because Section 502 advances a compelling government interest and is narrowly tailored to achieve that interest. Section 502 advances the compelling government interest in providing a free appropriate public education to all children, regardless of disability, and is narrowly tailored to achieve this interest that is also advanced through the Individuals with Disabilities Education Act ("IDEA").

II. Section 502 also does not violate the Equal Protection Clause of the Fourteenth Amendment. Section 502 allows families of children with disabilities to receive requisite special education services. Section 502 imposes no disparate impact because the benefit it provides is available to all families. Religiously-observant families like Petitioners are choosing not to participate. Further, Petitioners have offered no evidence that Section 502 carries a discriminatory purpose.

III. Finally, the extension of federal IDEA funds to sectarian schools through Section 502 would violate the Establishment Clause of the First Amendment, even under several different views of the Clause. Under the *Lemon* test, this would constitute excessive government entanglement with religion. This would also constitute government endorsement of religion. Finally, there is a historical tradition in prohibiting public funds from supporting sectarian institutions.

ARGUMENT

I. SECTION 502 OF THE TOURVANIA EDUCATION CODE ("TEC") DOES NOT VIOLATE THE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

Summary judgment is proper when "the [moving party] shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material fact" is a fact that can affect the substantive outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1988). A dispute over a material fact is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The same legal standards as those used in the district court are applied when an appellate court reviews a district court's denial of summary judgment. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990). Courts review "questions of law" de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

The Free Exercise Clause of the First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Through the Fourteenth Amendment, the Free Exercise Clause also applies to states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). This Court has held that a law that substantially burdens the free exercise of religion will not be upheld unless the provision serves a compelling governmental interest and is the least restrictive means of achieving that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691-92 (2014). However, this Court has also held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of

general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)). Therefore, "even if the law has the incidental effect of burdening a particular religious practice," a law need not satisfy strict scrutiny if the law is both "neutral" and "of general applicability." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Ultimately, this court has reasoned that "'[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' . . . favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-793 (1973)).

A. Section 502 of the TEC is neutral.

A law is not neutral "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). In deciding whether a law is "neutral," this Court has considered several factors, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (citing to *Vill. of Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 267-68 (1977)). For instance, in *Lukumi*, this Court observed that the city council did not attempt to address problems resulting from the sacrifice of animals before the Church announced plans to open. *Id.* at 540-41. This Court held that the ordinances prohibiting religious animal sacrifice were not neutral because the ordinances had the objective of specifically suppressing a ritual practice in the Santeria religion. *Id.*

Section 502 of the Tourvania Education Code ("TEC") is neutral because it only distinguishes between sectarian and non-sectarian institutions and does not discriminate or single out any one religion. Here, unlike in *Lukumi*, where the ordinances targeted a specific ritual practiced in the Santeria religion, Section 502 neither mentions a specific religion nor a specific religious practice. *See generally* TEC § 502. Regarding the language of the Tourvania provision specifically, Section 502 provides that, while a local educational agency ("LEA") may enter into contracts with nonpublic schools, nonpublic schools must be state-certified and "apply with the Superintendent of Public Instruction and meet several requirements" for certification. *Id.* § 502(d)(i). As Section 502 of the TEC imposes these requirements on all nonpublic schools seeking certification, regardless of whether the school is sectarian or nonsectarian, and does not impose separate requirements on schools based on whether the school is of a specific religion, the law is facially neutral.

B. Section 502 of the TEC is generally applicable.

A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in

a similar way." *Fulton*, 141 S. Ct. at 1877 (internal citation omitted). For example, in *Lukumi*, the city council adopted ordinances that specifically prohibited religious animal sacrifice and in doing so cited concerns for both the "public health, safety, welfare and morals of the community," and the unnecessary killing of animals. 508 U.S. at 527-28. This Court held that the ordinances were not generally applicable to address the city's interest in public health through the disposal of animal carcasses when the ordinances sought to address the issue "only when it results from religious exercise." *Id.* at 545.

