No. 24-012

In the Supreme Court of the United States

CHERYL FLYNN, et al.,
Petitioners,

v.

TOURVANIA DEPARTMENT OF EDUCATION and KAYLA PATTERSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

TEAM 2
Counsel for Respondents
March 4, 2024

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The Individuals with Disabilities Education Act ("IDEA") makes funding available for states to administer and provide special education to students with disabilities. Under Tourvania's IDEA program, a secular private school may only receive funding if it hosts a student for whom the Local Educational Agency ("LEA") has determined alternative placement in that private school is appropriate. Religious private schools are not eligible for funding.

Petitioners allege that Tourvania's failure to subsidize a parentally-placed disabled student's special education at a religious private school violates the Constitution's Free Exercise and Equal Protection Clauses. The questions presented are:

1. Whether Tourvania's failure to fund special education at religious private schools violates the First Amendment's Free Exercise Clause, and the Fourteenth Amendment's Equal Protection Clause.
2. Whether Tourvania's funding of a student's special education at a religious private school would violate the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

A. Statutory Framework

In 1975, Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. The Act "offers States federal funds to assist in educating children with disabilities." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017). In order to qualify for funding, states must ensure a "free appropriate public education [("FAPE")] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1). A FAPE includes "special education," which means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom." *Id.* § 1401(9), (29).

Under the IDEA, states may provide special education and related services to disabled children whose parents have placed them in "private, including religious, schools." *Id.* § 1412(a)(10)(A)(i)(III). However, federal regulation establishes that no "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). When private schools do provide IDEA-funded special education to private school children, that education must be "secular, neutral, and nonideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II). That is because the Establishment Clause does not permit the "diversion of secular government aid to religious indoctrination." *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in judgment).

The IDEA "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 183 (1982). Under the Tourvania Education

Code ("TEC"), a private school may only receive IDEA funding if it hosts a student for whom the LEA has decided "alternative placement in a private institution is appropriate." TEC § 502(e). IDEA funds are not available for parentally-placed students. Private schools "owned, operated, controlled by, or formally affiliated with a religious group or sect" are also not eligible to receive IDEA funds. *Id.* § 502(b), (c).

B. Factual Background

H.F. is the five-year-old daughter of Cheryl and Leonard Flynn. (R. at 8.) B.K. is the thirteen-year-old daughter of Barbara and Matthew Kline. (R. at 8–9.) Both children have autism and both, under the IDEA and TEC, are eligible for secular special education at Tourvania public schools. (R. at 8–9.) Indeed, B.K. currently attends school at the Tourvania Central School District ("TCSD"), where she receives special education. (R. at 9.) H.F. similarly receives occupational and behavioral therapy, but not at taxpayer expense, because the Flynns have not sought "a FAPE from [TCSD]," instead placing H.F. in an Orthodox Jewish school. (R. at 8.) The parents of both children wish for the government to subsidize their children's special education at private Orthodox Jewish schools. (R. at 8–9.)

Joshua Abraham High School and Bethlehem Hebrew Academy are two Orthodox Jewish dual curriculum private secondary schools. (R. at 9.) Both institutions are "pervasively sectarian." *Mitchell*, 530 U.S. at 850 (O'Connor, J., concurring in judgment). The mission of Joshua Abraham is "to promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning, and to develop a love for the State of Israel." (R. at 9.) Similarly, Bethlehem Hebrew "seeks to promote in its students a passion for Torah," and "respect for tradition." (R. at 9.) Both applied to "qualify under Tourvania law as certified nonpublic schools" to receive IDEA funds but were denied under the TEC's requirement that private schools receiving funding be nonsectarian. (R. at 10.)

C. Procedural History

In 2023, the Flynns, Klines, Joshua Abraham High School, and Bethlehem Hebrew Academy ("Petitioners"), sued the Tourvania Department of Education and its superintendent, Kayla Patterson ("Respondents"), in the United States District Court for the District of Tourvania. Petitioners alleged that section 502(b) of the TEC, making religious private schools ineligible for IDEA funds, violates the Free Exercise Clause of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. (R. at 1.) The District Court denied Respondents' motion for summary judgment. (R. at 15–16.)

On Respondents' interlocutory appeal, the United States Court of Appeals for the Eighteenth Circuit vacated the District Court's order and instructed it to enter summary judgment for Respondents. (R. at 20.) Soon after, this Court granted certiorari to resolve the two questions now presented. (R. at 21.)

SUMMARY OF THE ARGUMENT

I. TEC section 502 does not violate the Free Exercise Clause. TEC section 502 is nondiscriminatory because Petitioner schools face largely the same treatment as secular private schools. Even if TEC section 502 were discriminatory, it does not impose a substantial burden on Petitioners' religious exercise. The benefit at issue for Petitioner families is a free appropriate public education, while for Petitioner schools it is IDEA funding. Petitioner families are not excluded from receiving a FAPE, as Tourvania has made that benefit equally available to all, without putting anyone to a choice between receiving a FAPE and maintaining their religious status. Petitioner religious schools are excluded from IDEA funding not because of their religious status, but because they would direct that benefit to a religious use, and therefore they face a permissible use-based exclusion.

In the event this Court applies heightened scrutiny to TEC section 502, Petitioner religious schools' exclusion from IDEA funding would pass strict scrutiny because it is narrowly tailored towards furthering two compelling state interests: the provision of public education and the avoidance of an Establishment Clause violation.

