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

**In the Supreme Court of the United States**

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*
*TO THE UNITED STATES COURT OF APPEALS FOR THE*
*EIGHTEENTH CIRCUIT*

# BRIEF FOR PETITIONERS

TEAM #7

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## QUESTIONS PRESENTED

1. 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.

2. Whether the extension of IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

## STATEMENT OF THE CASE

A. Statutory Background

I. IDEA

Education is perhaps the most important function of state and local governments." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). However, states and localities had historically denied educational access to children with disabilities. So in 1975, Congress stepped in and passed the Education for All Handicapped Children Act of 1975 ("EHA"). Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.). At the time, eight million children were deprived of their educational needs and parents were required to seek support outside the public educational system. *Id*. at 89 Stat. 774. Therefore, Congress decided to grant funding so those children would receive a free appropriate public education (FAPE) designed to meet their unique needs. *Id*. at 775.

In 1990, Congress reauthorized the EHA. Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended in scattered sections of 20 U.S.C.).[1] The reauthorization changed the title to the Individuals with Disabilities Education Act ("IDEA"). § 1400 (a). IDEA's purpose is to ensure *all* children with disabilities can receive a FAPE designed to meet their unique needs. (emphasis added). §1400(d)(1)(A)-(2). The law reaffirmed that improving educational results for children with disabilities is an essential element of the national policy to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency. §1400(c)(1). IDEA noted 30 years of research and experience which demonstrated that educating children with disabilities can be made more effective by strengthening the role of parents and emphasized the importance

[1] All further statutory references are to 20 U.S.C. unless otherwise noted.

of protecting the rights of both the children and their parents. §§ 1400(c)(5)(B), (d)(1)(B). Lastly, IDEA added autism as a covered disability. §1401(a)(3)(A)(i).

IDEA operates through federal grants to states. *See* § 1411. In exchange for the funds, the state must provide a FAPE and establish a goal of providing full educational opportunities to all children with disabilities in the state. § 1412(a)(1)(A). These opportunities must be made available to children attending private schools as well. § 1412(a)(10); 34 C.F.R. § 300.132(a). Parents are authorized to select religious schools and still receive funding. § 1412(a)(10)(A)(i)(III). The funds can only go towards non-ideological services for the disabled children, without benefiting the school's general needs. 34 C.F.R. § 300.141.

The FAPE must include a highly detailed individualized education program (IEP). §§ 1412(a)(4), 1414(d). These details include statements of the child's present level of academic achievement and functional performance, annual measurable goals, how to measure progress towards those goals, the services and modifications to be provided to the child, and the anticipated frequency, location, and duration of the services. § 1414(d)(1)(A)(i)(I)-(VI). The IEP must consider the child's strengths, parents concerns, initial evaluation results, and academic, developmental, and functional needs of the child. § 1414(d)(3)(i)-(iv). The state must include the parents in deciding where the child's education would take place. § 1414(e).

## II. TOURVANIA LAW

This case concerns §502 of Tourvania's Education Code (TEC). TEC § 502 authorizes special education services, provided that the school remain public or nonsectarian. § 502(a). Nonsectarian is defined as a private school not owned, operated, controlled by, or formally affiliated with any religious group or sect. § 502(b). Furthermore, the articles of incorporation or

bylaws cannot stipulate that the assets will inure to the benefit of a religious group. *Id*. This requirement is not waivable. § 502(d)(ii)(1).

For a nonpublic school to be eligible to receive funds, they must enter a contract with the Local Education Agency (LEA). § 502(c). To be eligible for a contract, the school must apply for certification from the Superintendent of Public Instruction (Superintendent). § 502(d)(i). The school must meet certain requirements, including a description of Tourvania's core curriculum, instructional materials used by general education students, a description of the special education to be provided, and the teachers authorized to provide special education with their credentials. § 502(d)(ii). The institution must agree to maintain compliance with IDEA. §502(d)(iii). Services are only provided to a private school when the LEA decides that placement there is appropriate, despite the parents opinion on the matter. § 502(e).

B. Factual and Procedural Background

This action was filed by Cheryl and Leonard Flynn (the Flynns), Barbara and Matthew Kline (the Klines)(Parents), and Joshua Abraham High School and Bethlehem Hebrew Academy (the Schools)(collectively Petitioners), in the District Court for the District of Tourvania. The Flynns and Klines are Orthodox Jewish parents and the Schools are Orthodox Jewish schools. The action was brought against the Tourvania Department of Education and Kayla Patterson, Superintendent of Public Instruction (collectively Respondents).

The Flynns have a five-year-old daughter, H.F., who has been diagnosed with high functioning autism. R. at 8. The Flynns seek to provide her with an Orthodox Jewish education, to immerse her in Orthodox Jewish culture and heritage, and instill their deeply held values and beliefs in her. *Id*. The Flynn's sent her to a private Orthodox Jewish pre-school where she received occupational, behavioral, and speech therapy, and paid for it out-of-pocket. *Id*.