Section 502 of the TEC is generally applicable. Here, unlike in *Lukumi*, where the provisions at issue were specifically aimed at prohibiting a specific practice of the Santeria religion after the church was established, Section 502 of the TEC does not prohibit the practice of specific religious exercises within the Orthodox Jewish faith. *See generally* TEC § 502. Instead, the requirements under the provision apply to any private institution that wishes to apply for nonpublic certification, such as the requirement that the institution will maintain compliance with IDEA. *Id.* § 502(d)(iii). This would include the requirement that children receiving special education and related services receive "equitable services" that are "secular, neutral, and non-ideological" when provided in religious schools. *See* 20 U.S.C. § 1412(a)(10)(A)(vi)(II). As no nonpublic school, whether sectarian or nonsectarian, is exempt from Section 502's certification requirements, and thus the requirements of Section 1412 of IDEA, the law is generally applicable.

C. Even if the provision is deemed neither neutral nor generally applicable, Section 502 survives strict scrutiny because the

provision advances a compelling government interest and is sufficiently narrowly tailored to achieve that interest.

This court has held that a law that burdens religious practice and is neither neutral nor generally applicable "must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. This Court has reasoned that a law "restrictive of religious practice" must then advance a compelling governmental interest and be narrowly tailored in pursuing those interests to survive strict scrutiny. *Id.*

i. Section 502 advances a compelling government interest.

"[T]his Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct." *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). For example, in *United States v. Lee*, 455 U.S. 252, 254 (1982), an Amish farmer and carpenter "failed to file required quarterly social security tax returns. . . , withhold social security tax from . . . employees, or pay the employer's share of social security taxes." This Court ultimately held that "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system [was] very high." *Id.* at 258-59. This Court reasoned that "because the social security system is nationwide, the governmental interest is apparent" because the United States social security system "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." *Id.* at 258.

In considering a compelling government interest in enforcing laws relating to funding education, this Court affirmed the proper denial of tax-exempt status to a private school that upheld racially discriminatory admissions standards in *Bob*

Jones. 461 U.S. at 577, 605. This Court reasoned that, while the "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, [the denial of tax benefits] will not prevent those schools from observing their religious tenets." *Id.* at 603-04. This Court has also recognized that in exchange for federal funds through IDEA, a participating State must pledge to comply with the specific statutory conditions that are laid out in the federal provision, including providing "a free appropriate public education . . . to all eligible children." *Joseph F. ex rel. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017) (citing to § 1412(a)(1)).

Section 502 advances a compelling government interest because the provision advances the government's interest in specifically ensuring that all children receive a free public education, regardless of a disability a child may have. Similar to *Bob Jones*, where this Court held that eradicating racial discrimination in education was a compelling government interest, providing free public education to children with disabilities is a comparably compelling government interest advanced by § 502 and the provision's IDEA compliance measures. *See generally* TEC § 502. The primary purpose of IDEA, as a whole, is "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that includes special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Therefore, IDEA promotes the proper stewardship of federal funds to ensure that they are being used to provide children with a FAPE. In compliance

with the goals of IDEA, Section 502 also advances this compelling government interest in providing a public education for children, regardless of their disabilities.

ii. Section 502 is narrowly tailored to achieve the State's interest in providing a free public education to all children regardless of disability.

A law is narrowly tailored when the government shows "that measures less restrictive of the First Amendment activity could not address its interest." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021). For instance, in *Lukumi*, this Court explained that regulating conditions and treatment, regardless of why an animal is kept, rather than a blanket prohibition on possession for religious sacrifice, would be sufficiently narrower to achieve the city's interest in preventing cruelty to animals. *See* 508 U.S. at 539. Accordingly, this Court held that the ordinances were not sufficiently narrowly tailored because there were less restrictive measures the city could have taken to achieve its purported interest in protecting the welfare of animals. *See id.*

Regarding a narrowly tailored means in achieving a governmental interest in public education specifically, this Court has also recognized the difference between public education and education at private religious schools. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 503 (1979) ("The raison d'être of parochial schools is the propagation of a religious faith."); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970) (recognizing that "an affirmative . . . policy of church schools" is "to maintain schools that plainly tend to assure future adherents to a particular faith

by having control of their total education at an early age"); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020) (acknowledging that many religious institutions "expressly set themselves apart from public schools that they believe do not reflect their values").