II. Tourvania's exclusion of Petitioner schools from IDEA funding does not violate the Equal Protection Clause. The Equal Protection Clause claim is disposed of by the resolution of the Free Exercise claim. Furthermore, neither Petitioner families nor Petitioner schools are subject to disparate impact.

III. The extension of IDEA funding to Petitioner schools would violate the Establishment Clause. The history of the First Amendment, and the writings of its authors demonstrate the Founders' principled opposition to the use of tax-raised funds for the support of religious schools. Unlike other traditions that implicate the government establishment of religion, the direct funding of religious schooling has never enjoyed broad acceptance. Consistent with those "historical practices and understandings," *Kennedy v. Bremerton Sch, Dist.*, 597 U.S. 507, 535 (2022), ever since this Court had its first opportunity to apply the Religion Clauses, it has held that the Establishment Clause "was intended to erect 'a wall of separation between Church and State'" that prohibits the direct state funding of religious schools, *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

The extension of funds to Petitioner schools under Tourvania's IDEA program would also fail this Court's other tests of constitutionality. IDEA funds, if provided, would come in the form of direct money payments as a result of the choices of LEAs, not the independent choices of aid recipients. That aid would also have the effect of advancing religion. Both are constitutionally impermissible. That a faithful application of the Establishment Clause protects religious

institutions from secular influences and deters interreligious strife also weighs in favor of withholding IDEA funds from religious schools under Tourvania's program.

ARGUMENT

I. TEC SECTION 502 DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

A. TEC Section 502 Does Not Trigger Presumptive Constitutional Protection Under the Free Exercise Clause.

The Free Exercise Clause of the First Amendment provides "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. To trigger presumptive constitutional protection under the Free Exercise Clause, a claimant must show that the burden imposed by state action on the exercise of religion is both discriminatory and substantial. TEC section 502 is neither.

1. TEC Section 502 is nondiscriminatory.

A burden on religious exercise triggers searching scrutiny under the Free Exercise Clause only if it is discriminatory, meaning if it results from a law that is tainted by the "unconstitutional object of targeting religious beliefs and practices." *City of Boerne v. Flores*, 521 U.S. 507, 507 (1997). On the other hand, where a burden is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). In *Smith*, for example, this Court declined to apply heightened scrutiny to an Oregon law that banned the use of peyote—a drug that, incidentally, is used religiously by some Native Americans—because of the law's facial neutrality and general applicability. *Id.* at 889. In contrast, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court applied strict scrutiny to a city's ban on animal sacrifice because it was enacted as a deliberate attempt to suppress Santería—a religion that features animal sacrifice—and thus it was discriminatory. *Id.* at 546.

Here, the burden on Petitioner schools is more akin to the nondiscriminatory one in *Smith* than the discriminatory one in *Lukumi*—and thus does not implicate the Free Exercise Clause—because TEC section 502 is religion-neutral with respect to IDEA funding for parentally-placed private school children. True, the nonsectarian requirement excludes religious private schools from IDEA funding for parentally-placed students. TEC § 502(b). However, under TEC section 502(e), *secular* private schools are *also* excluded from IDEA funding for parentally-placed children. *Id.* § 502(e) ("The provisions of this code apply only when the LEA, not the child's parents, decides that alternative placement in a private institution is appropriate."). Thus, just as the peyote ban in *Smith* did not target religion for mistreatment, here TEC section 502 also does not target religion for mistreatment, at least in the context of parentally-placed private school children.

Although this Court has suggested that "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as . . . the religious exercise at issue," *Tandon v. Newsom*, 593 U.S. 61, 63 (2021), TEC section 502's favorable treatment of public education does not render the code discriminatory, since public education is fundamentally different from religious private education. In *Tandon*, this Court stated that laws are "not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* True, TEC section 502 includes public education—which is concededly secular—in IDEA funding and thus treats it more favorably than religious education. But public education is fundamentally different from religious private education precisely *because* it is public and secular; IDEA funding is intended to provide students with a free appropriate *public* education, and although the IDEA authorizes the provision of IDEA-funded education in private and religious schools, it requires that education to be "secular, neutral, and nonideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II).

That the nonsectarian requirement treats religious private schools less favorably than secular private schools with respect to funding for LEA-placed students is irrelevant in the instant case and of no practical moment in general. As to Petitioner families, neither B.K. nor H.K., if placed into a private school, would be classified as LEA-placed. (R. at 5.) As to Petitioner schools, the Establishment Clause bars LEAs from placing students in religious private schools.

2. Even if TEC Section 502 were discriminatory, it does not constitute a sufficiently substantial burden on Petitioners' religious exercise.

i. Status-based exclusions necessarily trigger strict scrutiny, whereas use-based ones do not.

The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450 (1988). In particular, this Court has held that a state's "denial of or placing of conditions upon a benefit" violates the Free Exercise Clause. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

However, in the context of public funding, this Court has recognized a distinction between use-based and status-based exclusions; whereas the latter necessarily triggers strict scrutiny, the former does not. In *Locke v. Davey*, 540 U.S. 712 (2004), this Court rejected an indirect-coercion claim, holding that a Washington statute prohibiting beneficiaries of a publicly-funded college scholarship program from using their scholarship to pursue a degree in devotional theology did not trigger strict scrutiny because it imposed only a "minor burden"—not a substantial one—on Petitioner's Free Exercise rights. *Id.* at 725. However, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), this Court held that Montana's denial of a church's application for public funding *did* trigger strict scrutiny because the denial was based solely on religious status. *Id.* at 451, 466. In so holding, this Court distinguished the claimant in *Locke*, who was "denied a

scholarship because of what he proposed *to do*," not because of "who he *was*." *Id.* at 464. Thus, in assessing whether an exclusion is status-based, this Court focuses on whether state action places Free Exercise claimants on the horns of a decisional dilemma by conditioning the receipt of a government benefit on the claimants' abandonment of their religious status. *Id.* at 462 ("[T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.").