Currently, she attends the Fuchsberg Academy, an Orthodox Jewish learning center, where she receives 15 hours of behavioral and 45 minutes of occupational therapy weekly. *Id*. The Flynns continue to pay for regular tuition and the services out of their pocket. *Id.* The Flynns never sought a formal evaluation from the Tourvania Central School District, because §502(d)(ii)(1)'s nonwaivable sectarian requirement makes it impossible for them to receive funds while staying true to their Orthodox Jewish values. *Id.*

The Klines have a thirteen-year-old daughter, B.K., who has been diagnosed with autism since she was three. R. at 9. The Klines seek an Orthodox Jewish education, along with the proper services their daughter needs. *Id.* The Klines have sought to place her in an Orthodox Jewish school since she was in pre-school, but they've been unsuccessful. *Id.* Therefore, H.F. has attended a non-Jewish public school, where she has been provided with the necessary services. *Id*. However, she has not performed well academically, received necessary services on secular and Jewish holidays, or consistently received kosher food. *Id*. The Klines would like to send B.K to an Orthodox Jewish School, but that would require them to forfeit the funding under §502. *Id.*

The Schools teach both Orthodox Jewish values along with secular studies. R. at 9. They sought certification to provide special education and related services to disabled Orthodox Jewish children under IDEA, as Orthodox Jewish institutions. *Id.* at 9–10. Each application complied with § 502's requirements, except for the nonsectarian requirement. *Id.* at 10; TEC § 502(b)-(d)(i). As a result, Respondent Patterson denied their applications. R. at 10.

Petitioners filed this action in the District Court for the District of Tourvania, challenging § 502's nonwaivable nonsectarian requirement, because it violates the Free Exercise of the First Amendment and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amends. I, XIV; R. at 1–2. Petitioners challenge the law as applied,

focusing on § 502 as applied to Orthodox Jewish parents and schools. R. at 2. Respondents moved for summary judgment, arguing that providing funding to religious institutions would violate the Establishment Clause of the First Amendment. U.S. CONST. amend. I.

The district court denied Respondents motion. R. at 16. The court found that Tourvania's law violated the Free Exercise clause because it denied a generally available benefit solely on account of religious identity without satisfying strict scrutiny as defined in this Courts prior cases. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); R. at 11. As this Court held when confronting a categorical ban on churches applying for tire scrap grants in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the court found that Tourvania is forcing a choice between religion and government benefits. 582 U.S. 449, 458 (2017); R. at 11.

The court added that this Court reaffirmed *Trinity Lutheran* in 2020, finding that Montana's categorical ban on providing tuition assistance to religious schools did not satisfy strict scrutiny, and thus violated the Free Exercise clause. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020); R. at 11. The *Espinoza* court rejected the notion that using taxpayer funds to improve a church would violate the Establishment Clause, so Montana did not have a compelling government interest. *Espinoza*, 140 S. Ct. at 2261-62; R. at 12.

This Court added onto *Trinity Lutheran* and *Espinoza* in 2022, finding that Maine's categorical exclusion of nonsectarian schools from private school tuition assistance violated the Free Exercise clause. *Carson v. Makin*, 596 U.S. 767, 771 (2022); R. at 12. The court concluded that Tourvania's categorical nonsectarian exclusion violates the Free Exercise clause, as it thwarts Petitioners rights by forcing them to choose between disability funding and keeping their religious convictions. R. at 13. The Court found further that the law violates the Equal Protection

clause of the Fourteenth Amendment because they restrict IDEA funding for public and nonsectarian schools. *Id.* The court concluded that overt discrimination could not possibly be the least restrictive means and that IDEA's purpose is to provide funding to all qualified schools, regardless of their sectarian status. *Id.*

The court concluded further that §502 is not neutrally applicable because it treats comparable secular activity in seeking services for disabled children different than when a religious entity seeks the same funding. *Tandon v. Newsom*, 593 U.S. 61, 63 (2021); R. at 14. § 502's authorization of waiver for all requirements except the nonsectarian requirement established further that § 502 fails strict scrutiny. R. at 14.

The court rejected Respondents claim that §502 is necessary to conform to the Establishment Clause of the First Amendment, because this Court has repeatedly held that religious organizations can receive generally available funds through the independent choice of private benefit recipients. *Carson*, 596 U.S. at 780; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); R. at 15. Like *Zelman*, IDEA funding goes to religious organizations because of the choices made by private beneficiaries, so it would not violate the Establishment Clause. 536 U.S. at 639; R. at 15. Therefore, the court denied Respondents motion for summary judgment. R. at 16.

On an interlocutory appeal, the Eighteenth Circuit reversed, finding that § 502(d)(ii)(1)'s nonwaivable sectarian requirement does not violate the Free Exercise clause. R. at 18. The court held that the Free Exercise clause is only violated when the state action substantially burdens the exercise of religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690 (2014); R. at 18. The court pointed to the fact that the Flynns and Klines could receive adequate services in a nonsectarian school and contended that the parents merely preferred private schools. R. at 19. The court reversed the district court's finding that §502 is not neutral, because it ensures that

government officials would treat all religions equally, by treating them all with the same denial. R. at 19–20. The court did not review the determination that § 502 violates the Equal Protection Clause, nor did it explicitly reverse the district court's determination that providing IDEA funds to religious institutions would not violate the Establishment Clause. *See* R. at 13–16. However, the court ordered the district court to enter summary judgment for Respondents. R. at 20.

