TOURO UNIVERSITY
JACOB D. FUSCHBERG LAW CENTER
NATIONAL MOOT COURT COMPETITION
LAW & RELIGION
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No. 24-012

THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

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

Respondents.

BRIEF FOR THE PETITIONER

By Their Attorneys

Identification Number: 20

(Thirty-minute oral argument requested)

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QUESTION(s) PRESENTED

I. Whether § 502 of the Tourvania Education Code Violates the Plaintiff's rights under (a) the first amendment's free exercise clause, and/or (b) the fourteenth amendment's equal protection clause.

II. Whether the extension of IDEA funds to religious institutions violates the establishment clause of the First Amendment.

STATEMENT OF THE CASE

The petitioners, Cheryl and Leonard Flynn and their child H.F. (the "Flynn's), Barbara and Matthew Kline and their child B.K. ("the Klines"), Joshua Abraham High School and Bethlehem Hebrew Academy, are orthodox Jewish parents and private schools suing on behalf of themselves and their disabled children. The petitioners filed suit against the Tourvania Department of Education and Kayla Patterson[1] claiming Tourvania Educatoin Code violates the petitioners' constitutional rights under the First and Fourteenth Amendments. (Order *Jacobs J.*, 1:7, 2:2).[2] Specifically, the plaintiffs alleged Tourvania Education Code § 502(b) ("TEC") inhibited their First Amendment right to the Free Exercise of Religion. (OJ, 1:7, 6:b). In the same vein, plaintiffs allege Tourvania Education Code violates the Equal Protection Clause of the Fourteenth Amendment by extending funding to public and private nonsectarian schools but not to the plaintiffs religious-orientated school. OJ, 2:2, 6:b).

Tourvania Education Code § 502 is federally funded through the "Individuals with Disabilities Education Act" ("IDEA"). 20 U.S.C. §1400; (OJ, 1:8-9). The IDEA "offers states federal funds to assist in educating children with disabilities." (OJ, 2:13-15). IDEA's stated purpose is to "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE")." 20 U.S.C. § 1400(d)(1A); (OJ, 2:14-15). A State can receive IDEA funding if they comply with several statutory conditions, of the conditions the state must provide a FAPE to all eligible children. (OJ, 3:6-9). IDEA allows states to allocate funding to children who attend private religious schools. 20 U.S.C.§ 1412(a)(10)(A)(i)(III); (OJ, 5:1-4). IDEA mandates "no parentally placed private school child with a disability has an individual right to

[1] Respondent Patterson was sued in her official capacity as Superintendent of Public Instruction.
[2] "OJ" refers to the United States District Court Order by Judge Jacobs with its respective page and line numbers.

receive some or all of the special education and related services that the child would receive if enrolled in a public school." (OJ, 5:9-11). However, IDEA specifically dictates that '"decisions about the services that will be provided to parentally-placed private school children with disabilities" must be made "in accordance with § 300.137(c) and § 300.134(d)."' (OJ, 5:15-17). The services provided through IDEA funding must be secular, but may be provided by religious institutions. (OJ, 5:9-11).

The respondents moved for summary judgment on the grounds there is not a genuine issue of material fact. (OJ, 10:12-17). Specifically, respondents contend tTEC § 502(b) "is not only constitutional, but in fact is constitutionally required" under the Establishment Clause of the First Amendment. (OJ, 14:19-21).

The Tourvania District Court denied respondents' motion for summary judgment on the grounds that there were substantial questions of law necessitating review. (OJ, 16:1-2). The District Court concluded that Tourvania's "nonwaivable nonsectarian requirement… is a categorical exclusion of religiously affiliated families and schools" and therefore a violation of the Free Exercise Clause of the First Amendment and Equal Protection Caluse of the Fourteenth Amendment. (OJ, 12:19-22). Further, the Tourvania District Court rejected the respondents' view that the Establishment Clause of the First Amendment compelled the statutory difference between sectarian and nonsectarian schools. (OJ, 15:21-23).

The Tourvania District Court stayed the decision because the defendants expressed a desire to file an appeal. (OJ, 16:3-8). The District Court reasoned the appeal should be stayed because there were substantial questions of law which there could be grounds for differing opinions. (OJ, 16:5).

On Appeal, the Eighteenth Circuit for the United States Court of Appeals vacated and remanded the Tourvania District Court's decision for improperly denying summary judgment. (Order, Quinn J., 20:8-10).[3] The Eighteenth Circuit held that the TEC §502 did not hinder the plaintiff's constitutional rights under the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. (OQ, 19:14-22). The Court reasoned plaintiffs could receive other benefits from other programs, or they could send their child to a nonsectarian school. (OQ, 19:1-3).

Following the decision by the United States Court of Appeals for the Eighteenth Circuit the plaintiffs filed this appeal.

[3] "OQ" refers to the United States Court of Appeals for the Eighteenth Circuit Order by Judge Quinn with its respective page and line numbers.

