In the United States Supreme Court

On Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit

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

Petitioners,

v.

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

Respondents.

RESPONDENT'S BRIEF, TEAM 17

Case No. 24-106

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QUESTION PRESENTED

I. **Establishment.** In *Zelman v. Simmons-Harris,* the court found that when aiding religious institutions, recipients should be chosen through the choices of private individuals rather than government officials. The provisions of §502 only apply when the LEA is placing a child in a private institution. §502 does not apply when the child is parentally placed in a private school. §502 protects religious schools from excessive government entanglement. Does the extension of IDEA funding through §502 violate the Establishment Clause of the First Amendment?

II. **Free Exercise and Equal Protection.** 20 U.S.C. § 1400 states the purpose of the IDEA is provide a free public appropriate education to all who choose to receive one. §502 ensures that all who seek FAPEs will receive adequate disability services, which, if necessary, will include an LEA placement. Petitioners Flynn have opted not to take advantage of a FAPE for their daughter, H.F.; Petitioners Klines have opted to have B.K. receive a FAPE. School Petitioners cannot receive LEA placements because doing so would violate the Establishment Clause. Does §502 violate Petitioners' Free Exercise and Equal Protection Rights when §502 does not even apply to Parent Petitioners, and §502 is a neutral and generally applicable law, meaning any incidental burdens on religion are permissible?

STATEMENT OF THE CASE

Petitioners brought suit claiming provisions of the Tourvania Law violates the Free Exercise Clause of the First Amendment because they are denied IDEA funding due to their religious affiliation. Record on Appeal at 1. Petitioners also argue the same provision violates the Equal Protection Clause of Fourteenth Amendment. *Id*. at 2.

Respondents defend their position that §502 does not violate the Petitioner's constitutional rights, rather §502 is necessary to protect against excessive government entanglement that would offend the Establishment Clause of the First Amendment. *Id*. Respondents are the Tourvania Department of Education and the Superintendent of Public Instruction, Kayla Patterson. *Id*. at 2.

§502 was enacted by the Tourvania Department of Education to carry out the requirements of the Federal Individuals with Disabilities Educational Act. *Id.* §502 and other Tourvania Education Code sections ensure statutory compliance that largely tracks "key provisions of the IDEA" to ensure the district receives federal funding. *Id*. at 6. §502 specifically allows LEAs to place children with disabilities into private institutions when the school district does not have the adequate resources to meet that specific child's needs. *Id.* at 7. This guarantees each child who opts into receive a free appropriate public education will receive a free appropriate public education ("FAPE").

Petitioners are Cheryl Flynn and Leonard Flynn ("Petitioner Flynns"), Orthodox Jewish parents who sue on behalf of themselves and their child with a disability, H.F.; Barbara Kline and Matthew Kline ("Petitioner Klines"), also Orthodox Jewish parents suing on behalf of themselves and their disabled child, B.K.; Joshua Abraham High School, a private Orthodox Jewish secondary school; and Bethlehem Hebrew Academy, also a private Orthodox Jewish secondary school. *Id.* at 1.

Petitioner Flynns have placed their daughter H.F. into a private Orthodox Jewish school, the Fuchsberg Academy. *Id.* at 8. Petitioner H.F. has received disability services paid for out of pocket by the Flynns since she was a preschooler. *Id.* However, if H.F. were enrolled in public school, the state would fund her special education. *Id.* Petitioner Flynns have never sought to place H.F. in a public school where she would receive the full extent of disability services at no cost to

her parents. *Id.* Nor have Petitioner's sought to have H.F. evaluated by Tourvania Central School District ("TSCD"). *Id.*

Petitioner Klines have elected to place B.K. in a public school where B.K. receives disability services needed to address her disability. *Id*. at 9. Petitioner Klines wish to send B.K. to an Orthodox Jewish school but choose not to do so because they would not have access to the IDEA funding they currently receive. *Id*.

School Petitioners, Joshua Abraham High School and Bethlehem Hebrew Academy, are bringing suit even though neither child is old enough to attend high school. *Id.* at 8-9. The School Petitioners applied to be §502 schools but were denied because allowing them to be §502 would mean the LEA can place any child, regardless of religion, into School Petitioner's buildings. *Id.* at 7.

