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 the behalf of their minor child B.K.; THE JOSHUA ABRAHAM HIGH SCHOOL; andBETHLEHEM HEBREW ACADEMY

Petitioners,

-against-

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 RESPONDENTS

TEAM 8

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QUESTIONS PRESENTED

1. Whether TEC § 502, as a neutral and generally applicable law, violates Petitioners' rights under either the First Amendment's Free Exercise Clause, and/or the Fourteenth Amendment's Equal Protection Clause when it denies a public-intended benefit to a private religious entity?
2. Whether the Establishment Clause is violated when the government selects to fund religious schools with IDEA aid and finances religious indoctrination with public funds, undermining the fundamental principle of the separation of church and state?

STATEMENT OF THE CASE

STATEMENT OF FACTS

Tourvania Department of Education, overseen by Superintendent of Public Instruction Kayla Patterson ("Respondents") seek to provide enriching and necessary services to students with disabilities in coordination with the Individuals with Disabilities Education Act ("IDEA"). As a recipient of the federal funds, Tourvania has thoughtfully adopted IDEA to provide services to the children of the school district.

IDEA was not enacted to give discretionary funding to the states. Instead, IDEA's promise is to offer federal funds to assist states' ability to provide a fair and public education for those with disabilities. R. at 2. IDEA is, in principle, an exchange between the Federal Government and the states. R. at 3. The Federal Government promises to give disability funding to states in exchange for states providing a Free Appropriate Public Education (FAPE) to all eligible children. R. at 3. While IDEA is clear in its goal, the Federal Government allows the states latitude to decide the best way to ensure the promise of IDEA. R. at 5. Local educational agencies ("LEA"), like Tourvania, are public boards of education who oversee the implementation of IDEA funding at their local level. R. at 5.

IDEA requires LEAs to "find" children who are eligible under the program, including children who are parentally placed in private schools. R. at 5. In order for children with disabilities to receive a "FAPE," states must create individualized education plans ("IEP") consisting of a "highly individualized" written statement for each child with a disability that plans out their accommodations. R. at 4. IEP's include, but are not limited to, short term and long term educational goals, dates of services, projected dates of services and evaluation criteria. R. at 4. If the "FAPE" is the promise of IDEA, the "IEP" is the means for that promise to happen. R. at 4.

While not directly in line with the primary purpose of IDEA, the Federal Government allows states to fund private school institutions at their discretion. R. at 5. If granting funding, LEA's must use a proportionate amount of funds on private school students. R. at 5. These services must also be equitable, but secular and ideologically neutral. R. at 5.

Tourvania Education Code ("TEC §502") follows IDEA and has several measures to ensure "compliance" with IDEA's goal to provide the means for those with a disability a free accessible *public* education. R. at 6. However, Tourvania, following IDEA, grants funds to private schools when several conditions are met, including a contract with the nonpublic school outlining the services for instruction, program development, staffing, IEP implementation, and the supervision of the LEA and a requirement that the school carry out a nonsectarian purpose. R. at 6. A private school cannot waive the nonsectarian requirement. R. at 6. The superintendent can deny or accept certification of the school depending on whether instruction in private school can adequately meet the needs of the student. R. at 7. An application for certification must include Tourvania's Board of Education-adopted core curriculum, instruction materials and the names of teachers with their credentials. A superintendent can also conditionally certify a private school. R. at 7.

Petitioners are two families and two school districts – the Flynns and the Klines, and The Joshua Abraham High School and Bethlehem Hebrew Academy – who desire to stretch the scope of IDEA's promise and require Tourvania to pay IDEA funds to sectarian schools. Petitioners wish to access the full benefits of IDEA without compromising their children's religious education. R. at 8-9. Petitioners insist that their religious beliefs obligate them to provide their children with an Orthodox Jewish education to foster religious culture and heritage. R. at 8. Curiously, despite their stringent beliefs, the Flynns have not sought a FAPE from Tourvania Central School District

("TCSD") and have thus not had their child evaluated for a special education plan. R. at 8. Similarly, the Kline's have had their child enrolled in public education for the better part of a decade. R. at 9. Thus, Petitioners seek to access the full range of IDEA benefits to supplement the cost of their children's religious education. R. at 19.

The Joshua Abraham High School and Bethlehem Hebrew Academy both seek to bypass Tourvania's non-sectarian restriction to access IDEA funding. Both schools have missions deeply rooted in the Orthodox Jewish faith, seeking to promote the values and learning of the Torah, yet also claim that in gaining the benefit, can carry out the goals of a free and appropriate public education that IDEA promises R. at 9. The Petitioners believe that their application is sufficient, however Superintendent Patterson, using her statutorily granted power, denied both applications. R. at 10. Although schools do not meet the nonsectarian requirement of provision TEC §502(b), Petitioners otherwise allege that they have met the requirements for IDEA funding. R. at 10. However, nothing from the record indicates that they have met these requirements according to the Tourvania Board of Education. R.10. Neither families' child attends Joshua Abraham High School or Bethlehem Hebrew Academy, and nothing from the record indicates that either one has plans to attend either school. Both schools claim they are entitled to federal IDEA. Further, nothing in the record indicates the number of students who have disabilities in their schools or any family that has children with disabilities that attends or plans to attend these schools.

PROCEDURAL HISTORY

Petitioners argue that giving full IDEA funding to public and nonsectarian private schools violate their Free Exercise and Equal Protection rights. They brought their claims in the District Court of Tourvania, where Respondents moved for Summary Judgment. The District Court of Tourvania denied the Board of Education's motion. Respondent Department of Education

appealed the denial of their motion to the Eighteenth Circuit Court of Appeals, holding that §502 of the Tourvania Education Code did not substantially burden the claimants' religion, and thus did not violate the Free Exercise Clause. Accordingly, the Eighteenth Circuit declined to address the merits of the Equal Protection Claim, or whether a compelling interest (Establishment) is required to uphold constitutionality of the law. Petitioner appealed the decision, and this Court granted a writ of certiorari on the questions presented.

SUMMARY OF ARGUMENT

I. This Court should affirm the lower court's Summary Judgment dismissal of the Petitioner's Free Exercise and Equal Protection challenges to TEC §502. Case law has established that laws and statutes that are neutral and have general application to numerous people will not be subject to strict scrutiny. While this Court has somewhat varied in its interpretation of "neutral and generally applicable," there has only been one underlying constant: laws that violate one's Free Exercise Rights typically include evidence of animus towards one group or evidence that the object of the law is to burden a specific group's belief. Laws that do not have such evidence, do not violate the Constitution. There is nothing in the record that suggests Tourvania has any animus towards the Jewish Orthodox community.