SUMMARY OF THE ARGUMENT

I. The Eighteenth Circuit for United States Court of Appeals erred when it reversed the United States District Court for the District of Tourvania's denial of the respondents' motion for summary judgment. The Eighteenth Circuit erred when it found that TEC § 502 did not violate the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. TEC § 502 did violate the Free Exercise Clause because it was not neutral and generally applicable, and effectively punished the free exercise of religion by petitioners. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017) (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)). TEC § 502 did violate the Equal Protection Clause because it expressly and invidiously discriminates against a religious group. Wash. v. Davis, 426 U.S. 229, 248 (1976). Likewise, TEC § 502 fails to satisfy strict scrutiny by offering a compelling government interest because this Court has repeated held a greater separation of church and State than what is protected by the Establishment Clause is limited by the Free Exercise Clause. Espinoza v. Montana Department of Revenue, 140 S.Ct. 2246, 2260 (2020).

II. The extension of IDEA funds to religious institutions does not violate the Establishment Clause of the First Amendment because it is "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients". Carson as next friend of O. C. v. Makin, 596 U.S. 767, 775 (2022). The IDEA extends funds to religious private school when the children are placed there independently by their parents, and so this extension of funds does not violate the Establishment Clause.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD OF REVIEW.

Summary judgment is only proper where "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it has a bearing on the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1988). A material fact is at issue if it requires submission to a jury to settle the disagreement. *See* Scott v. Harris, 550 U.S. 372, 376 (2007). The facts must be viewed in the light most favorable to the non-moving party. Lujan v. Nat'l Wildlife Fed'n, 504 U.S. 555, 561 (1990). An appellate court reviews a lower court's ruling of summary judgment under the same legal standard. Hoffman v. Allied Corp., 912 F.2d 1379, 1383 (11th Cir. 1990).

II. THE TOURVANIA EDUCATION CODE VIOLATES THE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE AND THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

In relevant part, the Free Exercise Clause of the First Amendment establishes that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend I. "The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." Carson, 596 U.S. at 778 (citing Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 450 (1988)). Specifically, a law or regulation "violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." Id. The United States Supreme Court has consistently held that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" Trinity Lutheran, 582 U.S. at 458 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

The Free Exercise Clause requires law that burden's religion freedoms to be "neutral" and of "general applicability," or else it must be justified by a compelling government interest. Trinity Lutheran, 582 U.S. at 458. "Government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." Tandon v. Newsom, 593 U.S. 61, 62 (2021). "To satisfy it, government action 'must advance interests of the highest order' and must be narrowly tailored in pursuit of those interests." Espinoza v. Montana Department of Revenue, 140 S.Ct. 2246, 2260 (2020) (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 1993; quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

Under the Equal Protection Clause of the Fourteenth Amendment, no State shall "deny to any person within its jurisdiction the equal protection of the laws." Amend. 14, § 1. The Supreme Court has held "the purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willbrook v. Olech., 582 U.S. 562, 564 (2000) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)). Under the Fourteenth Amendment, the Free Exercise Clause applies to States to protect religious persons against unfair treatment and laws that burden the free exercise of religion. Espinoza, 140 S. Ct. at 2254.

A. The Tourvania Education Code infringes on the Petitioners' rights under the Free Exercise Clause because it is not neutral and generally applicable, and denies religious observers a generally available benefit.

The Tourvania Education Code is not neutral nor generally applicable, denies the Petitioners' a generally available benefit exclusively because of their religious observations, and prohibits the free exercise of religion. (OJ, 14:6-18). In Trinity Lutheran, the State of Missouri established the Missouri Scrap Tire Program, in which they used old tires to create a pour-in-place surface for children's playgrounds. Trinity Lutheran, 582 U.S. 449, 454 (2017). Nonprofit organizations can apply for this program, but assistance is granted based on the organization's needs. Id at 455. Trinity Lutheran Church Child Learning Center applied for the program and ranked fifth out of forty-four applicants, but because they are associated with the Trinity Lutheran Church, they were denied. Id at 455-56. Trinity Lutheran sued Missouri's Department of Natural Resources claiming denying the Center's application violated the Free Exercise Clause. Id.

The Court held the "department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Id at 462. Essentially, the Court found the Center would have been able to access to the publicly available benefit if they were not a Church. Id. Citing to a prior ruling, the Court reiterated "to condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." Id (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978)).

The Department argued they had not prohibited the Church from exercising its religious freedoms by declining benefits and did not meaningfully burden the Church's exercise of religion. Id. The Court explained that it is not just direct discrimination the Free Exercise Clause

forbids, but "indirect coercion or penalties on the free exercise of religion." Id at 463; (Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 450 (1988)). The Church's injury is its inability to compete with secular organizations for grant access because it is a church. Id.

This discrimination requires the strictest scrutiny. Id at 466. The Court requires a state interest of "the highest order" for justification. Id (citing McDaniel, 435 U.S. at 628). The Department's only interest offered was achieving a greater separation of church and state. Id. The Court concluded this cannot qualify as a compelling state interest "in the face of clear infringement on free exercise." Id. The Court held the Department's policy violated the Free Exercise Clause. Id.

About three years later, in Espinoza v. Montana Department of Revenue, the Supreme Court addressed the issue of whether a tuition assistance program giving a tax credit to donors that precluded the scholarship from being provided to religious provide schools violated the Free Exercise Clause. Espinoza, 140 S. Ct. at 2251. The State of Montana enacted this program to assist families with school tuition to schools that are a qualified education provider. Id. at 2251. However, the Montana State Constitution had a no aid provision that barred government aid to religious institutions. Id at 2252. Petitioners were ultimately denied access to the tuition assistance because they intended to use the funds at a private religious school. Id.