Since *Trinity Lutheran*, this Court has continued to apply strict scrutiny to state action that excludes solely on the basis of religious status. *See Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020) (invalidating a Montana Department of Revenue rule that excluded religiously-affiliated private schools from a state tuition assistance program for students attending private schools, because it excluded on the basis of religious status); *see also Carson as next of friend of O.C. v. Makin*, 596 U.S. 767 (2022) (invalidating the nonsectarian requirement of a Maine tuition assistance program because it excluded on the basis of religious status). This Court's holding in *Carson* did nothing to disturb the status-use distinction first articulated in *Trinity Lutheran*. In *Carson*, this Court applied strict scrutiny to Maine's tuition assistance program because the program excluded "solely because of . . . religious character." *See Carson*, 596 U.S. at 780 ("The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve the instant case."). Although this Court stated, in dicta, that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination," nowhere did it suggest that use-based exclusions trigger the same level of scrutiny as status-based ones. *Id.* at 788.

ii. Petitioner families face neither a status-based nor use-based exclusion.

Here, the nonsectarian requirement does not place Petitioner families on the horns of a decisional dilemma between receiving a FAPE and maintaining their religious status. Just as the claimant in *Locke* was free to receive a taxpayer-funded scholarship without abandoning his Christian status, here Petitioner families can receive a FAPE without abandoning their Jewish status. *See Locke*, 540 U.S. at 724 (noting that Washington's scholarship program accommodated religion by permitting recipients to attend pervasively religious schools and even to take devotional theology courses). Petitioner families' eligibility for a FAPE turns not on their religious status, but on parentally-placing their children in a public school (or on the LEA placing their children in a secular private school), which they have always been free to do. Indeed, B.K. already attends a public school and receives a FAPE. (R. at 9.) This is nothing like *Trinity Lutheran*, where a church was denied a grant simply because of its status as a church. *Trinity Lutheran*, 540 U.S. at 451. Petitioner families' Free Exercise claim flows from a fundamental mischaracterization of the benefit at issue; though they seek taxpayer funded education inside the walls of a Jewish school, the benefit offered by Tourvania is a FAPE, which is available to all Tourvanians equally, including Petitioner families.

Not only can Petitioner families parentally-place their children in a public school without abandoning their Jewish status, but doing so does not even require them to violate their religious obligations. Attending a full-day religious private school is not the only way in which Petitioner families can fulfill their religious obligation to "instill and strengthen in [their children] the family's religious beliefs and . . . immerse [them] in Orthodox Jewish culture and heritage." (R. at 8.) Petitioner families are welcome to supplement public schooling by engaging their children in torah study groups, religious instruction on weekends, or religious services. That public-school

enrollment may make it more *difficult* for Petitioner families to fulfill their religious obligation does not mean that TEC section 502 qualifies as a substantial burden on their religious exercise. *See Lyng*, 485 U.S. at 450–451 (rejecting the claim that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," trigger presumptive constitutional protection).

iii. Petitioner schools face not a status-based exclusion, but rather a use-based one that does not trigger presumptive constitutional protection.

Here, Petitioner schools face exclusion based not on their Jewish status, but rather on the religious use towards which they would direct IDEA funding. The IDEA authorizes the inclusion of religious private schools in the funding program, but subjects them to certain additional requirements, including that IDEA-funded equitable services provided to parentally-placed religious private school children must be "secular, neutral, and non-ideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II). In turn, Tourvania, as a recipient of federal IDEA funds, enacted the nonsectarian requirement *as a statutory compliance measure.* (R. at 6.) Thus, although the text of the nonsectarian requirement excludes from funding any school "formally affiliated with a religious group," the purpose of the requirement is to ensure that IDEA funds are put to uses that are "secular, neutral, and non-ideological"—in other words, to impose a use-based restriction.

The nonsectarian requirement's textually broad exclusion simply reflects the Tourvania legislature's reasonable belief that schools formally affiliated with a religious group provide instruction that is pervasively sectarian. The record supports this belief; Joshua Abraham's "mission is to promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning, and to develop a love for the State of Israel." (R. at 9.) Similarly, Bethlehem Hebrew

Academy "seeks to promote in its students a passion for Torah, respect for tradition, hard work, and a desire to be positive community members." (R. at 9.) The Tourvania legislature's belief is also consistent with this Court's understanding that "[t]he religious education and formation of students is the very reason for the existence of most religious private schools." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2055 (2020).

The use-based exclusion at issue here is readily distinguishable from the status-based ones in *Trinity Lutheran*, *Espinoza*, and *Carson* because this case is the only one in which the excluded religious entity seeks to direct a government benefit towards a religious use. *Trinity Lutheran* featured public funding for an entirely non-religious use—playground resurfacing—rather than for instruction at a religious private school, as is true here. *See Trinity Lutheran*, 582 U.S. at 471 (Breyer, J., concurring) (noting that the state program was designed to improve the health and safety of children). *Espinoza* and *Carson* both involved tuition assistance programs aimed at helping students pay for schooling. *Espinoza*, 140 S.Ct. at 2251; *Carson*, 596 U.S. at 767. There, tuition proceeds were not earmarked for any religious purpose; religious private schools, if included, could, similar to the beneficiaries in *Trinity Lutheran*, direct the taxpayer-funded tuition proceeds towards non-religious uses—like playground resurfacing—rather than towards instruction. Here, on the other hand, the purpose of the IDEA is to fund special education—which, given religious private schools' pervasively sectarian nature, constitutes a religious use. *See Endrew F.*, 580 U.S. at 390 (noting that the IDEA "offers states federal funds to assist in *educating* children with disabilities") (emphasis added).