There are also narrow exceptions to the rule of general applicability that do not apply in this case. This Court has held that when a decision to grant funding is determined by the discretion of a government agent, the law is subject to strict scrutiny. However, TEC §502 is clear in that there is no discretion in giving IDEA funds to religious organizations, as the nonsectarian requirement is "nonwaivable." Second, Petitioners bring an equal protection claim—claiming that they are unable to assert their fundamental right to direct their child's upbringing. Yet, this "hybrid-rights" exception to Smith is not even acknowledged by some Circuits, and many other Circuits

require the companion claim to be "colorable." Their claim is meritless as Petitioners fail to show that TEC §502 implicates a clearly defined fundamental right or suspect class. Therefore, neither exception applies.

In short, Petitioners' attempt to frame the facts and their argument to get around the rule of general applicability is fruitless, and a desperate attempt to gain strict scrutiny review. They have failed to do so, as such, TEC §502 is not subject to strict scrutiny analysis.

II. This Court should find that the Establishment Clause is violated when IDEA funds are improperly extended to religious institutions because the aid is not available to a neutral, broad group of students, and the government is responsible for selecting eligible recipients. Thus, TEC §502 is constitutionally required to exclude sectarian schools from receiving IDEA aid.

IDEA aid cannot be extended to religious schools without running afoul of the Establishment Clause because only a narrow class of persons are eligible for the program – disabled children who are identified by the government. IDEA funding to religious schools poses serious unconstitutional Establishment Clause violations because it requires that government officials select eligible recipients.

IDEA aid in religious schools violates the Establishment Clause because it leads to excessive government entanglement with religion. Religious schools are intrinsically linked to nonsecular studies, even in conversations that are not about religion, so much so that Petitioners seek to send their children to religious schools to maintain constant religious indoctrination. Therefore, once IDEA aid reaches the schools by direct government involvement, the aid is unrestricted in its potential uses. IDEA requires the government to pay for an agency to provide the services, yet still allows for staff of the religious institutions to act as the government-endorsed agent. IDEA aid quickly becomes unrestricted funds, where nonsecular schools use taxpayer

monies for religious indoctrination. Thus, permitting, even encouraging, government endorsement of religion in violation of the Establishment Clause.

Lastly, this Court should preserve the fundamental principle of the separation of church and state in finding that Establishment Clause is violated when IDEA funds are extended to religious institutions. This approach is aligned with the intentions of the Founders, who warned of the dangers of taxpayer's monies reaching the coffers of the church.

Thus, this Court should find that TEC §502's nonwaivable nonsectarian requirement is constitutionally required, and without it, IDEA funds extended to religious institutions is an Establishment Clause violation.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE EIGHTEENTH CIRCUIT AND FIND THAT §502 OF THE TOURVANIA EDUCATION CODE DOES NOT VIOLATE PETITIONERS' FIRST AMENDMENT FREE EXERCISE RIGHTS NOR THEIR EQUAL PROTECTION RIGHTS.

Section 502 of the Tourvania Education Code does not violate the Free Exercise Clause because the law is neutral and generally applicable based on the central holding in Employment Div. v. Smith, 494 U.S. 872, (1990), and its progeny. Further, the exceptions to this rule—the hybrid-rights exception and the individualized governmental assessment exception—do not apply. Therefore, §502 is a valid burdening of religious exercise and does not violate the protections of the First Amendment. Thus, this Court should affirm Summary Judgment granted by the Eighteenth Circuit.

Section 502 of the Tourvania Education Code does not violate the Equal Protection Clause of the Fourteenth Amendment. Petitioners fail to show there is any basis for heightened scrutiny review of §502. They fail to assert a fundamental right, a discriminatory purpose in passing the

ordinance, or that the Petitioners are a suspect class. Therefore, their claim is, at best, subject to rational basis review. Thus, the Eighteenth Circuit was correct in failing to consider Petitioners' Equal Protection claim and this Court should decline to consider its merits as well.

A. TEC §502 does not violate Free Exercise Rights of Petitioners' because the law is not subject to strict scrutiny.

The First Amendment asserts that "Congress shall make no law . . . prohibiting the free exercise" of religion and has been made applicable to the states by incorporation. U.S. Const. Amend. I; See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In Sherbert v. Verner, 374 U. S. 398 (1963), this Court held that a law that imposes "any burden" on the free exercise of religion would need to be justified by a "compelling state interest." The Employment Div. v. Smith Court reinterpreted Sherbert and held that laws that substantially burden religion are constitutional if they are "neutral" and "generally applicable." 494 U.S. 872, 880 (1990). However, Smith and its progeny of Free Exercise cases have applied strict scrutiny in cases that dealt with another constitutional claim in conjunction with a Free Exercise claim (hybrid-rights). Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying strict scrutiny to a Free-Exercise Claim in conjunction with a parental rights claim) See also Wooley v. Maynard, 430 U.S. 705 (1977) (applying strict scrutiny to Free Exercise and companion Free Speech claim). An exception to a neutral law also applies in cases where government actors used their sole discretion to create exceptions to a neutral law. See Fulton v. City of Philadelphia, 141 S. Ct. 1868, (2021) (holding validity of law required a compelling state interest because commissioner granted exceptions to non-discrimination contracting policy).

TEC §502 is not a violation of Petitioners' Free Exercise Rights because the law is generally applicable law and does not purport to discriminate or single out any specific religious group. Furthermore, none of the exceptions to the Smith rule apply.

1. TEC§502 is a "neutral" and "generally applicable" law because there is no evidence of animus towards the Jewish Orthodox Community.

TEC §502 is neutral and generally applicable because the "object" of the law is not to discriminate against Orthodox Jewish families or schools. See Smith, at 494 U.S 878-79; Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993). Courts have held that even laws with "subtle departures from neutrality and covert suppression of particular religious beliefs" may subject the law to strict scrutiny. Lukumi, 508 U.S. at 534. Courts use direct and circumstantial evidence, including the historical background, the specific series of events leading to the law's enactment, the policy in question and the legislative or administrative history. Lukumi, 508 U.S. at 520 (citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). In Lukumi, this Court utilized this evidence to find that the town's enactment of a statute preventing animal sacrifice fell "well below the minimum standard necessary to protect First Amendment rights" of the Santeria religion. 508 U.S. at 543. Particularly, this Court found evidence of the ordinances being "gerrymandered with care to proscribe religious killings of animals" from the significant hostility towards the Santeria religion during town council meetings, hostility from council members and the police chaplain quoting the practice as "abhorrent." Id.

Similar evidence of animus was found by this Court in Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, holding that a baker's refusal to make a cake for a same-sex couple violated his Free Exercise rights because of the Colorado Civil Rights Commission's lacking "neutral and respectful" *enforcement* of their policy because of their hostility towards his religious beliefs. 584 U.S. 617, 640 (2018). In that case, this Court found that the challenger did not get a "neutral decisionmaker" where the members of the commission called his sincerely held beliefs "despicable" and compared his beliefs to "defenses of slavery and the Holocaust." Id. at 635-6,

640. Thus, neutrality and thus constitutionality of a law, at a "minimum" requires neutrality in its creation, application, and enforcement. Id. at 640.

