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 MATTHER 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; 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

TEAM 15
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Supreme Court Cases

Circuit Court Cases

QUESTIONS PRESENTED

1. Whether a State violates the Free Exercise Clause or Equal Protection Clause of the United States Constitution by prohibiting students who could participate in an otherwise generally available special education funding program from choosing to attend a religious school.
2. Whether private religious schools are prevented by the Establishment Clause from accessing an otherwise generally available special education funding program intended to assist handicapped children.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

TEC § 502 provides in full:

(a) Services provided by private, nonsectarian schools and agencies, as well as services provided by public schools and agencies, shall be made available to provide the appropriate special education and related services required by the individual child.

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

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

> (i) The LEA pays the nonpublic school pursuant to a contract between the LEA and the nonpublic school. The contract for nonpublic schools to provide special education and related services must incorporate provisions concerning instruction, program development, staffing, documentation, IEP implementation, and LEA supervision.

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

> (i) To be certified, nonpublic schools must apply with the Superintendent of Public Instruction and meet several requirements.
>
> > (1) The Superintendent is authorized to certify, conditionally certify, or deny certification.
> >
> > (2) The Superintendent must conduct an initial validation review before granting an initial conditional certification, and then must conduct an onsite review within 90 days of that.
>
> (ii) An application for certification must include" a description of the Tourvania Board of Education-adopted core curriculum; instructional materials used by general education students; description of the special education, designated instruction and services provided to individuals with exceptional needs; the names of its teachers with a credential

authorizing them to provide special education services; and, copies of the credentials of said teachers.

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

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

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

(e) The provisions of this code apply only when the LEA, not the child's parents, decides that alternative placement in a private institution is appropriate.

STATEMENT OF THE CASE

Factual History

Congress enacted the Education for All Handicapped Children Act of 1975 ("IDEA") "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living." R. at 2. The statute further requires the States "to adopt procedures that would result in individualized consideration of and instruction for each child." R. at 3. The special education and related services under the statute include those that may be required to assist a child with a disability to benefit from special education. *Id.* IDEA expressly provides for the "participation of" disabled children who are placed in nonpublic and religious schools. R. at 4.

Tourvania complies with IDEA through several provisions in its Education Code. R. at 6. However, Tourvania carves out religious schools from "nonsectarian" private schools from the statute, and only allows services to be provided by "nonsectarian" schools, i.e., those "not owned, operated, or controlled by, or formally affiliated with a religious group or sect." *Id.* This provision makes it impossible for any children with disabilities to receive the same funding as another child, based only on whether the child attends a religious school. R. at 8.

Petitioners are two sets of Orthodox Jewish families who are religiously obligated to give their children an Orthodox Jewish education, and two Orthodox Jewish schools. R. at 8–9. H.F. was diagnosed with high-functioning autism, and B.K. was diagnosed with autism, both at a young age. *Id.* H.F. currently attends a religious school while her parents bear the costs of behavioral and occupational therapy; B.K. is currently forced to attend a public school so she can access the services she requires. *Id.* Both schools, Joshua Abraham High School, and Bethlehem

Hebrew Academy, are co-educational, Orthodox Jewish, and dual curriculum (religious and secular) schools. R. at 9. Both schools' mission includes promoting the Torah and Judaism. *Id.* Both schools have attempted to qualify under Tourvania law as certified nonpublic schools, so they can provide the same special education and related services as envisioned by the formation of IDEA. *Id.*

Procedural History

Plaintiffs filed suit in the United States District Court for the District of Tourvania, arguing that Tourvania law violates the Free Exercise Clause by denying them the special education funds authorized by IDEA on the basis of their religious affiliation. R. at 1. Similarly, Plaintiffs assert that the extension of full IDEA funding to nonsectarian schools but not to Jewish schools and the families they serve violates the Fourteenth Amendment's Equal Protection Clause. R. at 1–2. Defendants moved for summary judgement, which the District Court denied. R. at 2. Defendants appealed from the District Court's order to the United States Court of Appeals for the Eighteenth Circuit, which vacated the District Court's decision to deny summary judgement and remanded the case to District Court to enter summary judgement in favor of the Defendants. R. at 20.

SUMMARY OF ARGUMENT

Tourvania Education Code § 502 is unconstitutional under the Free Exercise Clause of the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment. Under this Court's Free Exercise precedent, the government cannot discriminate in its laws based on religious belief, and is required to show the statute is narrowly tailored to a compelling interest. The denial of a generally available benefit on the basis of a religious identity, in this case the exclusion of religious private schools from special education funding, imposes a penalty on religious belief. Any such law must be justified by a compelling interest, and the law must be narrowly tailored to meet that interest. In this case, there is no interest brought forward by the Respondent. The law cannot be justified by a compelling interest because it unfairly discriminates against religious belief. The law is not narrowly tailored to any compelling interest because of the wide-reaching exclusion. The denial of special education funding based on religious belief is unconstitutional.

