Docket No. 24-012

IN THE SUPREME COURT OF THE UNITED STATES

April Term, 2024

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR THE RESPONDENTS

Team 4

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QUESTIONS PRESENTED

I. Under § 502 of the Tourvania Education Code providing IDEA funds for the free appropriate public education for handicapped persons, does the nonsectarian requirement violate the petitioners' First Amendment Free Exercise rights, when petitioners refuse to attend the public institution and instead elect to attend a private religious secondary school?

II. Under § 502 of the Tourvania Education Code providing IDEA funds for the free appropriate public education for handicapped persons, does the nonsectarian requirement violate the petitioners' Fourteenth Amendment's Equal Protection rights when petitioners were provided a free appropriate public education irrespective of their religious affiliation?

III. Under the Individuals with Disabilities in Education Act, does the extension of funds to sectarian schools violate the Establishment Clause when the funding carries with it the requirement of direct and continued oversight by State officials over the schools to ensure proper implementation of the educational services required by each student?

STATEMENT OF THE CASE

I. Statement of Facts

In 1975, Congress enacted the Education for All Handicapped Children Act. (R. at 2). Known today as the Individuals with Disabilities Education Act ("IDEA"), the law is meant to offer states federal funding for the assistance of educating children with disabilities. (R. at 2). As part of its primary purpose, the IDEA is meant to ensure that all children with disabilities are provided with a free appropriate public education ("FAPE") which includes special education and

related services as well as individualized consideration and instruction for each child. (R. at 3). "Special Education" under the IDEA means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," and it includes instruction in settings such as the classroom, home, hospitals, and institutions, as well as "other settings." (R. at 3). "Related services" include services required to assist a disabled child in receiving his or her special education benefit, which may include speech-language pathology and audiology services, physical therapy, counseling, recreation, orientation and mobility services, and diagnostic services. (R. at 3).

To meet IDEA requirements, every State must begin by creating a "highly individualized, scrupulously detailed document" known as an Individualized Education Plan ("IEP") for each disabled student. (R. at 3–4). The IEP is prepared through direct consultation between the student's parents/guardians, teachers, school officials, and a qualified representative of the local education agency ("LEA"). (R. at 3–4). Required contents of an IEP include statements on the child's level of academic achievement and performance, annual goals, and the specific educational services to be provided to the child, as well as the projected date for initiation, anticipated duration of such services and objective criteria and schedules for determining on at least an annual basis, whether these objectives have been achieved. (R. at 4). Additionally, the IEP itself must also be reviewed and revised (if necessary) annually. (R. at 4).

While the IDEA provides that services to parentally placed private school children with disabilities may be provided on the premises of private, including religious, schools, such accommodations carry with them additional requirements. (R. at 4–5). LEA's must spend a "proportionate" share of their IDEA funds on parentally placed private school children with special education needs following "timely and meaningful" consultation with the private school's

representatives. (R. at 5). However, these children are entitled only to "equitable services" that must be "secular, neutral, and non-ideological" even if provided in the environment of a religious school. (R. at 5). Furthermore, regulations passed pursuant to the IDEA have stated that "no parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." (R. at 5). Under the provisions of the IDEA, LEA's must create a "services plan" that the LEA will make available to parentally-placed private school students based on its consultation with private school officials and parents. (R. at 5–6). LEA's must also ensure that "a continuum of … placements," including private schools, to meet the varied needs of disabled children. (R. at 6).

As a recipient of IDEA funds, the State of Tourvania passed its Education Code §502 to ensure IDEA compliance. Notably, the Code includes a nonwaivable provision that requires IDEA funds to be used exclusively at "nonsectarian" institutions. (R. at 6). The Code states the following:

Tourvania Education Code § 502 (TEC § 502)

(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.

(c) An LEA's placement of one of its students in a nonpublic school allows the LEA to receive state funding for that student because such students are deemed to be "enrolled in public schools" for funding purposes.

> (i) The LEA pays the nonpublic school pursuant to a contract between the LEA and the nonpublic school. The contract for nonpublic schools to provide special education and

related services must incorporate provisions concerning instruction, program development, staffing, documentation, IEP implementation, and LEA supervision.

(d) LEAs may enter into contracts only with state-certified nonpublic schools.