More recent case law suggests that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Fulton, 593 U.S. 141 S. Ct. at 1868. Put another way, a law is not subject to the Smith review standard "whenever [government regulations] treat any comparable secular activity more favorably than religious exercise" as the court held in Tandon v. Newsom, which resulted in the court enjoining California's attempt to enforce COVID-19 restrictions on at-home prayer but not similarly-situated activities. 141 S.Ct. 1294, 1296 (2021) (per curiam) (original emphasis). However, this proposition has only muddled Free Exercise jurisprudence, rather than clarifying it. Particularly, the rule has tenuous justification, as the per curiam decision has seen criticism from not just the legal community but even the justices on the bench. See Tandon, 141 S. Ct. At 1298 (2021) (Kagan, K., dissenting) (calling the majority decision the "per curiam" six times in dissent); Whole Woman's Health v. Jackson, 141 S.Ct 2494, 2500 (2016) (Kagan, J., dissenting) ("ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process . . . In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decision-making—which every day becomes more unreasoned, inconsistent, and impossible to defend") Merrill v. Milligan, 595 U.S. 142 S. Ct. 879 (2022) (Kagan, J., dissenting from grant of application for stay) (slip op., at 11) (lamenting use of the so-called "shadow docket to signal or make changes in the law, without anything approaching full briefing and argument").

Tandon's proposition requiring religious activity to be treated the same as analogous secular activity has loose footing for further reasons. 141 S. Ct. At 1922 (Barrett, J., concurring). First,

comparing grocery stores, movie theatres and schools has places of worship has been difficult. Id. (". . . compar[ing] the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities that should be used for comparison has been hotly contested"). Second, since the Tandon holding, courts have been reluctant to even apply the standard in the exact same context that Tandon was held: COVID-19 regulations. Id. In fact, courts have not only ruled in favor of regulations, but they have often refused to even grant cert in these identical scenarios. See Dr. A. v. Hochul, 142 S. Ct. 552 (2021) (denying cert to challenge of COVID-19 regulation that allowed for medical exemptions but not religious ones); Doe v. Mills, 142 S. Ct. 17 (2021) (denying cert to challenge of COVID-19 law allowing an exemption for those who have a written statement that their immunization may be "medically inadvisable" but not for sincerely held religious beliefs) Contra Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020). While in Roman Catholic Diocese, this Court held to enjoin enforcement of a state law that treated comparable secular activities more favorably than religious activities. Id. This Court also considered that the Governor's comments also suggested that "ultra-Orthodox [Jewish] communities" was the target of the regulation. Id.; see also Stormans, Inc. v. Wiesman, 579 U.S. 942, 948 (2016) (court failing to grant cert and reverse lower court's denial of free exercise challenge when no animus was present; judges dissenting to denial of cert noted that there was clear animus, likened to Lukumi and therefore cert should have been granted).

Case law shows that the line between passing and not passing constitutional muster does not depend on the impact of the law. Instead, it depends on the intentions of the law. Thus, what remains of neutrality is the proposition that Cakeshop and Lukumi stand for: A law is subject to strict scrutiny in the Free Exercise context if there is clear circumstantial evidence of animus or

hostility towards a specific group of people in the making or enforcement of the law. That is, strict scrutiny applies when the claimants can prove the "object" of the law is to target one group. Lukumi, 508 U.S. at 543. Otherwise, the law is valid. Despite the court's differing interpretations of Smith, no other principle seems to govern.

The facts of the case at hand show TEC §502 neutral and generally applicable because there is no evidence of religious animus towards Orthodox Jewish Families or Schools. This Court found in Roman Catholic Diocese, Lukumi, Masterpiece Cakeshop, and Tandon a common thread: the "object" of the law enacted, or the purpose of its enforcement was to target a single religious group or belief. Lukumi, 508 U.S. at 534. These targeted attempts to burden religious belief were corroborated by statements of public officials or committee members deciding on the validity of the action. Masterpiece Cakeshop, 582 U.S. at 635-6. Statements called such beliefs "abhorrent" and "despicable." Lukumi, 508 U.S. at 534; Masterpiece Cakeshop, 582 U.S. at 635-6. There is nothing in this record that suggests any statements or feelings that remotely disparage the beliefs of the Orthodox Jewish Community. On the contrary, the object, or purpose, of the law can more accurately be described as an attempt to comply with a federal initiative. R. at 6. Further, the plain reading of IDEA guarantees a FAPE— free public appropriate education— any other benefit is outside of the statute's mandate and within the discretion of the states. 20 U.S.C. § 1412(a)(1)(A)(i)(III). Thus, Petitioners' attempt to paint this as an arbitrary law, or one that may divert from normal circumstances is a flat misrepresentation. The nonwaivable, nonsectarian requirement indicates no discriminatory purpose. Instead, it is an attempt to uphold IDEA's purpose: to give a free appropriate *public* education, nothing more, and nothing less. Id.

Even if this Court were to hold that the Tandon rule governs Free Exercise Jurisprudence, the law is still likely neutral and generally applicable. Tandon, S.Ct. at 1296 (2021). The cases after

the Tandon decision deny certiorari to claims that led directly to the shutdown of places of worship such as in Dr. A, and Doe. In the case at hand there is less "burdening"[1] on religion because the effect of the law impacts funding at schools and not shutdowns of temples or synagogues. R.at 8. Even more, Petitioners cite they are "entitled" to the same disability funding as other non-religious schools, yet non-religious private schools are also not "entitled" to IDEA funding. R. at 8. Therefore, the secular entity they seek to be treated like are public schools, who *are* "entitled" to IDEA funding. R. at 8. Petitioners seek to promote education through the Torah. R. at 9. The goals of private and public education are not similar, in fact, they are opposites. See Epperson v. Arkansas, 393 U.S. 97, 1 (1968). "By and large, public education in our Nation is committed to the control of state and local authorities" is to "not adopt programs or practice in its public schools or colleges which "aid or oppose" any religion.". See also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction . . . will not be partisan or enemy of any . . . creed."). Thus, public and private sectarian schools are not analogs; they are antithetical.

In short, it would be a great windfall for Petitioners to be granted heightened review based on a principle without legal foundation. This Court should utilize a narrower understanding of Smith, and therefore affirm the Eighteenth Circuit's Summary Judgment.

2. There are no exceptions to Smith's rule of general applicability that warrant strict scrutiny review.

a. Individualized Government Assessment exception does not apply because TEC §502's nonsectarian requirement is not subject to discretion of Tourvania Board of Education.