This Court granted review. R. at 21.

## SUMMARY OF THE ARGUMENT

This Court's First Amendment jurisprudence has repeatedly established that states may provide funding to parents with children attending sectarian schools. Tourvania's categorical exclusion religious children attending sectarian institutions from receiving IDEA funds violates the Free Exercise and Equal Protection clauses. Notwithstanding Tourvania's erroneous beliefs, extending these needed funds to religious children with disabilities would not violate the Establishment Clause.

Despite this Courts successive holdings starting with *Trinity Lutheran* in 2017 continuing on through *Espinoza* in 2020, and *Carson* in 2022 recognizing the ability of religious institutions and schools to receive generally available funds, the Eighteenth Circuit reached back to 2014 to find some way to uphold §502. The court reached for *Hobby Lobby*'s holding that a challenged state action must substantially burden the exercise of religion, instead of *Kennedy*'s holding that any burdening triggers a Free Exercise violation. They then reached back to this Courts' 1990 and 1994's holdings in *Smith* and *Grumet*, for the proposition that §502 is neutral and generally applicable, rather than 2022's unequivocal holding in *Carson* that categorically excluding religious institutions public assistance is not.

The Court should correct the Eighteenth Circuit's error and apply the correct standard. §502 is a categorical ban restricting sectarian institutions from receiving IDEA funding.

Religious parents with autistic children attending school in Tourvania cannot access these funds without compromising their child's ability to receive a religious education. Religious schools in Tourvania cannot be certified to receive these IDEA's funds because Tourvania's nonsectarian requirement is the only nonwaivable condition to receive IDEA funding.

This hostile exclusion is neither neutral toward religion or generally applicable, and the absence of both has long constituted a Free Exercise Violation. Like *Trinity Lutheran*, *Espinoza*, and *Carson*, this exclusion burdens religion and must therefore contain a compelling government interest, be narrowly tailored, and the least restrictive means of achieving that compelling interest to satisfy strict scrutiny. Like Missouri, Montana, and Maine, Tourvania forces a choice between receiving crucial disability funding and receiving a religious education. The Eighteenth Circuit's holding that Tourvania can force parents to make this decision flies in the face of this Court's established precedent.

As if one constitutional violation is not enough, Tourvania's categorical exclusion also violates the Fourteenth Amendment's Equal Protection clause. Despite this Court's inherent suspicion of laws targeting classes of people, Tourvania decided to enact a law targeting religious individuals and institutions. Somehow, the state interpreted this Court's holding in *Plyler* requiring that similarly circumstanced people be treated alike, does not apply when religion is involved. Tourvania accepted IDEA funding along with its conditions including that the state provide funding to all qualified individuals. Overt discrimination cannot be the way to avoid those conditions, especially when strict scrutiny is applied.

Up until two years ago, Tourvania could have argued that §502 is permissible use-based discrimination, not to be confused with the unconstitutional status-based discrimination. But the

Court shut the door to that argument in *Carson*. So Tourvania grasped at another straw by arguing that §502 is necessary to avoid violating the Establishment Clause.

Once again, this Court starting with *Everson* in 1947, continuing on to *Romer* in 1976, through *Zobrest* in 1993, *Zelman* in 2002, and through *Trinity Lutheran*, *Espinoza*, and *Carson* in the past seven years has consistently rejected this contention. In fact, *Zelman* explicitly allowed IDEA funds to go towards an interpreter for a deaf child attending a religious school. And while Tourvania could have responded by arguing a *Lemon* violation, the Court shut the door to that argument by overruling *Lemon* in 2022.

Left without that argument, Tourvania persuaded the Eighteenth Circuit to redefine "neutrality" as within and between religious groups. That argument could only be made by ignoring *Lukimi*, where this Court discusses neutrality along with general applicability, both of which apply to the entire regulated public. Because § 502 violates the Free Exercise and Equal Protection Clauses, and IDEA is consistent with the Establishment Clause, the Eighteenth Circuit's holding must be reversed.

## ARGUMENT

1. TOURVANIA EDUCATION CODE §502 VIOLATES THE FREE EXERCISE CAUSE AND THE EQUAL PROTECTION CLAUSE.

TEC §502 violates the Free Exercise Clause because it specifically denies the publicly available education to religious children with disabilities. Additionally, TEC § 502 violates the Equal Protection Clause because it denies Petitioners, and only people like Petitioners, the public benefit of specialized schooling services for children with disabilities. The Court should reverse the Eighteenth Circuit's erroneous holding to the contrary.

## I. TEC §502 BURDENS THE PETITIONERS SINCERE RELIGOUS PRACTICES

This Court subjects Free Exercise challenges to a two-part test. First, the plaintiff must demonstrate that the law burdens religious practice. If the law burdens religious practice, then the burden shifts to the defendant. The law presumptively violates the Free Exercise clause and is unconstitutional, unless the law is neutral and generally applicable, or otherwise satisfies strict scrutiny. *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 524 (2022)(internal citations omitted); *Lukumi*, 508 U.S. at 545. A burden is an infringement of rights granted by the Free Exercise clause. *Kennedy*, 597 U.S. at 524. For example, Maine burdened religious schools by disqualifying them from public tuition funds on account of their religion. *Carson*, 596 U.S. at 780. The City of Philadelphia burdened religious practice by forcing foster care agencies to decide between following their religious mission or approving relationships inconsistent with their beliefs. *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2019). And attempting to ban animal slaughter in the name of public health burdened religious practice as well. *Lukimi*, 508 U.S. at 546.