Petitioners brought suit in the United States District Court for the District of Tourvania. *Id.* at 1. Respondents moved for summary judgement as a matter of law dismissing Petitioner's claims. *Id.* The district court denied Respondent's motion but allowed Respondents to move for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). *Id.* at 16. Respondents appealed to the United States Court of Appeals for the Eighteenth Circuit. *Id.* at 17. The circuit court the remanded the case and ordered the district court Respondent's summary judgement motion. *Id.* at 20. Petitioner requested review on a Writ of Certiorari to the United States Supreme Court. *Id.* at 21.

SUMMARY OF THE ARGUMENT

The purpose of the IDEA is to provide equal opportunities, full participation, and economic self-sufficiency for individuals with disabilities. IDEA achieves its goals by ensuring all students receive a free public appropriate education ("FAPE"). However, IDEA does not force parents to

take advantage of available public benefits and respects a parent's right to choose how and where their child is educated.

Petitioners argue that their Free Exercise Rights have been violated and that §502's nonsectarian requirement violates the Equal Protection Clause. However, Petitioners are asserting a position that ignores historical precedents, realistic federal funding capabilities, and common sense. §502 is not only constitutional under Free Exercise and Equal Protection, but §502 is also constitutionally required by the Establishment Clause.

Petitioner Flynns argue H.F. is being denied IDEA funding simply because she is Jewish. However, §502 treats all religions the same and was not enacted to discriminate Orthodox Jews or any other religion. Additionally, §502 does not even apply to the Flynns or H.F. because §502 only applies to children who are placed in schools by the LEA seeking a FAPE. The Flynns have not taken any action to obtain a FAPE for H.F. The Supreme Court has made it explicitly clear that no statute can compel anyone to accept benefits, to do so would violate the Petitioners' Free Exercise rights. §502 does not prohibit individuals from parents privately choosing to send their children to sectarian schools, rather it ensures that an LEA will not make the parents' choice for them.

Petitioner B.K. receives a FAPE with all the accommodation and resources properly decided by an IEP. Her IEP guarantees that all of her lessons using a Universal Design Learning theory, built into a lesson plan. She is also guaranteed learning in the least restrictive environment possible, allowing her to develop social skills and gain independence by interacting with other students in her school. Despite B.K. receiving all proper accommodations established by her IEP, Petitioner Klines are not satisfied with the education she receives. §502 is not applicable to Petitioner B.K. because the school she currently attends provides all the resources she needs, and an LEA would not need to establish a new placement B.K.

Petitioners Joshua Abraham High School and the Bethlehem Hebrew Academy ("School Petitioners") claim they are being denied IDEA funding because they are Orthodox Jewish institutions unwilling to compromise their religious beliefs. This is a false statement that fails to reflect the larger necessary scheme of IDEA funding. Under Federal IDEA, no private school is entitled to any IDEA funding; regardless of if the school is secular or non-secular. The School Petitioners are ignoring the plain language of §502 and disregarding the opportunity for them to receive funding through the private choices of parents, instead of as a contracted school under §502. At no point does §502 state religious schools cannot receive any funding under the IDEA; rather, §502 guarantees the government cannot force itself into the School Petitioners' doors and regulate the day-to-day functions of these religious schools. Through §502's nonsectarian requirement, School Petitioners are protected from the LEA placing a child in their institution against the school's permission and the parent's will.

ARGUMENT

I. UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, IDEA FUNDS CANNOT BE EXTENDED TO RELGIOUS INSTITUTIONS UNDER THE DISCRETION OF THE LEA.

The First Amendment of the constitution states "congress should make no law respecting an establishment of religion." U.S. Const. amend. I. This clause means "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). When the government plays a role in the distribution of funds to religious schools, it must strongly consider the risk of violating the Establishment Clause.

All Children ages 3-21, including those with disabilities, are entitled to a Free Appropriate Public Education. 34 CFR 300.101 (2024). However, "no parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137 (2024). Thus, so long as a FAPE is available, the government is not responsible for providing an alternative education for students. 20 U.S.C.S § 1412 (LEXIS through Pub. L. 118-34, 2023).

