# No. 24-012

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# IN THE SUPREME COURT OF THE UNITED STATES

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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,

*Respondent*.

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ON APPEAL FROM THE UNITED STATES APPEALS COURT FROM THE EIGHTEENTH CIRCUIT

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**BRIEF FOR PETITIONER**

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**TEAM 005**

***Attorneys for Petitioner***

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## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** .......... **II**

**QUESTIONS PRESENTED** .......... **1**

**STATEMENT OF THE CASE** .......... **2**

**PROCEDURAL HISTORY** .......... **5**

**SUMMARY OF THE ARGUMENT** .......... **6**

**ARGUMENT** .......... **7**

**I. THE TOURVANIA EDUCATION CODE § 502 VIOLATES THE PETITIONERS' RIGHTS UNDER (a) THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.** .......... **7**

A. *Tourvania Education Code § 502 Substantial Burdens The Exercise of Religion.* .......... 7

B. *§ 502 is Not Generally Applicable or Neutral With Respect to Religion, Because Expressly Prohibits Religious Expression.* .......... 9

C. *§ 502's Categorical Ban Does Not Pass Strict Scrutiny's High Burden.* .......... 12

*i.* *The Nonwaivable Nonsectarian Provision In The Tourvania Education § 502 Violates The Equal Protection Clause Notwithstanding Whether It Violates The Petitioners' Right to Free Exercise* ……….................15

**II. THE EXTENSION OF IDEA FUNDS TO RELIGIOUS INSTITUTIONS DOES NOT OFFEND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.** .......... **18**

A. *Historical Practices and Understanding Support Plaintiff's Position That IDEA funds to Religious Institutions Does Not Violate the Establishment Clause.* .......... 19

B. *Clear Precedent of this Court Governs and Supports a Finding That the Establishment Clause Does Not Prohibit IDEA Funds to Plaintiffs* .......... 24

**CONCLUSION** .......... **31**

## TABLE OF AUTHORITIES

**UNITED STATES SUPREME COURT CASES:**

*Abrams v. Johnson*,
521 U.S. 74 (1997) ....................15

*Bd. of Ed. of C. Sch. Dist. No. 1 v. Allen*,
392 U.S. 236 (1968) ....................22, 25

*Burlington N. R.R. Co. v. Ford*,
504 U.S. 648 (1992) ....................17

*Burwell v. Hobby Lobby Stores, Inc.*,
573 U.S. 682 (2014) ....................7

*Cantwell v. State of Connecticut*,
310 U.S. 296 (1940) ....................7

*Carson v. Mackin*,
596 U.S. 767 (2022)....................*passim*

*Church of Lukumi Babalu Aye v. City of Hialeah*,
508 U.S. 520 (1993) ....................*passim*

*Emp't Div. v. Smith*,
494 U.S. 872 (1990) ....................*passim*

*Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist. RE-1*,
580 U.S. 386 (2017).................... 2

*Engel v. Vitale*,
370 U.S. 421 (1962) ....................18, 29

*Epperson v. Arkansas*, 393
U.S. 97 (1968) ....................9

*Espinoza v. Mont. Dep't of Revenue*,
140 S. Ct. 2246 (2020) ....................*passim*

*Everson v. Bd. of Ed. of Ewing Tp.*,
330 U.S. 1 (1947) ....................*passim*

*Fulton v. City of Phila.*,
141 S. Ct. 1868 (2021) ....................10

*Hernandez v. Commissioner*,
490 U.S. 680 (1989) ....................................................................................8

*Johnson v. Robinson*,
415 U.S. 361 (1974) ....................................................................................16

*Kennedy v. Bremerton Sch. Dist.*,
597 U.S. 507 (2022) ....................................................................................*passim*

*Lee v. Weisman*,
505 U.S. 577, 590 (1992) ............................................................................23

*Lemon v. Kurtzman*,
403 U.S. 602 (1971) ....................................................................................*passim*

*Locke v. Davey*,
540 U.S. 712 (2004) ....................................................................................22, 23

*Massachusetts Bd. of Ret. v. Murgia*,
427 U.S. 307 (1976) ....................................................................................16

*McDaniel v. Paty*,
435 U.S. 618 (1978) ....................................................................................12

*New Orleans v. Dukes*,
427 U.S. 297 (1976) ....................................................................................17

*Pierce v. Society of Sisters*,
268 U.S. 510 (1925) ....................................................................................*passim*

*Roemer v. Bd. of Pub. Works of Maryland*,
426 U.S. 736 (1976)....................................................................................*passim*

*School Dist. of Abington Township v. Schempp*,
374 U.S. 203 (1963) ....................................................................................19

*Tandon v. Newsom*,
141 S. Ct. 1294 (2021) ...............................................................................*passim*

*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*,
450 U.S. 707 (1981) ....................................................................................8

*Trinity Lutheran Church of Columbia, Inc. v. Comer*,
582 U.S. 449 (2017) ....................................................................................*passim*

*Town of Greece, N.Y. v. Galloway*,
572 U.S. 565 (2014) ....................19

*Widmar v. Vincent*,
454 U.S. 263 (1981) ....................14

*Wisconsin v. Yoder*,
406 U.S. 205 (1972) ....................*passim*

*Witters v. Washington Dep't of Servs. for the Blind*,
474 U.S. 481 (1986) ....................26

*Zorach v. Clauson*,
343 U.S. 306 (1952) ....................23

**UNITED STATED CIRCUIT COURT OF APPEALS:**

*Phan v. Virginia*,
806 F.2d 516 (4th Cir. 1986) ....................16

*Stiles v. Blunt*,
912 F.2d 260 (8th Cir. 1990) ....................16

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. I ....................*passim*
U.S. CONST. amend. XIV § 1 ....................*passim*