Section 502 is narrowly tailored in pursuing the government's interest in ensuring access to a FAPE regardless of disability because the TEC excludes only that which substantively contradicts this compelling interest. Here, unlike *Lukumi*, where this Court held that the ordinances advancing a blanket prohibition against religious animal sacrifices were underinclusive and not sufficiently narrowly tailored to advance an interest in preventing cruelty to animals, the interest in providing FAPE to children with disabilities is narrowly tailored by the requirements of § 502 and the provision's IDEA compliance measures. *See generally* TEC § 502. Not only do the Tourvania provisions articulate how appropriate special education and related services are to be provided through the distribution of IDEA funds to public schools, but the provisions also provide how nonpublic institutions may obtain certification in compliance with IDEA. TEC § 502(a), (d). The provision is the least restrictive means of achieving the interest in providing a FAPE to children in Tourvania, regardless of disability, due to the recognized substantive difference between private religious education and the appropriate public education advanced by IDEA. *See* TEC § 502(d)(ii)(1); *see also* O*ur Lady of Guadalupe Sch*, 140 S. Ct. at 2065.

As Section 502 is sufficiently narrowly tailored to advance the compelling

government interest that is also advanced through IDEA on a federal level, Section 502 does not violate the Free Exercise Clause of the First Amendment.

II. SECTION 502 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT DOES NOT HAVE A DISPARATE IMPACT ON RELIGIOUS FAMILIES AND IT LACKS A DISCRIMINATORY PURPOSE.

Plaintiffs further allege that Section 502 of the TEC violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. D.C. 2. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official [discriminatory] conduct." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Its purpose is not to protect those who choose to abstain from a generally-available public benefit program.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In assessing a challenge to a state law under the Equal Protection Clause, "a court is called upon only to measure the basic validity of the legislative classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). State legislation may create a classification on its face, where heightened scrutiny can be automatically triggered if a suspect class is implicated. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 502 (2005) (race); *see also McDaniel v. Paty*, 435 U.S. 618, 639 (1978) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.").

This Court has held that, if the law is facially-neutral, legislation may nonetheless create a classification through its discriminatory impact on a protected

class. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977). However, even if a facially-neutral law has a discriminatory impact, this Court holds as a "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *City of Mobile*, 446 U.S. at 66.

Section 502 therefore does not create a facial classification, because all families have this benefit available to them. Therefore, to succeed under their Equal Protection claim, Petitioners must demonstrate not only that Section 502 disproportionately affects religiously-observant families, but also that it possesses a religiously-discriminatory purpose. Petitioners can show neither that Section 502 imposes a disparate impact on them, nor that it carries a discriminatory purpose.

A. Section 502 does not impose a disparate impact on Petitioners or any other religious families in Tourvania.

IDEA aims to provide a free public education to students with disabilities. 20 U.S.C. § 1400(d)(1)(A). Section 502 provides all Tourvanian families with children with disabilities the specific benefit of a free public education, or one that is substantially similar to a public education, to their children commiserate with their unique needs. TEC § 502(a).

Tourvania went beyond the original goal of IDEA, and extended IDEA funding to not only public schools, but also nonpublic schools that are able to pass certification to show that they will be proper stewards of IDEA funds. *See id.* § 502(d)(ii). Nonpublic schools that seek to receive federal IDEA funds must provide descriptions of the "Tourvania Board of Education-adopted core curriculum";

instructional materials; special education services and instruction; and the teachers with credentials to provide special education services. *Id.* (detailing the certification process for nonpublic schools).