When a child is enrolled in a private school without consent or referral by a public agency, the local educational agency does not have to expand funds so long as the agency made a free appropriate education available to the child. 20 U.S.C.S § 1412 (LexisNexis 2023). When a Free Public education is unavailable, parents can seek reimbursements from IDEA for the cost of special education and related services. *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1130 (9th Cir. 2021). In *Capistrano*, parents argued their child had received inadequate IEPs for Kindergarten and first grade, and they placed their child in a private school. *Id.* at 1131, 1136. Although the parents sought reimbursement expenses, they failed to request that the district prepare an IEP for their child. *Id.* at 1131. The court has not found that an IEP is necessary when a claim is filed by the parents for reimbursement of expenses for special education and services. *Id.* at 1137. The Ninth Circuit court of Appeals in *Capistrano* clarified that "when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one." *Id.* at 1140.

When funds are given to private institutions it needs to be under the direction of parents' private choices, not government officials. Zelman v. Simmons-Harris, 536 U.S. 639, 651 (2002). In *Zelman,* funds were given to individuals based on financial need who then gave the funds to private schools, sectarian or nonsectarian, at their own discretion. *Id.* at 646. The decision of what schools to send the funds to was based solely on the parents' preferences. *Id.* The court concluded that the act was not a violation of the establishment clause because, the allocated funds are then given to

institutions by private actors based on their private choices and not through the choices of government actors. *Id.* at 662.

Similarly, in *Espinoza v. Mon't Dep't of Revenue,* tax credits were given to individuals who would donate to a student scholarship organization. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020). In *Espinoza,* individuals who received the scholarships had the option decide if they wanted to direct their scholarships to a religious or nonreligious institution. *Id.* No funding was given to sectarian institutions through a choice made by the government. *Id.* at 2254. The court again upheld that funding to sectarian institutions is permissible under the establishment clause because the government is not directly funding the religious institutions, rather sectarian schools are only receiving government funds from the choices of private individuals receiving the scholarships. *Id.* at 2262.

To avoid a violation of the establishment clause, when extending funding to private schools the government should not be excessively entangled in the affairs of sectarian school. Carson v. Makin, 142 S. Ct. 1987, 2002 (2022). In *Carson v. Makin,* tuition assistance was awarded to parents when their district did not have appropriate FAPE available. *Id.* at 1993. The private schools receiving aid were not required to meet particular requirements made by the state. *Id.* at 1991. "The curriculum taught at participating private schools need not even resemble that taught in Maine public schools." *Id.* Under the statute, private schools were not required to hire state-certified educators. *Id.* The court in Carson found that funding to the private schools would not lead to excessive government control because the private institutions receiving funding are not required to provide an education resembling that offered by Maine Public Schools. *Id.* at 1992.

Likewise, in *Zelman v. Simmons-Harris,* despite receiving state funding, both the magnet schools and community schools participating in the program were operated under the discretion of their own boards and not state boards. Zelman v. Simmons-Harris, 536 U.S. 639, 647 (2002). Thus,

even though the religious schools did receive funding from the government, they were not subject to additional instruction or requirements. *Id.*

It is a violation of the establishment clause for the government to coerce or persuade students to participate in religious observance. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022). In *Kennedy*, a football coach was fired because he was praying on the field after the games. *Id.* at 2416. Students were not required or expected to participate in the prayers, and the religious exercise often took place when the players were occupied. *Id.* at 2429. In *Kennedy,* the court found that the establish clause was not violated just because the record showed no proof that the students felt coerced or persuaded to participate in the prayers. *Id.* However, had the students been expected or required to participate, there would be a violation of the establishment clause. *Id.* at 2430.

On the other hand, in *Lee v. Weisman,* the Principal invited a Rabbi to deliver prayers at their Middle School Graduation. Lee v. Weisman, 505 U.S. 577, 581 (1992). Although the graduation is not mandatory to receive a diploma the state has compelled attendance at the event in which the students did not have a true opportunity to avoid the prayer. *Id.* at 594. Unlike in *Kennedy,* the students in *Lee* were subjected to participation or at the very least observing the prayer. *Id; Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. at 2416. Although the government may accommodate religion, the court held that it is a violation of the first amendment's establishment clause for the government to "persuade or compel a student to participate in a religious exercise." *Lee v. Weisman*, 505 U.S. at 599.