**FEDERAL STATUTES:**

20 U.S.C. § 1400(d)(1)(A) ....................*passim*
20 U.S.C. § 1400 (d)(1)(C) ....................*passim*
20 U.S.C. § 1400 (d)(1)(B) ....................*passim*
20 U.S.C. § 1401(9)(D)....................*passim*
20 U.S.C. § 1412(a)(10)(A)(i)(III) ....................*passim*
20 U.S.C. § 1412(a)(10)(A)(vi)(II) ....................*passim*
28 U.S.C.§1292(b) ....................6

**OTHER:**

H.M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland 64 (1829) ....................20

Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause,* 169 U. PENN. L. REV. 111 (2020) ....................22

Nathan Chapman & Michael McConnell*, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 119 (2023) ....................22

Stephanie H. Barclay, Brady Earley & Annika Boone, Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis, 61 ARIZ. L. REV. 505 (2019) .........22

## QUESTIONS PRESENTED

I. Whether § 502 of the Tourvania Education Code violates the Plaintiffs' 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

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

The Individuals with Disabilities Education Act (IDEA) is designed "to provide for the education of all children with disabilities" and remedy past discrimination that prevented the educational needs of disabled children from being met. 20 U.S.C. § 1400 (d)(1)(C), (c)(2). In advancing these objectives, IDEA offers states federal funding "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" and "to ensure that the rights of children with disabilities and parents of such children are protected." *Id*. § (d)(1)(A)–(B). In line with Congress's intent to "bring previously excluded handicapped children into the public education systems of the States" and "open the door of public education to handicapped children on appropriate terms," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 189, 192 (1982), the statute requires the States "to adopt procedures that would result in individualized consideration of and instruction for each child." Id. at 189. To receive the IDEA funding, a State must comply with a number of statutory conditions. This includes providing a free appropriate public education to all eligible children. *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017). A free appropriate public education ("FAPE") includes both special education and related services that conform with the individualized education program ("IEP") for each child. 20 U.S.C. § 1401(9)(D). An IEP is "a written statement for each child with a disability" that covers, inter alia, a "child's present levels of academic achievement and functional performance," "a statement of measurable annual goals, including academic and functional goals," and "a statement of the special education and related services and supplementary aids and services … to be provided to the child, or on behalf of the

child." 20 U.S.C. § 1414(d). In sum, the IEP is the means by which special education and related services are "tailored to the unique needs of each handicapped child." *Rowley*, 438 U.S. at 181. Given the broad range of special needs a child may have, the IDEA expressly permits placement in private schools, both secular and religious, to provide services that are tailored to the unique needs of each student. 20 U.S.C. § 1412(a)(10)(A)(i)(III). The special education and related services provided to children in parentally placed private schools must be secular, neutral, and nonideological. 20 U.S.C. § 1412(a)(10)(A)(vi)(II).

## II. Tourvania's Education Code

As a recipient of IDEA funds, Tourvania has enacted Tourvania Education Code §502 (TEC §502), which provides several statutory compliance measures, including in relevant part that services provided by private, nonsectarian schools and agencies, shall be made available to provide the appropriate special education and related services required by the individual child. R. at 6. "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. R. at 6.

A local education agency ("LEA") places a student in a nonpublic school and pays the nonpublic school pursuant to a contract between the LEA and the nonpublic school. R. at 6. 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. R. at 6. LEAs may enter into contracts only with state-certified nonpublic schools, subject to requirements of the Superintendent of Public Instruction.

R. at 6. Tourvania's code prohibits nonsectarian institutions from certification, and such schools cannot petition for a waiver of the nonsectarian requirement. R. at 7.

## III. Parent Plaintiffs attempt to obtain a religious education for their Children Plaintiffs with disabilities.

### A. *The Flynns*

The Flynns are parents of five-year-old H.F. who was diagnosed with high-functioning autism and requires occupational, behavioral, and speech therapy. R. at 8. The Flynns are Orthodox Jewish and have invoked their right to send their child to Fuchsberg Academy, an Orthodox Jewish learning center. R. at 8. Currently, the Flynns pay out-of-pocket for H.F.'s behavioral and occupational therapies which she receives at Fuchsberg. R. at 8. The Flynns assert that, if H.F. were to attend a public school, she might qualify for more services than she receives at Fuchsberg, but they have been forced to forgo that option because Tourvania's nonwaivable nonsectarian requirement makes it impossible for H.F. to receive the equivalent of a FAPE at an Orthodox Jewish school. R. at 8.

### B. *The Klines*

The Klines are parents of thirteen-year-old B.K. who was diagnosed with autism at age 3. R. at 9. Unlike their other, able-bodied child, the Klines have been unable to give B.K. an Orthodox Jewish education, essential to instill in her the family's religious beliefs and to immerse her in the culture and heritage. R. at 8. Due to the Tourvania's nonwaivable nonsectarian requirement, the Klines would be required to sacrifice the services B.K. needs to address her disability if they enrolled her in the Orthodox Jewish institution which their faith obligates them. R. at 9. In her current setting in a public school, B.K. is receiving the special education and related services she needs, however she does not receive special education and related services on

the many secular holidays or on Jewish holidays, she is not always served kosher food, nor is she performing well there academically. R. at 9 n. 4.

**IV.School Plaintiffs attempt to support students with disabilities**

The Joshua Abraham High School and the Bethlehem Hebrew Academy are co-educational, Orthodox Jewish, and dual curriculum secondary schools which seek to qualify under Tourvania law as certified nonpublic schools. R. at 9. Joshua Abraham High School and the Bethlehem Hebrew Academy assert that, even as Orthodox Jewish institutions, they should be eligible for the funding provided for in IDEA. R. at 9-10. Accordingly, each school applied for certification and were denied by Superintendent Patterson because neither school could comply with the nonsectarian requirement. R. at 10. Plaintiffs allege that because they meet all other certification requirements to receive funding. R. at 10.