The Supreme Court explained under this no aid provision, "to be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control of affiliation. Id at 2256. The Court then explained that "placing such a condition on benefits of privileges 'inevitable deters or discourages the exercise of First Amendment rights.'" Id (citing Trinity Lutheran, 582 U.S. at 465). The scope of the Free Exercise Clause "protects against even

'indirect coercion,' and a State 'punishes the free exercise of religion' by disqualifying the religious from government aid …." Id (citing Trinity Lutheran, 582 U.S. at 462).

The Court emphasized the broad, sweeping nature of this no aid prohibition "burden's not only religious schools but also the families whose children attend or hope to attend them." Id at 2261. Further, the Court re-emphasized its precedent that parents have the right to provide their children with a religious up brining and send their children to private religious schools. Id. However, a no aid provision violates that right because it cuts families off from being able to access what is an otherwise publicly available benefit for the sole reason that they choose a religious school. Id. Therefore, the no aid provision violated of the Free Exercise Clause and was subject to strict scrutiny. Id at 2260.

The Montana Supreme Court stated that the no-aid provision in its State Constitution serves the State's interest in separating church and state greater than the Federal Constitution. Id. However, this Court ruled as it had before, stating "'that interest cannot qualify as compelling' in the face of the infringement of free exercise here." Id (quoting Trinity Lutheran, 582 U.S. at 466). Any attempt to achieve greater separation of church and state other than what is already guaranteed by the Establishment Clause is limited under the Free Exercise Clause. Id. The State's argument failed strict scrutiny. Id at 2260-61.

Lastly, the Supreme Court scrutinized the Montana Supreme Court for failing to recognize the application of the Supremacy Clause in this instance. The Supremacy Clause "'creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law.'" Id at 2262 (citing Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 324 (2015)). The U.S. Supreme Court instructed that the Montana Supreme Court should have disregarded this no aid provision "'conformably to the Constitution' of the United

States." Id (citing Marbury v. Madison, 5 U.S. 137 (1803). The Supremacy Clause holds that federal law is the "supreme law of the land" and it prohibits "discrimination against religious schools and the families whose children attend them." Id. Therefore, the no aid provision in Montana's State Constitution was held to be invalid as it violated the Free Exercise Clause and the Supremacy Clause. Id.

About two years later in Carson, the U.S. Supreme Court again held a tuition assistance program violated the Free Exercise Clause because it prevented families from directing received aid to religious institutions. 596 U.S. at 773. The State of Maine, due to the lack of available schools in certain regions, created a tuition assistance program. Id. If a citizen of the State is provided tuition assistance under the program, the school administrative unit had to pay the tuition at "the public or the approved private school of the parent's choice…." Id. However, the State of Maine imposed a "nonsectarian" requirement on any school to which funding could be directed. Id at 774. Petitioners filed suit against the commissioner of the Maine Department of Education claiming the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause. Id at 776.

The Court, looking to its precedent in Trinity Lutheran and Espinoza, stated that Maine was providing tuition assistance to a wide range of schools. Espinoza, 778; 140 U.S. at 2260; Trinity Lutheran, 582 U.S. at 463. However, Maine had carved out a specific exception – denying publicly available tuition assistance to religious schools. Carson, 596 U.S. at 780. "By 'conditioning the availability of benefits' in that manner, Maine's tuition assistance program – like the program in *Trinity Lutheran* – 'effectively penalizes the free exercise' of religion." Id. (citing Trinity Lutheran, 582 U.S. at 463). The Court held Maine's nonsectarian requirement violated the Free Exercise Clause and therefore must survive strict scrutiny. Id at 780.

Any law that discriminates against religious freedoms survives strict scrutiny in only rare cases. Id at 781. The Court emphasized its prior consistent holding that an "interest in separating church and state more fiercely than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." Id. "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." Id. Maine's nonsectarian clause failed strict scrutiny. Id. Since it failed strict scrutiny, the nonsectarian policy was deemed to violate the Free Exercise Clause. Id at 789.

a) The Tourvania Education Code is Not Neutral Because it Discriminates Against Religious Schools and Persons.

The Tourvania Education code expressly excludes otherwise eligible recipients of IDEA funding solely because of their religious affiliation. (OJ, 7:25-27). TEC § 502. Section 502(a) grants funding to private and public schools as long as they are nonsectarian. (OJ, 6:10-17). Section 502(b) proceeds to define "nonsectarian" as a private or nonpublic school that "is not owned, operated, controlled by, or formally associated with a religious group or sect, … ; and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group." TEC § 502(b). (OJ, 6:10-17). The TEC expressly precludes the extension of funds to schools solely because of their religious affiliation. (OJ, 6:10-17).

Essentially, a private school is able to access IDEA funding, a publicly available benefit, as long as they are not associated with any religion. (OJ, 6:10-17). Similarly, the day care center in Trinity Lutheran was denied funding solely because of their religious affiliation. 582 U.S. at 455-56. In Espinoza, the State of Montana had a tuition assistance program, but the Montana State Constitution had a no-aid provision to institutions that had a religious affiliation. 140 S. Ct.

at 2252. In Carson, the State of Maine provided tuition assistance and services for schools across the state, but, similar to the TEC, it imposed a nonsectarian requirement for schools to receive funding and services. 596 U.S. at 773-74.