The Tourvania Education Code § 502 similarly violates the Equal Protection Clause because it unlawfully discriminates against religious believers, an inherently suspect class subject to strict scrutiny. For the same reasons as above, the law fails strict scrutiny because there is no interest reasoned by the government, let alone the compelling interest necessary for strict scrutiny. Moreover, the law fails the lower standard of rational basis review because it singles out and disqualifies a certain class of citizens for disfavored legal status on the basis of their religious belief. The law violates the Equal Protection Clause because it closes the door on all religious adherents, thus denying the religious the equal protection of the laws due under the Constitution.

The extension of IDEA funds to private, sectarian schools is not violative of the Establishment Clause. Under this Court's existing Establishment Clause jurisprudence, public funds directed towards private sectarian schools are permissible when the benefit programs have a valid secular purpose, and do not serve to advance religious institutions above their nonreligious counterparts. In practice, this means that the direction of public funds to sectarian schools is generally permissible when it is done via educational choices made by families who qualify to receive benefits from broad, neutral programs like IDEA. Because the provision of IDEA funds to sectarian schools has a valid secular purpose and does not advance sectarian schools above their nonsectarian counterparts, it does not violate the Establishment Clause.

STANDARD OF REVIEW

In reviewing a grant of summary judgment by the lower court, this Court shall review the record *de novo*. When a court rules on a motion for summary judgment, "all justifiable inferences are to be drawn in [non-movant's] favor." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

ARGUMENT

I. TOURVANIA EDUCATION CODE § 502 IS UNCONSTITUTIONAL BECAUSE THE FREE EXERCISE CLAUSE PROHIBITS DISCRIMINATION BASED ON RELIGIOUS BELIEF.

The Tourvania Education Code § 502 ("TEC § 502") violates the Petitioner's right under the Constitution to freely exercise their religious beliefs, because it denies a generally available benefit on the basis of a religious identity, by preventing any religious schools from accessing special education funding.

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The First Amendment is incorporated into the States

and municipalities through the Fourteenth Amendment clause. *Cantwell v. State of Conn*., 310 U.S. 296, 303 (1940). Any law that "denies a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion," and triggers strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017).

The Tourvania Education Code § 502 is inclusive of "private, nonsectarian schools," but carves out religious schools that are "owned, operated, controlled by, or formally affiliated with a religious school or sect." R. at 6. Furthermore, local educational agencies ("LEA") are not allowed to enter into contracts with state-certified nonpublic schools. R. at 5–6. The Tourvania law fails because it denies the generally available benefit of special education funding to all religious private schools solely on account of their religious identities.

A. Tourvania's Exclusion Requires Petitioners To Choose Between The Free Exercise Of Their Religious Beliefs And The Receipt Of The Public Benefit.

In denying special education funding to religious schools, Tourvania has "pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. *Trinity Lutheran*, 582 U.S. at 466. By enacting this statute, and thus denying IDEA funding to the Petitioner, Tourvania has restricted the free exercise of Petitioner's Orthodox Jewish religious beliefs. The First Amendment Free Exercise clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). The denial of special education funding is no doubt such an indirect coercion or penalty on the exercise of free religion, a real fear of the Founders of this country when framing the Constitution.

As early as *Sherbert v. Verner*, this Court has held that "the door of the Free Exercise clause stands tightly closed against any governmental regulation of religious beliefs[.]" 374 U.S.

398, 402 (1963). In *Sherbert*, the Court found that the disqualification of unemployment benefits based on the appellant losing his employment due to a religiously-held belief against working on Sundays violated the Free Exercise clause. *See id.* at 409. This Court found that the statute forced the appellant "to choose between following the precepts of her religion and forfeiting benefits, and abandoning one of the precepts of [their] religion in order to accept work." *Id.* at 404. Much the same is here, where Tourvania desires that Petitioners forfeit benefits in order to follow the precepts of their religion. The Court went further, finding that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404. In this case, Tourvania did much the same, denying them the ability to reap a benefit of a federal program paid for by their taxes, thus placing an unconstitutional burden on Petitioner's beliefs.

In *Trinity Lutheran*, the court overturned a Missouri State Department of Natural Resources policy that "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. *Trinity Lutheran*, 582 U.S. at 462.. The Department offered state grants to help public and private schools, daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. *Id.* at 453. But for Trinity Lutheran's status as a church, as opposed to any other organization, it would have received the benefit under the playground resurfacing program. *Id.* at 453–54. By overturning the policy, the Court highlighted that Trinity Lutheran was forced between a choice "to participate in an otherwise available benefit program or remain a religious institution. *Id.* at 462. The Court found that the constitutional obstruction present was not a denial of a grant, "but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. *Id.* at 463. By creating such a policy, the State

removed the ability for the Church to participate in a generally available benefit, which violated strict scrutiny. *Id.* at 465–66; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("[A] law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests") (internal citations omitted). The Court in *Trinity Lutheran* found that "[t]he State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." 582 U.S. at 466.