Other cases from this Court detail examples of actual disparate impacts against a certain protected class due to facially-neutral legislation. In *Washington*, Petitioners alleged that a test for applicants to the District of Columbia Police Department was racially discriminatory against Black applicants because more Black applicants failed than white applicants. 426 U.S. at 235. In *Arlington Heights*, the respondents alleged that the local authority's denial of a rezoning permit in order for a developer to build low- and moderate-income housing had a discriminatory impact on Black families who would have lived in that housing. 429 U.S. at 258-59. In both cases, the aggrieved parties alleged that they had been denied a specific benefit, i.e., an employment opportunity or a housing opportunity.

Here, Petitioners have not been denied any such benefit. Unlike the applicants in *Washington* who were denied employment, Petitioners and other religious families like them still have IDEA benefits available to them. The benefit that Section 502 provides to Tourvanian families is *not* any type of education in whatever setting, environment, or milieu that each individual family desires; the benefit provides a public education in public schools or certified nonpublic schools. Petitioners still possess the option to educate their children at a public school or approved nonpublic school and obtain the full benefits of IDEA funding through Section 502. In fact, Petitioners Kline have been taking advantage of this generally-

available benefit by sending their daughter to a school certified to receive IDEA funds.

Although some religiously-observant families like Petitioners Flynn choose not to participate in this benefit program and instead pay out-of-pocket for their children's unique needs, that does not mean they are excluded from this benefit. Religiously-observant families still have the option to take advantage of IDEA funds distributed through Section 502.

B. Even if Section 502 has a disparate impact on religiously-observant families, it does not violate the Equal Protection Clause because it has no discriminatory purpose.

A law that is purported to have a discriminatory impact "must ultimately be traced to a . . . discriminatory purpose" to show a violation of the Equal Protection Clause. *Washington*, 426 U.S. at 240; *see also U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."). However, a discriminatory purpose "implies more than awareness of consequences." *Feeney*, 442 U.S. at 279. Petitioners must also show that the government decisionmaker (here, the Tourvania legislature) "selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,'" its discriminatory impact on a protected class (religiously-observant families). *Id.*

For example, in *Rogers v. Lodge*, 458 U.S. 613, 616 (1982), this Court found that an at-large election system violated the Equal Protection Clause because a discriminatory purpose accompanied its discriminatory impact. The Court only found that such discriminatory purpose after deferring to the trial court's rigorous

multi-factor test used to examine the totality of the evidence. *Id.* at 620-21.

Here, however, the record contains no evidence that Section 502 was motivated by any such discriminatory purpose against religiously-observant families. As the District Court for the District of Tourvania found, the Tourvania legislature enacted Section 502 as "statutory compliance measures that largely track key provisions of IDEA." D.C. 6. IDEA's stated purpose is to provide a free public education to students with disabilities. 20 U.S.C. § 1400(d)(1)(A). Section 502 fulfills this purpose for the families and students of Tourvania by requiring recipient schools of IDEA funds to either be public or to provide an education substantially similar to a public education. *See* TEC § 502 (d)(ii). Section 502's nonsectarian requirement, TEC § 502 (d)(ii)(1), has the added purpose of safeguarding Tourvania and its public educational system from Establishment Clause concerns. *See* D.C. 14-15.

In sum, Section 502 imposes no disparate impact on religiously-observant families like Petitioners. Further, Petitioners can point to no evidence that Tourvania acted with a discriminatory purpose in enacting Section 502. Accordingly, Section 502 does not violate the Equal Protection Clause of the Fourteenth Amendment.

III. EXTENDING IDEA FUNDS TO SECTARIAN SCHOOLS VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT CONSTITUTES EXCESSIVE ENTANGLEMENT, ENDORSEMENT OF RELIGION, AND THERE IS A HISTORICAL TRADITION OF PROHIBITING PUBLIC FUNDS FROM GOING TO SECTARIAN SCHOOLS.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. This Court incorporated the Establishment Clause to the States and their subdivisions in *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947).