(i) To be certified, nonpublic schools must apply with the Superintendent of Public Instruction and meet several requirements.

(1) The Superintendent is authorized to certify, conditionally certify, or deny certification.

(2) The Superintendent must conduct an initial validation review before granting an initial conditional certification, and then must conduct an onsite review within 90 days of that.

(ii) An application for certification must include" a description of the Tourvania Board of Education-adopted core curriculum; instructional materials used by general education students; description of the special education, designated instruction and services provided to individuals with exceptional needs; the names of its teachers with a credential authorizing them to provide special education services; and, copies of the credentials of said teachers.

(1) When a nonpublic school applies for certification, it cannot petition for a waiver of the nonsectarian requirement.

(iii) An institution applying for nonpublic certification must also agree that it will maintain compliance with the IDEA.

(iv) Administrators and staff of the nonpublic school must hold a certificate, permit, or other document equivalent to that which staff in a public school are required to hold.

(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.

(R. at 6–7).

Plaintiffs Cheryl and Leonard Flynn (the "Flynns") and Barbara and Matthew Kline (the "Klines") are Orthodox Jewish parents of disabled children, H.F., and B.K. respectively. (R. at 1). Both children have been diagnosed with autism. H.F., now five years old, attended an Orthodox Jewish preschool where she received occupational, behavioral, and speech therapy that the Flynns paid for out of pocket. (R. at 8). H.F. now attends the Orthodox Jewish Learning Center Fuchsberg

Academy, where she receives behavioral therapy (15 hours per week) and occupational therapy (45 minutes per week) which the Flynns bear the cost of in addition to the school's regular tuition. (R. at 8). The Flynns concede that although H.F. might qualify to receive more services at a public school than she receives at Fuschberg, they did not seek a FAPE from Tourvania Central School District ("TCSD") or have H.F. evaluated by TCSD personnel because sending H.F. to a public school would require them to compromise their religious beliefs. (R. at 8).

Like the Flynns, the Klines believe that their religious convictions obligate them to send their children to an Orthodox Jewish school. (R. at 8). The Klines allege that they have been thwarted in their efforts to provide such an education for their 3-year-old daughter B.K. because of Tourvania's nonwaivable nonsectarian requirement. (R. at 9). The Klines allege that B.K. has been attending a public school since her preschool days where she is receiving the special education services she needs, but that she has not performed well there academically. (R. at 9). They also complain that B.K. does not receive special education and related services on both secular and Jewish holidays and that B.K. is often served non-kosher food. (R. at 9).

The Joshua Abraham High School and the Bethlehem Hebrew Academy are co-educational, Orthodox Jewish secondary schools that offer both religious and secular studies. (R. at 9). Both schools' mission is to promote the values of the Torah, instilling respect for hard work and Jewish traditions. (R. at 9). Both schools seek to be qualified under Tourvania law as certified nonpublic schools that can provide the special education services envisioned by the IDEA, and both schools have applied for certification. (R. at 9–10). According to the allegations, although both schools have complied with the principal requirements set forth in the Trouvania Education Code, both applications were denied by Superintendent Patterson because they are sectarian schools.

Plaintiffs thus collectively brought this action alleging that certain provisions of Tourvania law violate the Free Exercise Clause of the First Amendment because they are being denied the special education funds authorized by the IDEA solely on the basis of their religious affiliation. (R. at 1). Plaintiffs further allege that these same circumstances violate the Equal Protection Clause of the Fourteenth Amendment because Tourvania is discriminating against Orthodox Jewish families with disabled children and the Jewish schools that seek to offer them special education services by extending IDEA funding to public and nonsectarian schools and their disabled students but not to Plaintiffs. (R. at 2).

II. Procedural History

The United States District Court for the District of Tourvania rendered an opinion on the matter of Flynn and Kline v. Tourvania Dept. of Education to determine whether Section 502 of the Tourvania Education Code violates both the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. (R. at 1). Plaintiff's claim that Section 502 of the Tourvania Education Code violates both the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment was decided on October 1, 2023. (R. at 7). The District Court found that the Plaintiff's rights were violated because both families had the fundamental right to control their children's upbringing. (R. at 13). The District Court denied the Tourvania Dept. of Education's motion for summary judgment on this claim. (R. at 13). This decision was immediately appealed to the United States Court of Appeals for the Eighteenth Circuit. (R. at 16). The United States Court of Appeals for the Eighteenth Circuit decided this case on January 19, 2024, ruling that the District Court's understanding of the relevant Free Exercise jurisprudence was incorrect, and this court held that Tourvania's nonwaivable nonsectarian requirement did not substantially burden the appellee's exercise of religion (R. at 17).