This Court has held time and time again that religious private schools cannot be barred from public benefits on account of their status as religious schools. In *Espinoza*, the Supreme Court held that Montana's no-aid provision barred religious schools from public benefits solely because of the religious character of the schools. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. ___, 140 S. Ct. 2246, 2260 (2022). The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools—school vouchers—granting a tax credit to anyone who donates to organizations that award scholarships to students who attend such schools. *See id.* at 2251. The Montana Supreme Court struck the law down because of a no aid provision in the state constitution barring government aid to sectarian schools. *See id* at 2251. This Court reiterated its holding in *Trinity Lutheran*, that "when otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny." *Id.* at 2260. The Montana Supreme Court in its decision had asserted the overturned statute served Montana's interest in separating church and State, but the Court found that less compelling than the Free Exercise Clause. *See id.* In doing so, the Court highlighted that our federal system does not prize "state experimentation in the suppression of free speech." *Id.* Instead, the Court showed the "enduring American tradition"

of parental rights to direct the "religious upbringing" of their children. *See id.* at 2261 (internal citations omitted). Critically, the Court stated that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* Tourvania has done exactly this activity, which is sanctioned by the Supreme Court.

Tourvania unlawfully discriminates against Orthodox Jewish children, and the schools they must attend as part of their religious education, treating them differently from other students with disabilities who attend "nonsectarian" schools. By doing so, Tourvania denies them a "generally available benefit solely on account of religious identity." *Trinity Lutheran*, 582 U.S. at 466. The overarching statute that encompasses § 502, the Education for All Handicapped Children Act of 1975 ("IDEA") requires individualized education plans which should be "tailored to the unique needs of each handicapped child" as the "primary vehicle for providing each child" with access to special education. R. at 4; *Capistrano Unified Sch. Dist. v. S.W. on behalf of B.W.*, 21 F.4th at 1125, 1129 (9th Cir. 2021). The IDEA recognizes that religious schools exist, and expressly provides for "the participation of those children in the program carried out under [the IDEA]," subject to additional requirements. R. at 4–5.

Against reason, and against the Constitution, the State of Tourvania has wrongfully denied a generally applicable benefit to the Petitioners, solely based on their status as religious schools, a clear violation of the First Amendment's Free Exercise Clause.

B. The Court Below Erred When It Applied a Substantial Burden Test.

The court below ignored this Court's jurisprudence on the Free Exercise clause when it made its decision, thus abusing its discretion and making an unconstitutional entrance into the Petitioner's religious beliefs.

This Court has held that placing a condition on benefits "inevitably deters or discourages the exercise of First Amendment rights." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). The Court of Appeals erred when it stated the challenged statute did not "substantially burden Plaintiff's exercise of their religion." R. at 18.

The correct test is whether a benefit recipient has been denied an otherwise generally applicable benefit based solely on the recipient's religious exercise. *See Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 785 (2022) ("Maine's administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise.").

The Constitution prohibits States from discriminating against religious schools for receipt of generally available benefits that are given to nonsectarian religious schools. In *Carson*, the Court held that a "nonsectarian" requirement of Maine's tuition assistance program for private secondary schools violated the Free Exercise clause. 596 U.S. at 780. Maine offered the benefit of tuition assistance for families whose school district did not provide a public secondary school, which was necessary because of the rural nature of Maine's geography and population. *See id.* However, Maine disqualified religious schools of the generally available benefit solely on the basis of their religious identity. *Id.* Maine's program flat out discriminated against religion because it carved out the religious schools specifically, violating the Free Exercise Clause. *Id.* at 781.

The Court of Appeals contradicts *Carson* by finding the Petitioner wanted special accommodations under the Tourvania Education Code, but ignored the nonwaivable requirement of the nonsectarian status requirement. R. at 19. Regardless of whether the challenged statute substantially burdened the Plaintiff's exercise of religion, the statute comes under "strictest