## PROCEDURAL HISTORY

Plaintiffs commenced this action in the United States District Court for the District of Tourvania alleging certain provisions of Tourvania law (1) violate the Free Exercise Clause of the First Amendment to the United States Constitution because they are being denied, solely because of their religious affiliation, the special education funds authorized by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, and (2) violate the Equal Protection Clause of the Fourteenth Amendment in that by extending full IDEA funding to public and nonsectarian schools and their disabled students but not to Plaintiffs, Tourvania is unlawfully discriminating against Orthodox Jewish families with disabled children and the Jewish schools who seek to offer these children the special education and related services they need. R. at 1-2. Defendants assert that although IDEA funding can be provided to private institutions, it does not and should not reach religious schools without running afoul of the First Amendment's

Establishment Clause. R. at 2. Defendants moved for summary judgment as a matter of law, dismissing all of Plaintiffs' claims. The District Court denied Defendant's summary judgment. R. at 16. Additionally, because Defendants expressed their desire to appeal any adverse ruling, this Court finds for purposes of that interlocutory appeal pursuant to 28 U.S.C.§1292(b) that (i) the District Court's ruling involves substantial questions of law as to which there is substantial ground for difference of opinion, and (ii) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Under the authority of 28 U.S.C.§ 1292(b), proceedings in the District Court were stayed pending resolution of Defendants' appeal. R. at 16.

The United States Court of Appeals for the Eighteenth Ci exercised its jurisdiction over the interlocutory appeal. R. at 17-18. The Court of Appeals for the Eighteenth Circuit held that the decision of the District Court for the District of Tourvania denying summary judgment to Appellants is hereby vacated, the case is remanded, and the District Court is directed to enter summary judgment in favor of Appellants. R. at 20. On Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit, the United States Supreme Court reviews this case. R. at 20.

## SUMMARY OF THE ARGUMENT

The Tourvania Education Code § 502 substantially burdens the Petitioners' fundamental right to free exercise and the right of parents to direct education and upbringing of their children. In prohibiting religious schools' access to federal funding, it forces Petitioners to compromise their religious beliefs and ultimately undermines the IDEA's intent to provide individualized special education services tailored to meet the unique needs of each child. Further, the Tourvania Department of Education's categorical exclusion of religious schools from accessing IDEA funds is discrimination based on religious status that violates the Free Exercise and Equal

Protection Clauses of the United States Constitution. It is not neutral nor is it generally applicable for Tourvania to treat comparable secular activity more favorably than religious exercise. Conditioning the availability of benefits on religious status or upon a recipient's willingness to violate their religious convictions cannot survive strict scrutiny. Moreover, Tourvania's antiestablishment interest is limited by the United States Constitution's guarantees of free exercise of religion and equal protection to all citizens.

## ARGUMENT

### I. THE TOURVANIA EDUCATION CODE § 502 VIOLATES THE PETITIONERS' RIGHTS UNDER (a) THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

The Free Exercise Clause of the First Amendment, made applicable to the States[1] through the Fourteenth Amendment, provides that Congress shall make no law… prohibiting the free exercise [of religion]," U.S. CONST. amend. I; *See Emp't Div. v. Smith*, 494 U.S. 872, 876-77 (1990).

#### A. *Tourvania Education Code § 502 Substantial Burdens The Exercise of Religion*.

A plaintiff bringing a challenge under the Free Exercise Clause must show that the challenged state action substantially burdens the exercise of religion. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 691-92 (2014) (finding that a regulation requiring a corporation to provide health-insurance coverage for contraception imposed a substantial burden on the sincerely held religious beliefs of the corporation's owners). The Eighteenth Circuit held that the Plaintiffs' situation is "not tantamount to the substantial burdening of religious exercise that implicates the Free Exercise clause." R. 19. However, the Court has repeatedly warned against questioning the centrality of religious practices and beliefs or the validity of litigants' interpretations of those creeds. *See E.g., Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990);

[1] *See* Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940),

*Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd. of Ind. Emp't* Sec. Div., 450 U.S. 707, 716 (1981).

At a minimum, the protections of the Free Exercise Clause pertain when a law discriminates against religious beliefs. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). These "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection" Id. at 531. Individuals may be protected in their own understanding of the requirements of their faith, even if their understanding differs from that of other adherents of the same religion. *Thomas*, 450 U.S. at 715 (holding that the Free Exercise Clause protects all interpretations of religious practices and a state may not deny unemployment benefits to a person who leaves employment based on religious beliefs that may not be held by the entire religious sect). Judicial deference to a person's understanding of religious expression is paramount.

For the Plaintiffs, sending their children to Orthodox Jewish schools is a critical feature of the exercise of their religion. The Court has long recognized the rights of parents to direct the religious upbringing of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). The Constitution protects parents' ability to exercise that right by sending their children to religious schools. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). TEC § 502 is especially burdensome because it limits opportunities for children with disabilities who need tailored, individualized educational services most of all. The primary purpose of the IDEA was to ensure the availability of special education services to meet the unique needs of each child. 20 U.S.C. § 1400(d)(1)(A). Given the broad range of special needs a child may have, placement in private schools, both secular and religious, is permitted to provide services that are tailored to the unique needs of each student. 20 U.S.C. § 1412(a)(10)(A)(i)(III).

What the Eighteenth Circuit mischaracterizes as seeking special accommodations is precisely the unique circumstances envisioned by the statute. Although the Klines concede that these public schools provide B.K. with special education and other related services, these schools have been unable to wholly satisfy B.K.'s needs. B.K. has not performed well academically in Tourvania's public school system and these schools often serve B.K. non-kosher food, in violation of her religious beliefs. Furthermore, B.K. is deprived of special education and related services on secular or Jewish holidays. Ultimately, § 502 undermines an LEA's obligation to holistically consider a child's specific needs when developing an individualized education program plan for that child. Preventing children from receiving a placement whenever the proposed school fails to meet the nonsectarian requirement is a substantial burden on the Plaintiffs' First Amendment rights.