In all three of these cases, Trinity Lutheran, Espinoza, and Carson, the U.S. Supreme Court consistently stated that conditioning the reception of otherwise publicly available benefits on an institutions religious affiliation "effectively penalizes the free exercise of religion." Id at 778 (citing Trinity Lutheran, 582 U.S. at 463). The Court in Espinoza explained that "placing such a condition on benefits of privileges 'inevitable deters or discourages the exercise of First Amendment rights.'" Espinoza, 140 S. Ct. at 2256 (citing Trinity Lutheran, 582 U.S. at 465). The scope of the Free Exercise Clause "protects against even 'indirect coercion,' and a State 'punishes the free exercise of religion' by disqualifying the religious from government aid …." Id (citing Trinity Lutheran, 582 U.S. at 462).

The TEC is effectively penalizing the free exercise of religion by disqualifying private religious schools because of their religious affiliations. See (OJ, 6:10-17). If the petitioners were not religious or associated with religious groups, then they would be able to access IDEA funding under the TEC. (OJ, 10:7-11). However, because of their religious affiliations, they are disqualified from receiving funding under the TEC. (OJ, 10:7-11). The Supreme Court has consistently held that this essentially discourages the free exercise of religion. Carson, 596 U.S. at 778 (citing Trinity Lutheran, 582 U.S. at 463). The TEC is not neutral and penalizes the free exercise of religion. See (OJ, 14:7-11).

b) The Petitioners, the Flynns and Klines, were excluded from otherwise publicly available benefits because of their religious beliefs and indirectly coerced into forgoing their religious beliefs.

The petitioners are unable to receive the benefits of IDEA funding under the TEC because of their Orthodox Jewish religious beliefs. (OJ, 8:6-7). For each of the petitioners, they are either denied benefits because of their religious beliefs, or are forced to forgo their religious beliefs to receive the funding under IDEA. (OJ, 8:6-7). The Flynns are sending their daughter to Fuschberg Academy, an Orthodox Jewish learning Center. (OJ, 8:6-7). Their daughter is receiving behavioral therapy, but the Flynns are forced to pay for this service out of their own pocket. (OJ, 8:8-9). Due to the TEC's nonsectarian requirement, the Flynns are forced to either continue to pay for their daughters' behavioral therapy instead of receiving an otherwise publicly available benefit under the TEC because of their religious beliefs, or they must forgo their religious beliefs and send their daughter to a public school to receive the benefits. (OJ, 8:8-9).

The Klines are Orthodox Jews who wish to send their daughter with autism to a religious school. (OJ, 8-9:21-23, 1-4). However, they are not able to receive the services that she needs. (OJ, 9:3-4). The Klines have been trying to place their daughter in an Orthodox Jewish school and receive the services their daughter needs but have not been unsuccessful because of the TEC's nonsectarian requirement. (OJ, 9:4-7). The Klines have now been placed in a position by the TEC where they must choose between services their daughter needs and their religious beliefs. (OJ, 9:7-10).

The Flynns have been excluded from what are otherwise available benefits because of their religious beliefs. (OJ, 10:7-11). The Klines are forced to choose between their religious beliefs and providing necessary behavioral services for their daughters. (OJ, 9:10-11). The scope of the Free Exercise Clause "protects against even 'indirect coercion,' and a State 'punishes the

free exercise of religion' by disqualifying the religious from government aid …." Carson, 596 U.S. at 778 (citing Trinity Lutheran, 582 U.S. at 462). TEC punishes the Flynns' free exercise of their religion by denying them otherwise publicly available benefits because they send their child to a religious school. (OJ, 10:7-11). The Klines must chose against their religious beliefs and services for their daughter. (OJ, 10:7-11). The TEC indirectly coerces the Klines into having to forgo their religious beliefs and send their daughter to public school to receive the services she needs. (OJ, 9:7-10). The TEC effectively excludes the Flynns and Klines from otherwise publicly available benefits because of their religious beliefs. (OJ, 10:7-11).

c) The Josh Abraham High School and Bethlehem Hebrew School were denied publicly available benefits solely because of their religious affiliation.

The TEC expressly discriminates against otherwise eligible institutions solely because of their religious beliefs. (OJ, 10:1). The Josh Abraham High School and Bethlehem Hebrew School both submitted applications for certification. (OJ, 10:1). Both applications complied with all requirements in the TEC, but their applications were denied because the schools could not comply with the TEC's nonsectarian requirement. (OJ, 10:5-7). If both schools did not have religious affiliations, they would be eligible under the TEC for IDEA funding. (OJ, 10:7-11).

The Court's precedent from Trinity Lutheran is directly on point. As described above, the Trinity Lutheran Church Child Learning Center applied for the Missouri Scrap Tire Program but was denied funding because of their association with the Trinity Lutheran Church. Trinity Lutheran, 582 U.S at 454-56. This Court found that if the Child Learning Center was not associated with the church, then it would have been eligible to receive the benefits under the Missouri Scrap Tire Program. Id at 462. Further, the Court ruled that the denial of access to such an otherwise generally available benefit because of a recipient's religious associations penalizes

the free exercise of religion and such policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." Id.