The decision for the Appellant's summary judgment was remanded back to the District Court, and the District Court was directed to enter summary judgment in favor of the Appellants. (R. at 20). Petitioners filed to have this decision appealed to the United States Supreme Court. (R. at 21). The United States Supreme Court provided an order granting certiorari on this matter in the October Term of 2024. (R. at 21).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Eighteenth Circuit Court of Appeals. The Free Exercise Clause is generally interpreted to prohibit discrimination from a public benefit for a person or entity's religious character. The benefit of a "Free Appropriate Public Education," which is guaranteed by Tourvania's Statutory scheme is provided irrespective of a person's religion. The federal regulatory scheme of IDEA benefits provides the benefit of a "free appropriate public education," and this Court has always interpreted the legislative intention to serve this goal. Petitioners fail to show that there was state discrimination preventing petitioners from receiving a free appropriate public education as a result of their religious affiliation. Absent a showing of any material fact indicating direct discrimination as a consequence of the petitioner's religious status, an entry of summary judgment resolves the Free Exercise claim in favor of the respondents. The Equal Protection Clause of the Fourteenth Amendment protects from prohibitive discrimination. Petitioners fail to show that there was state discrimination preventing petitioners from receiving a free appropriate public education. Therefore, the Fourteenth Amendment Equal Protection Clause protects is not applicable in this case.

The extension of IDEA benefits to a religious school is also violative of the Establishment Clause because such a practice is antithetical to the historical practices and understandings of the

founding fathers. It is a practice that was clearly intended to be forbidden by the Founding Fathers, because it requires direct and long-term supervision by the state over religious organizations. This type of government entanglement with religion was viewed as a particularly pernicious threat to American democracy by the authors of the Bill of Rights. For these reasons, this Court should affirm the decision of the Court of Appeals for the Eighteenth Circuit.

ARGUMENT

I. THE FIRST AMENDMENT OF THE BILL OF RIGHTS PROVIDES CONGRESS SHALL MAKE NO LAW PROHIBITING THE FREE EXERCISE OF RELIGION, AND TOURVANIA DOES NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THERE IS NO DISCRIMINATION HERE.

The First Amendment, in part, reads that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise clause provides that denying benefits to a person on account of their personal religious identity imposes a penalty on the free exercise of religion, such a restriction can only be justified by a state interest "of the highest order." *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). To succeed on a Free Exercise claim, a plaintiff has the burden to show that the challenged state action "substantially burdens the exercise of religion." *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 690 (2014). The challenged statute must have a compelling governmental interest, and also be in the least restrictive means of showing that interest. *Hobby Lobby*, 573 U.S. at 691-92.

The First Amendment prohibits the government from "mak[ing a] law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. This Court's decisions have recognized that a burden on religious exercise may occur both when a State proscribes religiously motivated activity and when a law pressures an adherent to abandon their religious faith or practice. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2279 (2020). The Free Exercise clause is a prohibition on the

authority of the government, and the highest Court has never held a statute unconstitutional that fails to benefit religious exercise. *See Lyng v. Nw. Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988) ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."). The Supreme Court has observed that disqualifying an entity from a public benefit "solely because of [the entity's] religious character" amounted to "a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 453 (2017).

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Espinoza*, 140 S. Ct. at 2254; *Carson v. Makin,* 596 U.S. 767, 790 *(2022)*; *McDaniel*, 435 U.S. at 620. This makes the First Amendment binding on the states.

A. The Benefit of a "Free Appropriate Public Education," Guaranteed by Tourvania's Statutory Scheme is Provided Irrespective of a Person's Religious Affiliation.