The Eighteenth Circuit was correct in explaining that a "dispositive" feature that allows TEC §502 to pass constitutional muster is the nonsectarian requirement because it prevents the risk

[1] The Eighteenth Circuit found that the nonsectarian requirement of TEC §502 does not substantially burden exercise of Petitioners' religion.

of a government official from choosing where funding may go. R. at 20. Courts further scrutinize laws that would allow for individualized exemptions of a law burdening religion based solely on government discretion. Fulton, 141 S. Ct. at 1878 (2021). For instance, the Smith Court explained that Sherbert's law allowing unemployment benefits for "good cause" permitted individualized discretion of the government based on the circumstances, making a generally applicable law into a system of "individual[ized] exemptions." Sherbert v. Verner, 374 U. S. 398, 401 (1963); See also Fulton, 141 S. Ct. at 1873 (2021) (holding section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner); But see Smith, 494 U. S., at 884, (holding that an "across-the-board criminal prohibition on a particular form of conduct" was not an individualized government assessment and that "it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws" but "not constitutionally *required*") (emphasis added). In these cases, the "religious hardship" may not come about unless the state proves a "compelling reason." Bowen v. Roy, 476 U.S. 693, 708 (1986).

TEC §502 entails no such individualized exemption. Under TEC §502, government officers do not decide whether sectarian private schools receive funding. R. at 7. It is true that §502 grants Superintendent Kayla Patterson the ability to certify granting of funds after an "initial validation review" and that LEA's may decide that alternative placement is appropriate for private schools. R. at 7. However, this statute makes clear that this assessment occurs for non-public nonsectarian schools, not religious schools. R. at 7. Thus, unlike Sherbert which involved a statute that required a government official to broadly define what a "good cause" for unemployment was, or Fulton where a commissioner could grant an exemption to an anti-discrimination policy at their "sole" discretion, the plain language of TEC §502(b) gives Kayla Patterson and its LEA *no* ability to grant a religious exemption. Sherbert, 374 U.S. at 401; Fulton, 141 S. Ct at 1873. In short, the "burden"

the Petitioners cite is not one that comes from the any single person's use of discretion, but the plain and unambiguous language of the statute that has the backing of a larger federal legislative scheme. R.at 7.

b. The hybrid-rights exception does not apply to TEC §502 because Petitioners bring no colorable companion claim.

Petitioners further believe that sending their children to sectarian private schools is "critical" to their Orthodox Jewish faith and their ability to carry out this fundamental right is not being protected equally to other parents in Tourvania. R. at 13. Thus, what the claimant attempts to bring to this Court is the "curious doctrine" known as the "hybrid-rights" exception to the Smith rule. Fulton, 593 U.S. At 1915 (Barret, J. concurring). This Court has held that while Smith's rule of general applicability governs laws implicating Free Exercise rights unless those rights are asserted "in conjunction with other constitutional protections" such as freedom of speech and of press. Cantwell, 310 U.S. at 304-307. See also Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating state law that compelled speech and offended religious beliefs); West Virginia Bd. Of Education v. Barnette, 319 U.S. 624 (1943). Most notably, when "parental rights" are asserted in conjunction with a Free Exercise right, rational basis review is not appropriate. See Yoder, 406 U.S. at 235.

In Yoder, the Court asserted that the combination of a Fourteenth and First Amendment claim requires the asserted governmental interest to pass only upon "great circumspection." Id. The court factored the parents' liberty interest in directing the education of their children. Id. (Citing Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Yet, most critical in the court's striking down the compulsory school attendance law as applied to the Amish was the nature of their beliefs, stating, "the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent" and forcing the Wisconsin compulsory education statute on them would effectively

uproot their "three centuries as an identifiable religious sect" as a "self-sufficient segment of American society." Id. at 215, 235.

While later recognized by Smith, the use of the hybrid-rights exception has a tenuous foundation. Circuit Courts are divided into three different camps on applying this exception. Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353 (4th Cir.), cert. denied, 132 S. Ct. 590 (2011) (observing that there is a circuit split over the validity of this "hybrid-rights" exception). The Second, Third and Sixth circuits reject the exception. Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny or any scrutiny level higher than rational basis review to hybrid-rights cases); Leebaert v. Harrington, 332 F.3d 134, 143–44 (2d Cir. 2003) (rejecting the application of strict scrutiny, or anything higher than Smith's rational basis review, to hybrid rights cases); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 246–47 (3d Cir. 2008) (per curiam) (refusing to apply an undefined hybrid-rights theory without further Supreme Court direction). Other courts have recognized that the companion claim must be either "independently viable" See EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (holding that even if ministerial exception did not apply, Free Exercise Clause claim could be subject to strict scrutiny because of an independently viable Establishment Clause claim) or "colorable". See Miller v. Reed 176 F.3d 1202, 1207 (9th Cir. 1999) ("a free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated—that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits). Not only have hybrid- rights been difficult to apply, but this Court has also criticized its purpose. Lukumi, 508 U.S. at 566-67 (Souter, J., concurring) (citation omitted) (finding hybrid-rights to be "untenable" because it would be so vast as to "swallow up" the Smith rule and would make the Free Exercise claim unnecessary).

The circumstances surrounding the Amish and Jewish Orthodox faith are inapposite. First, the Petitioners simply do not allege enough facts to show that their religious burden rises to the significance of forcing Amish children to attend public school. The court in Yoder explained the significance of the "interrelationship" between Amish faith and way of life. 406 U.S. at 235. While it is not contested that the parents believe that attending private religious school is important to their faith, nothing suggests that their beliefs would be uprooted by going to public school. In fact, Petitioner already sends their child to public school, and has done so for nearly a decade. R. at 9. Second, since this case does not reach the level of religious burdening in Yoder, Petitioners may argue that Pierce allows parents to obtain federal funds mandated for public education in a private religious setting. But as noted previously, Pierce's central holding does not stretch so far. 268 U.S. at 534 (1925). Finally, Petitioners attempt to have strict scrutiny review, but their Equal Protection claim is not even "colorable" and moreover lacks any basis. Thus, the Eighteenth Circuit did not even address its merits. R. at 20.

B. Petitioners fail to show a "colorable" Equal Protection violation because there is no evidence of a discriminatory purpose by Tourvania Board of Education and no fundamental right implicated.

Petitioners assert that the nonsectarian requirement of TEC §502 discriminates against Orthodox Jewish families with disabled children and Orthodox Jewish Schools. R. 13, fn 5. This discrimination is the basis of the asserted violation of the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment, part of the Civil War Amendments passed to protect the rights of newly freed slaves, asserts that no person shall be deprived of "life, liberty, or property without due process of law" or may "deny to any person within its jurisdiction the equal protection of the laws" U.S. CONST. amd. XIV. Other races, national origins, ancestries, and ethnicities have been determined to also be suspect. See Strauder v. West Virginia, 100 U.S. 303, 308 (1879)

(holding protecting of "Celtic Irishmen" to be within spirit of Amendment); Yick Wo v. Hopkins, 118 U.S. 356, 365, 6 S. Ct. 1064, 1068 (1886) (invalidating ordinance discriminating against Chinese-Americans); Rice v. Cayetano, 528 U.S. 495 (2000) (invalidating law discriminating against non-native Hawaiians). A state law may also be subject to strict scrutiny review when a law is facially discriminatory or is facially neutral but has a discriminatory effect on a suspect class. Arlington Heights, 429 U.S. at 266. It may also be subject to strict scrutiny when the law implicates a fundamental right. San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973). In these cases, a state needs to prove their action is justified by compelling state interest that is narrowly tailored. Reno v. Flores, 507 U.S. 292, 294, 113 S. Ct. 1439, 1443 (1993).