scrutiny" because it burdens all religious schools equally, which must be satisfied by a compelling interest. *See Carson*, 596 U.S. 767, at 781. The only equivalence under the statute is the equivalence of secular public schools and secular private schools, religious schools are purposefully carved out from the statute entirely, resulting in the denial of a benefit because of religious exercise. R. at 6. However, the court below ignored this satisfaction of a compelling interest component, and both the Court of Appeals and the Respondent failed to identify a state interest in enacting the statute. The court below ignores that the purported "religious-based preferences" of the Petitioner are in actuality a mandate from their religion that their child be educated in accordance with Orthodox Jewish values. R. at 8; *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049, at 2064–65 (2020) ("Religious education is vital to many faiths practiced in the United States . . . . Religious education is a matter of central importance in Judaism. . . . [T]he Torah is understood to require Jewish parents to ensure that their children are instructed in the faith."). The attempt by the Court of Appeals to scrutinize whether and how a religion should be exercised raises serious concerns about state entanglement with religion and denomination favoritism. *See id.* at 2069 ("Deciding such questions would risk judicial entanglement in religious issues."). The Court of Appeals nonsensically and irrationally makes its decision by quoting *Kiryas Joel*, "'[a] proper respect for . . . the Free Exercise . . . Clause[] compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents," in support of its specious claim that the challenged provisions of the Tourvania Education Code are neutral and generally applicable, but ignores the fact that they are clearly *not* so, since they specifically favor religious nonadherents collectively over religious adherents. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994). While this Court's focus in *Kiryas Joel* was on

religious adherents being favored over religious nonadherents by the creation of a special school district, "the allocation of power on a religious criterion," it is nonsensical to assume that the reverse would not be also true when it comes to the disability funds at issue here. *See id.* at 690.

As the Court of Appeals ignored whether the petitioner had been denied a generally applicable benefit based solely on the recipient's religious exercise, and instead used a substantial burden test, the Court's scrutinization of the Petitioner's religious beliefs was both dangerous, and unconstitutional.

C. Tourvania has Failed to Express a Compelling Governmental Interest for Excluding Religious Schools from IDEA Funds.

Tourvania has no compelling interest to exclude schools and petitioners on the basis of their religious belief. In creating a statute designed to exclude sectarian, or religious, private schools, there must be a compelling government interest for the statute, and that interest must, at the very least, be expressed. Strict scrutiny must apply, and there must be a compelling interest to justify the Tourvania Education Code. The State of Tourvania has failed to meet that low threshold here.

In *Lukumi*, the Court held that "[a] law burdening religious practice that is not neutral or of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 502, 546 (1993). The ordinances in question in *Lukumi* related to several distinct City of Hialeah ordinances that related to the killing of animals, but narrowly crafted to capture religious behavior the City found odious, the religious sacrifice of animals. *See id.* at 543. The respondent City of Hialeah offered two interests for the government action: "protecting the public health and preventing cruelty to animals." *Id.* The Court found the ordinances to be underinclusive because they "failed to prohibit nonreligious conduct that endangers th[o]se interests in a similar or greater degree than Santeria sacrifice

does." *Id.* By doing so, the ordinances prevented conduct motivated by religious belief solely, instead of preventing all general—religious and nonreligious—activities related to the government's interests. *Id.* at 545.

There are examples of the Court refusing to engage in strict scrutiny when it comes to the Free Exercise clause. This Court has held that "the exercise of religion often involves not only belief and profession but the performance (or abstention from) physical acts." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). In *Smith*, the Court held that the Free Exercise clause did not forbid the State of Oregon from prohibiting sacramental peyote use and thus to deny unemployment benefits to persons who had been fired as a result of that use. *See id.* at 890. The Court refused to apply compelling interest in this case, because it feared that the rule would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," and proceeded to list many compelling interests the government had to protect. *Id.* at 889. The Court did so because it did not want to "weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890. It is important to note that permitting drug use for unemployment seekers is extremely different from the facts of this case, where religious parents are simply trying to get their special needs children additional resources in their religious private school. But, as *Carson* indicates in a case directly on point, decided on the merits, exclusion of all religious schools from public funding is violative of the Free Exercise clause, and must be satisfied by a compelling interest. *See Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 781 (2022).

Tourvania could have argued that Tourvania has a compelling interest in ensuring that each student receiving a benefit gets a worthwhile public education based on a curriculum established by the State to create a fulfilling citizen, but this fails because the statute excludes *all*

private religious schools, but includes private secular ones, and ignores that many religious schools have secular education. R. at 9. Both Petitioner schools, the Joshua Abraham High School and the Bethlehem Hebrew Academy, provide both religious and secular education to their students. R. at 9. The law is overinclusive in achieving this possible state interest, because the Respondent fails to demonstrate that the provision of funding to nonsecular private schools would result in a better education. It may be that the private nonsecular schools are teaching curriculum that are completely devoid of facts, logical reasoning, or worthwhile educational goals, but are still afforded benefits because of their nonsectarian status. Instead, these private secular schools are allowed to receive additional special education funding, while still providing a secular education that simply includes the Torah. R. at 9. Indeed, even a private school promoting negative values, convincing students to commit crime, not pay taxes, and fail to be productive members of society could still be included under the statute, while Petitioner schools missions of "promot[ing] the values of Jewish heritage . . . respect for tradition, hard work, and a desire to be positive community members" are completely cast off because of their nonsectarian status. R. at 9.