In the present case, a benefit, the "free appropriate public education" was guaranteed to handicapped children, and was provided in Tourvania irrespective of the recipient's religious status. However, petitioners misrepresent the legislature and assert that this highest court should interpret more. The Religion Clauses of the First Amendment have long been understood to provide benevolent neutrality, which means permitting religious exercise "without sponsorship and without interference." *Walz v. Tax Com. of the City of New York*, 397 U.S. 664, 666 (1970); *Carson v. Makin*, 596 U.S. 767, 791 (2022). There is some "play in the joint" of the free exercise clause and the establishment clause, and historically the Court provides States legislative leeway by allowing a State to further anti-establishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion. *Locke*

v. Davey, 540 U.S. 712, 715 (2004). In the present case, the petitioner would have this Court believe that the federal law, 20 U.S.C. § 1400 (§ 1400), which provides for IDEA funds, and the Tourvania Educational Code §502 (TEC §502) provides a benefit by serving disabled persons with a privatized Orthodox Jewish education, or otherwise, that IDEA funds are compensatory in nature. Nowhere in either statute will this language be found. The petitioner's assertions go well beyond what the legislature enacted, and this interpretation misunderstands the legislative intention written into §1400 and TEC § 502.

B. The Federal Statutory scheme of IDEA Benefits Provides for a "Free Appropriate Public Education," and this Court has Consistently Interpreted the Legislative Intention to Serve this Primary Goal.

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a "free appropriate public education' available to all children with disabilities residing in the State." 1412(a)(1)(A); *Forest Grove School District v. T. A.*, 557 U.S. 230, 232 (2009); *Honig v. Doe*, 484 U.S. 305, 309 (1988); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.,Westchester Cnty. v. Rowley*, 458 U.S. 176, 189 (1982). Since the record is silent on the specific legislative intention of TEC §502, this Court should hold that the legislative intention of 20 U.S.C. § 1400 et seq., which provides for these IDEA funds, is consistent with that of TEC § 502. The Court should presume this legislative intention is synonymous because the history of IDEA funds has been well-established since 1982. *See Rowley*, 458 U.S. 176, 180-181 (1982) (stating that to qualify for federal aid under the Act, a State must demonstrate that it has a policy that assures "all handicapped children the right to free appropriate public education."). Confusing that IDEA funds instead provide the benefit of "financial assistance," or "recompensation," would invoke substantial questions about established precedent in health law, and federal IDEA funds could be threatened with unconstitutionality if rendering a new interpretation.

Furthermore, the petitioner's interpretation is wrong, because Section 1412(a)(10)(C)(i) states that IDEA "does not require a local educational agency to pay for the cost of education… of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and his parents nevertheless elected to place him in a private school." *Forest Grove*, 557 U.S. 230 at 240 (2009). This section and interpretation provide that the State receiving IDEA funds must serve students with a free and appropriate public education, and nothing more. The court has even gone further, by interpreting that the educational authorities can avoid compensating private education by either providing "the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). This shows that the primary purpose of IDEA funds, even were they provided as a reimbursement, serves the singular benefit of providing a free appropriate public education. In limited instances where reimbursements are appropriate, this governing rule strongly suggests that the state need only provide a private educational facility the state deems appropriate. In this case, this standard was met, because both petitioners conceded that the necessary educational opportunities were available to both students at Tourvania public schools.

C. Petitioners Fail to Show that There was State Discrimination Preventing Either Child from Receiving a Free Appropriate Public Education as a result of their Religious Affiliation.

This court has previously addressed different state monetary provisions with inconsistent results but has provided one clear standard. The petitioner can succeed in a free exercise claim only when petitioners can demonstrate a causal link between an actual denial, or exclusion, of a free appropriate public education directly because of a person's religious affiliation. *Locke v. Davey*, 540 U.S. 712 (2004); *Trinity Lutheran Church*, 137 U.S. at 453; *Espinoza*, 140 S. Ct. at

2249. In *Locke*, a scholarship program in the State of Washington refused funds to a person pursuing a postsecondary religious education. The court held that Washington had not violated the Free Exercise Clause. 540 U.S. at 721. Additionally, Washington had "merely chosen not to fund a distinct category of instruction" which was an "essentially religious endeavor;" allowing the State to deny this scholarship because the funds were going to be used to prepare for the ministry. *Id.* at 721. In *Trinity*, a Church applied for a playground grant, but was deemed categorically ineligible because the Church was a religious institution. 137 U.S. at 451. This court ruled that a standard of "no churches need apply" put the Church to choose between "being a church" and "receiving a government benefit." *Id*. Similarly, when the Montana Legislature established a program to provide tuition assistance to parents seeking to send their children to private schools, this court held that disqualifying persons from a public benefit "solely because of their religious character" was inconsistent with the Constitution. Such exclusions from the scholarship program were deemed "odious to our Constitution" and thus "cannot stand." *Espinoza*, 140 S. Ct. at 2262-2263.