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). A State may neither "adopt programs or practices in its public schools . . . which 'aid or oppose' any religion." *Epperson v. Arkansas*, 393 U. S. 97, 106 (1968). The Establishment Clause has traditionally been understood as a "negative prohibition" against government action, *see Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), forbidding actions that "favor or disfavor one religion over another." *Trump v. Hawaii*, 138 S. Ct. 2392, 2434 (2018).

The *Lemon* Test, the "Endorsement Test" and this Court's recent decision in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022), each propose different ways to evaluate potential Establishment Clause violations. Were Tourvania to provide IDEA funds to sectarian schools, it would violate the Establishment Clause under all three views.

A. Providing public funds to sectarian schools would not pass the *Lemon* Test.

The *Lemon* Test provided this Court with its first clear inquiry to determine

whether a government action violated the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). "First, the [act] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, [it] must not foster an excessive government entanglement with religion." *Id.* (citations and internal quotation marks omitted).

Although this Court has eschewed *Lemon* in the past, the considerations underlying the *Lemon* test have [not] become irrelevant; far from it." *Hilsenrath v. Sch. Dist. of the Chathams*, No. 18-00966, ___ F. Supp. ___, 2023 U.S. Dist. LEXIS 185661, at *22 n.15 (D. N.J. Oct. 16, 2023). This is especially true in cases involving public education. *See Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (noting that a historical approach to the Establishment Clause is not useful in public school cases since free public education did not exist at the Founding).

i. First Prong

Respondents do not dispute that providing IDEA funds to sectarian schools would have a secular legislative purpose – i.e., providing children with disabilities in sectarian schools with disability accommodations. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d. Cir. 2011) (holding that there need only be "*some* secular purpose" to satisfy the first prong).

ii. Second and Third Prongs

This Court has "folded the entanglement inquiry into the primary effect inquiry . . . [because] both inquiries rely on the same evidence . . . , and the degree

of entanglement has implications for whether a statute advances or inhibits religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002).

The "anti-entanglement" prohibition originated in the context of education in *Lemon*. *Id.* This prohibition has also been implication where States too closely examined a sectarian school's curriculum. *See, e.g.*, *New York v. Cathedral Acad.*, 434 U.S. 125, 133-34 (1977) (holding that the "detailed inquiry into the subtle implications of in-class examinations and other teaching activities" of a sectarian school constituted excessive entanglement); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (finding "excessive entanglement" where Colorado had to examine a sectarian university's curricula to determine whether it was too "pervasively sectarian" for state scholarship funds).

Similarly, requiring Tourvania to extend IDEA funds to sectarian schools would lead to such "excessive entanglement." Under Tourvania's certification process for nonpublic schools to receive IDEA funds, a school must submit an extensive application to the Department of Education. TEC § 502(d)(ii). This includes their curricula and instructional materials. *Id.* Like *Cathedral Acad.*, this would force state officials to conduct a "detailed inquiry" into sectarian curricula, creating an entanglement issue. By instituting a nonwaivable, nonsectarian requirement, Tourvanian officials avoid such entanglement concerns.

B. Providing public funds to sectarian schools would constitute government endorsement of religion.

Under an alternate view of the Establishment Clause, the government is precluded from the "endorsement" of religion, or "'from conveying or attempting to

convey a message that religion or a particular religious belief is *favored* or *preferred*.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (citing *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)). The Court judges whether a government's action amounts to state "endorsement" of religion according to the standard of a "'reasonable observer.'" *Id.* at 620 (citation omitted). *See also id.* at 593-94 ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . .").

In its opinion, the District Court emphasized *Zelman*'s holding. D.C. 15. There, this Court held that programs where individuals decide to spend public vouchers at sectarian schools do not offend the Establishment Clause; "no reasonable observer would think a neutral program of private choice, carries with it the imprimatur of government endorsement." *Zelman*, 536 U.S. at 655. *See also Carson v. Makin*, 596 U.S. 767, 780 (2022) ("[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.").