Here, § 502 burdens the rights of the Parents and the Schools. As this Court concluded in Carson, Espinoza, and Trinity Lutheran, forcing parents and schools to choose between religious values and receiving generally available funds burdens religious practice. *See Carson*, 596 U.S. 784; *Espinoza*, 140 S. Ct. at 2261 (2020); *Trinity Lutheran*, 582 U.S. at 462. Maine, Montana, and Missouri all tried to contend that they had concocted a permissible way to discriminate against religion and the Court flatly rejected every one of them. Accord, *Carson*, 596 U.S. at 782 ("The First Circuit attempted to distinguish our precedent…"); *Espinoza*, 140 S. Ct. at 2255 ("The Department counters that trinity Lutheran does not govern here…"); *Trinity Lutheran*, 582 U.S. at 464 ("The Department attempts to get out from under the weight of our precedents"). Now, Tourvania is attempting to burden the religious practice of the Parents, by forcing them to

choose between religious institution or possibly receiving IDEA funds and being fed non-kosher food. *See* R. at 9. They are burdening the Schools by forcing them to choose between serving religious students or receiving IDEA funding. R. at 9-10. The "unremarkable" principles of this Courts precedents should carry the day again and find that Tourvania has burdened Petitioners religious practice. See *Carson*, 596 U.S. at 779. Accordingly, the burden would then shift to Respondents to contend that § 502 is neutral, generally applicable, or satisfies strict scrutiny. *See Kennedy*, 597 U.S. at 524.

## II. TEC §502 IS NOT A NEUTRAL, GENERALLY APPLICABLE LAW AND THUS STRICT SCRUTINY APPLIES.

The only time this Court will find that the heightened requirements of strict scrutiny under the Free Exercise clause can be avoided is if a regulation is neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 532 (1993); *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 886 (1990) (holding there is no "private right to ignore generally applicable laws."). "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi,* 508 U.S. at 521. TEC §502 is not neutral or generally applicable and this Court should reverse the Eighteenth Circuit's erroneous holding to the contrary.

### A. TEC §502 is Not Neutral Because It On Its Face Discriminates Against Religious Institutions and Singles Them Out for Especially Harsh Treatment.

The bare minimum requirement for neutrality is that a regulation does not discriminate on its face. *Lukumi,* 508 U.S. at 533("The law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context"). That test includes situations where the "intent to discriminate against particular religious beliefs or against religion in general" is found. *Bowen v. Roy*, 476 U.S. 693, 707 (1986). When evaluating intent of the

ordinance in *Lukumi*, this Court noted that the only entity restricted by the ordinance was the religious group, leading to the "necessary conclusion" that the intent was not for the ordinance to be neutral and generally applicable. 508 U.S. at 535.

Laws that single out institutions of religion for especially harsh treatment are discriminatory on their face. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020)(holding regulations limiting the number of people allowed at religious institutions to lower than those allowed at similar secular gatherings unconstitutional). Neutrality does not exist if a law treats "*any* comparable secular activity more favorably than religious exercise." *Id*. Additionally, if a statute allows for individualized exceptions, then "the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Lukumi* at 537. The failure for an exception to be made, when it can be done in another scenario, because the claim is based on a religious hardship shows an intent to discriminate against religion and triggers strict scrutiny. *Bowen*, 476 U.S. at 708.

TEC § 502 is not and cannot be a neutral statute on its face because it specifically, without exception, excludes all religious institutions from receiving *any* IDEA benefits. TEC § 502(b). As this Court held in *Lukumi*, a law that discriminates on its face cannot be neutral. 508 U.S. at 534. The language of TEC § 502(b) clearly excludes any organization based if they are "owned, operated, controlled by, or formally affiliated with a religious group or sect." Even if a law discriminates against all religions, it cannot be seen as neutral. 508 U.S. at 532. Additionally, if the object of the law is to specifically enjoin religious practices, the law is not seen as neutral and must be tested against strict scrutiny. *Cuomo*, 592 U.S. at 17.

TEC § 502 clearly bans all institutions which are affiliated with religion generally from participating in otherwise generally available funding programs. TEC § 502(b) These restrictions

apply solely to religious institutions, signaling an intent to target religious institutions. *Lukumi.* at 533. Compounding the injury, is the ability to apply for waivers of the statutory requirements; unless it's the religious requirement. TEC § 502(d)(ii)(1). This highlights a specific intent to target religious institutions by discriminating based on the type of institution applying for a waiver. *Bowen v. Roy*, 476 U.S. at 707.

### B. TEC §502 is Not Generally Applicable Because It Singles Out All Religious Institutions to Try and Achieve a "Government Interest."