Here, the TEC is expressly discriminating against the Josh Abraham High School and Bethlehem Hebrew School by denying them what are otherwise available benefits solely because of their religion. (OJ, 9:12-20). The TEC is penalizing the schools for their religious beliefs. Under such a policy, a potential recipient of IDEA funds would be forced to choose between receiving what necessary funds might be and their religious beliefs. (OJ, 10:7-11). Conditioning the schools' ability to receive IDEA funding on their religious character violates their constitutional rights under the Free Exercise Clause. (OJ, 14:10-17).

d) The IDEA provides funding to religious schools for neutral services for special needs children.

The IDEA specifically states that children with disabilities "who are enrolled in private schools, including religious," may receive services. 20 U.S.C. § 1412(a)(10)(A)(i)(III). The extension of funding under IDEA to private religious schools is permittable because the Act states the services can be provided when the children are "parentally placed" and the services these children receive must be "secular, neural, and nonideological." 20 U.S.C. § 1412(a)(10)(A)(i)(III)/(vi)(II). Congress has clearly stated its intention to allow these services at religious schools. Id, (OJ, 4:21-23; 5:1-4). The denial of such services when children are parentally placed, and the services provided are neutral and secular, is a violation of the Free Exercise Clause. (OJ, 14:6-20).

Instructive case law on this issue is provided in Espinoza and Locke. In Locke, the State of Washington denied tuition assistance to the Petitioner who was looking to use the scholarship funds to pursue a devotional theology degree and preparation to join the clergy. Lock v. Davey,

540 U.S 712, 719 (2004). This Court held this denial was not a violation of the Free Exercise Clause because the recipient was going to specifically use the funds to become a pastor. Espinoza, 591 U.S. 2257. The Court in Espinoza distinguished the facts of Locke, where the petitioner was planning to use the funds for furthering a specific religious endeavor, from the complete denial of funds to a religious institution simply because of its religious character. Id. Looking to the Montana no aid provision of its State Constitution, this Court held the circumstance differed from Locke because the denial was because of a school's religious identity – forcing schools to choose between receiving benefits and holding their religious beliefs. Id.

Similar to Espinoza, the TEC has an outright ban on religious institutions from receiving funding solely because of their religious character. See 140 S. Ct. at 2260. This forced students, families, and schools from having to choose between funding and their religious beliefs –. Id. IDEA allows for funding of parentally placed private school children and provides that services can be provided as long as they are secular and neutral. (OJ, 4:21-23; 5:1-4). Nothing in the Petitioner's claims indicates they are looking to support a religious endeavor similar to that in Locke. *Contra* 540 U.S at 719. The denial of the Petitioners right to provide their children with adequate services and exercise their religious freedom is in direct violation of the Free Exercise Clause. (OJ, 4:21-23; 5:1-4).

e) Tourvania has not provided any compelling government interest to survive strict scrutiny.

The TEC violates the Free Exercise Clause and is subject to strict scrutiny. Carson, 596 U.S. at 780. Any law that discriminates against religious freedoms survives strict scrutiny in only rare cases. Id at 781. The Court requires a state interest of "the highest order" for justification. Trinity Lutheran, 582 U.S. at 466. (citing McDaniel, 435 U.S. at 628).

There is no compelling government interest offered by respondent throughout the record. See (OJ). The only suggested compelling government interest in the record is stated by the Court of Appeals, stating the nonsectarian requirement "in fact assures neutrality because it eliminates the unconstitutional risk that a government official, rather than a private individual, might make the choice about where to direct aid and thereby appear to favor any one religiously-affiliated recipient over another." (OQ, 20:2-5). Therefore, the only articulable "compelling government interest" in the record is to secure a greater separation of church and state. (OQ, 20:2-5).

In Trinity Lutheran, the Department's only interest offered was achieving a great separation of church and state. 582 U.S. at 466. The Court concluded this cannot qualify as a compelling state interest "in the face of clear infringement on free exercise." Id. The Court held the Department's policy violated the Free Exercise Clause. Id.

In Espinoza, the Montana Supreme Court stated that the no-aid provision in its State Constitution serves the State's interest in separating church and state greater than the Federal Constitution. 140 S. Ct. at 2260. Regarding this alleged government interest, this Court held "'that interest cannot qualify as compelling' in the face of the infringement of free exercise here." Id (quoting Trinity Lutheran, 582 U.S. at 466). Any attempt to achieve greater separation of church and state other than what is already guaranteed by the Establishment Clause is limited under the Free Exercise Clause. Id.

In Carson, this Court emphasized its prior consistent holding that an "interest in separating church and state more fiercely than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." Carson, 596 U.S. at 781. "A State's antiestablishment interest does not justify enactments that exclude some members of the

community from an otherwise generally available public benefit because of their religious exercise." Id. Maine's nonsectarian clause failed strict scrutiny. Id.