Additionally, under the Establishment Clause of the First amendment, religious institutions are protected from the government interfering with operations regarding faith and doctrine. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020). "The religious education and formation of students is the very reason for the existence of most private religious schools." *Id.* Thus, when the government interferes with the formation of students, it is interfering with the

sectarian school's independence in such a way that is impermissible under the Establishment Clause. *Id*. at 2069.

a. Children afforded the right to a Free Public Education with special education services

Under 20 U.S.C. §1400, students with disabilities are entitled to a free appropriate public education that includes special education and appropriate services personally designed. 20 U.S.C.S § 1400 (LEXIS through Pub. L. No. 118-34). Petitioner B.K. attends public school where she is receiving the proper services and special education her parents believe is essential for her to be successful as a student. *R.* at 9.

Despite not being required under 34 C.F.R. § 300.137(a) to provide special education to children who have access to a FAPE, private school children can receive a proportionate of IDEA funding under 20 U.S.C. § 1412(a)(10)(A)(iii). Petitioner H.F attends and Orthodox Jewish Learning Center, Fuchsberg academy. *Id.* at 8. H.F.'s parents pay for her tuition and supplemental services such as behavioral therapy and occupational therapy. 20 U.S.C. § 1412(a)(10)(A)(iii). The Flynns' acknowledge that if H.F. were to attend a public school and receive a FAPE, more appropriate special education services may be available to her. *Id.* However, they claim that their religious beliefs require that she receives her education from a Jewish Institution despite not receiving the same educational programs she may need or having to supplement funding of appropriate services. *Id.*

The Flynns claim that they cannot receive the equivalent of FAPE without compromising their religious beliefs. *Id.* However, the Flynns have failed to seek a FAPE and have not had H.F. evaluated by the district to establish what needs and services are necessary under an IEP. *Id.* In *Capistrano,* the court held that the district is only required to prepare an IEP upon the request of the parents. *Capistrano,* 21 F.4th. Thus, because the Flynns have failed to request that H.F. be evaluated by the district, there is no foundation for their argument that it is "impossible for H.F. to

receive the equivalent of a FAPE at an Orthodox Jewish School." Had H.F. been evaluated, the district may have awarded the Flynns proportionate funding for her education.

A. The decision to send their children to sectarian schools should be left to the parent's private choice.

The Provisions of Tourvania Education Code §502 apply "only when the LEA, not the parents, decides that alternative placement in a private institution is appropriate." *R.* at 7. An LEA should not have the authority to place students in a sectarian institution, by doing so they would be free to impose their own religious beliefs directly on the students through their placements. "The design of the constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. at 589. The decision to send students to sectarian schools must remain in the hands of their parents, and not the LEAs under TEC §502.

In both *Zelman* and *Espinoza,* funding was only given to sectarian institutions when the parents made the decision to send their children to religious schools. *Zelman v. Simmons-Harris*, 536 U.S. at 645. *Espinoza v. Mont. Dep't of Revenue,*140 S. Ct. at 2251. It is imperative that the LEA not decide on where to send students and which religious intuitions shall receive funding, rather the choice of which schools to send their children, religious or non-religious, must be left to the parents to decide. *Id.* The extension of IDEA funding to sectarian schools must depend on the parents' choice on where to send their students.

Additionally, petitioners are overlooking that parents have the opportunity to send their children to religious institutions and receive IDEA funding. *R*. at 4. Under the Child Find Process under 20 U.S.C. 1412(a)(10)(A)(iii), Paternally placed private school children, will be given a proportionate share of IDEA funds to supplement the education they are given at the private institution. *Id.* at 5. The Flynn's have chosen to parentally placed H.F. in a sectarian institution and supplement their education through privately paying for therapies and services they may deem appropriate for the children. *Id.* at 8. However, the Flynn's have failed to have H.F. evaluated by

Tourvania Central School District personal to establish what IDEA funding would be appropriate. *Id.* Thus, because of their failure to have H.F. evaluated, it is invalid for the Flynn's to claim that it is impossible for H.F. to receive the equivalent of a Free Appropriate Public Education. *Id.*

B. Under §502, the government would be unduly entangled with religion.

If IDEA funding is extended to sectarian institutions through the Tourvania Education Code, they will be subjected to extensive government entanglement with religion. "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." *Id.* at 7. In *Carson,* the court held that it was not an excessive entanglement of religion to require approval of where the funding would be sent. *Carson v. Makin*, 142 S. Ct. at 2001. However, in our case the LEA would be going well beyond certifying schools District. *R.* at 7. If the LEA entered contract allowing them to place students in religious schools, the schools would be required to adopt Tourvania Law core curriculum and teachers would be required to meet certain criteria set forth by the government. *Id.* Additionally, each IEP would be reviewed and revised at the very least, annually. *Id.* We do not want the government to have the power to force its hand in the functions of private schools under §502 so that the institutions can receive government funding.