### B. *§ 502 is Not Generally Applicable or Neutral With Respect to Religion, Because Expressly Prohibits Religious Expression.*

The Religion Clauses of the First Amendment direct the State to pursue a course of neutrality toward religion which prohibits favoring religious adherents over non-adherents. *See Epperson v. Arkansas*, 393 U.S. 97, 104, 107 (1968) ("[T]he State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion."). Therefore, the First Amendment is not violated when a burden on religious exercise is merely the incidental effect of a neutral, generally applicable law. *Smith*, 494 U.S. at 878 (holding that a state criminal statute did not violate the Free Exercise Clause of the First Amendment in including religiously inspired drug use within its reach because the law was neutral and generally applicable). However, a law burdening religious practice that is not neutral or generally applicable will be subject to strict scrutiny. *Lukumi*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.")

The government fails to act neutrally when it restricts religious practice because of its religious nature. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021). A law is also not of general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. Id. Therefore, government regulations are not neutral and generally applicable when they treat any comparable secular activity more favorably than religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In *Tandon*, the Court found that California's COVID-19 restrictions were not neutral and generally applicable because they permitted hair salons, retail stores, movie theaters, and indoor restaurants to bring together more than three households at a time while prohibiting the same for at-home meetings when their purpose was for religious exercise. 141 S. Ct. at 1297.

Like the restrictions in *Tandon*, Tourvania Education Code § 502 is not neutral or generally applicable because it treats comparable secular activity more favorably than religious exercise. The IDEA expressly provides for the participation of children enrolled in private, including religious, schools by their parents. 20 U.S.C. § 1412(a)(10)(A)(i)(III). The statute requires that the special education and related services provided to parentally placed private schools must be secular, neutral, and nonideological. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). The Joshua Abraham High School and the Bethlehem Hebrew Academy are co-educational, Orthodox Jewish, and dual curriculum secondary schools that offer both religious and secular studies. R. 9. These schools are able to provide the secular, neutral, and nonideological special education services required by the IDEA. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). The nonwaivable nonsectarian provision of the Tourvania Code of Education § 502 treats secular activity, the provision of special education and related services to disabled children at public and non-religious private schools, more favorably than it treats Orthodox Jewish schools that can provide

the same secular special education services required by the IDEA. Aside from their religious status, these schools are otherwise qualified for receipt of the IDEA funds. Yet, § 502 ensures that families of disabled children at religious schools are not entitled to the same benefits as their counterparts at non-religious schools without compromising the exercise of their religious convictions.

Tourvania Code of Education § 502 provides students in private schools the same benefits as those given to students in public, but in allowing only private non-sectarian schools to provide special education services to parentally-placed children, it favors secular private schools over others solely because of religious affiliation. Because § 502's nonwaivable nonsectarian requirement treats nonsectarian schools far more favorably than religious schools in providing IDEA funding, it is not a neutral law of general applicability.

Even if the Court were to find that § 502 of the Tourvania Education Code is neutral and generally applicable, its burden on the free exercise of religion is still an impermissible infringement on constitutional rights. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220. Furthermore, the First Amendment may bar the application of a neutral, generally applicable law to religiously motivated action when it involves the Free Exercise Clause in conjunction with other constitutional protections including the right of parents to direct the education of their children. *Smith*, 494 U.S. at 881; *Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205. In *Smith*, the Court upheld Oregon's neutral and generally applicable drug law because, unlike the Plaintiff's case here, it did not present a hybrid situation. 494 U.S. at 882. Not only does Tourvania's nonwaivable nonsectarian requirement burden the free exercise of the Plaintiffs' religious beliefs, but it also

infringes upon the parents' fundamental right to direct the religious upbringing and education of their children protected by the Fourteenth Amendment.

### C. *§ 502's Categorical Ban Does Not Pass Strict Scrutiny's High Burden.*

Under the Free Exercise Clause, religious observers are protected against unequal treatment and laws that impose special disabilities on the basis of religious status. *Lukumi*, 508 U.S. at 542; *Smith*, 494 U.S. at 877l; *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a state law that disqualified members of the clergy from holding certain public offices because it imposed special disabilities on the basis of religious status). Therefore, laws that target the religious for distinctive treatment and selectively impose burdens on religious practices are not neutral or generally applicable and will be subject to strict scrutiny. *Lukumi*, 508 U. S. at 546. To withstand such scrutiny, the law must advance a compelling governmental interest and be narrowly tailored to advance that interest. Id. at 531-32. Applying that principle, this 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 Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017).

In *Trinity*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization owned or controlled by a religious entity from receiving a grant. Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. 582 U.S. at 453-54. The Court found that the policy imposed a penalty on the free exercise of religion because it expressly discriminated against otherwise eligible recipients solely due to their religious character, thus triggering strict scrutiny.

A few years later, the Court applied the principles expounded in *Trinity* to *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). There, the Court held that the Free Exercise Clause precluded Montana from applying a state constitutional "no-aid" provision to bar religiously affiliated schools from a tuition assistance program, solely because of their religious status. *Id*. To be eligible for government aid under the state constitution, schools were forced to renounce their religious character. *Id*. In placing such a condition on these benefits, the Court found that Montana burdened the free exercise of religion by disqualifying the religious from government aid and subjected the status-based discrimination to strict scrutiny. *Id*. at 2260.