Laws that are facially neutral but have a disparate impact on one class of people are not per se a violation of the Equal Protection Clause. Arlington Heights, 429 U.S. 252 (holding "official action will not be held unconstitutional solely because it results in a racially disproportionate impact"); Washington v. Davis, 426 U.S. 229, 242 (1976). Instead, there must be a discriminatory purpose, or that the law is made "with an evil eye and unequal hand" Yick Wo, U.S. 118 at 364. This discriminatory purpose or "evil eye" may be shown by "a clear pattern, unexplainable on other grounds" Arlington Heights, 429 U.S. at 265; Gomillion v. Lightfoot, 364 U.S. 339 (1960) (inferring discriminatory intent when law would allow just four African Americans to vote in a district; holding this was almost a "mathematical" impossibility that the law was not intended to result in such impact). It may more commonly be proven by a sensitive inquiry into such circumstantial and direct evidence as may be available. Arlington Heights, 429 U.S. at 267 (ruling discriminatory purpose can be inferred from specific series of actions leading up to passing of law, departures from normal procedural sequence, substantive changes in laws, and actions of public

officials); See also Lukumi, 508 U.S. at 542 (holding "object" of law was discriminatory towards one religious practice because of public official's comments during public meetings).

TEC §502 does not violate the Equal Protection Clause because there is no evidence of a discriminatory intent, and there is not even a recognizable disparate impact on one group or class. First, unlike cases that found a disparate impact of a facially neutral law, this case restricts IDEA funding to private schools with religious affiliations, not just Orthodox Jewish sectarian schools. R. at 7. Thus, unlike the disparate impact of laws on one group or identity such as in Yick Wo and Arlington Heights, the claimed impact is on numerous sectarian private institutions of all faiths, essentially creating a disparate impact on "all religious schools" and not one particular religion, which has never been a suspect class. Next, there is nothing in the record that shows any level of animus towards Jewish Orthodox communities, or even devout religious believers. Unlike Lukumi, there are no disparaging comments by public officials. Further, there is no circumstantial evidence— no abnormal sequence of evidence, from substantive or procedural departure, or public official actions— that would suggest a discriminatory motive. Arlington Heights, 429 U.S. at 266. In fact, it more so appears that Tourvania Department of Education is acting in line with carrying out a federal directive. Not only does the statute assert that its purpose is to create a "free appropriate *public* education ("FAPE") that includes special education, and related services designed to meet their unique needs" (20 U.S.C section 1400 (d)(1)(A))(emphasis), but is clear that States "*may*" (not must) grant these services to religious private schools. 20 U.S.C. § 1412(a)(10)(A)(i)(III)(emphasis added). Tourvania is not acting with "an evil eye and an uneven hand," they are acting within and following the mandate of IDEA and utilizing its discretion as a sovereign local entity. Yick Wo, 118 U.S. at 374. Thus, Petitioners' claim of discrimination is not viable.

Finally, Petitioners may also assert that a fundamental right has been implicated, but none is readily apparent or applicable from the record. Fundamental rights garner strict scrutiny if they are unenumerated in the first Ten Amendments of the Constitution or are judicially implied in the Fourteenth Amendment. Arlington Heights, 429 U.S. at 266. Certain "privacy rights" are considered fundamental and are subject to heightened equal protection scrutiny, such as marriage. See Obergefell v. Hodges, 576 U.S. 644 (2015); Loving v. Virginia, 388 U.S. 1 (1967); cf. Lawrence v. Texas, 539 U.S. 558 (2003) (upholding fundamental right to sexual intimacy as a privacy right implicit in ordered liberty) Among these are, as Petitioners cite to, the fundamental right to control the upbringing of a child. R. 13; Pierce, 268 U.S. 510. Defining a fundamental right depends on whether the asserted right is deeply rooted in the historical tradition of the nation, and it must be defined narrowly. Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022); Washington v. Glucksberg, 521 U.S. 702 (1997); Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 354-55 (1st Cir. 2004) (citing Maher v. Roe, 432 U.S. 464, 475-77, (1977) (explaining that the fundamental right to abortion does not entail a companion right to a state-financed abortion).

First, Petitioners attempt to gain strict scrutiny review through a fundamental right in a substantive due process context. However, their arguments fall flat. While it is true that Pierce stands for the proposition that parents have a fundamental right to direct the upbringing of their children, its stands for only that principle, and not a fundamental right to choose to have a public benefit in the private context. R. 15. Eulitt, 386 F.3d at 354-55. Petitioners attempt to define this right quite broadly, which would go expressly against the grain of this Court's holding in Dobbs regarding privacy rights, as there is no historically rooted right in state-financed disability services in religious private schools. 597 U.S. at 615.

The purpose behind this Equal Protection Claim is not to challenge an unfair law, but rather legal gamesmanship. Petitioners' Equal Protection claim is just another way to obtain strict scrutiny review. Claims like the one at hand bring to light fears that this Court forecasted. See Lukumi, 508 U.S. at 566 (Souter, J. concurring) (explaining that the presence of a companion claim would always "swallow up" Smith's main holding). Thus, this Court should affirm the Eighteenth Circuit's decision, because of the claim's lack of viability and further be weary of hybrid-rights claims such as these.

C. TEC §502 does not violate the Free Exercise Clause and as a result, Petitioners' Equal Protection Claim would also pass rational basis review.

In the free exercise context, laws are found to be neutral and generally applicable and do not require a means-end analysis. Smith, 494 U.S. at 890. Further, this Court has ruled that because there is no violation of the Free Exercise Clause, its companion Equal Protection claim is subject to only rational basis review. Locke v. Davey, 540 U.S. 712, 720 n.3, (2004); Johnson v. Robison, 415 U.S. 361, 375, n. 14, (1974); see also McDaniel v. Paty, 435 U.S. 618, (1978) (reviewing religious discrimination claim under the Free Exercise Clause). Rational basis review involves a very deferential standard of review, requiring the government prove only a legitimate government interest, and that the law is rationally related to carrying out this interest. Compare Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (holding legislative restriction on billboards cannot be said to have "no rational relation" to interest in government safety); with Romer v. Evans, 517 U.S. 620 (1996) (holding that bare desire to harm an unpopular group is not a legitimate governmental interest).

TEC §502 meets rational basis review. Tourvania Department of Education has an interest in maintaining "neutrality" in how funds are allocated, and to ensure proper funds go to public education, which "ranks at the very apex of the function of a State," Yoder, 406 U.S. 205, 213,

(1972). Once again, there is no animus or evidence of a bare interest in harming Jewish Orthodox families or schools. Romer, 517 U.S. 620 (1996). Therefore, the nonsectarian requirement of TEC §502 is more than rationally related to the granting of neutral IDEA funds.