Additionally, without the nonsectarian requirement in §502 of the Tourvania Code, schools would be forced to accept students at the LEAs discretion. *R.* at 6. In *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* the court emphasized the freedom religious schools have in the formation of their students. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. at 2055. If LEAs are allowed to determine placement of a child into a sectarian school, the school would be required to accept the student and the credentials set forth by TEC §502. *R.* at 6. This would eliminate their protection given under the establishment clause to have control over the formation of their students and faculty. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. at 2055. The amount of

control given to the government over the sectarian schools would be a direct violation of the Establishment Clause.

C. Under §502 the government would be coercing and persuading students to participate in religious exercise.

It is crucial that the government avoid coercion or persuasion of religious exercise. If Tourvania Education Code §502 waives the nonsectarian requirement, LEAs would have the opportunity to place students in private sectarian institutions of their choosing. District Ct. Op. 7-8. Joshua Abraham's High School's mission is to "promote the values of Jewish Heritage, to live Torah values, to simulate Torah learning, and to develop a love for the state of Israel." *Id.* at 9. Similarly, Bethlehem Hebrew Academy "seeks to promote in its student's passion for Torah, respect for tradition, hard work, and desire to be positive community members." *Id.* If LEAs, and therefore the government, are able to place a student in institutions with such strong religious beliefs and practice as Joshua Abraham's High School and Bethlehem Hebrew Academy, it would be direct enforcement on the student to participate in the practice of religion which is a direct violation of the establishment clause.

Students are entitled to a Free Appropriate Public Education under 34 CFR 300.101. The extension of IDEA funds to religious institutions beyond what is provided in 34 C.F.R. §300.101 is a clear violation of the Establishment Clause of the First Amendment. The decision of whether to send students to sectarian or nonsectarian intuitions needs to remain in the power of their parents. The government should not have the authority to choose which religious institutions receive funding. The nonsectarian requirement under §502 of the Tourvania Education Code ensures that the government is not unduly entangled with religion and that parents retain the choice to send their children to sectarian or nonsectarian schools. Thus, the nonsectarian requirement ensures that §502 does not violate the Establishment Clause of the First Amendment.

II. §502 OF THE TOURVANIA EDUCATIONAL CODE DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FREE EXERCISE CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners falsely assert a Free Exercise and Equal Protection claim against a statute that is inapplicable to their circumstance. The Free Exercise Clause guarantees that the government will make no law prohibiting the exercise of religion. U.S. Const. amend. I. Petitioners are attempting to push the bounds of Free Exercise even though "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms what the individual can exact from the government.'" *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 885 n.2 (1990) (citation omitted). The Free Exercise Clause has never been a blank check, and here, Petitioners "seek to carry the meaning of 'prohibiting the free exercise [of religion] one step further'" than is permissible under the Establishment Clause and required by the Free Exercise Clause. *Id.* at 878.

§502 is a neutral and generally applicable law that passes rational basis review as well as strict scrutiny. Additionally, §502 cannot violate Petitioners Flynn or Klines' Free Exercise or Equal Protection rights since §502 deals only with LEA placed students. §502 was passed following the legislative intent of the IDEA, and "the benefits to which appellants lay claim under the First Amendment are benefits the federal government has earmarked solely for students enrolled in the nation's public schools -- benefits still available for [Petitioners] were [they] sent to a public school." *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19 (1st Cir. 2004).

a. §502 is a neutral and general applicable law that passes rational basis review.

Under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). When a law is neutral and generally applicable, it is subject to a form of rational basis review, meaning any incidental burdens on religion are permissible

under the Free Exercise Clause. *Smith*, 494 U.S. at 890. §502 of the Tourvania Educational Department is neutral and generally applicable.