The Supreme Court faced this same issue in *Carson v. Mackin*, 596 U.S. 767 (2022). There, the Court determined that a program excluding religious private schools from public benefits violated the Free Exercise Clause. *Id*. at 778-89. The decision reaffirmed the notion that the government cannot categorically exclude religious schools from receiving public benefits provided to private secular schools. *Id*. Conditioning the receipt of otherwise available public benefits on religious practice triggers strict scrutiny. *Id*. at 787.

Like the policies invalidated in *Trinity*, *Espinoza*, and *Carson*, Tourvania's nonwaivable nonsectarian requirement is a categorical exclusion of religiously affiliated families and schools from the individualized special education services IDEA provides. The nonwaivable nonsectarian provision similarly bars religious schools from public benefits solely because of the religious character of the schools. It also puts parents and students in need of special education up to a choice: forgo essential educational benefits available only to those attending public and nonsectarian private schools or compromise their religious beliefs — which require a religious education. As the Eighteenth Circuit indicates, the IDEA is explicit in imposing limits on the special education and related services parentally placed private school children may receive.

However, once a state decides to subsidize private education, it may not disqualify some private schools solely because they are religious. Such express religious discrimination imposes a penalty on the free exercise of religion that triggers strict scrutiny. Therefore, § 502 of the Tourvania Education Code may only be upheld if it can withstand the strictest standard of judicial scrutiny. To withstand such scrutiny, § 502 of the Tourvania Education Code must advance a compelling governmental interest and be narrowly tailored to advance that interest.

Only a state interest of the highest order can justify the nonwaivable nonsectarian requirement, yet the Tourvania Department of Education offers nothing more than an antiestablishment interest in preserving the separation of church and state. Its assertion that § 502 of the Tourvania Education Code is constitutionally required to avoid excessive government entanglement with religion is unconvincing in light of recent Supreme Court precedent. The Court has repeatedly held that religious observers and organizations may benefit from neutral government programs without violating the Establishment Clause. *See e.g.,* Espinoza, 140 S. Ct. at 2254. As the Court explained in *Trinity*, *Espinoza*, and *Carson*, the states' interest in achieving greater separation of church and State than what is already guaranteed under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause. *Trinity*, 582 U.S. 449, 466 (2017) *quoting Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (finding that a state university's antiestablishment interest in prohibiting the use of university facilities for religious worship was not compelling because allowing religious student groups to use university facilities as a public forum does not create excessive entanglement with religion).

Essential to the protection of the rights guaranteed by the Free Exercise Clause is the principle that the government cannot impose selective burdens on religion, even in pursuit of legitimate interests. *Lukumi*, 508 U.S. at 543. § 502 of the Tourvania Education Code permits an

LEA to place its students in private schools to receive the IDEA funding, so long as that school is not religious. Such a law is impermissible religious discrimination. It would be preposterous to hold that a state interest in maintaining neutrality under the Establishment Clause permits excluding members of the community from an otherwise generally available public benefit on the basis of religious exercise. *See Carson*, 596 U.S. 767, 778 (2022). Therefore, Tourvania's antiestablishment interest cannot qualify as compelling in the face of clear infringement on free exercise.

Moreover, Tourvania's nonwaivable nonsectarian provision is not narrowly tailored to achieve its asserted interest. The IDEA only necessitates that the special education and related services provided to parentally placed private schools must be secular, neutral, and nonideological. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Yet, Tourvania goes so far as to restrict all religious schools from receiving public benefits. TEC § 502(b) defines 'nonsectarian' as 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." R. 6.

To the Tourvania Education Department, it does not matter that the Joshua Abraham High School and Bethlehem Hebrew Academy can provide secular, neutral, and nonideological special education services that the IDEA requires. Any trace of religious affiliation bars otherwise qualified schools from receiving funding. In short, The Tourvania Education Department fails to raise a state interest compelling enough to justify its categorical exclusion of religious schools from accessing federal special education funding. Further, TEC § 502 is not narrowly tailored to be the least restrictive means of achieving its asserted state interest. Thus,

TEC § 502 cannot prevail under the most rigorous standard of judicial scrutiny and must be invalidated.

*ii.* *<u>The Nonwaivable Nonsectarian Provision In The Tourvania Education § 502 Violates The Equal Protection Clause Notwithstanding Whether It Violates The Petitioners' Right to Free Exercise.</u>*

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall… deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV § 1. The Equal Protection Clause protects against the government's interference with the exercise of a fundamental right or the disadvantage of a suspect classification. When a legislative classification impermissibly interferes with the exercise of a fundamental right or functions to the peculiar disadvantage of a suspect class, the law will be subject to strict scrutiny. *See, e.g., Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). To survive strict scrutiny, the challenged government action must be narrowly tailored to serve a compelling governmental interest. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

Plaintiffs may bring a challenge under the Equal Protection Clause on account of the government's interference with a fundamental right, a suspect classification, or both. *See, e.g., Stiles v. Blunt*, 912 F.2d 260, 264 (8th Cir. 1990) ("Appellant argues that the minimum age requirement should be subjected to strict scrutiny review because the requirement affects a suspect class and infringes on fundamental rights."). *See Johnson v. Robinson*, 415 U.S. 361, 375 (analyzing the appellee's claims that the denial of benefits infringed upon a fundamental right to the free exercise of religion and that it disadvantaged a suspect class as separate and distinct claims). Fundamental rights include the free exercise of religion, thus conditioning the receipt of public benefits on religious affiliation interferes with that fundamental right under the Equal Protection Clause. *Phan v. Virginia*, 806 F.2d 516, 519-20 (holding that conditioning the receipt

of public benefits upon choice of religion unconstitutionally interferes with the fundamental right to exercise religious freedom under the Equal Protection Clause). Furthermore, religion is recognized as a suspect class for equal protection purposes. *See, e.g., Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (Equal Protection Clause prohibits classification "along suspect lines like race or religion"); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (Equal Protection Clause prohibits classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage"). Thus, the Petitioners can argue that TEC § 502 interferes with their fundamental right to free exercise of religion and the rights of parents to direct the religious upbringing of their children and/or that they were disadvantaged due to a suspect classification on the basis of religion. Either one of these claims will trigger strict scrutiny. *Murgia*, 427 U.S. at 312.