Even if religious private schools *claimed* to be able to separate their secular instruction from their religious instruction and thus direct IDEA funds exclusively to the former, the certification process would raise serious concerns about state entanglement with religion and

denominational favoritism. Per TEC section 502(d), LEAs may enter into contracts only with state-certified nonpublic schools. TEC § 502(d). To be certified, nonpublic schools must apply with the Superintendent of Public Instruction and meet several requirements, such as agreeing that it will maintain compliance with the IDEA and submitting a "description of the school's special education." *Id.* § 502(d)(i)–(iii). Thereafter, the Superintendent must conduct an initial validation review of the application, which in some cases even involves an onsite review. *Id.* § 502(d)(i)(2). Requiring state officials to scrutinize whether a religious private school sufficiently separates their secular instruction from their religious instruction, so as to ensure compliance with the IDEA, "is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971).

Finally, Petitioner schools' use-based exclusion is akin to that in *Locke* and thus does not trigger presumptive constitutional protection. Similar to how the claimant in *Locke* faced a use-based exclusion that prevented the use of public money to *study* devotional theology, here Petitioner schools face a use-based exclusion that prevents the use of public money to *teach* religion. *Locke*, 540 U.S. at 712. Publicly funded study of religion implicates antiestablishment concerns just as much as publicly funded instruction of religion. *See Carson*, 596 U.S. at 805 (Breyer, J., dissenting) ("There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children.").

B. Even if TEC Section 502 Triggered Presumptive Constitutional Protection Under the Free Exercise Clause, It Would Pass Strict Scrutiny.

Ultimately, whether TEC section 502 amounts to a status-based or use-based restriction is irrelevant because it passes strict scrutiny. To pass strict scrutiny, government action "must

advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).

1. TEC Section 502 is narrowly tailored towards furthering a compelling state interest in providing a free public education to all children.

This Court has recognized that public education, which is necessarily secular, is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). As this Court said in *Brown*, "[education] is the very foundation of good citizenship. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* This Court's respect for the vital role of public education has persisted after *Brown*. *See Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."). Furthermore, this Court has long held that a state may not adopt programs or practices in its public schools that aid any religion. *See Carson*, 596 U.S. at 809 (Breyer, J., dissenting) (collecting cases).

In contrast to *Carson*, and as discussed above, the benefit at issue here is precisely what this Court has lauded on various occasions: a free appropriate *public* education. Absent from this case are certain infirmities that led this Court in *Carson* to reject the government's claim that the benefit at issue there was also free public education. First, this Court noted in *Carson* that the text of the statute did not purport to provide a free public education, but rather "*tuition* at a public *or* private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education." *Carson*, 596 U.S. at 782. But here, the IDEA states, on its face, that a primary purpose of IDEA funding is "to ensure that all children with disabilities have available

to them a free appropriate *public* education." 20 U.S.C. § 1400(d)(1)(A) (emphasis added). This Court itself has recognized that the IDEA states as much, noting that "the face of the [IDEA] statute evinces a congressional intent to bring previously excluded handicapped children into the *public* education systems of the States" and "to open the door of *public* education to handicapped children." *Rowley*, 458 U.S. at 189, 192 (emphases added).

Second, TEC section 502 bars parents from accessing the benefit if they parentally-place their child in a secular private school, in contrast to the program in *Carson*. In *Carson*, parents could receive tuition assistance by parentally-placing their child in a state-approved secular private school. *Carson*, 596 U.S. at 773. Indeed, Maine was spurred to create the program *because* of the absence of public schools in many areas of the state. *Id.* at 797. Here, by contrast, public funding is *not* available to parents who opt out of Tourvania's public education system. The TEC restrains parents' options by specifying that secular private schools are eligible to receive IDEA funding only for their *LEA*-placed children, not their parentally-placed students. *See* TEC § 502(e) ("The provisions of this code apply only when the LEA, not the child's parents, decides that alternative placement in a private institution is appropriate.").

Third, the statutory and regulatory regimes here—but not the ones in *Carson*—ensure that benefit recipients at secular private schools receive an education that is roughly similar to that provided in public schools. Federal regulations promulgated pursuant to the IDEA specify that the state must ensure that LEA-placed secular private school children—which, under TEC section 502(e), are the *only* private school children eligible for public funding in Tourvania—are provided "an education that meets the standards that apply to education provided by the . . . LEAs," as well as special education "in conformance with an [individualized education program]" that is prepared by, among other actors, a *public agency representative* who is qualified to provide instruction

specifically designed for disabled children and is knowledgeable about the general educational curriculum. 34 C.F.R. § 300.146(a)(1), (b); *id.* 300.321(a); 20 U.S.C. § 1412(a)(10)(b); (R. at 4) (describing an individualized education program as "a highly individualized, scrupulously detailed document" that includes "the specific educational services to be provided to such child"); *Honig v. Doe*, 484 U.S. 305, 311 (1988). Finally, the TEC prescribes that secular private schools seeking eligibility for IDEA funding must show that their administrators and staff "hold a certification, permit, or other document equivalent to that which a staff in a public school are required to hold" and that the contract between the LEA and secular private school incorporate provisions concerning LEA supervision. (R. at 6–7.)