A. §502 is subject to and passes rational basis review.

i. Neutral

§502 is neutral to religion because it does not single out and attack any particular religion. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 527 (1993). In *Lukumi,* the laws enacted by the legislature were not neutral because the laws were directly targeted at the Santeria religion and its practices. *Id.* at 542. The "object of the law is to infringe upon or restrict practices because of their religious motivation," so the law was not neutral." *Id.* at 533.

§502 is neutral because the object is not to restrict religious practice, rather §502 was passed to ensure that all children whose parents choose to receive a free appropriate public education will receive one in accordance with Federal IDEA requirements. § 1400 (LEXIS). §502 was not maliciously enacted to target any of the Petitioners like in *Lukumi.* 508 U.S. at 542. There is no direct attack on Petitioner's sincerely held beliefs and their ability to practice. *Id*. §502 guarantees the Federal IDEA's promise that "children with disabilities and the families of such children [have] access to a free appropriate public education and in improving educational results for children with disabilities." § 1400 (LEXIS). IDEA takes great pains to mention "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.133 (2024). While Petitioners would prefer they receive §502 funding, Petitioners are not guaranteed, constitutionally or otherwise, any IDEA funding. *Id.*

Petitioners may argue §502 is not neutral because it explicitly has a nonsectarian requirement, however, the Court has held that even an explicit mention of religion may be neutral.

Locke v. Davey, 540 U.S. 712, 720 (2004). In *Locke*, a high school senior was awarded a scholarship for college, however, he could not use his scholarship to "pursue a devotional theology degree." *Id.* at 717. This was not a violation of Davey's Free Exercise or Equal Protection Rights. *Id.* at 720. Additionally, the Court in *Locke* explicitly stated that holding the scholarship in question facially unconstitutional because it mentions religion would extend the *Lukumi* case "well beyond not only [its] facts but [its] reasoning." *Id. Locke* is neutral because there was nothing "that suggests animus towards religion" like in *Lakumi. Locke*, 540 U.S. at 725.

Just as the State was not funding a "distinct category of instruction" in *Davey*, so too is the Tourvania Department of Education not funding a distinct category of instruction; the Department of Education is not providing funding for an LEA placement in a religious school. For the Department of Education to do so would violate the Establishment Clause and Petitioners' Free Exercise Rights.

Additionally, §502 is neutral because there is no religious animus in the statute. *Id.* §502 could not be farther from spiteful, reactive legislation seen in *Lakumi*. *Lakumi*, 508 U.S. at 542. §502 is a statutory scheme necessary under the Establishment Clause and permissible under the Free Exercise; as the Court noted in *Locke*, "if any room exists between the two Religion Clauses, it must be here." 540 U.S. at 725. §502 provides the same room between the two clauses.

Petitioners argue that §502 provides parentally placed secular school children with IDEA funding but not parentally placed religious school children with funding, but statement is grossly inaccurate. §502 does not extend funding to *any* parental placement in a private school and explicitly states as much. Petitioners Flynn and Kline have brought suit against a statute that is inapplicable to them.

ii. Generally Applicable

A law is generally applicable when it "has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. However, "inequality results when a legislature decides that the government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 543. In *Lukumi*, the Court held the laws to be inequal and not generally applicable because of the wide range of exclusions to get around applying the laws. *Id.* (holding "[m]any types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision… th[is] do[es] not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.").

§ 502 is generally applicable because it is equally applied to all religions and does not make exceptions like the government did in *Lukumi*. Unlike the disparate application of Hialeah's laws, §502 is applied equally and only "has the incidental effect of burdening religious practice." *Id*. at 542. Because §502 does not seek out one particular religion to discriminate against its treatment, the law is not "being pursued only against conduct with a religious motivation." *Id.* at 543. §502 was enacted to ensure all children who need a free appropriate public education receive one.

iii. §502 does not violate Petitioners' Free Exercise of Religion

Because §502 is neutral and generally applicable, the incidental burdens on religion are permissible. *Smith*, 494 U.S. at 879. §502 is constitutional because the law was not enacted with the purpose of targeting religion or specific beliefs. *Id.* at 878 (holding a law violated Free Exercise "if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.") §502 was enacted to carry out the purpose of the Federal IDEA.