Tourvania's nonwaivable nonsectarian provision draws a classification between secular private schools and religious private schools that operates to the disadvantage of a suspect class. The provision disqualifies the Joshua Abraham High School and Bethlehem Hebrew Academy from accessing federal special education funding solely because they are Orthodox Jewish institutions. Because religion is a suspect class, Tourvania bears the burden of proving that categorically barring religious schools from federal funding is a narrowly tailored means of furthering its compelling governmental interest. Just as TEC § 502 is unable to withstand strict scrutiny under the Petitioners' free exercise claims, it will fail strict scrutiny under the equal protection challenge for the same reasons.

## II. THE EXTENSION OF IDEA FUNDS TO RELIGIOUS INSTITUTIONS DOES NOT OFFEND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

"It is true that this Court and others often refer to the 'Establishment Clause,' the 'Free Exercise Clause,' and the 'Free Speech Clause' as separate units. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. AMEND. I. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. This language commands that a state cannot hamper its citizens in the free exercise of their religion, nor it cannot exclude individual "Catholics, Lutherans, [Muslims], Baptists, Jews, Methodists, Non-believers, Presbyterians, or any members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 16 (1947).

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Its first purpose rested in the idea that "union of government and religion tends to destroy government and to degrade religion." *Id*. History shows that when government allied itself with one particular form of religion, "the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id*. at 431. "Another purpose… rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Id*. at 432.

Prior to *Kennedy v. Bremerton Sch. Dist*., courts looked to the test derived from *Lemon v. Kurtzman* to determine whether a state action violated the Establishment Clause. 597 U.S. 507 (2022); 403 U.S. 602 (1971). Under the Lemon test, courts were directed to permit government assistance to religion only if (1) the primary purpose of the assistance was secular, (2) the assistance neither promoted nor inhibited religion, and (3) there was no excessive entanglement between church and state. Id.

In *Kennedy*, this Court overturned the *Lemon* test, holding that the Establishment Clause must now be interpreted by "reference to historical practices and understandings." 597 U.S. at 535. "'[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.' A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 835 (2014), qu*oting School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). This Court's inquiry, then, with respect to the Establishment Clause issue, must begin with whether the extension of IDEA funds to religious institutions fits within our historical traditions regarding religion, education, and government aid.

### A. *Historical Practices and Understanding Support Plaintiff's Position That IDEA funds to Religious Institutions Does Not Violate the Establishment Clause.*

From its inception, this Nation has navigated the delicate balance between governmental authority and religious liberty. This historical tension has significantly influenced judicial decision-making, particularly in interpreting the Founding Fathers' intentions and societal norms evolution.

To grasp the Establishment Clause fully, it's essential to consider the First Amendment's context amidst the colonial era's religious and political conflicts. These disputes, often fueled by established sects vying for supremacy, led to the imposition of taxes for religious purposes, sparking unrest that contributed to the Bill of Rights' formation. *Everson*, 330 U.S. at 8–9.

This Court has repeatedly addressed the First Amendment's breadth, emphasizing its role in preventing religious establishment and ensuring free exercise. This interpretation, solidified before the Fourteenth Amendment extended these principles to state actions, calls for a broad understanding of the Establishment Clause *Id*. at 14-15.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, this Court illustrated the long existing tension between religion and government quoting an 1829 Maryland legislator who supported a Maryland bill which would end the State's disqualification of Jewish persons from public office:

> "If, on account of my religious faith, I am subjected to disqualifications, from which others are free, ... I cannot but consider myself a persecuted man.... An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." 582 U.S. 449 (2017); quoting Speech by H.M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland 64 (1829).

The *Trinity Lutheran* Court explicated that when a law expressly requires an individual or institution to renounce its religious character to participate in an otherwise generally available public benefit program, it runs afoul of American tradition. Yet, when a religious institution is excluded from an otherwise generally available public benefit program solely due to a State's interest in preventing the "establishment of religion," this too runs afoul of American tradition.

Scholars have long debated between two opposing interpretations of the Establishment Clause as it applies to government funding with respect to education and religion: (1) that the government must be neutral between religious and non-religious institutions that provide education or other social services; or (2) that no taxpayer funds should be given to religious institutions if they might be used to communicate religious doctrine. The Court initially leaned toward the first interpretation, then shifted in the 1970s and 1980s towards the second interpretation, and have now decisively moved back to the first idea.

Drawing on "enduring American tradition," this Court has long recognized the rights of parents to direct "the religious upbringing" of their children. *Yoder*, 406 U.S. at 213–214, 232. This Court has also long accepted that many parents exercise that right by sending their children to religious schools, and that religious schools pursue not only religious instruction, but also a secular one foundational to the welfare of our society. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925).; *Bd. of Ed. of C. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968). Private education has played a significant and valuable role in raising national levels of knowledge and Americans have considered this high quality education to be an indispensable ingredient for achieving the kind of nation that they have desired to create. *Allen*, 392 U.S. at 247–48. "Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." *Id.*