The Court of Appeals argued that the challenged nonwaivable nonsectarian requirement is kosher because it assures neutrality. R. at 20. The court argued that this is an assurance of 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." *Id.* The court below found that the nonwaivable nonsectarian requirement need not be justified by a compelling government interest because the challenged statute eliminated the risk a governmental official picks winners and losers as it comes to aiding religious education. R. at 20. However, the court simultaneously

ignored that Tourvania, by making the nonsectarian requirement nonwaivable, removed the ability of any government official to allow certification of any religious private school, but still has discretion to certify, or deny certification, to any secular private school regardless of their educational output. R. at 7 ("The Superintendent is authorized to certify, conditionally certify, or deny certification."). Any interest the State of Tourvania has in providing for its public education is a reason to include private schools in the use of IDEA funding, but is not a reason to exclude the sectarian schools.

Tourvania created an exclusion of religious schools from the generally available benefit without a compelling interest. Tourvania fails to assert any state interest in the law at all. The Tourvania Education Code § 502 denies religious schools access to IDEA funding, "whatever might be the actual character of the education or the primary purpose of the facility." R. at 6. This wide sweeping law not only encompasses religious schools, but also any religious organization that provides services that could assist disabled children. The District Court was correct when it found that the "nonsectarian requirement in the Tourvania Education Code makes it impossible for a child with a disability to be placed at a religious school and receive the same funding to which he would otherwise be entitled had his parents sent him to a nonreligious school." R. at 8.

D. Tourvania's Exclusion of Religious Adherents from Its Special Education Funding is Not Narrowly Tailored.

Even if Tourvania does have the compelling interest that is left unclaimed in the record, the exclusion of religious schools could not survive scrutiny because it is not narrowly tailored to the interest. As shown before, both schools comply with every other aspect of public education law. *See* R. at 8–9. Excluding religious schools that provide secular education, because they are religious, despite their secular curriculum, is not narrowly tailored to any state interest in

providing children a good public education nor an interest in maintaining a separation between church and State. R. at 7. Furthermore, nothing shows that either school is out of compliance with the Tourvania Board of Education-adopted core curriculum for its secular curriculum. R. at 7. If religious education is the only thing inconsistent with public education, Tourvania could still include private schools that could discriminate on the basis of sex, lack curricular oversight, have different standards, charge an extraordinary amount of tuition, or have non-certified teachers, and allow those schools to access IDEA funding. R. at 5. Tourvania elevates these types of private schools to the level of public education, while ignoring religious schools with no fundamental difference with secular private schools, except for their religious status, making this statute not narrowly tailored to the interest of promoting public education in the State of Tourvania. The statute is simultaneously overinclusive in its inclusion of private schools that are completely unlike public schools, and underinclusive since it excludes religious private schools that are adequate substitutes for public education. R. at 8–9.

II. TOURVANIA'S EXCLUSION VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT UNLAWFULLY DISCRIMINATES AGAINST RELIGIOUS MINORITIES.

The Tourvania Education Code violates the Equal Protection Clause as it applies to the Petitioners because it denies equal protection of the laws to the Petitioners on the basis of their status as religious minorities. The Equal Protection Clause of the Fourteenth Amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In *City of New Orleans v. Dukes,* this Court held religion to be an "inherently suspect distinction," subject to strict scrutiny under the Fourteenth Amendment Equal Protection Clause. *See* 427 U.S. 297, 303 (1976). Furthermore, the State of Tourvania has not offered a compelling interest for Section 502's abrogation of sectarian schools.

Even if the religious classification was found to be under the judicial standard of rational basis instead of strict scrutiny, the statute would still fail under the Equal Protection because it singles out and disqualifies a certain class of citizens for disfavored legal status. In *Romer v. Evans*, this Court held "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. *Romer v. Evans*, 517 U.S. 620, 633 (1996). In *Romer*, the Court struck down a Colorado constitutional amendment that repealed statutes of local and state entities that barred discrimination based on sexual discrimination. *See id.* at 626. Even under an application of rational basis, where a law must neither burden a fundamental right nor target a suspect class so long as the law bears a rational relation to some legitimate end, the constitutional amendment failed. *See id.* at 631–32. The Amendment failed rational basis because it not only had the "peculiar property of imposing a broad and undifferentiated disability on a single named group," but also its "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." *Id.* at 632.