The nonsectarian requirement furthers Tourvania's compelling interest in providing public education because it prevents the government benefit from being diverted away from public schools to private schools. Absent the nonsectarian requirement, Tourvania LEAs would be required by the IDEA to "find" parentally-placed religious private school children and spend a "proportionate" share of their IDEA funds on them. 20 U.S.C. § 1412(a)(10)(A)(iii), (a)(10)(A)(i)(II); (R. at 5.) Since spending would be "proportionate," a dollar given to religious private schools is a dollar taken away from public schools.

The nonsectarian requirement is narrowly tailored to providing a free appropriate public education because it is the least restrictive way of excluding schools that do not provide the equivalent of a public education. The nonsectarian requirement excludes religious private schools from IDEA funding because, given that "[t]he *raison d'être* of parochial schools is the propagation of a religious faith," instruction in those schools is fundamentally different from that in public schools. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (quoting *Lemon*, 403 U.S. at 628 (1971) (Douglas, J., concurring)). Although TEC section 502 leaves secular private schools

eligible and, in that sense, excludes underinclusively, Tourvania should not be expected to exclude *all* private schools from IDEA funding; the broad range of special needs that children can have means that LEAs must "ensure that a continuum of alternative placements is available," including "private institutions." (R. at 6); *see also* 34 C.F.R. § 300.115, .118.

2. TEC Section 502 is narrowly tailored towards furthering a compelling state interest in avoiding an Establishment Clause violation.

This Court has recognized that a state's "interest . . . in complying with its [Establishment Clause] obligations may be characterized as compelling." *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Indeed, the states' antiestablishment interests are weighty for the same reason that the Establishment Clause was enshrined in the U.S. Constitution's first amendment: to help create a society free of the religious conflict that had long plagued European nations with "governmentally established religion[s]." *Carson*, 596 U.S. at 791 (Breyer, J., dissenting). Furthermore, the nonsectarian requirement is narrowly tailored to avoiding an Establishment Clause violation; it is impossible for Tourvania to include religious private schools and fund *only* their secular activities, given their purpose. *See Lady of Guadalupe*, 140 S.Ct. at 2055 ("The religious education and formation of students is the very reason for the existence of most private religious schools.").

Trinity Lutheran, *Espinoza*, and *Carson* did not hold that a state's interest in avoiding an Establishment Clause violation is uncompelling. Instead, in those cases the government proffered—and this Court rejected as uncompelling—a wholly different interest, namely an "interest in separating church and state 'more fiercely' than the Federal Constitution." *Trinity Lutheran*, 582 U.S. at 466; *Espinoza*, 140 S.Ct. at 2260; *Carson*, 596 U.S. at 781. Crucially, in those cases the Establishment Clause issue was either stipulated away or decided in favor of the claimant. *Trinity Lutheran*, 582 U.S. at 458; *Espinoza*, 140 S.Ct. at 2254; *Carson*, 596 U.S. at 781. Here, by contrast, inclusion of religious schools *would* violate the Establishment Clause because

public funding would flow directly to pervasively sectarian institutions—rather than through the independent choices of parents as in *Espinoza* and *Carson*—and would have the effect of advancing religion unlike in *Trinity Lutheran*. *See* Part III, *infra*.

II. TEC SECTION 502 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Where this Court has heard a religious discrimination claim brought under both the Free Exercise Clause and the Equal Protection Clause and has found no violation of the former, this Court has applied rational-basis scrutiny to the latter. *See Locke*, 540 U.S. at 720 n.3 ("Because we hold . . . that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to [Respondent's] equal protection claims."). Here, TEC section 502 does not trigger presumptive constitutional protection under the Free Exercise Clause, so this Court is bound by *Locke* to apply rational-basis scrutiny to Petitioners' Equal Protection Clause claim. Since TEC section 502 would pass even strict scrutiny for the reasons stated above, it would also pass rational-basis scrutiny.

Even if Petitioners brought a religious discrimination claim *only* under the Equal Protection Clause, this Court would still be bound to apply rational-basis scrutiny because TEC section 502 does not subject Orthodox Jewish families or schools to disparate impact. In *Palmer v. Thompson*, 403 U.S. 217 (1971), this Court upheld a city's decision to shut down its four white-only pools and one black-only pool, rather than keep them open and operate them on a desegregated basis, because of the absence of "state action affecting blacks *differently* from whites." *Id.* at 225 (emphasis added).

Similar to how state action in *Palmer* affected blacks no differently from whites, TEC section 502 also does not subject Petitioners to disparate impact, as discussed above. Petitioner families' eligibility for a FAPE turns not on their religious status, but on parentally-placing their children in a public school (or on the LEA placing their children in a secular private school), which they have always been free to do. *See* Part I, *supra.* And with respect to Petitioner schools, TEC section 502 is religion-neutral for parentally-placed private school children; under TEC section 502(e), private schools receive the *same* treatment—exclusion from IDEA funding for parentally-placed students—*regardless* of whether they are sectarian or nonsectarian. *See* Part I, *supra*. Although the nonsectarian requirement does subject religious private schools to disparate impact with respect to funding for *LEA*-placed students, the Establishment Clause bars LEAs from placing students in religious private schools. *See* Part I, *supra.*

III. THE EXTENSION OF FUNDS TO RELIGIOUS PRIVATE SCHOOLS UNDER TOURVANIA'S IDEA PROGRAM WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Establishment Clause Prohibits the Direct State Funding of Religious Institutions.