II. THE ESTABLISHMENT CLAUSE IS VIOLATED WHEN IDEA AID IS GIVEN TO RELIGIOUS INSTITUTIONS, AS IT FAVORS A SPECIFIC GROUP SELECTED BY THE GOVERNMENT AND RESULTS IN UNWARRANTED ENTANGLEMENT BETWEEN THE GOVERNMENT AND RELIGION, CONTRADICTING THE FRAMERS' GOAL OF MAINTAINING SEPARATION BETWEEN CHURCH AND STATE.

IDEA funds improperly extended to religious schools violates the Establishment Clause of the First Amendment, encroaching the core premise of separation of church and state. TEC § 502's nonwaivable, nonsectarian requirement is constitutionally necessary. Aligned with its constitutional significance, the first part of the First Amendment gives way to the Establishment Clause, providing that "Congress shall make no law respecting an establishment of religion," thus, commanding the separation of church and state. U.S. CONST. amend. I, cl. 1; Cutter v. Wilkinson, 544 U.S. 709, 719 (2005). The Establishment Clause guards against taxpayer monies being levied in support of religious activities. Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15 (1947). It also prevents government endorsement of one religion over another, ensuring that the government remains neutral as to religion. Id. at 16 (prohibiting government to aid "one religion, aid all religions, or prefer one religion over another."). Powered through the Fourteenth Amendment, the Establishment Clause prevents states from acting in ways that establish religion. Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

In the classroom, the Establishment Clause shields young, susceptible, and impressionable students from religious indoctrination. Id. When government funding is extended to religious schools, the Court must consider "whether any religious indoctrination that occurs in those schools

could reasonably be attributed to governmental action." Mitchell v. Helms, 530 U.S. 793, 809 (2000). IDEA funds reaching the halls of sectarian schools by direct government action is a violation of the Establishment Clause, as it authorizes unrestricted use of funds for religious indoctrination.

To analyze an Establishment Clause violation, this Court examines the relationship between government funding and religious institutions by considering whether: (1) the funds come from a neutral benefit program; and (2) whether the funds reach sectarian schools by the independent private choices of beneficiaries. Zelman v. Simmons-Harris, 536 U. S. 639, 643 (2002). First, IDEA sponsorship of religious institutions is not neutral and reaches the institutions by government selection of eligible recipients, not a private choice. Next, when IDEA funding reaches religious schools, it creates dangerous entanglement between taxpayer monies and religious indoctrination. Further, extending IDEA funding to religious institutions establishes a dangerous precedent which blurs the line between separation of church and state. Thus, Tourvania's TEC §502 is constitutionally obligated to exclude sectarian schools from IDEA aid.

A. IDEA contravenes the Establishment Clause by necessitating direct government involvement in channeling funds to religious schools, and its implementation lacks neutrality as government agencies play a role in fund distribution.

A benefit program remains in accordance with the Establishment Clause only when public funds reach sectarian schools through the independent choices of private beneficiaries in a neutral manner. Zelman, 536 U.S. at 630. The link between government funding and religious education "is broken by the independent and private choice of the recipients." Locke, 540 U.S. at 719. "A neutral benefit program in which public funds flow to religious organizations through the independent choices of private recipients does not offend the Establishment Clause." Carson v. Makin, 596 U.S. 767, 780 (2022); see also Zelman, 536 U.S. at 639. Here, however, IDEA aid is

offered only to a small group of students and is not a program open to all students. When extended to religious institutions, IDEA requires government officials to hand-select recipients, creating the constitutional risk that the government favors one religious denomination over another, and it provides distinct benefits to religious institutions, incentivizing families to send their children to religious schools over secular schools.

1. Granting IDEA funding to religious groups is inherently not neutral.

IDEA is inherently a biased program because only a narrow group of students are eligible to receive the aid, not a broad class of recipients. 20 U.S.C. § 1401(a)(3)(A). Key to the Religion Clauses, a state must maintain neutrality toward religion, not favoring one religion over another, nor religion over non-religion. R. 19. Bd. of. Ed. of. Kiryas Joe Village Sch. District v. Grument, 512 U.S. 687, 696 (1994).

A program is neutral, where it is offered to a broad class of beneficiaries. Mitchell v. Helms, 530 U.S. 793, 809 (2000). In Mueller v. Allen, this Court upheld a Minnesota tax deduction for education, including religious schools, emphasizing the class of beneficiaries included "all parents." 463 U.S. 388, 399-400 (1983); see also Zelman, 536 U.S. at 644 (holding Ohio program is neutral considering it provides educational opportunities to students of a failed school district); see also Carson, 596 U.S. at 780 (holding Maine program that is open all students without a secondary school in their district is neutral). IDEA is limited to a narrow and specific class of beneficiaries – it is not open to all students in the state but rather only to disabled children who are "found" by LEAs. 20 U.S.C. § 1401(a)(3)(A); 20 U.S.C. § 1412(a)(A)(iii).

IDEA maintains a "child find" requirement, meaning the state has the responsibility of identifying students who qualify for the funding. Id. The child find requirement makes eligibility for IDEA distinctly different than programs like that of in Carson, where families qualify based on

their geographical location. 596 U.S. at 767. Similarly, in Zelman, all families qualify in a failing school district. 536 U.S. at 644. IDEA does not release funding to anyone who fits a broad class of beneficiaries, but rather, IDEA is only available to a narrow class of recipients, then the government hand-selects who qualifies for funding and how much. 20 U.S.C. § 1401(a)(3)(A); 20 U.S.C. § 1412(a)(A)(iii).

The child find requirement of IDEA inherently requires the government to express preference for religions when determining funding eligibility, which has always been held as unconstitutional. 20 U.S.C. § 1412(a)(A)(iii). The Establishment Clause is violated where a state favors one religion over another, which will occur as a result of this selection. Kiryas, 512 U.S. at 696. Though Petitioners will argue IDEA is neutral because the program does not facially discriminate against one religion in preference for another, this is not outcome determinative in our constitutional assessment. When extended to religious institutions, IDEA can be facially neutral with a discriminatory effect. While in Carson, Maine "approved" the school where tuition was used based on standard requirements. 596 U.S. at 773. Students selected the school themselves without government involvement, and the amount of aid was not discretionary in the hands of the government. Id. Here, government officials have the ultimate discretion of deciding which students, and as a result, which religious schools receive the funding. 20 U.S.C. § 1414(b)(2)-(4).

IDEA also requires government officials to determine an appropriate amount of funding to provide the religious institution, permitting them to send inconsistent amounts between different religious denominations. 20 U.S.C. § 1412(a)(10)(B). With over 330 million people who practice over 100 religions, the state cannot be the one who chooses what religious schools to support and which it does not. Carson, 596 U.S. at 806 (Breyer, J., dissenting). This dangerously runs the risk of government preference for religion in a way this Court has not been faced with in its past.