Much like the law at issue in *Romer,* Section 502 fails even a rational basis review. Firstly, the law has the peculiar property of placing a disability on religious adherents, their children, and the religious schools that provide them an education, simply on account of their sectarian status. R. at 8. Secondly, like *Romer*, Section 502 is so broad, and if any reasons had actually been offered for it, it would be discontinuous with any legitimate government interest in public education that could be offered; Instead, the law seems inexplicable by anything but animus toward the class it affects, religious students. This is violative of the rule of law and the Constitution's guarantee of equal protection, because Section 502 specifically closes the door on

the benefit of special education to the students at religious schools who seek its assistance. *See Romer*, 517 U.S. at 633–34. While it is true that Tourvania has not out-and-out declared its animosity toward the class of persons affected, unlike *Romer*, the lack of any declaration whatsoever makes the silence as to a government interest startling to the point where one must consider that the law was motivated by animus toward religion. *See id.* at 634. The statute at issue here is similarly a "status-based enactment divorced from any factual context." *Id.* at 635. It is impossible to discern a relationship between Section 502 and any legitimate state interest, because no legitimate interest has even been stated by the Respondent.

Because Tourvania's Education Code is a status-based enactment, and there is no legitimate state interest for the statute, the nonsectarian requirement of Tourvania's Education Code is unconstitutional under the Fourteenth Amendment Equal Protection Clause as it discriminates against the inherently suspect designation of religion.

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

The Establishment Clause of the First Amendment provides that the government "shall make no law respecting an establishment of religion[,]" U.S. Const. amend. I, and was incorporated to the States in *Cantwell v. State of Conn*., 310 U.S. 296, 303 (1940). While the Establishment Clause serves to limit the entanglement of government and religion, time and again, this Court has held that the direction of public benefit funds to religious institutions via the choices of private individuals is not violative of the Establishment Clause. *See, e.g. Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 779 (2022). This Court's decision in *Zelman v. Simmons-Harris* provides a clear and easily-applicable framework for determining when public benefit funds *are* impermissibly flowing to sectarian institutions. *See* 536 U.S. 639, 649 (2002).

Under *Zelman*, this Court applies what is essentially a truncated version of the *Lemon* test. *Id.* First, the Court asks whether there is a secular purpose for the government program at hand, then considers whether that program improperly advances religious institutions over their nonsectarian counterparts. *Id.* So long as a government program meets both of these requirements, the Establishment Clause is satisfied. *Id.* This Court's Establishment Clause jurisprudence is clear–the nonwaivable nonsectarian requirement of Tourvania Education Code Section 502 is not a constitutional requirement, and in fact unfairly punishes religious institutions by denying them the ability to become state certified to receive public funds in the same manner as their nonsectarian counterparts.

A. Extending IDEA Funds to Sectarian Schools Has a Valid Secular Purpose Under This Court's Exist Establishment Clause Jurisprudence.

Allowing the provision of IDEA funds to religiously-affiliated private schools is consistent with this Court's other decisions examining whether there was a secular purpose for the flow of public money to religious institutions. In broad terms, this Court has embraced a highly permissive view of what constitutes a secular purpose, generally determining that one is absent only in cases where there is an open religious practice or doctrine being endorsed by the state. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (finding that a Kentucky county could not provide a secular justification for posting the Ten Commandments in a county courthouse); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000) (finding that a district's policy encouragement student-led prayers prior to football games constituted a state endorsement of prayer in public schools and lacked a secular purpose). Generally so long as a government practice has a purpose beyond endorsing religion, this Court has found that sufficient to constitute a secular purpose. *See, e.g., Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (reversing an injunction preventing the display of a Chanukah menorah in a government

building because it also held a secular symbolic meaning alongside its religious one). As a result, under the appropriate test respondent bears the heavy burden of suggesting that granting equal access to IDEA funds to disabled children in sectarian schools is violative of the Establishment Clause against the backdrop of a jurisprudence that has consistently endorsed the provision of public funds to religious schools when directed by the choices of individual benefit recipients.

In *Zelman*, though the secular purpose of Ohio's tuition assistance program was not disputed, this Court determined that "providing educational assistance to poor children" was sufficient to avoid violating the Establishment Clause. 536 U.S. at 649. This secular purpose was sufficient despite the fact that the statute at issue allowed parents to direct public funds towards tuition at private sectarian schools, which made up a substantial percentage of the alternative options to the failing public schools addressed by the Ohio statute. *Id.* Similarly, prior to this Court's decision in *Zelman*, it outlined more directly what constitutes a valid secular purpose in the context of public funds for educational purposes. In *Mueller v. Allen*, this Court determined that "governmental assistance programs have consistently survived this [secular purpose] inquiry even when they have run afoul of other aspects of the *Lemon* framework." 463 U.S. 388, 394–95 (1983). There, the Court held that a Minnesota state tax deduction program designed to defray the costs of educational expenses for parents, regardless of whether their children attended sectarian or nonsectarian private schools, had the secular purpose of supporting private educational options in the state while broadly helping to facilitate quality educations for all children within the state. *Id.* at 395–96. Even though the program at issue in *Mueller* ultimately primarily benefited families whose children attended sectarian schools, the fact that it was intended to confer an equally-accessible benefit to the wider population of the state was enough to satisfy the secular purpose requirement. *Id.* From both *Zellman* and *Mueller* we can synthesize

an obvious theme–in the context of K-12 education, even when government programs primarily benefit students who attend sectarian schools, providing educational choice is a valid secular purpose.