This Court has repeatedly ruled that attempting to achieve a greater separation of church and state than what is guaranteed by the Establishment Clause is not a compelling government interest to survive strict scrutiny in the face of blatant religious discrimination. Carson, 596 U.S. at 781. As described thoroughly above, the TEC blatantly and expressly excludes and discriminates against religious persons and schools solely because of their religious character. (OJ, 14:6-14). A compelling government interest is required to survive the strictest scrutiny this discrimination triggers. Trinity Lutheran, 582 U.S. at 466. Attempting to achieve greater separation of church and state does not defeat strict scrutiny. Carson, 596 U.S. at 781. This Court has made this abundantly clear in its recent rulings. Id. No other potential government interest is offered in the record, nor can one even be imagined in the face of such significant religious discrimination. *See* (OJ). Consistent with this Court's holdings, the TEC fails strict scrutiny. (OJ, 12:21-23; 13:1-3).

f) The TEC directly conflicts with the IDEA and is void under the Supremacy Clause.

The TEC directly conflicts with the IDEA, a federal law, and therefore is void under the Supremacy Clause because federal law is the supreme law of the land. U.S. Const. Art. VI cl. 2. Under the Supremacy Clause, all federal laws are the supreme law of the land and judges in each state are bound by them. Id. The Supremacy Clause "'creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law.'" Espinoza, 140 S. Ct. at 2262 (citing Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 324 (2015)). In Espinoza, the Montana Supreme Court ignored the Supremacy Clause in its ruling, as the Court

of Appeals has done here, and this Court instructed that the Montana Supreme Court should have disregarded the no aid provision in its State Constitution because it conflicts directly with federal law, the supreme law of the land. Id. As such, this Court held the no aid provision to be invalid under the Supremacy Clause. Id.

Similarly, the IDEA is a federal law passed by Congress. The IDEA expressly states the parentally placed children at private religious schools may receive funding for services. 20 U.S.C. § 1412(a)(10)(A)(i)(III). The TEC directly conflicts with this federal law because it expressly states that religious schools are not eligible for IDEA funding. TEC § 502(a). Due to this conflict in law between the IDEA, a federal law, and the TEC, a local law, the IDEA is therefore the "supreme law of the land" and trumps the TEC. U.S. Const. Art. VI cl. 2. Therefore, the TEC's nonsectarian requirement is void under the application of the Supremacy Clause. Id.

The Court of Appeals ruling should be reversed because the TEC is not a neutral and generally applicable law, expressly discriminates against religious persons and schools, directly and indirectly coerces persons and schools from practicing their religious beliefs, fails strict scrutiny, and it directly conflicts with federal law under the IDEA. (OJ, 14:13). Therefore, the TEC violates the Supremacy Clause and the Free Exercise Clause. (OJ, 14:13).

B. THE PLAINTIFF'S RIGHTS WERE VIOLATED UNDER THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE.

a) Standard of Review

The Tourvania Education Code attempts to serve neutral ends but, in its effect, runs afoul of the Equal Protection Clause of the Fourteenth Amendment. *See* Davis, 426 U.S. 229, 248 (1976) (finding a neutral statute in violation of the Equal Protection Clause where, in practice, the statute burdened one race). This Court has held that the "invidious quality of a law claimed to

be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Id. at 240. Legal classifications made based on race, religion, national origin, etc. are subject to the strictest of scrutiny. *See* id. at 242.

b) The Tourvania Education Code is Discriminatory on its face.

Laws that are discriminatory on their face must be subject to the strictest of scrutiny. Hunt v. Cromartie, 526 U.S. 541, 546 (1991). A law lacks facial neutrality when the law is written with explicit classifications regarding a protected class. Id. Facially discriminatory laws are constitutionally suspect and subject to strict scrutiny. Id. "When otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," we must apply strict scrutiny." Espinoza, 140 S. Ct. at 2260 (internal quotations omitted).

The Tourvania Education Code is discriminatory on its face and, therefore, must be strictly scrutinized. (OJ, 6:14-16). The TEC § 502 denies aid based on an educational institution's religious status. (OJ, 6:14-18). A law is only facially neutral when the law does not contain a classification. Hunt, 526 U.S. at 546. TEC § 502 contains a religious classification; it states,

> (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.
> (b) As used in part (a), "nonsectarian" means a private, nonpublic school that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility; and, whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group.

(OJ, 6:11-13). The law is discriminatory on its face, as evidenced by the fact that the law bars religious groups from receiving funding. (OJ, 6:11-13). The classification within TEC § 502 necessitates strict scrutiny review. *See* Espinoza, 140 S. Ct. at 2260.

c) The Tourvania Education Code has a discriminatory purpose.

A law deemed facially neutral warrants strict scrutiny if there is evidence that the law was motivated by a discriminatory purpose. *See* Hunt, 526 U.S. at 546. Proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Hernandez v. NY, 500 U.S. 352, 360 (1991). Intl. Union, United Auto., Aerospace and Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"). In Pers. Adm'r of Mass. v. Feeney, the court held that "certain classifications, in themselves, infer antipathy." 442 U.S. 256, 272 (1979) (noting that certain classifications, such as race, religion, etc. are presumptively invalid). In Davis, the court held that a statute does not violate the Equal Protection Clause simply because the statute disproportionately impacts a protected class; rather, the purpose of the law must be to discriminate. 426 U.S. at 229. While evidence of a discriminatory purpose is required to show a violation of the Equal Protection Clause, the court in Arlington Heights v. Metropolitan Housing Dev. Corp. opined that "disproportionated impact may afford some evidence that an invidious purpose was present." 429 U.S. 252, 266 (1977). Feeney, 442 U.S. at 279 (reasoning a discriminatory purpose implies that the drafter wrote the law "because of," not merely "in spite of," the adverse effect the statute would have on a group).