This Court has also explained that "there is no 'historic and substantial' tradition against aiding private religious schools." *Carson. v. Makin*, 596 U.S. 767, 770 (2022). Rather, history demonstrates that financial support for religious education does not constitute an establishment

of religion. “In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.” *Espinoza*, 140 S. Ct. at 2258. “Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy,” including by making grants to private religious schools for the education of the poor. *Id*. In fact, “[b]oth before and after the ratification of the First Amendment, the federal government and virtually every state that ended church taxes also funded religious activity—specifically, religious schools of all kinds.” Mark Storslee, Church Taxes and the Original Understanding of the Establishment Clause, 169 U. Penn. L. Rev. 111, 117 (2020). “Even denominations … which were in the vanguard of disestablishmentarianism … sought and received legislative grants for support of their colleges and seminaries.” Nathan Chapman & Michael McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 119 (2023). “[T]he most vocal opponents of the Virginia assessment, for example, supported public subsidies for denominational schools even as they dismantled the old establishment.” *Id*. This “pervasive” historical practice clarifies that “where the government’s interest in providing funding rested on something other than financing religion for its own sake,” it was “wholly unobjectionable.” Storslee, Church Taxes at 117, 185-86; see also Stephanie H. Barclay, Brady Earley & Annika Boone, Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis, 61 Ariz. L. Rev. 505, 558 (2019) (similar).

In *Espinoza*, the parents of students at a private Christian school brought action against the Montana Department of Revenue challenging the Department’s rule that excluded religiously affiliated private schools from a state tax credit program for students attending private schools. 140 S. Ct. While the Department of Revenue argued *Locke v. Davey*, 540 U.S. 712 (2004), governed, directing the Court to invoke a “historical and substantial” state interest against this

type of government aid, the Court found that “no comparable tradition [against using taxpayer funds to support church leaders] support[ed] Montana’s decision to disqualify religious schools from government aid.” *Id*. at 2258. *Locke*, at its outset, distinguished itself from the cases in which the Court struck down laws requiring individuals to “choose between their religious beliefs and receiving a government benefit.” 540 U.S. at 720–721. The *Espinoza* Court noted that, in fact, in the founding era and the early 19th century, governments provided financial support to private schools, including secular ones. *Id*.

In *Kennedy*, the Court stated:

> A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’ No historically sound understanding of the Establishment Clause begins to ‘mak[e] it necessary for government to be hostile to religion’ in this way…. Respect for religious expressions is indispensable to life in a free and diverse Republic.597 U.S. at 510, quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Applying a historical perspective to this case, there is a recognized tradition of accommodating religious institutions within public welfare and education programs, provided that such accommodation respects the principles of neutrality and does not promote religious indoctrination. Plaintiffs' request for the IDEA funds to be made available to parentally placed students in religious schools and the religious schools themselves, The Joshua Abraham High School and Bethlehem Hebrew Academy, reflects this tradition of accommodation and does not seek to undermine the separation of church and state. Instead, it underscores the importance of ensuring that all children, including those attending religious schools, have equal access to vital educational resources and services.

**B. *Clear Precedent of this Court Governs and Supports a Finding That the Establishment Clause Does Not Prohibit IDEA Funds to Plaintiffs*.**

The core issue here relates to whether extending IDEA funds to Plaintiffs would contravene the Establishment Clause. Based on the Supreme Court's jurisprudence, particularly the shift towards interpreting the Establishment Clause with reference to historical practices and understandings as emphasized in *Kennedy* and the acknowledgment of neutral government programs benefiting religious organizations without violating the Establishment Clause as affirmed in *Espinoza* and *Carson*, it is clear that such funding does not inherently violate the Establishment Clause.

The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. *Everson*, 330 U.S. at 18. Religious institutions need not be quarantined from public benefits that are neutrally available to all. *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 746 (1976).

In *Everson*[2], plaintiff, in his capacity as a district taxpayer, challenged a New Jersey statute, and the resolution passed pursuant to it which allowed for the payment of transportation of some children in the community to Catholic parochial schools, as violative of the Establishment Clause. 330 U.S. at 8. Through analysis of the history of the First Amendment and balancing the purpose of both the Free Exercise Clause and the Establishment Clause, the Court found that New Jersey's legislation "as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id*. at 18. Without such comparable programs, like those providing state-paid policemen to protect children going to and from church schools from the "very real hazards of traffic," state action would go beyond neutrality and handicap religion. *Id*. Thus, the

[2] While the Court was directed by the Lemon Test in its analysis, *Everson* is still good law.

Establishment Clause did not prohibit New Jersey from spending tax raised funds to pay the bus fares of parochial school students "as a part of a general program under which it pays the fares of pupils attending public and other schools." *Id.* at 17.

In *Allen*[3], the Board of Education of Central School District No. 1 challenged a New York statute requiring local public-school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students attending private schools. 392 U.S. at 238-240. The legislature based the statute on the finding "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." *Id.* at 239 (internal citations omitted). Looking to *Everson* and our Nation's tradition of public assistance, the *Allen* Court stated "As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment." *Id.* at 242. Notably, the Court found that "[p]erhaps free [nonsectarian] books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Id.* at 244.

In *Roemer*[4], this Court addressed whether a Maryland statute "which, as amended, provides for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for 'sectarian purposes.' 426 U.S. at 739. Citizens and taxpayers from Maryland, serving as plaintiffs, challenged the statute under the Establishment Clause due to the allocation of aid to four colleges with

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[3] While the Court was directed by the Lemon Test in its analysis, *Allen* is still good law.
[4] While the Court was directed by the Lemon Test in its analysis, *Roemer* is still good law.

affiliations to the Roman Catholic Church. *Id*. Plaintiffs claimed that these institutions were constitutionally ineligible for state aid. *Id*. The Court found that when the government aid was extended for a secular purpose, regardless of whether the aid was provided to a sectarian or nonsectarian college, there was no danger of the state establishing a religion. *Id*. at 738.