Further, a program is neutral and does not provide a financial incentive where religious, private schools receive similar financial assistance to public schools. Zelman, 536 U.S. at 654 (noting no financial incentives skewed families to choose religious schools because private schools received "only half the government assistance given to community schools and one-third the assistance given to magnet schools"). IDEA funding is not neutral because parents have a financial incentive to place their children in religious schools. Parents who enroll their children in private schools without the consent of the public agency can qualify for enrollment reimbursement – meaning the state pays for the student's religious education. 20 U.S.C. § 1412 (a)(1)(C)(ii). This is an alluring incentive for parents to place their children in private, religious schools. In the words of the Court of Appeals, families can seek "the maximum-available IDEA benefits delivered in the gift-wrapping of an exclusively Orthodox Jewish educational milieu." R. at 19. Thus, IDEA funding is not neutral because it provides a financial incentive.

2. IDEA funds reach religious schools by government involvement, not private choice.

IDEA funding reaches religious institutions by direct government involvement, not a true private choice, thus violating the Establishment Clause. Forcing states to give funding violates the Establishment Clause, where the government payments directly reach sectarian schools. See Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 487 (1986) (holding it is "well-settled" that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the State.").

There is a precedential distinction between programs that provide aid directly to religious schools and programs that provide aid because of true private choice. Compare Mitchell, 530 U.S. at 810-14 (plurality opinion); with Zelman, 536 U.S. at 649. In Carson, this Court held that a tuition assistance program in rural Maine does not violate the Establishment Clause when extended to

secular schools. 596 U.S. at 773. The funding reached nonsecular schools by true private choice of the parents because parents selected the school they wanted their child to attend, Maine approved the school, and then transmitted payments to school to contribute to the tuition. Id at 767. Similarly, in Espinoza v. Mont. Dep't of Revenue, the family *chooses* which school they want to use the scholarship at as long as it meets standard accreditation requirements. 591 U.S. __, 140 S. Ct. 2246, 2251 (2020). But IDEA does not allow for such a simple, transactional, private choice as in Carson. 596 U.S at 767. Instead, IDEA demands direct funding to secular schools in violation of the Establishment Clause. 20 U.S.C. § 1412(a)(10)(A)(vi); contra Witters, 474 U.S. at 752 (holding not a violation of Establishment Clause because aid is paid to the student, who then transmits it to the education institution).

A program violates the Establishment Clause where the private hand is not genuinely free to send the money in either a secular direction or a religious one. Zelman, 536 U.S. at 647 (Souter, J., dissenting). Here, children are placed in religious institutions in the following ways: (1) the government decides their needs are best suited for a religious institution based on intense evaluations and meetings, or (2) parents place their child in a religious school without the consent of the public agency because the public agency has not addressed their needs, then the parents seek reimbursement, and the court decides to provide reimbursement. 20 U.S.C. § 1412(a)(10)(C)(ii); 20 U.S.C. § 1412(a)(10)(B). In both scenarios, children are not being placed in religious schools by the independent choice of private parties because the government is directly placing them in religious schools. This is not a private choice.

B. IDEA funding to religious schools excessively entangles religion and government by permitting unrestricted use of taxpayer monies to advance secular missions.

IDEA funding to religious institutions forces excessive entanglement between government and religion. To be constitutional under the Establishment Clause, a statute may not promote an excessive entanglement of government with religion, resulting in a relationship between the government and religious institutions. Lemon v. Kurtzman, 403 U.S. 602, 612-615 (1971). In recent years, this Court has favored the neutrality and choice test over the long-lasting Lemon test. Id. However, neutrality and choice should not be dispositive factors, and this Court must also consider the ways in which IDEA promotes excessive entanglement with religion in violation of the Establishment Clause. Mitchell, 503 U.S. at 855 (Souter, J., dissenting).

Core to this Court's interpretation of the Establishment Clause is the fact that "[n]o tax, in any amount, can be used to support religious activities or institutions." Everson, 330 U.S. at 16. IDEA crosses the line of impermissible government funding of religious institutions because the government is directly involved in the way in which it reaches schools, and then subsequently unregulated in the way it is used. This is more than the incidental advancement of religion; rather, it is the direct endorsement of particular religious institutions. Zelman, U.S. 536 at 652. Even where the primary effect is to support a legitimate legislative purpose, the effect cannot be to endorse religion. Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 793-84 (1973). Because IDEA is not distributed by private choice but rather by public employees' discretion of what private schools to fund, this poses a very real threat of government endorsement of religion. 20 U.S.C. § 1412(a)(10)(B).

1. Unrestricted use of funds leads to government endorsement of religion.

Aid to a religious institution is a violation of the Establishment Clause when it is unrestricted in its potential use. Witters, 474 U.S. at 489. Here, IDEA directs unrestricted taxpayer monies to the coffers of religious schools. Cf. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) ("[N]o funds traceable to the government ever find their way into sectarian schools' coffers."). IDEA requires payment to schools, unlike in Mueller, where a tax deduction for religious schools was valid because the government funds did not directly extend to the schools. 436 U.S. at 396; see also Rosenberger v. Rector, 515 U.S. 819 (1995) (student activity fee is not government money); 20 U.S.C. § 1412 (a)(10)(A)(vi).

When an LEA places a student in a private, religious school, those funds are distributed via contracts with the school. 20 U.S.C. § 1412(a)(10)(A)(vi). Proportionate funds are made available to provide equitable services based on the number of qualifying students in the school, however, such services can be provided by contract of an agency or individual. 34 C.F.R. § 300.138(c). Teachers, not always mandated to possess special education certifications, are allowed to offer services, raising the concern of potential indoctrination. 34 C.F.R. § 300.142(b); 34 C.F.R § 300.138(a)(1). This creates a dangerous opportunity for funds to be used for religious indoctrination, instead of to provide necessary services for disabled children. Once aid is contracted to schools, it is difficult to ensure that is it used only for neutral, secular services.[2] Under this Court's jurisprudence, grants designated for "maintenance and repair" are deemed as unrestricted use of funds, violating the Establishment Clause due to the impossible challenge of guaranteeing that the

[2] C.f. Brian Rosenthal, How Hasidic schools reaped a windfall of Special Education Funding The New York Times (2022), https://www.nytimes.com/2022/12/29/nyregion/hasidic-orthodox-jewish-special-education.html (last visited Mar 2, 2024) (suspected unrestricted misappropriated use of IDEA aid in religious schools in New York City.)

funds are not utilized for religious indoctrination. Nyquist, 413 U.S. 756, 758. IDEA grants fall squarely within this precedent.