The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Its meaning is determined by "reference to historical practices and understandings." *Kennedy*, 597 U.S. at 535 (quotation marks omitted). This Court's historical understanding of the Establishment Clause has been unwavering for almost two centuries: "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson*, 330 U.S. at 16 (quoting *Reynolds*, 98 U.S. at 164). Consistent with that understanding, a state cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 67. That rule is firmly rooted in the Framers' principled opposition to laws that compelled the furnishing of

taxpayer funds to religious institutions, and is also consistent with a long history of opposition to the practice at the state level.

1. The writings of James Madison and Thomas Jefferson demonstrate the Framers' principled opposition to state funding of religious institutions.

The First Amendment's Religion Clauses were written to address government-sanctioned religious persecution "transplanted" from the "old world" that "began to thrive in the soil of the new America." *Id.* at 9. One practice that was particularly abhorrent to "freedom-loving colonials" was the compelled payment of "tithes and taxes to support government-sponsored churches." *Id.* at 10. It was Americans' feeling of "indignation" at the "imposition of taxes" to fund religious institutions in particular "which found expression in the First Amendment." *Id.* at 11. That historical backdrop gave the founders good reason to oppose statutes that provided tax-dollars directly to religious institutions.

James Madison, "the leading architect of the religion clauses of the First Amendment," *Flast v. Cohen*, 392 U.S. 83, 103 (1968), and Thomas Jefferson, who also played a "leading role[]" in its "drafting and adoption," *Everson*, 330 U.S. at 11, both spoke out against taxes levied to support the church. In 1785, Madison wrote his now-famous Memorial and Remonstrance to protest a measure before the Virginia legislature that would have set up a tax "for the support of the established church." *Id.* at 11. Decrying the proposal, he wrote, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." James Madison, Memorial and Remonstrance (1785) (reprinted in *Everson*, 330 U.S. at 65–66). In Madison's view, the law was ideologically coercive because it enforced "a form of religious devotion." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011).

Madison's position was widely held. His "Remonstrance received strong support throughout Virginia." *Everson*, 330 U.S. at 12. In the face of public pressure, the Virginia legislature rejected the tax measure. Instead, soon after, the Assembly enacted Thomas Jefferson's "Virginia Bill for Religious Liberty." *Id.* That bill similarly reflects the founding generation's hostility to the direct government funding of religious institutions:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . . [E]ven the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.

Id. at 13 (quoting Thomas Jefferson, Virginia Bill for Religious Liberty). In other words, for the government to compel an individual to contribute money to advance religion is to violate that person's liberty.

In 1878 when this Court had its first opportunity to interpret the Religion Clauses, it acknowledged that "the provisions of the First Amendment had . . . the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Id.* (citing *Reynolds*, 98 U.S. at 168). In 1947, when it revisited the Establishment Clause to decide *Everson*, the Court rightfully placed great weight on the views of its author, James Madison. Consistent with that historical understanding the Court held that a state cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 67.

2. Early state constitutions and historical practices also reveal a long tradition of prohibiting the use of tax-raised funds to support religious instruction.

Madison's Memorial and Remonstrance, and Jefferson's Bill for Religious Liberty are not the only sources that support the Court's understanding. Some government practices that implicate

the establishment of religion have been observed since the founding. The same cannot be said of taxpayer-funded religious education. Where the undeviating acceptance of those practices has previously served as evidence of their consistency with the Religion Clauses, continual opposition to the state funding of religious education suggests its incompatibility with the Constitution.

That "[r]eligion . . . be strictly excluded from the public forum . . . . is not, and never was, the model adopted by America." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting). Certain practices, like "state grants of tax exemption to churches," have enjoyed "undeviating acceptance" since the founding. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680–81 (1970) (Brennan, J., concurring). "Sunday Closing Laws" also "go far back into American history." *McGowan v. State of Md.*, 366 U.S. 420, 431 (1961). Likewise, "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). "From colonial times through the founding of the Republic and ever since," those practices have "coexisted with the principles of disestablishment and religious freedom." *Id.* The same cannot be said of the use of tax-raised funds to support religious schools.

Americans' rejection of the use of tax dollars to fund religious institutions can be seen in early state constitutions: "Most . . . that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Locke*, 540 U.S. at 723. These "no-aid" clauses are found in eight of the founding states' constitutions.[1] That they "saw no problem in explicitly excluding *only* the ministry

[1] *See, e.g.*, N.J. Const., Art. XVIII (1776) ("No person shall . . . within this Colony, ever be obliged to pay tithes, taxes, or any other rates . . . for the maintenance of any minister or ministry, contrary to what he believes to be right . . . .") (reprinted in 5 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2597 (F. Thorpe ed. 1909)).

from receiving state dollars" suggests that government funding for "religious instruction is of a different ilk" than government programs that fund secular education. *Id.*

The state funding of religious schools, unlike practices like the granting of tax-exempt status to churches, has never enjoyed "undeviating acceptance" alongside the Establishment Clause. *Walz*, 397 U.S. at 681 (Brennan, J., concurring). Quite the opposite is true: "subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed." *Lemon*, 403 U.S. at 645 (Brennan, J., concurring).

As public education became more prevalent in the early 19th century, "strong opposition developed to use of the States' taxing powers to support private sectarian schools." *Id.* at 647. Although not yet bound by the First Amendment and the Establishment Clause,[2] between 1840 and 1875 nineteen states adopted its guarantee by adding no-aid provisions "to their constitutions prohibiting the use of public school funds to aid sectarian schools." *Id.* Each state "admitted to the Union after 1858," except West Virginia, included a similar provision in its first constitution. *Id.* In other words, each embraced the understanding of the Establishment Clause as intended by its authors.