Statutes targeting religion receive heightened suspicion. *Lukumi*, 508 U.S. at 542 . The intent of the Free Exercise Clause is to protect people from unequal treatment based on their religious practices, so "a government attempting to pursue a government interest only against conduct with a religious motivation breeds inequity." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987). Respondent has not stated a compelling government interest beyond an incorrect understanding of the Establishment Clause. If a compelling interest did exist, it would still be unimaginable to put the entire regulation only on religious institutions. *Id*. at 148.

This Court has consistently held that public funds can be given to religious institutions if they are given through a wholly independent and private choice. *See* Part 2.I*; Carson*, 596 U.S. at 778. Again, Tourvania has not expressed specific concerns, but one could theorize concerns about public funds being misused for "nonideological services. However, that is not an issue that is exclusive to religious institutions, because any private institution could potentially misuse publicly available funds. R. at 5. This Court has held that the State cannot assume the worst of people when participating in religiously motivated activities but assume the best of people when people are engaged in the same activities but in a secular capacity. *Tandon*, 593 U.S. at 64("State cannot 'assume the worst when people go to worship but assume the best when people go to

work'"). It is clear from the text and application of TEC §502, specifically subsections (b) and (d)(ii)(1), that this statute is not neutral and generally applicable and therefore requires Respondents to prove that this statute satisfies strict scrutiny. *Tandon*, 593 U.S. at 62.

## III. TEC §502's Categorical Ban on Religious Institutions Fails Strict Scrutiny

"Congress shall make no law prohibiting the free exercise [of religion]." *U.S. Const. amend. I*. The purpose of the Free Exercise clause is to protect religious exercise. *Kennedy v.*, 598 U.S. at 523. The Constitution's drafters were all too familiar with historical instances of religious persecution and intolerance and sought to prevent laws that discriminate against religion. *See Lukumi*, 508 U.S. at 533 (internal citations omitted). This right was incorporated into the States by the Fourteenth Amendment. *Cantwell v. State of Connecticut,* 310 U.S. 296, 303 (1940).

Under this Court's precedent, "when otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny." *Espinoza*, 140 S. Ct. at 2260. Strict scrutiny is the standard of review applied to all Free Exercise challenges because "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). When a plaintiff shows that a government entity has burdened his sincere religious practices with a law that is not neutral or generally applicable, he has demonstrated a Free Exercise violation. *Kennedy*, 597 U.S., at 525 (2022). The burden then shifts to the Government to prove that there exists a compelling government interest; the statute is narrowly tailored to achieve this government interest; and it is the least restrictive means of achieving that interest. *Id*.; *Tandon*, 593 U.S. at 62; *Lukumi*, 508 U.S. at 546.

This Court has consistently held that categorical bans on religious entities from engaging in neutral government benefits programs do not survive strict scrutiny because there is no compelling state interest that outweighs people's right to Free Exercise under these circumstances, categorical ban cannot be highly tailored to an interest, and a categorical ban cannot be the least restrictive means of achieving an interest. *Carson*, 596 U.S. at 778-89; *Espinoza*, 140 S. Ct. at 2254; *Trinity Lutheran*, 582 U.S. at 458; *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 67 (1947).

### A. Tourvania does not have a Compelling Interest in Restricting Aid from Religious Children with Disabilities

This Court has made it abundantly clear that there is no Establishment Clause issue for religious groups having access to public funds through neutral government programs. *Espinoza*, 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."). If the funds are being directed to a religious institution through a wholly independent and private decision there is no federal Establishment Clause concern. *Zelman,* 536 U.S. at 648. In *Trinity Lutheran*, the Court held if a state is trying to establish a separation of church and state that is even more stringent than what is federally recognized that interest "is limited by the Free Exercise Clause." 582 U.S. at 458 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). The government in *Trinity Lutheran* offered no other interest besides the basic Establishment Clause concerning money going to religious institutions. The Court strongly held that in the face of a clear violation of the Free Exercise Clause, Establishment clause concerns "cannot qualify as compelling." *Id*. at 466.

Respondents have established no compelling governmental interest beyond an erroneous concern of violating the Establishment Clause. This Court in *Espinoza*, expounding on *Trinity Lutheran*, all but foreclosed such arguments in the context of these specific facts. 140 S. Ct. at

2254 ("Here, the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they."). There is no doubt that IDEA funding could be a neutral benefits program, if not for the religious exclusion currently applied, as was the tuition assistance program in *Espinoza.* 140 S. Ct. at 2251; R. at 2.

The goal of the legislation in both cases was to increase access to education, in this case by ensuring children with disabilities were given equal access to education and the services they need, and in *Espinoza* by increasing access to private school. 20 U.S.C. § 1400(d)(1)(A); 140 S. Ct. at 2251; R. at 2. With a thorough administrative process, Tourvania could ensure that children with disabilities were given individualized education plans that would take into consideration their direct needs and unique circumstances, including private school education. Respondents even specified, that the funding should go directly to aspects of their education that were "secular, neutral, and non-ideological." R. at 5; *contra Espinoza*, 140 S. Ct. at 2251.

From the words of the Tourvania legislation, it was already apparent that children with disabilities would be given this funding while attending religious institutions. If the funding itself went to the specific services required by the children with disabilities in a non-ideological form such as "speech-language pathology and audiology services, physical and occupational therapy, counseling, recreation, orientation and mobility services, and diagnostic medical services" there would be no issue. R. at 3; 20 U.S.C. § 1401(26).