In *Witters v. Washington Dep't of Servs. for the Blind*[5], petitioner suffered from a progressive eye condition and applied to the Washington Commission for the Blind for vocational rehabilitation assistance pursuant to a Washington statute. 474 U.S. 481 (1986). Petitioner was denied assistance pursuant to a Commission policy that "[t]he Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." *Id*. at 483. The Washington Supreme Court affirmed petitioner's denial based on the Establishment Clause, holding that the provision of aid to petitioner would have the primary effect of advancing religion in violation of that Clause. *Id*. at 484-85.

On certiorari, the Court noted that "It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution," examining several instances wherein government money which makes its way to the hands of a religious institution was permitted under the Establishment Clause. *Id*. at 486. In examining Washington's program, the Court found:

> It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that

[5] While the Court was directed by the Lemon Test in its analysis, *Witters* is still good law.

> the decision to support religious education is made by the individual, not by the State. *Id.* at 488.

The Court found that it was inappropriate to view any aid ultimately flowing to the petitioner's school for the purpose of providing petitioner with the vocational rehabilitation assistance a state action sponsoring, subsidizing, or endorsing religion. *Id.* at 488-89. The Court therefore held it failed to see how "extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment." *Id.* at 489.

More recently, in *Espinoza*, the Court found the extension of Montana's tax credit program to students attending private schools was permissible under the Establishment Clause, particularly given that state government support made its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. 140 S. Ct. at 2254. "We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id. See also Carson*, 596 U.S. at 781 (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). A "State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 787.

Here, Defendants' position that IDEA funding does not and should not reach religious schools without running afoul of the Establishment Clause is blatantly incorrect. IDEA provides within its relevant statutes that such funding may be extended to children parentally placed in private schools. 20 U.S.C. § 1412(a)(10)(A)(i)(III) ("Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private,

including religious, schools, to the extent consistent with law."); 20 U.S.C. § 1412(a)(10)(A)(vi)(II). (These children are entitled to "equitable services" that must be "secular, neutral, and non-ideological" even when provided in religious schools).

Thus, applying the principles established in the line of cases from *Everson* through *Espinoza* and *Carson*, extending IDEA funds to religious institutions, when done in a manner that is neutral, secular, and non-ideological, as the framework of the statute provides, does not violate the Establishment Clause and fits squarely within the permissible bounds delineated by the Supreme Court's precedents.

Firstly, the IDEA funds in question are allocated for the secular purpose of providing special education and related services to children with disabilities, irrespective of the religious or secular nature of the school they attend. This neutral, secular aim is consistent with the longstanding principle that government programs intended to promote the general welfare should be accessible to all citizens, regardless of their religious affiliations. The provision of IDEA funds to religious schools, under this case, would be based on the independent choices of the parents (like the Flynns and Klines), not a direct government endorsement of religion. This approach aligns with the "private choice" doctrine that the Supreme Court has upheld as a crucial consideration in determining the constitutionality of government aid to religious entities.

Secondly, the IDEA's framework ensures that any funds provided to children in religious schools are used for secular, neutral, and non-ideological purposes, specifically for the provision of special education and related services. *See* 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Here, providing IDEA funds to H.F. and B.K. preserves the historical notion that parents have the right to provide their children with a secular education and extending public funds to those children is permissive

under the Establishment Clause. *See Allen*, 392 U.S.; *Espinoza* 140 S. Ct.; *See generally Pierce* 268 U.S.; *Yoder*, 406 U.S.

Applying the same logic in *Witters*, where the funding is provided on an individual basis and does not create a financial incentive for students to undertake sectarian education over a nonsectarian one, the mere circumstance that the parents of H.F. and B.K. have chosen to use neutrally available state aid to help pay for their childrens' religious education does not confer any message of state endorsement of religion. At. 481.

Allowing IDEA funds to reach the Joshua Abraham High School and the Bethlehem Hebrew Academy preserves the notion that providing otherwise available public funds to a secular institution for the non-secular purpose of a child's wellbeing is not regarded as an "establishment of religion." *See generally Roemer*, 426 U.S.; *Allen*, 392 U.S. As seen in *Allen*, when a school receives the benefit of a public assistance program which is intended to promote the general welfare and education of our nation, the Establishment Clause does not prohibit the extension of that program on the basis that a school may predominantly focus on secular teachings.

In cases where this Court has found that the Establishment Clause is offended by a practice, it is in instances wherein there is a showing that a statute operates directly to coerce non-observing individuals. *Engel v. Vitale*, 370 U.S. 421 (1962). Here, Defendants fail to present evidence supporting any showing that the extension of IDEA funds to H.F. and B.K., or The Joshua Abraham High School and the Bethlehem Hebrew Academy is coercive on any individual to observe a religion. Rather, the evidence supports a showing of the opposite - the failure to extend IDEA funds more strongly supports a finding that individuals would be coerced not to observe, and violative of the Free Exercise Clause.

In conclusion, extending IDEA funds to the religious institutions represented by the plaintiffs in this case, under the conditions specified by the statute and consistent with Supreme Court precedents, does not violate the Establishment Clause. This extension upholds the principles of government neutrality toward religion and ensures that the right to free exercise of religion is not infringed upon by denying children access to public welfare benefits based on their religious education choices.

Therefore, extending IDEA funds to religious institutions, under the conditions specified by the statute, aligns with the constitutional mandate for government neutrality towards religion, respects the choices of parents in directing the education and religious upbringing of their children, and serves the compelling state interest in ensuring that children with disabilities receive a free and appropriate public education. This approach does not violate the Establishment Clause but rather upholds the principles of neutrality and accommodation that are foundational to the First Amendment's protection of religious freedom and the separation of church and state.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to find that § 502 violates the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Moreover, Petitioner moves this Court to find that § 502 does not violate the Establishment Clause, and grant any further relief deemed proper by this Court.

DATE: March 4, 2024

Respectfully submitted,

X_____Team 005_____

Attorney for Petitioner