"[T]he story relevant here is one of consistency." *Trinity Lutheran*, 582 U.S. at 481 (Sotomayor, J., dissenting). Just as the country has a long tradition of practices like legislative prayer, it has an equally long tradition, stretching back to the founding, of opposition to the direct government funding of religious schools.

[2] *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (holding that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws "respecting an establishment of religion or prohibiting the free exercise thereof").

B. IDEA Funds, if Provided to Petitioner Religious Schools, Would Violate This Court's Other Tests of Constitutionality.

Where history shows that a particular practice is constitutionally impermissible, "it is not necessary to define the precise boundary of the Establishment Clause." *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 (2014). While history demonstrates that the Establishment Clause prohibits the contribution of "tax-raised funds to the support of an institution which teaches the tenets and faith of any church," *Everson*, 330 U.S. at 67, providing IDEA funds to religious private schools through Tourvania's program would also fail this Court's other tests of constitutionality. Tourvania IDEA funds, if provided, would flow from the government directly to religious schools. IDEA aid provided to Joshua Abraham High School and Bethlehem Hebrew Academy would also be used "to advance the religious missions of the recipient schools." *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring in judgment). Both are impermissible under this Court's precedents.

1. Tourvania's IDEA program, if extended, would provide aid directly to religious schools, an arrangement this Court rejects.

This Court's precedents "have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted). It has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 842 (1995). Tourvania's IDEA laws create a program of direct money payments to private schools, and bear little resemblance to the "true private choice" programs that have previously withstood Establishment Clause scrutiny.

In *Mueller v. Allen*, 463 U.S. 388 (1983), for example, this Court approved a program of indirect funding to religious private schools. In that case, a Minnesota statute allowed taxpayers to

deduct from their state income tax statements between $500 and $700 for "expenses incurred for the 'tuition, textbooks and transportation' of dependents." *Id.* at 391. Some Minnesota taxpayers sued claiming the provision violated the Establishment Clause "by providing financial assistance to sectarian institutions." *Id.* at 392. Rejecting their challenge, the Court held that under those circumstances parochial schools received only an "attenuated financial benefit" that the "historic purposes of the [Establishment Clause] simply do not encompass." *Id.* at 400.

This Court has also approved programs that make available to parents grants and vouchers to spend on the education of their choosing. *See Zelman*, 536 U.S. at 662 (upholding the constitutionality of school voucher program for low-income parents who could use the funds at religious or non-religious schools); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 (1986) (holding that a grant provided under a state's vocational rehabilitation program could be used to finance the petitioner's training to become a pastor). Those programs were upheld because where the government provides its citizens a grant or voucher to spend as they choose, that transaction is "no different from a State's issuing a paycheck to one of its employees, knowing that the employee [might] donate part or all of the check to a religious institution." *Agostini v. Felton*, 521 U.S. 203, 226 (1997).

Tourvania's IDEA program is not driven by "true private choice" as was the case in *Mueller*, *Zelman*, and *Witters*. Under the TEC, private schools may only receive funding if they host a student for whom the LEA, not the student's parents, has determined placement in a private school is "appropriate." TEC § 502(c), (e). Therefore, absent the nonsectarian requirement, the funding of religious private schools would depend on the choices of LEAs, not on the "private choice[s]" of citizens. *Zelman* 536 U.S. at 649. Far from receiving an "attenuated financial benefit," *Mueller*, 463 U.S. at 400, private schools participating in Tourvania's IDEA program

receive government funds directly. *See* TEC § 502(c)(i) (reflecting that under the TEC "[t]he LEA pays the nonpublic school," not parents). Were schools like Joshua Abraham High School and Bethlehem Hebrew Academy allowed to participate in Tourvania's IDEA program, these would become exactly the "direct money payments to sectarian institutions" the Court has previously warned against. *Rosenberger*, 515 U.S. at 842.

2. IDEA-funded special education at Petitioner schools would impermissibly advance religion.

"[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968). Where the content of aid to a religious school is entirely secular, that aid is permissible. But where aid has "the 'effect' of advancing . . . religion," it violates the Establishment Clause. *Agostini*, 521 U.S. at 223.

Thus, for example, the Establishment Clause does not bar states from lending secular textbooks, free of charge, to students at religious private schools. *Allen*, 392 U.S. at 248. Similarly, a state may authorize its school boards to provide for transportation to and from schools, including religious private schools. *Everson*, 330 U.S. at 17. Likewise, the Establishment Clause does not forbid publicly paid teachers from providing secular remedial education on the premises of private religious schools where that program is monitored to "prevent or . . . detect inculcation of religion by public employees." *Agostini*, 521 U.S. at 234; *see also Mitchell*, 530 U.S. at 835 (holding that the Establishment Clause allows federally funded computers and other instructional equipment and materials to be provided to primary and secondary schools, religious and secular); *Trinity Lutheran*, 582 U.S. at 467 (holding that government aid provided to a church to resurface a playground did not violate the Establishment Clause). These forms of secular non-fungible aid are

not "instrumental in the teaching of religion," and therefore do not infringe the Establishment Clause. *Allen*, 392 U.S. at 248.