Similarly, the facts are nearly identical to *Trinity Lutheran*. Both government programs have identified specific instances for what the state money can be used for: playground resurfacing and nonideological services required by children with special needs. 582 U.S. at 455; R. at 5. Both governments also added additional requirements to ensure the money was being awarded to places that were in line with their education objectives. TEC §502(d); *Trinity*

*Lutheran*, 582 U.S. at 455("The Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling"). These are examples of neutral and generally applicable requirements to make sure the money is funding the right services for children in private schools and would be acceptable under the Free Exercise Clause. The Court in *Trinity Lutheran*, as cited by *Espinoza*, reiterated that there is no federal Establishment Clause concern, and the states cannot bring a heightened interest if it would infringe of free exercise as it does here. 582 U.S. at 466; 140 S. Ct. at 2254.

## IV. There is No Legitimacy Given to "Use Based" Discrimination Over "Status Based" Discrimination.

A state is not allowed to exclude individuals from public benefits programs because of their religion. *Carson*, 596 U.S. at 778 (citing *Everson*, 330 U.S. at 16). Before *Carson* was decided, there seemed to be room for a state to argue that the discrimination against religious institutions was based on how institutions would use the funds not based on their status as a religious institution. However, the Court was clear that such an argument is not valid, and discrimination is discrimination despite how it is justified. The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id*.; *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988).

In *Carson*, Maine argued that the religious schools were being excluded because the money was going generally to the schools not towards a specific aspect of the school like in *Trinity Lutheran*. 596 U.S. at 786; 582 U.S. at 455. However, Maine has never scrutinized how the funds were being used at any other nonsectarian school, so this distinction is merely theorized, because other private schools may very well be using the funds in inappropriate ways but are not being precluded from the funding. *Carson*, 596 U.S. at 786. Additionally, Maine did

not have any curriculum requirements, only requiring that they be accredited, giving more room for any private school to establish any type of curriculum without any oversight.

In the present case, Respondents have created several requirements that show that they are taking involvement in the institution to make sure the educational standards are what is expected. They created specific curriculum requirements, accreditation, teaching certification all of which Petitioners agreed to and met. TEC § 502(d)(ii); R. at 10. It should be noted that there can be waivers for those requirements, meaning a school might be able to get funding even without meeting those requirements. TEC § 502(d)(ii)(1). Petitioners did not file for a waiver meaning all of the educational standards are met and they agreed that the money can only go to specific non-ideological services needed to accommodate children with disabilities. These specific facts show that if in *Carson* there was no issue even more so there is no issue here because there are specific delineated services Respondents' money is being used for and the schools themselves meet every other educational standard set by Respondents. 596 U.S. at 786.

Despite what Respondents argue; Petitioners, meeting all other requirements, are banned from receiving funding solely based on their religious status, like the plaintiffs in *Trinity Lutheran*. R. at 10 ("each application complied…including a description of the Tourvania Board of Education-adopted core curriculum and instructional materials used by general education students, the names of its teachers with a credential authorizing service in special education, and copies of the credentials"); *Trinity Lutheran*, 582 U.S. at 455 ("Department had a strict and express policy of denying grants to any applicant owned or controlled by a church…"). Since the sole factor barring these schools from receiving funding is their religion, the state is essentially asking them, like in *Trinity Lutheran*, to choose between their religious identity and their ability to provide state-funded services to children with disabilities.

Either way Respondents try to argue, the Court is clear on the "unremarkable" principles they use to determine if in this scenario there is a Free Exercise violation. *Carson*, 596 U.S. at 780. There is a public benefit, funding for children with disabilities to receive the services they would receive under FAPE in a private school through IDEA, and there exists one reason why the Petitioners are not receiving this funding, their religious identity. R. at 1.

## V. The Eighteenth Circuit Applied The Wrong Test

The Eighteenth Circuit fundamentally misunderstood this Court's precedent and applied an inaccurate standard that Petitioners needed to prove a "substantial burden." *Hobby Lobby*, 573 U.S. at 690; R. at 18. However, *Hobby Lobby* was decided under the Religious Freedom Restoration Act of 1993, which has been ruled unconstitutional since the *Hobby Lobby* holding, which established a specific "substantial burden" standard not applicable in this case. 573 U.S. at 690; 42 U.S.C. § 2000bb-1("Government shall not substantially burden a person's exercise of religion."). The district court correctly identified and applied the proper legal rule of strict scrutiny, unless Respondents can prove that the statute was neutral and generally applicable. R. at 11.

The Eighteenth Circuit additionally misapplied the law regarding how a statute is seen as neutral, because they viewed neutrality as applied just between different religions. R. at 20 ("assures neutrality because it eliminates the unconstitutional risk that a government official, rather than a private individual, might make the choice about where to direct aid and thereby appear to favor any one religiously affiliated recipient over another"). The panel found that this nonwaiver ability of religious institutions is neutral because it would not lead to government officials favoring one religion over the other. R. at 20. That application ignored this Courts' consistent holdings that neutrality has to be applied to all regulated under a statute both religious

and secular. *Tandon,* 593 U.S. at 62; *Cuomo*, 592 U.S. at 17; *Lukumi,* 508 U.S. at 532; *Bowen,* 476 U.S. at 707. The district court correctly identified and applied the law, finding that § 502 is not neutral because it, "treats comparable secular activity…far more favorably than it treats Orthodox Jewish families and schools." R. at 14. The Eighteenth Circuit's holding to the contrary was erroneous and should be reversed.