Even though IDEA mandates that materials must be secular, neutral, and non-ideological, the intricate connection between religion and secular education poses a considerable challenge to fulfill this requirement. 34 C.F.R § 300.138(c)(2). The requirement that materials must be secular is relevant, but not dispositive. Mitchell, 530 U.S. at 852. While the materials supplied may have a secular nature, there is a high probability that staff at the private schools is incorporating religious elements into the teaching, especially where schools boast their emphasis to "stimulate torah learning." R. at 9. In nonsecular schools, religion and core curriculum cannot be separated, as the interconnectedness of these curricula is the fundamental basis of the existence of religious private schools in the first place. Carson, 596 U.S. at 799 (Breyer. J., dissenting). Further, Petitioners in this case explicitly insist on sending their children to Orthodox Jewish schools on the basis of the interconnectedness between religious and traditional curricula. R. at 9. This inherently underscores their stance that secular content will not blend with religious teachings and instead makes evident that IDEA funding will inevitably be utilized to support religious instruction. R. at 9.

2. IDEA funding is not a valid governmental issue because it leads to religious indoctrination.

Funding religious schools through IDEA is not a valid governmental service. This Court has long spoken to the importance of the Establishment Clause to protect public education as secular and neutral as to religion. Carson, 596 U.S. at 807 (Sotomayor, J., dissenting); see also Everson, 330 U.S. at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."). There is a narrow category where a government may extend funding to religious institutions – governmental services. Id. Responding to fires at churches, as well as

police services, and maintaining sidewalks are government services. Id. Similarly, subsidizing bus fares for students attending religious schools, the sharing of textbooks among public and religious schools, and the building of a safe playground are governmental services. See id.; see also Board of Education v. Allen, 392 U.S. 236 (1968); see also Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017). These services all provide a neutral benefit to the community. IDEA funding in application does not fit into this category of governmental services because it creates the opportunity for religious indoctrination with taxpayer monies. IDEA funding requires the government to pay an agency to provide services like counseling and speech-language pathology. R. at 4; 20 U.S.C. § 1401(a)(26).

The nature of these services allows for religious indoctrination to be incorporated, such as counseling based on religious morals and religious scripts being the subject of the speech lessons. In Zobrest, the Court determined that funding for a translator to a deaf student in a religious school did not violate the Establishment Clause because the translator was neutrally translating the content of the class, not taking on the role of a guidance counselor or teacher. 509 U.S. at 10-13. ("the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.")

The vast services IDEA provides go beyond neutral services such as translation, leading to taxpayer-financed religious indoctrination – not a valid governmental service (supportive services include: "speech-language pathology and audiology services, physical and occupational therapy, counseling, recreation, orientation and mobility services, and diagnostic medical services"). 20 U.S.C. § 1401(a)(26). IDEA aid requires services more akin to that of a teacher or a guidance counselor, which as Zobrest distinguishes from the role of a translator, leaves ample room for government paid religious education. 509 U.S. at 10-13. Simply, "[t]here is no meaningful

difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's child." Carson, 596 U.S. at 805 (Breyer. J., dissenting). As such, the function of those aiding students with disabilities cannot be divorced from any secular teachings. IDEA funding allows for, even encourages, unrestricted use of funds on religious indoctrination and cannot be disguised as a permissible use of governmental funding.

Further, by allocating aid for religious institutions, IDEA runs the risk of leading the public to believe the government has religious preferences. In Zelman, the Court noted that no reasonable observer would find the program to be a reasonable endorsement of religion. 536 U.S. at 655. But that is not the case here; a reasonable observer would see a government employee making regular trips to religious schools to meet with administrators and discuss IEPs. 20 U.S.C. § 1412(a)(10)(A)(iii). Services must be provided by a public agency employee or through a contract with another individual. 34 C.F.R. § 300.138(c). A public employee must go to a religious school multiple times per week to provide services, or taxpayers must pay another individual to do the same thing. 20 U.S.C. § 1412(a)(10)(A)(vi). From the public perception, this would lead many to believe the government is endorsing religion, which is not a far-off assumption.

C. When extended to religious institutions, the ultimate effect of IDEA undermines the separation of Church and State.

IDEA funding to religious institutions is not historically understood to be a permissible use of taxpayer monies, nor has this Court recognized it as a valid government service. The Establishment Clause must be analyzed as "a reference to historical practices and understandings." Kennedy v. Bremerton School District, 597 U.S. 507, 536 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 562, 576 (2014)).

In Kennedy, this Court overruled the longstanding Lemon test in favor of a new test that emphasized the historical and traditional understanding of the Establishment Clause and the relationship between government and religion. 597 U.S. at 536. The line must "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" Kennedy, 597 U.S. at 536 (quoting Town of Greece, 572 U.S. at 577).

The First Amendment explicitly states, "Congress shall make no law respecting an establishment of religion". U.S. CONST. AMEND. I, CL. 1. Founders intended to maintain a separation between church and state. James Madison and Thomas Jefferson advocated for a separatist structure, believing "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[3] It is fundamental to the Constitution to maintain separate relationships between the church and government. As quoted in Everson, 330 U.S. 12-13, Thomas Jefferson's Bill for Religious Liberty states:

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

When extending IDEA funding, taxpayer monies to religious schools fall on the impermissible, unconstitutional line. The education of young people is one of the most important responsibilities of civil authority. Aligned with the Founders' intention, public funds do not belong in religious schools, paying for the religious indoctrination of young students. Carson, 596 U.S. at 800 (Breyer. J., dissenting). Here, Petitioners, the Joshua Abraham High School and the Bethlehem Hebrew Academy, are both Orthodox Jewish schools dedicated to the values and morals of Judaism.

[3] James Madison and the Social Utility of Religion: Risks vs. Rewards, by James Hutson (James Madison: Philosopher and Practitioner of Liberal Democracy, A Symposium held on March 16, 2001, at the Library of Congress) (2001).

R. at 9. Joshua Abraham seeks to promote the values of the Torah and a love for the State of Israel. R. at 9. Petitioners seek to place their child in Orthodox Jewish schools to learn religion. In religious schools, like these, it is impossible to separate religion and secular studies because they are so closely linked. Thus, aligned with the historical intent of the Founders and the Establishment Clause, TEC § 502 is constitutionally required to not extend IDEA funds to religious schools.

CONCLUSION

This Court should affirm the Eighteenth Circuit's granting of Summary Judgment to Respondents, Tourvania Board of Education and Kayla Patterson because §502 of the Tourvania Education Code is a neutral and generally applicable law and the Petitioners have failed to present any justification showing that it is subject to strict scrutiny analysis. Further, even if this case were subject to strict scrutiny analysis, Tourvania has a compelling state interest in not mandating funding to sectarian religious schools—an interest that goes beyond even a separation of powers or state autonomy interest. Respondents' exclusion of IDEA funds to sectarian schools is constitutionally required to prevent an Establishment Clause violation because when IDEA aid is extended to religious institutions, the government is impermissibly endorsing religion.

Respectfully Submitted,

_____/s/ Team 8

Attorneys for Respondents