Indeed, this Court has previously determined specifically that the provision of IDEA funds to assist disabled students attending sectarian schools has a secular purpose. In *Zobrest v. Catalina Foothills Sch. Dis.*, this Court determined that there was a valid secular purpose for the use of public IDEA funds to provide a deaf student attending a Catholic high school with an interpreter. 509 U.S. 1, 10 (1993). There, the court determined that religious institutions are not "disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.* at 8 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). In examining whether IDEA funds could be directed to supporting a disabled student attending a sectarian school, this Court determined that the IDEA had "a clear secular purpose" in "assisting[ing] States and Localities to provide for the education of all handicapped children." *Zobrest*, 509 U.S. at 5.

Here, much as in *Zobrest*, petitioners advocate for merely the fulfillment of the IDEA's intended purpose–supporting the education of all disabled children, even those who might attend schools which might have a religious affiliation or otherwise fail the nonwaivable nonsectarian requirement required for certification under Section 502. R. at 6–7. Given the relatively permissible standard this Court has repeatedly upheld for secular purposes in the context of education, and its prior determination that there is a valid secular purpose for IDEA reaching a sectarian school, it is clear that here the provision of IDEA funds would not serve to violate the Establishment Clause. To have a secular purpose in the context of allowing public funds to reach private, sectarian schools, those funds need only be spent to support the education of children within the state. Simply because a program aids a sectarian school does not defeat its secular

purpose. Indeed, as this court stated in *Zobrest*, "if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" 509 U.S. at 8 (quoting *Widmar v. Vincent,* 454 U.S. 263, 274–75 (1981)). Allowing sectarian schools to certify like their nonsectarian counterparts is far from the state endorsing religious practice. Instead, it merely levels the playing field by making IDEA funds available for their express purpose–helping "to provide for the education of all handicapped children." *Zobrest*, 509 U.S. at 5.

B. The Distribution of IDEA Funds to Sectarian Schools Would Not Improperly Advance Them Over Their Nonsectarian Counterparts

Allowing IDEA funds to reach students attending private sectarian schools remains in line with this Court's precedent, which holds that when confronted with "programs of true private choice," where the decisions of private citizens rather than governmental officials direct the flow of funds, the Establishment Clause is not violated. *Zelman*, 536 U.S. at 649. In broadest terms this Court has consistently determined that, so long as a government aid program is neutral and available to both sectarian and nonsectarian schools, it does not advance religion or religious schools over their nonreligious counterparts. *Id.*

Consider this Court's reasoning in *Zelman*; there, when examining an Ohio state tuition assistance program, the Court determined that the key question was whether the program at hand was one of these aforementioned "program[s] of true private choice." *Id.* at 654. Because in *Zelman* government funds were made available regardless of where parents chose to send their children, and only reached sectarian educational institutions in instances where parents chose to direct them there, the program did not impermissibly advance sectarian schools over their nonsectarian counterparts. *Id.* Key to this court's reasoning was the fact that the program at issue

in *Zelman* conferred educational assistance "directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District." *Id.* All schools in the area could participate irrespective of their sectarian or nonsectarian status, whether they were public or private. Similarly, the benefits of the program were available to all participating families with no focus on their religious affiliation. *Id.*

Examining this Court's reasoning on the advancement of religion issue in *Mueller v. Allen* lends itself to the same test applied in *Zelman*. There, even when the vast majority of the beneficiaries of a state benefit program were children in religious schools, this Court emphasized the principle of private choice, deciding that "'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (quoting *Widmar*, 454 U.S. at 274). Because the Minnesota tax deduction program at issue there was only conferring a neutral benefit on religious schools via the private educational decisions of families claiming the tax benefit, it did not run afoul of the Establishment Clause by way of advancing sectarian schools over their nonsectarian counterparts. *Mueller*, 463 U.S. at 399–400. This Court reached a similar conclusion specifically in the context of IDEA funds in its decision in *Zobrest*–there, when the benefit was distributed neutrally to all children who qualified as disabled, the beneficiaries were not sectarian schools, but instead the children themselves. 509 U.S. at 10–12.