Even if TEC § 502 is not discriminatory on its face, TEC § 502 has a discriminatory purpose and, therefore, runs afoul of the Equal Protection clause. (OJ, 7:20-6). The discriminatory purpose of the TEC § 502 is evidenced by the fact that the code limits the scope

of IDEA funding. (OJ, 6:11-13). IDEA states that federal services may be provided to children with disabilities at private religious and non-religious schools. (20 U.S.C. § 1412(a)(10)(A)); (OJ, 2:4). However, TEC § 502 limits the scope of this funding by stating that IDEA services provided by private schools can only be allocated to nonsectarian schools. (OJ, 6:11-13).

The disproportionate impact that TEC § 502 has on the petitioners is evidence the statute was enacted with an invidious purpose. *See* Arlington Heights, 429 U.S. at 266 (reasoning that a negative impact on a group can provide evidence that an invidious purpose was present). Here, the petitioners were denied aid for special education programs because their children attend Orthodox Jewish education centers. (OJ, 8:4-7). The two perspective schools the petitioners attend, Joshua Abraham High School and Bethlehem Hebrew Academy, have a mission to promote Jewish tradition, heritage, and values. (OJ, 9:13-16). The petitioners send their children to these schools because their religious beliefs obligate them to send their children there. (OJ, 8:4-5, 21-23). The petitioner schools meet all the requirements to receive special education funding. (OJ, 10:1-7). However, the Respondent denied the petitioner access to the education fund solely because the nonsectarian requirement within TEC § 502 bars them from receiving the federal funds. (OJ, 10:7-11). As a result, the nonsectarian provision within TEC § 502 had a disparate impact, evidence the law was enacted with discriminatory intent. (OJ, 7:22-26).

d) The Classification with the Tourvania Education Code is Invidious.

"The Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *See* Lovings v. Virginia, 388 U.S. 1, 10 (1967). The purpose of the 14th Amendment is to eliminate all state sources of invidious discrimination. *See* Id. Discrimination is not invidious simply because it applies to a protected clause; discrimination is invidious when a law subjects any group to

oppressive treatment. *See* Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 541 (1942) (finding discrimination invidious when Oklahoma mandated sterilization of habitual offenders). In Harper v. Virginia State Bd. of Elections, the court found that the poll tax ran violated the Equal Protection Clause because the poll tax necessitated a classification on the basis of income. *See* 383 U.S. 663, 668 (1966).

The discrimination within the Tourvania Education Code is invidious discrimination because it targets religious groups. *See* (OJ, 6:11-13). As this Court has made clear, the classification need not be against a protected class. Skinner, 316 U.S. at 541. Simply singling out a group in an invidious manner is in violation of the Equal Protection Clause. *See* Id. However, the Tourvania Education Code has a classification that is both against a protected class and is invidious. *See* (OJ, 6:11-13). The Tourvania Education Code singles out all secular disabled children by rejecting aid on the basis of their religious affiliation. (OJ, 6:11-13). This type of discrimination is facially discriminatory and invidious. (OJ, 6:11-13). This is the type of discrimination that the Equal Protection Clause was enacted to protect against. *See* Lovings, 388 U.S. at 10.

e) The Tourvania Education Department does not have a Compelling Interest that is Narrowly Tailored to validate the TEC § 502.

The Equal Protection Clause necessitates strict scrutiny where the legal classification impermissibly interferes with a fundamental right or disadvantages a suspect class. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). Strict scrutiny is applied to cases where the law infringes on a fundamental right, such as the Free Exercise of Religion. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 106 (2022). A distinction made in the law based on the classification of a suspect class necessitates strict scrutiny where the law hinders religious exercise. Carson, 596 U.S. at 779. Laws that make distinctions that are irrational,

irrelevant, unreasonable, arbitrary, or invidious violate the Equal Protection Clause. Harper, 383 U.S. 673. "A law that targets religious conduct for distinctive treatment. . . will survive strict scrutiny only in rare cases." Carson, 596 U.S. 779 (internal quotations omitted). To satisfy strict scrutiny, the government must show that the non-sectarian requirement in TEC § 502 is "narrowly tailored" to achieve a "compelling" government interest. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (Internal quotations omitted).

The Tourvania Education Code necessitates strict scrutiny review because § 502 infringes on a fundamental right and disadvantages a suspect class. (OJ, 16:1-8). TEC § 502 infringes on the petitioner's fundamental right to free exercise of religion by carving out an exception to the funding of secular schools. (OJ, 6:11-13). Further, TEC § 502 classifies a suspect class, religious private schools, in violation of the Equal Protection Clause. (OJ, 6:11-13). As a result, TEC § 502 must satisfy strict scrutiny, which necessitates they prove that the classification was put in place to advance a compelling government interest and must be narrowly tailored to advance that interest. *See* Carson, 596 U.S. at 779. Tandon, 593 U.S. at 63 (finding the government fails to satisfy strict scrutiny where they fail to show that religious gatherings pose a greater risk to public health than non-religious gatherings). Tourvania fails to satisfy strict scrutiny as the classification of secular vs. non-secular schools is not necessary to achieve the government's interest in keeping church and state separate. (OJ, 14:14-16). As the District Court concluded, even if the government has a strong or compelling interest, "the overt, wholesale discrimination against religious families and religious schools cannot possibly be the least restrictive means of furthering any such interest." (OJ, 14:16-18).