Consistently, these cases stand for the rule that where a benefit is denied because of a person or entity's religious affiliation that prohibition is violative of a party's Free Exercise Rights. In *Locke* the benefit, a scholarship, was not restricted because of the recipient's religious affiliation, and that court recognized that it was that the legislature did not have to fund an essentially religious endeavor. Under the Tourvania law, this precedent means that the Petitioners needed to establish a more direct causal link between the total deprivation of a benefit and a party's religious character. This standard is the same in *Trinity* because deeming a party ineligible for a benefit because of their religious affiliation is a restriction on a party's ability to freely exercise their religion. Under TEC § 502, and in the present facts, petitioners could still receive a public

benefit, which is a free appropriate public education. *Espinoza* maintains the same standard, but it superficially appears to be a more dangerous case because it deals with similar facts. Most important to recognize, Montana intended to provide a direct public benefit, tuition assistance, and deprived that benefit from a total class of persons, those religiously affiliated. In this instance, a religious person could be excluded from receiving a proper education because of their religious preference; this was a direct restriction on a person's religious exercise. Although some facts are similar to the case at hand, no party was deprived of the public benefit here, a free appropriate public education, because of their religious affiliation.

The case law stands for a common and unified interpretation that a person's free exercise rights are violated when they are excluded from receiving a public benefit, and that is not what happened in the present case. Section 1412(a)(10)(C)(i) states that IDEA "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child" and the parents nevertheless elected to place the students in a private school. *Forest Grove*, 557 U.S. at 240.

The principles applied in *Trinity* and *Espinoza* suffice to resolve this case. Furthermore, even more contemporary precedents would affirm this judgment. In *Carson*, where the State offers citizens tuition assistance payments for any family whose school district does not provide a public secondary school, 596 U.S. 767, 773 (2022). This case is similarly situated and similarly resolved. The IDEA funds in Tourvania were designated and designed to provide a singular benefit to Tourvania's citizens: the appropriate special education and related services required by the individual child." TEC § 502(a). On these facts, a free appropriate public education was provided, and so the benefit was received.

D. Absent a Showing of the Material Fact Indicating Direct Discrimination Based on the Petitioner's Religious Status, an Entry of Summary Judgment Resolves the Free Exercise Claim in Favor of the Respondents.

Petitioners fail to state a claim upon which relief may be granted. An entry of summary judgment is proper when "the movant shows that 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 can affect the litigation's substantive outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The petitioner's contention that the nonsectarian requirement in the Tourvania Education Code makes it impossible for a child with a disability to be placed at a religious school and receive the same funding to which he would otherwise be entitled had his parents sent him to a nonreligious school, is not violative of petitioner's constitutional rights. It is undisputed that IDEA funds would be provided to either of the two petitioners irrespective of their religious affiliations to guarantee the benefit of a free and appropriate public education irrespective of their religious affiliation. Tourvania's Educational Code is designed to foster a free appropriate public education.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS FROM PROHIBITED FORMS OF DISCRIMINATION, AND THE EQUAL PROTECTION CLAUSE IS NOT APPLICABLE HERE, BECAUSE THERE IS NO SHOWING THAT A FREE APPROPRIATE PUBLIC EDUCATION WAS DEPRIVED.

Were this Court to interpret the Tourvania statute, TEC § 502, as discriminatory, then this would trigger the Equal Protection Clause. If this Court finds that there is religious discrimination in this statute due to the nonsectarian clause, this could trigger the most exacting scrutiny. *Espinoza*, 140 S. Ct. at 2249; *Trinity*, 582 U.S. at 450; *McDaniel*, 435 U.S. at 644. A law burdening a party's religious practice must undergo strict scrutiny.