More recently, this Court reaffirmed in *Espinoza v. Mont. Dep't of Revenue* that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." 591 U.S. ___, 140 S. Ct. 2246, 2254 (2020). There, though the parties involved did not dispute the permissibility of a tuition aid program under the Establishment Clause, the Court asserted that, in cases where government support "makes its

way to religious schools only as a result of [citizens] independently choosing to spend their scholarships at such schools[,]" objections under the Establishment Clause are unavailing. *Id.* Similarly, this Court's decision in *Carson v. Makin* held that "a State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at 781. Taken together the two cases clearly show that allowing public funds to flow to sectarian schools through the choices of private individuals is permissible.

Here, it is clear that IDEA is a system through which public funds are directed purely through the private decisions of benefit recipients; this Court has already determined as much in its *Zobrest* decision. 509 U.S. at 10–12. While the facts here differ slightly to those in *Zobrest*– here the system in place under Section 502 would result in public funds reaching sectarian schools, whereas in *Zobrest* the funds merely went towards providing an interpreter for a deaf student–the underlying reasoning employed by the *Zobrest* court still applies. R. at 5–6; *see* 509 U.S. at 3. Ultimately IDEA funds will not provide a windfall for sectarian schools, who presumably will spend those funds supporting disabled students just as their nonsectarian counterparts would. As the *Zobrest* court articulated, "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries." 509 U.S. at 12. Thus, the function of the IDEA is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" *Id.* at 12–13 (quoting *Mueller v. Allen*, 463 U.S. 388, 400 (1983)). This statement rings true in the present case. The only potential benefit being conferred on nonsectarian schools is the tuition dollars they receive that may have otherwise gone elsewhere, though the existence of such a benefit is premised on the assumption that sectarian schools would be unable to fill their

classrooms otherwise. The Flynn family sends H.F. to a sectarian school despite losing access to care for her special needs, suggesting that oftentimes religious schools will receive those tuition dollars irrespective of whether they receive IDEA funds. R. at 8. This Court has already rejected the idea that such an attenuated benefit violates the Establishment Clause, and should do so again here. Allowing sectarian schools to certify under Section 502 would not advance religious schools over their secular counterparts.

C. The Provision of IDEA Funds to Sectarian Schools Falls Comfortably Within the Degree of Separation of Church and State Already Ensured Under the Establishment Clause.

The Establishment Clause is satisfied by neutral benefit programs when they have an identifiable secular purpose, and their associated public funds only reach sectarian institutions through the personal decisions made by recipients. *See, e.g.*, *Zelman,* 536 U.S. at 649. By placing these requirements on a benefit program which might aid sectarian schools, this Court has ensured that government neutrality is maintained in respect to religious matters. However, Section 502 of Tourvania's Education Code is anything but neutral. Consider the statute at issue in *Carson*, where this Court determined that there was "nothing neutral about Maine's program" providing tuition assistance to students whose districts lacked public secondary schools. *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 781 (2022). There, Maine's nonsectarian requirement largely mirrored the one put in place by Tourvania, requiring that any school to receive tuition assistance must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." *Compare Carson*, 596 U.S. at 774, *with* R. at 5–6. This Court ultimately determined that, in the case of a neutral public benefit, "[a] State's antiestablishment interest does not justify enactments that exclude some members of the

community from an otherwise generally available public benefit because of their religious exercise." *Carson*, 142 S. Ct. 1987 at 1994.

In essence, while the Establishment Clause might be the floor of a State's anti-establishment interest, in a case such as this it is also effectively its ceiling. By implementing the nonwaivable nonsectarian requirement in Section 502, Tourvania overstepped its anti-establishment interest, just as Maine did in *Carson*. *See id.* When a nonsectarian requirement is applied to the receipt of public benefits with a secular purpose, the State goes beyond the Establishment Clause and reaches beyond its permissible anti-establishment interest; as this Court has so succinctly put it, "[t]hat is discrimination against religion." *Id.* That is exactly what has happened in this case. Because allowing sectarian schools to receive IDEA funds has a valid secular purpose in advancing education, and does not advance religious institutions over their secular counterparts, this court should hold that the provision of IDEA funds to secular schools does not violate the Establishment Clause.

CONCLUSION

For the forgoing reasons, this Court should reverse the decision of the Eighteenth Circuit. This Court should find that Section 502 of the Tourvania Education Code violates the Plaintiffs' rights under both the First Amendment's Free Exercise Clause, and the Fourteenth Amendment's Equal Protection Clause. Similarly, this Court should hold that the extension of IDEA funds to religious institutions does not violate the Establishment Clause of the First Amendment.

Respectfully Submitted

Team Fifteen

Counsel for Petitioner