## VI. TEC 502 is Unconstitutional Under the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause requires "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982)(citing *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). That holding has been repeatedly affirmed, including in the context of education. *Id*. Usually, the definition of "similarly circumstance" is left to the states. *Id.* However, the purpose of the Fourteenth Amendment was to combat state legislatures from writing "class legislation," as such the Court has viewed legislation "presumptively invidious" when it disadvantages a "suspect class" or a infringes on a fundamental right. *Id*. at 217. Strict scrutiny is applied to such legislation, requiring the state to prove a compelling government interest, narrowly tailored legislation that is the least restrictive. *Id*. As discussed above, Respondents cannot meet that standard of scrutiny and this Court should find TEC § 502 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, as well as the Free Exercise Clause.

While the Court has never firmly decided religion as a classification is a suspect class under the Equal Protection Clause, it has held that classifications based on religion are "inherently suspect." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Additionally, there are two "fundamental rights" that are being restricted; the first, freedom of religious exercise; and the second, the fundamental rights of parents to educate their children. *U.S. Const.*

*amend. I.*; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). The combination of an "inherently suspect" class with the blatant denial of two fundamental rights that burden the federal right to life and liberty trigger strict scrutiny.

There is no doubt based on the facts of this case that both the Flynns and the Klines are being forced to sacrifice either their religious practice or their children's education and access to public services. The Flynn's' privately subsidize H.F.'s services such as "occupational, behavioral, and speech therapy." R. at 8. These services would likely, under IDEA be paid for by the Respondent to give H.F. the same level of education as her peers as statutorily required. The Klines have been forced to deny their daughter B.K. the Jewish education they so badly want to give her to ensure she is getting the proper services she needs. During her time at a secular school, she has frequently not gotten the support she has need on both secular and Jewish holidays and been served non-Kosher food, a blatant disregard for her and her parent's religious values. *Id*. at 9. Both religious schools have met every single requirement of TEC § 502 but were denied solely because they identify as religious institutions. *Id*. at 10. There is no doubt that people and institutions "similarly situated" are being treated unequally and deprived of basic rights to education and religion given to them by the Constitution and basic services given to them through Congress. *Plyler,* 457 U.S. at 216. Therefore, Court should apply strict scrutiny find TEC § 502 unconstitutional under the Equal Protection Clause.

2. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE STATES TO SUPPRESS EDUCATION FUNDING FOR RELIGIOUS AUTISTIC CHILDREN

The district court found that Petitioners are allowed to make an independent decision to utilize public funds for their child to receive benefits at a religious institution. R. at 15. The court rejected Respondents contention that the Government cannot have any involvement with public money reaching a religious institution. *Id*. The Eighteenth Circuit did not reverse the district

court's conclusion that IDEA does not violate the Establishment Clause. R. at 17–20. This is consistent with how this Court has ruled. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 13-14 (1993). The Court should affirm the district court's decision and reject Respondents contentions to the contrary.

## I. Religious Institutions Can Benefit from Public Funds

The Establishment Clause does not bar religious institutions from receiving public benefits or participating in social welfare programs. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). This Court has long recognized the discriminatory absurdity that would result from the opposite conclusion. *See Romer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976). States can provide busing, the fire department and police may respond to emergencies, and the city may allow churches to access the sewage system. *Everson*, 330 U.S. at 18. States can award generally available grants to religious institutions for tire scraps without violating the Establishment Clause. *Trinity Lutheran*, 582 U.S. at 458. Additionally, parents may send their deaf child to a religious institution, with IDEA funds paying for his interpreter. *Zobrest*, 509 U.S. at. 13. This Court should affirm that IDEA funds can be used for an autistic child's occupational, behavioral, and speech therapy as well, no matter where they go to school.

In evaluating Establishment Clause challenges, a crucial factor is whether the support flows to the religious institution by mandate or by choice. This Court has constantly funding schemes where the private citizen decides to take the funding to a religious institution. *Zelman*, 536 U.S. at 653 (Upholding Ohio's tuition assistance program which included religious institutions); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 482 (1986) (Finding that a student could use vocational rehabilitation assistance to attend a Christian college where he'd study to become a pastor); *See Mitchell v. Helms*, 530 U.S. 793, 810 (2000); *Mueller v. Allen*,

463 U.S. 388 (1983)(Allowing taxpayers to deduct certain education expenses for any school including religious institutions). This Court has rejected the notion that just being on religious school property means that the funding is going towards funding religious instructions. *Zobrest*, 509 U.S. at 13 (1993). IDEA is a neutral program which provides aid to children with disabilities. *Id*. That the child chooses to go to a religious school does not invalidate that funding. *Id.* at 14.