In order to satisfy the rights afforded by the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of

those interests. *McDaniel,* 435 U.S. at 628; *Wisconsin v. Yoder*, 406 U.S. at 205 (1972), *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990). *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). In order to trigger the Equal Protection Clause. There must be some form of religious discrimination present, and this is absent in this present case. Petitioner was not deprived of the specific public benefit, a free appropriate public education. Therefore, there was no violation of the Equal Protection Clause of the Fourteenth Amendment.

This Court has interpreted that parents have a general duty to nurture their children, and in a decision from 1925, suggested a vague right for the parent to "recognize and prepare [their child] for additional obligations." *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 533 (1925). However, more recently this court refused to make a determination about whether there was a right to education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973). Therefore, it is actually on petitioners to show that the subjective belief about an attenuated relationship between education and faith is even protected under the First Amendment. This Court ruled that were there such an infringement in this case then the standard would actually be a rational basis review. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973); ("Whether the challenged state action rationally furthers a legitimate state purpose or interest."). As far as legitimate state interest, involving the State in using tax-supported property for religious purposes breaches the "wall of separation" which, according to Jefferson, the First Amendment was intended to erect between church and state. *Epperson v. Arkansas,* 393 U.S. 97, 105 (1968). This court has found that IDEA funds were effectuated to provide millions of handicapped children with a "free appropriate public education," and further, this opinion suggested that "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v.*

Rowley, 458 U.S. 176, 198 (1982). Tourvania Education Code § 502 purports to provide all persons within Tourvania with equal access to a free appropriate public education, and it is uncontested that Tourvania did provide such an opportunity and benefit to the petitioners of this case. Were this basis not substantial enough to find that the Tourvania Education Code had a rational government interest, then the Supreme Court should still rely on the judgment of the Court of Appeals for the Eighteenth Circuit. Otherwise, this Court should affirm the prior decision and find that the Tourvania Education Code §502 does not violate the Equal Protection Clause of the Fourteenth Amendment.

III. THE EXTENSION OF IDEA BENEFITS TO RELIGIOUS SCHOOLS IS ANTITHETICAL TO THE HISTORICAL PRACTICES AND UNDERSTANDINGS OF THE FOUNDING FATHERS BECAUSE IT CROSSES THE LINE FROM GENERAL SUPPORT TO DIRECT AND LONG-TERM SUPERVISION BY THE STATE OVER RELIGIOUS ORGANIZATIONS

Known as the Establishment Clause, the opening words of the First Amendment of the United States Constitution declare that "Congress shall make no law respecting an establishment of religion …" U.S. Const. amend I. It is generally understood that the Establishment Clause was intended primarily to prohibit the creation of a state church or state religion. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 11 (1947) ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused … indignation. It was these feelings which found expression in the First Amendment.").

But while the prevention of state-mandated religion is a straightforward concept, identifying conduct that does not directly concern the creation of a state church, but that may nonetheless offend the First Amendment by providing a preliminary step to such an end has proven to be a vexing problem. *Compare Everson*, 330 U.S. at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."), with *Kennedy v.*

Bremerton Sch. Dist., 597 U.S. 507, 536 (2022) ("An analysis focused on original meaning and history … has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'") (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575 (2014)); *see also* Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 Wake Forest L. Rev. 617 (2019) (describing the varied and conflicting doctrines that have emerged in the interpretation of the Establishment Clause).

In the years following the incorporation of the First Amendment to State action, the Supreme Court worked to define the boundaries of the Establishment Clause, ultimately announcing a unified three-part test. *See Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971) ("In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid … and the resulting relationship between the government and the religious authority.") However, the *Lemon* Test is generally considered to have created more controversy than it resolved and was eventually ignored and then officially abrogated by the Court. *See Kennedy*, 597 U.S. at 510 ("[G]iven the apparent 'shortcomings' associated with *Lemon*'s 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned [it].") (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–81 (2019).

Under current Court jurisprudence, the Establishment Clause must be interpreted in accordance with the history and traditions of the United States and "faithfully reflect the understanding of the Founding Fathers." *Town of Greece*, 572 U.S. at 577 (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). When history demonstrates that a specific practice is contrary to the ideology of the Founding Fathers or was once accepted but has failed "to withstand the critical scrutiny of time and political change"

it is likely outside the boundaries of the Establishment Clause. *Id.* The extension of IDEA funds to religious schools, which carries with it the requirement of direct and long-term oversight of the religious institutions that receive it is undeniably such a practice.