However, Section 502 differs from the public education vouchers at issue in *Zelman* and *Carson*. *Zelman* and *Carson* dealt with *state* education vouchers that were unique creations of their respective states. Here, Tourvania enacted Section 502 to create a mechanism to distribute *federal* IDEA funds within the state – federal funds that Congress required be used for "secular, neutral, and non-ideological" services when funneled to nonpublic schools. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Congress specifically required that States not spend IDEA

funds on sectarian education. *Id.* Were Tourvania to disregard this command of Congress, a reasonable observer would see this express disobedience as an endorsement of sectarian schools by the state government.

C. There is a long history of prohibiting public funds from supporting sectarian education.

This Court additionally emphasizes that the government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise." *Kennedy*, 142 S. Ct. at 2428-29 (internal quotation marks and citations omitted). "[T]his Court has [also] instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

The record contains no evidence as to the proportion of public to private schools, or of sectarian to nonsectarian schools, in Tourvania. Accordingly, Respondents accept that extending IDEA funds to sectarian schools does not amount to "coercion" under this Court's jurisprudence. *See Zelman*, 536 U.S. at 707 (Souter, J., dissenting) (suggesting that students may be coerced into attending sectarian schools where there are few nonsectarian options in the area).

However, Founding-era history reflects how public funds going to sectarian schools would violate the Establishment Clause. Because little Establishment Clause jurisprudence exists before the mid-Twentieth Century, State analogues provide useful guides. In 1787, six States (nearly half of the then-existing States) had their own antiestablishment constitutional provisions. Steven G. Calabrisi et al., *State Bills of Rights in 1787 And 1791: What Individual Rights Are Really*

Deeply Rooted in American History and Tradition?, 85 S. Cal. L. Rev. 1451, 1470 (2012). Provisions that prohibited requiring citizens to financially support religion also existed in some States, including New Jersey ("[n]or shall any person . . . ever be obliged to pay tithes"), South Carolina (citizens shall not be obligated to "pay towards the maintenance and support of a religious worship"), and Vermont ("no man . . . can be compelled to . . . support any place of worship"). *Id.* at 1470-71.

Although these do not explicitly address sectarian schools, these state Establishment Clause analogues add color to the vagueness and sparse early jurisprudence surrounding the federal Establishment Clause. These examples show that a historical understanding of the Clause can require a prohibition on public funding of sectarian schools. Tourvania's extension of IDEA funds to sectarian schools would violate the Establishment Clause under this Founding-Era analysis.

There is also a deep historical tradition in specifically prohibiting public funds to sectarian schools and institutions. In 1875, Representative James Blaine of Maine proposed a federal constitutional amendment to prohibit public funds from supporting sectarian schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 556 (2003). Although his amendment failed, by the 1890s, over thirty States adopted their own "Blaine Amendments" prohibiting state funds from being used to support sectarian schools. *Id.* at 573.

Blaine originally proposed his amendment to take advantage of the popularity of President Ulysses S. Grant's defense of public education and

promotion of secularism. *Id.* at 558. Although a number of Blaine Amendments have roots in anti-Catholicism, *id.* at 625, Section 502 is not a Blaine Amendment. *See Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) ("The amici contend that Washington's Constitution was born of religious bigotry because it contains a so-called "Blaine Amendment". . . . [H]owever, the provision in question is not a Blaine Amendment . . . . Accordingly, [its] history is simply not before us."). Instead, this is illustrative of a historical understanding of public funds' support of sectarian schools as implicating the same concerns that the Establishment Clause seeks to address; namely, that such use of funds should be prohibited to defend public education from "sectarian . . . dogmas." DeForrest, *supra* at 558.

Accordingly, the provision of public funds to sectarian schools in Tourvania would violate the Establishment Clause in the variety of ways that this Court has interpreted the Clause.

CONCLUSION

The Respondents respectfully request that this Court affirm the decision of the Eighteenth Circuit in favor of the Respondents.

The State requests a 30-minute oral argument delivered by the Respondents' attorneys.

Respectfully submitted,
Tourvania Department of Education

Kayla Patterson, Superintendent of Public Instruction

By Their Attorneys,
Team No. 19

Date: March 4, 2024

/s/ Team No. 19