Petitioners may argue "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" because this suit involves "the Free Exercise Clause in conjunction with other constitutional protections, such as… the rights of parents." *Id.* at 881. However, §502 only applies in instances where the LEA places a child in a school, not a parent. As a result, this argument is inapplicable. *See Gary S.*, 374 F.3d at 19 (holding there is no "hybrid" case when a parent chooses to forgo the guarantee of IDEA funding in a public school to place their child in a religious private school).

B. §502 is not subject to strict scrutiny.

Petitioners will likely incorrectly assert this case at bench is synonymous with *Carson v. Makin* and should therefore be subject to strict scrutiny. *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022). Our present case and that in *Carson* are not comparable.

In *Carson*, Maine parents were provided with school vouchers when there was not a public secondary school in the area to accommodate their children. *Id.* at 1993. The voucher could be used at private schools so long as they were "nonsectarian." *Id.* The Court rejected Maine's argument that the nonsectarian private schools taught the same as a public education and Maine could not impose the same requirements on a religious school. However,

> [t]he curriculum taught at participating private schools need not even resemble that taught in the Maine public schools. For example, Maine public schools must abide by certain 'parameters for essential instruction in English language arts; mathematics; science and technology; social studies; career and education development; visual and performing arts; health, physical education and wellness; and world languages.' But NEASC-accredited private schools are exempt from these requirements and instead subject only to general 'standards and indicators' governing the implementation of their own chosen curriculum.

Id. at 1999 (citations omitted). Our present suit could not be more different than that of *Carson v. Makin.*

Under § 1400, IDEA funding comes with a heavy level of involvement. There are "high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." § 1400(LEXIS). There is a strong tie between the families and the school to "meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children." *Id.* There is "intensive preservice preparation and professional development for all personnel who work with children with disabilities." *Id.* This funding comes with stringent requirements that must be met for schools to receive federal funding. *Id.*

Each student with a disability receives an individualized education program ("IEP"). IDEA, 20 U.S.C.S. § 1401 (LEXIS through Publ. L. No. 118-34). That IEP must be reviewed annually by the IEP team. *Id.* The IEP team consists at the very least of special education and general education teachers, parents, and a representative of the LEA. § 1412 (LEXIS). The IEP lays out requirements that the school *must* adhere to. IEPs require schools to use universal design learning in every lesson plan, deliver the special education instruction in the least restrictive environment possible, and to satisfy the requirements for employing special education teachers to deliver the instruction. *Id.*

Once an LEA placement occurs, the school involvement only increases. The LEA must "[m]onitor compliance through procedures such as written reports, on-site visits, and parent questionnaires." § 300.147 (2024). It is the LEA's sole responsibility to ensure compliance with the IDEA when the LEA places a child in a private school. § 300.325 (2024). Compliance with IDEA must occur in every classroom, regardless of the subject. These burdens expand far beyond the blank check of *Carson* and would run afoul of the Establishment Clause due to the heavy entanglement in a religious classroom.

Once a school receives IDEA funding from a placement, this extensive process must be completed for every student with a disability. § 1400 (LEXIS). There is no ability to opt out or have parental choice; it is all in. Unlike in *Carson*, where "the benefit provided by statute is tuition at a public or private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education," any school, public or private, must comply with the requirements for every student when it receives IDEA funding. *Carson*, 142 S. Ct. at 1991. Rather than the no strings attached blank check in *Carson*, School Petitioners would be subject to heavy government intervention and monitoring that would then violate their free exercise rights.

b. Though §502 is neutral and generally applicable, § 502 still satisfies strict scrutiny.

When a law is subject to strict scrutiny, "it must be justified by a compelling government interest and must be narrowly tailored to advance that interest." *Lukumi*, syllabus, 508 U.S. (1992). However, it is important to keep in mind, "[n]ot all burdens on religion are unconstitutional." *United States v. Lee*, 455 U.S. 252, 257 (1982). While §502 is a neutral and generally applicable law that passes rational basis review, it can also survive even the most rigorous scrutiny.

A. Compelling Government Interests

Government interests must be "a state interest of the highest order." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). The Tourvania Educational Department has three compelling government interests justifying §502's constitutionality. First, §502 protects all Petitioner's Free Exercise Rights by keeping government commands out of religious schools. Second, there is limited IDEA funding for free appropriate public educations. Last, §502 protects the LEA from violating the Establishment Clause.

i. §502 Protects Petitioners' Free Exercise Rights

An LEA placement occurs when a public school district cannot provide for a student with a disability; the district then contracts with another school to educate the child. § 1412 (LEXIS).