A. The Founding Fathers Viewed Direct Financial Support and Supervision of Religious Institutions by the Government as a Particularly Pernicious Threat to American Democracy.

The historical context that gave rise to the First Amendment, and the clear intent of its drafters as evidenced by their writings and quoted speeches, demonstrate that the type of government support and oversight required by the extension of IDEA funds to religious schools has always been anathema to the Establishment Clause. *See, e.g., Everson*, 330 U.S. 31–32 (Jackson, J., dissenting). It is well known that a large portion of early American settlers crossed the Atlantic to North America specifically to escape the religious persecution that they endured in Europe. *Id.* Unfortunately, it is also true that many of the discriminatory practices that they fled were transplanted to and even thrived in the new American colonies. *Id.* at 8–9. Leading the fight against such tyranny were Thomas Jefferson and James Madison, two principal architects of the Constitution. *Id.* In his famous Memorial and Remonstrance against a proposed Virginia law intended to renew Virginia's tax levy for support of the established state church, Madison argued that a true religion did not need the support of law and that no individual should ever be taxed to support a religious institution of any kind. *Id.* at 12. Furthermore, when the First Amendment to the Constitution was proposed at the first session of the very first Congress, Thomas Jefferson replied to a statement directed at him by the Danbury Baptist Association by stating that "religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not

opinions" and that the Establishment Clause was intended to erect "*a wall of separation between Church and State*." *Reynolds v. United States*, 98 U.S. 145, 164 (emphasis added).

But it was not just government support of a state church that Madison and Jefferson feared. *Everson*, 330 U.S. at 8–9. When the *Everson* Court contemplated the boundaries of the Establishment Clause following the incorporation of the First Amendment to State action, it noted the importance of the historical context that gave rise to the First Amendment by describing the following:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy … In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

Id.

It was the circumstances described above that gave rise to Madison and Jefferson's desire to erect a wall of separation between religion and the government they sought to create. *Id.* And it was these circumstances that led Madison to believe that "the same authority which can force a citizen to contribute three pence only for the support of any one religious establishment, may force him to pay more; or to conform to any other establishment in all cases whatsoever." *Id.* at 57 (Jackson, J., dissenting).

James Madison and Thomas Jefferson, two of the most influential founders of the United States, clearly believed that not only should government support of religious institutions be avoided, but that no involvement with religious institutions on the part of the government should be permitted. *Id.* It is therefore clear that an examination of the understandings of the Founding

Fathers and the historical circumstances that gave rise to the First Amendment clearly demonstrates that government funding of a religious school was intended to be forbidden by the Establishment Clause. Therefore, based on the rule announced by this Court in *Kennedy v. Bremerton School District*, the extension of IDEA funds to religious schools is not in keeping with the history of the United States or the intentions of the Framers in drafting the First Amendment. As a result, the decision of the Eighteenth Circuit Court of Appeals must be upheld.

B. The Extension of IDEA Funds to Religious Schools Requires an Impermissible Level of State Oversight and Control That is Far Beyond That Which is Acceptable.

Even without an examination of the historical context of the First Amendment and the understandings of the Founding Fathers, it is clear that the extension of IDEA funds to religiously affiliated schools is violative of the Establishment Clause because it crosses the line from general support of a religious institution to an administrative scheme that requires substantial and long-term oversight by the State. *Compare Walz*, 397 U.S. at 674–75 (holding that the degree of governmental involvement with religious institutions that the extension of tax exemptions creates is minimal), *with Lemon*, 403 U.S. at 619 (finding the state aid to schools to be unconstitutional because the "comprehensive, discriminating, and continuing state surveillance … required to ensure that … the First Amendment [is] … respected … will involve excessive and enduring entanglement between state and church).