The same cannot be said of the IDEA support sought by Joshua Abraham High and Bethlehem Hebrew. Both schools seek funding, not secular non-fungible aid like math textbooks, transportation, or computers. *See* TEC § 502(c)(i) (reflecting that funding for special education is the only type of support for which the TEC provides). Because funds, unlike textbooks, are fungible, under Tourvania's IDEA program there is a risk that IDEA aid will be "diverted to the advancement of religion." *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring in judgment). That risk is heightened because, unlike other government aid programs, the IDEA, and the provisions of Tourvania's code implementing its program, lack measures to monitor how funds are used once disbursed to schools. *Cf. id.* at 802–03 (explaining that under Chapter 2 of the Education Consolidation and Improvement Act "private schools may not acquire control of Chapter 2 funds or title to Chapter 2 materials, equipment, or property").

Even if Tourvania IDEA funds were specifically allocated to provide secular special education and related services to children with disabilities, that aid will inevitably have "the 'effect' of advancing . . . religion," *Agostini*, 521 U.S. at 223, because Joshua Abraham High and Bethlehem Hebrew are "pervasively sectarian" institutions, *Mitchell*, 530 U.S. at 850 (O'Connor, J., concurring in judgment). Both are dual-curriculum Orthodox Jewish schools that administer both secular and religious studies. (R. at 9.) Their curricula are meant to "instill and strengthen" their students' "religious beliefs." (R. at 8.) The schools' missions are, respectively, "to promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning, and to develop a love for the State of Israel," and to "promote . . . passion for Torah," and "respect for tradition." (R. at 9.) Those are missions the Establishment Clause does not permit the government to directly

support. Even if the "secular activities" administered by the schools could "be separated out" from the religious ones, so that "they alone may be funded," Petitioners have not requested that relief. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 755 (1976). The aid they seek is religious in substance.

Tourvania's IDEA program also lacks the constitutional safeguards that have made similar programs allowable. Unlike the aid program challenged in *Agostini*, in which the city of New York sent "public school teachers into parochial schools to provide remedial [secular] education to disadvantaged children," 521 U.S. at 208, Tourvania's IDEA program requires private schools to furnish their *own* teachers to provide special education. *See* TEC § 502(d)(ii) (requiring applications for IDEA certification to "include . . . the names of [the school's] teachers with a credential authorizing them to provide special education services"). Even assuming the TEC refers only to teachers of secular subjects, it strains credulity to believe an employee of a pervasively sectarian religious private school could be effectively monitored to "prevent or . . . detect inculcation of religion" when the self-described mission of each institution and its employees is to inculcate religion. *Agostini*, 521 U.S. at 234.

Even if effective monitoring could be achieved, the TEC lacks a monitoring program. The TEC requires only one "onsite review within 90 days" of a private school receiving state certification to obtain IDEA funds. TEC § 502(d)(2). Because IDEA aid provided to Petitioner schools would have the impermissible effect of advancing religion, under the Establishment Clause Tourvania cannot waive the nonsectarian requirement.

C. The Policy Considerations Underlying the Establishment Clause Weigh Against Allowing the Direct Funding of Religious Private Schools Through the IDEA.

As early as the founding, James Madison, writing in his Memorial and Remonstrance, recognized the slippery slope that leads from the state funding religious institutions to other forms of religious compulsion. By prohibiting the compelled contribution of even "three pence only of [an individual's] property for the support of any one establishment," the Establishment Clause protects citizens from religious coercion; but it also protects religious institutions, including Petitioner schools, from secular influences as well.

When religious institutions accept government funding, they take on other obligations under federal law that may conflict with their religious missions. For example, Title VI of the Civil Rights Act of 1964 prohibits institutions that receive federal financial assistance from excluding or discriminating against individuals on the basis of religion. 42 U.S.C. § 2000d; Exec. Order No. 13,160, 65 F.R. 39775 (2000). Therefore, a Jewish private school that receives federal funding may soon be required by law to accept non-Jewish students and hire non-Jewish teachers, diluting and altering its religious character.

Reliance by religious institutions on government funding also creates the "potential for divisiveness." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). The Framers recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). One problem is that "[r]eligious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition." *Zelman*, 536 U.S. at 715 (Souter, J., dissenting). Not all Americans for example, will "acquiesce in paying for the endorsement of the religious Zionism" taught in schools like

Petitioners'. *Id.* at 716. Members of minority religions may also grow resentful at the fact that only those faiths with followings large enough to establish schools merit government funding.

That today we live in a period of relative religious harmony comes in part because of the faithful enforcement of Establishment Clause principles. State entanglement with religious schools gave rise to controversy across the country in the 19th century. The story of New York's schools is particularly informative, with competition for school funding among the Scotch Presbyterian, Jewish, Catholic, and Methodist communities leading to "bitter controversy." *Lemon*, 403 U.S. at 646 (Brennan, J., concurring). New York's interreligious conflict subsided only when the state legislature "prohibited the distribution of public funds to sectarian schools, and prohibited the teaching of sectarian doctrine in any public school," *Id.* That religious conflict only ended when New York adopted Establishment Clause principles demonstrates the wisdom in the Founders' design. Those policy considerations weigh against extending direct aid to Petitioner schools under the circumstances of this case.

CONCLUSION

Because the inclusion of Petitioner schools in Tourvania's IDEA program is not permitted by the Establishment Clause, or required by the Free Exercise and Equal Protection Clauses, Respondents urge the Court to affirm the Eighteenth Circuit's decision.

Respectfully submitted,

TEAM 2
Counsel of Record
1 Tourvania Dr,
Tourvania City, TV 12345
(123) 456 7890