III. THE EXTENSION OF IDEA FUNDS TO RELIGIOUS INSTITUTIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Establishment Clause of the First Amendment states "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1. The Establishment Clause applies to states through the Fourteenth Amendment. Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002). The purpose of the Establishment Clause is to prevent States "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." Id (quoting Agostini v. Felton, 521 U.S. 203, 222-23 (1997)). The Establishment Clause is meant to perpetuate the separation of church and State but is limited by the Free Exercise Clause. Wildmar v. Vincent, 454 U.S. 263 at 276 (1981). As this Honorable Court has held before, "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." Carson, 596 U.S. at 775.

A. IDEA's Extension of Funds to Religious Private Schools Does Not Violate the Establishment Clause.

The IDEA extension of funds does not violate the Establishment Clause because the funds are directed to secular and nonsecular schools at the election of benefit recipients, not by the government, and it requires that the services provided are secular and neutral. (OJ, 15:21-23). The extension of funds to a religious institution does not violate the Establishment Clause if the funds are extended at the direction of private recipients. Zelman, 536 U.S. 662-63. The separation of church and State is already guaranteed by the Establishment Clause, so if public funds flow to religious institutions through independent direction of private beneficiaries there is no violation of the Establishment Clause. Id at 781.

In Zelman, the State of Ohio passed a pilot scholarship program providing financial assistance to families in a covered district offering two kinds of basic assistance: (1) providing

"tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing," and "tutorial aid for students who choose to remain enrolled in public school." Zelman, 536 U.S. at 645. The program allowed any private school, religious or not, to participate and accept students as long as it was covered in the district. Id. A group of Ohio taxpayer's brought suit in the United States District Court alleging this Ohio state law violated the Free Exercise Clause. Id at 648.

The Supreme Court began by noting that its jurisprudence for government programs "or true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private citizens" has been consistent. Id at 649; see Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Dept of Servs for Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). The Court held Mueller, Witters, and Zobrest "make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own independent private choice, the program is not readily subject to challenge under the Establishment Clause." Zelman, 536 U.S. at 652. The Court continued to uphold this position by holding in this case that the Ohio program was entirely neutral with respect to religion because it provided the benefit to a wide group of individuals who were accepted into the program only by financial need and residence within the covered district. Id at 662. As such, the program was of "true private choice" and did not violate the Establishment Clause. Id at 662-63.

In Carson, the Supreme Court reiterated that "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." Carson, 596 U.S. at 781. This requires

complete neutrality in government funding programs. The Court ruled there was "nothing neutral about Maine's program. Id. The State pays tuition for certain students at private schools – so long as the schools are not religious." Id.

As described by the District Court below, the IDEA recognizes that families might choose to place their disabled children in private religious schools in addition to nonreligious private and public schools. (O.J., 4:21-22). IDEA expressly allows the participation of these children in religious schools. 20 U.S.C. § 1412(a)(10); (O.J., 4-22-23). Along with other requirements and regulations, disabled children are "entitled to 'equitable services' that must be 'secular, neutral, and non-ideological' even when provided in religious schools." (O.J., 5;9-100; 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Benefits recipients from IDEA funds direct independently where the funds go. See Zelman, 536 U.S. at 652

The IDEA does not direct where funds received by recipients must go. 20 U.S.C § 1412(a)(10); (OJ, 4:21-23; 5:1-4). IDEA permits funds to be extended at the direction of the beneficiary to any school - public or private, including religious schools. 20 U.S.C. § 1412(a)(10)(A)(i)(III); (OJ, 5:1-4). Since IDEA does not restrict where funds can be extended to by recipients, the Act is neutral and generally applicable to all institutions, regardless of religion. In both Zelman and Carson, the Supreme Court held that an act is neutral if the act allows benefits recipients to independently direct where the received funds go. Zelman, 536 U.S. at 652; Carson, 596 U.S. at 7793. Ultimately, because the acts were neutral, the Court held they did not violate the Establishment Clause. Zelman, 536 U.S. at 652; Carson, 596 U.S. at 779.

The IDEA is a neutral and generally applicable act which does not fully restrict where a benefits recipient can independently direct funds for special needs program assistance to a public, private non-religious, or religious private school. 20 U.S.C. § 1412(a)(10)(A)(i)(III); (OJ,

5:1-4). Therefore, the IDEA does not violate the Establishment Clause because the funds are directed by independent beneficiaries. See Zelman, 536 U.S. at 652.

CONCLUSION

For the reasons above, the Petitioners respectfully request that this honorable Court reverse the United States Court of Appeals for the Eighteenth Circuit judgment because there are genuine issues of material fact, and the Respondents are not entitled to judgment as a matter of law.

The Petitioner(s) requests a 30-minute oral argument.

Date: March 2, 2024 /s/ *Team # 20*

CERTIFICATE OF COMPLAINCE

We hereby certify that all members of Team No. 20 have received no assistance in the preparation of our brief; the work set forth in our brief is original; and, our brief has been prepared in accordance with all rules set forth in the Touro University's 10th Annual National Moot Court Competition In Law and Religion Rules.