Although the use of tax raised funds to support religious institutions is permissible when it provides a general benefit to religious institutions, such funding is unconstitutional when the State is required to participate so closely and continuously with the administration of the aid that the State must inevitably exert some measure of control *within* the institution. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that when a government aid program is neutral with respect to religion and provides assistance directly to a broad class of citizens, the

program is not subject to Establishment Clause challenge), *and Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 1–2 (1993) ("Government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."), *with Walz*, 397 U.S. at 695 (warning of "government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning") (Harlan, J., concurring).

In *Lemon*, the Supreme Court considered two state laws that provided salary supplements to teachers in nonpublic religious schools in which the average per pupil expenditure on secular education was below the average in public schools. 430 U.S. at 602–03. The Court held that both laws were violative of the Establishment Clause because they required long-term surveillance by the State to ensure that the laws' restrictions were obeyed and the "First Amendment otherwise respected." *Id.* Although the three-part test announced by the *Lemon* Court has since been abrogated, the Court's focus on the unacceptable level of administrative entanglement that the laws created between the government and religious institutions remains an important part of Establishment Clause jurisprudence. *See Zelman*, 536 U.S. at 652 (holding that government aid that reaches religious institutions "only by way of the deliberate choices" of the individual recipients with no governmental direction is "not readily subject to challenge under the Establishment Clause").

In contrast, every case relied upon by Petitioners in claiming that the extension of IDEA funds to religious schools is not violative of the Establishment Clause involved government aid programs that required little to no State oversight or surveillance of the religious institutions. Furthermore, none of the cases cited involved a government program that required the State to

actively collaborate with administrators of religious institutions on a continuing basis. In *Espinoza*, the Court upheld a law that granted a tax credit of $150 to any taxpayer who donated to a participating student scholarship organization, that would in turn use the donations to award scholarships to students, some of whom used the money to attend religious schools. 140 S. Ct. at 2251. The Court held that because the government support made its way to religious schools "only as a result of Montanans independently choosing to spend their scholarships at such schools" with no oversight from the government, the funding was fully permissible under the Establishment Clause. *Id. Carson* also involved an almost identical program. 596 U.S. at 771. *See also Trinity Lutheran Church*, 582 U.S. at 467 (holding that government aid to provide playground resurfacing for a church was not violative of the First Amendment); *Zobrest*, 509 U.S. at 2 (holding that the Establishment Clause does not bar the placing of a public employee in a sectarian school).

The extension of IDEA funds to religious schools violates the Establishment Clause because it requires government interaction and oversight of religious institutions that goes far beyond that seen in any precedential case brought before this Court. The record makes clear that the aid Petitioners are seeking requires State interaction with the religious schools they seek to enroll their children at that would be substantial and long-lasting. To begin with, the IDEA requires state representatives from the LEA to work closely in conjunction with school officials, the student's parents/guardians, and a qualified representative of the school to create a highly detailed and individualized IEP for each and every student. This IEP must then be updated on an at least annual basis. Furthermore, the LEA is then required to monitor the child's academic goals are being met and then take appropriate measures to adjust the IEP in the event that the child is found to be falling behind. This level of governmental involvement in a religious institution is not only

offensive to the Founding Fathers intent behind the Establishment Clause, but it is also clearly contrary to the long line of decisions this Court has carefully crafted over decades.

Furthermore, if there is any doubt as to the unconstitutionality of this arrangement, one need only ask the question: what happens when it is determined by the LEA that the child is not performing well academically, and the cause is determined to be that the child is not receiving adequate secular academic instruction because the institution insists on spending too much time professing its religious doctrine to the child? The LEA will then be forced to take action that is certainly in violation of the Establishment Clause when it attempts to force a religious school to teach less of its religion. This question makes clear exactly why the Founding Fathers loathed the concept of allowing any government aid to flow to religious institutions and why the jurisprudence of this Court that led to its focus on "entanglement" as described in Lemon was perhaps not as misguided as current popular conception seems to hold.

For these reasons, the extension of IDEA funds to religious institutions is violative of the Establishment Clause and the Eighteenth Circuit Court of Appeals decision must be affirmed.

CONCLUSION

For the aforementioned reasons, Respondents Tourvania Department of Education and Kayla Patterson respectfully request that this Court AFFIRM the decision of the United States Court of Appeals for the Eighteenth Circuit.

Dated: March 4, 2024

Respectfully Submitted,

s/ Team No. 4
Attorney(s) for Respondents