## II. The Lemon Test Has Been Discarded in Favor of Looking Towards Historical Practices And Understandings

Where the Court has rejected funding schemes based on the Establishment Clause, they've relied on the Lemon test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *See School Dist. Of City of Grand Rapids v. Ball*, 105 S. Ct. 3216, 3222 (1985); *Widmar*, 454 U.S. at 271. The *Lemon* test asked whether the government action (1) has a secular purpose; (2) has a "principal or primary effect" that "neither advances nor inhibits religion;" and (3) does not foster "an excessive government entanglement with religion." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2078-79 (2019) citing *Lemon*, 403 U.S. at 612-13 (1971)(internal quotation marks and citations omitted). But after decades and over a dozen times of ignoring or declining to apply the test, the Court formally abrogated *Lemon*. *See Am. Legion*, 139 S. Ct. at 2080 (internal citations omitted) *Kennedy*, 597 U.S. at 534.

The *Kennedy* ruling cautioned that the Establishment Clause does not compel the Government to purge religion from the public sphere. 597 U.S. at 535 (2022). In its place, the Court instructed that the Clause should be interpreted by reference to "historical practices and understandings." *Id*. at 536. That test was first used in *Marsh v. Chambers*, where the Court sanctioned the Nebraska State Legislature's chaplain opening legislative sessions with prayer and being paid from state funds for doing so. 463 U.S. 783 (1983). In 2014, the Court found again

that legislative sessions can be opened with prayers that are overtly religious, consistent with historical practices. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014).

In *Marsh and Galloway*, the Court was able to draw a direct line allowing prayers at legislative sessions to the Continental Congress of 1774. *Marsh*, 463 U.S. at 787-89 (1983); *Galloway*, 572 U.S. at 583-84 (2014). But as the *Bruen* decision made clear, a historical twin is not required to be considered a historical practice. *New York Rifle and Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022). Instead, the proper test is whether a historical analogue is identified. *Id*. As the Court made clear in *Everson*, unless a state constitution requires otherwise, the Establishment Clause does not forbid states from contributing generally available funds to parents who choose to send their children to sectarian schools. 330 U.S., at 13-18 (1947); *c.f. Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)(Recognizing the validity of general laws advancing state secular goals despite the indirect effect on religious exercise).

III. IDEA is Not Coercive Under the Establishment Clause

*Galloway* pointed to governmental coercion of supporting religion as a key factor in evaluating whether the Establishment Clause is violated. *Id*. at 586-87, 90; *See also*, *Lee v. Weisman*, 505 U.S. 577, 636 (1992)(Scalia, J., dissenting). In 1943, the Court found it coercive to require Jehovah's Witnesses' students to salute the American flag, because it conflicted with their religious belief that the flag was an image the Ten Commandments forbade them to serve. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 629, 642 (1943). But this Court has consistently found that states can provide funding to parents, who may choose to take that funding to a religious institution. *See Everson*, 330 U.S. at 18 (1947); *Locke v. Davey*, 540 U.S. 712, 719 (2004)("(T)he link between government funds and religious training is broken by the independent and private choice of recipients"); *Espinoza*, 140 S. Ct., at 2254 (2020). The district

court found that IDEA's public funds are taken to religious institutions because the Flynns and Klines' decided to do so. R. at 15. That finding was not reversed by the Eighteenth Circuit, is consistent with this Court's precedents, and should be affirmed.

## IV. IDEA Satisfies the Establishment Clause's Neutrality Requirement

The Establishment Clause requires neutrality towards religion. *Bd. of Educ. Of Kiryas Joel Vill. Sch. Dist. V. Grumet*, 512 U.S. 687, 688 (1994) (internal citations omitted). Neutrality requires neither "favoring one religion over others nor religious adherents collectively over nonadherents." *Id*. For example, creating a special school district where all the residents were of one religious sect, to enable that sect to receive special services within the district, was a departure from that neutrality requirement. *Id*. at 696. The Court found that the law delegated governmental functions in a way that entangled religion with governmental functions. *Id*. at 696-97. Justice Kavanaugh classified these kinds of cases as those that favor religious organizations over secular organizations. *Cavalry Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611 (2020)(Kavanaugh, J., dissenting from denial of application for injunctive relief).

But Justice Kavanaugh recognized that there are laws which do not favor either secular or religious organizations and do not violate the Establishment Clause. *Id*. And as this Court has recognized, IDEA is a neutral governmental program that distributes benefits neutrally to disabled children. *Zobrest*, 509 U.S. at 10 (1993). These benefits are distributed without regard to which school the child attends. *Id*. IDEA is not skewed towards religion in any way, and the Court held that it does not violate the Establishment Clause. *Id*. Tourvania's contention that §502 is necessary to ensure they do not violate the Establishment Clause flies in the face of this clear precedent and should be rejected.

The Establishment Clause plays an important constitutional role; prohibiting children with special needs who happen to attend religious institutions from receiving public benefits is not one of them. Neither the district court nor the Eighteenth Circuit found that providing aid to religious autistic children violates the Establishment Clause. R. at 15. The Court should conclude the same.

## CONCLUSION

The Eighteenth Circuit's decision should be reversed.

**Respectfully Submitted,**

TEAM #7

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