This happens in rare circumstances when another school has better resources to serve the student. LEA placements are necessary to provide "full educational opportunity to all children with disabilities." *Id.* When a child cannot be served in a public school, then "[c]hildren with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents," but only "if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency." *Id.*

Petitioners Flynn and Klines do not even qualify under §502 because these are not LEA placement situations, but even if they did, Petitioners Flynn and Klines still would not be guaranteed placement in the school they desire. Placement schools are chosen because they have adequate resources for the student that the public school did not have. Because Petitioners Flynn pay out of pocket, and Petitioners Klines have B.K. enrolled in a public school, it is clear the current Jewish school and the desired school do not have the adequate resources readily available to receive H.F. and B.K. if the students were LEA placed. Record at 8-9. *See J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 668 (S.D.N.Y. 2011) (stating "[w]hen an IEP's services are to be implemented at an outside placement, the recommended placement must not be wholly incapable of providing the services the IEP requires.").

This statutory scheme is necessary however to protect all students Free Exercise Rights. If Petitioners Flynn and Klines needed to be placed, and the LEA sent them to a Catholic school, Petitioner's Free Exercise Rights would be violated. If there was a student who needed to be placed that was a part of Islam, and was then put into School Petitioners' building, then that student's Free Exercise Rights would be violated. Asking the LEA to become highly involved in everyone's

religious practice is abhorrent to the Free Exercise Clause; and, forcing individuals to use a public benefit that violates their religion violates the Free Exercise Clause. *Lee*, 455 U.S. at 261 n.12.

If a §502 school would be allowed to pick and choose students the LEA sends, that would inhibit the purposes of IDEA and violate its timeliness requirements. § 1412 (LEXIS) (stating there must be "a detailed timetable for accomplishing that goal."). The purpose of an LEA placement is to provide all the resources a student needs as soon as possible to ensure the student is receiving a FAPE. § 1400 (LEXIS).

ii. §502 Serves as a General Operations Statute to Ensure Funds

Unfortunately, IDEA does not have limitless funds to provide for every child with a disability in the United States. IDEA operates on a limited budget. Because of this, funds must be apportioned. § 300.137 (2024). LEA placements occur because a district does not have enough funding to hire the necessary instructors or buy the necessary equipment for a child with a disability. § 1412 (LEXIS) *See also Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d at 647 (where the school district sought an alternative placement because the school could not provide "exposure to therapeutic intervention, a population of similar adolescents, and selection of a setting where the academic work is both stimulating and challenging" for the student).

Putting aside the fact that §502 does not apply to Petitioners Flynn and Klines because this deals with parental placement instead of LEA placement, School Petitioners would not receive full IDEA funding regardless of §502. 20 U.S.C.S. § 1411 (LEXIS through Pub. L. No. 118-34). School Petitioners cannot receive full funding because there is not enough funding; the LEA is required to provide a free public appropriate education to all students and parents who choose to take advantage of it. § 1400 (LEXIS). *See also Bd. of Educ. v. C.S.*, 990 F.3d 152, 155 (2d Cir. 2021) (stating "[t]he availability of federal funding is conditioned upon a state's submission to the

Secretary of Education of a plan adequately ensuring that a FAPE 'is available to all children with disabilities residing in the State.'"). There is no guarantee that any private school, secular or nonsecular, will receive any IDEA funding because the public schools must be the first priority to ensure there is a FAPE. § 300.137 (2024).

§502 operates as a general operations statute to ensure that all students can have a FAPE available to them. Sending money to every private school is financially impossible. §502 operates in tandem with Federal IDEA policies and principles. § 1400 (LEXIS). §502 allows the most children to receive the full range of benefits available for their education. § 300.133 (2024).

iii. §502 Protects the Establishment Clause

§502 is necessary because it protects the establishment of religion from the government; such protection is a compelling government interest. While the funding in *Carson* was not prohibited by the Establishment Clause and therefore could not be a government interest, keeping §502 certification away from religious schools is the floor of Constitutional requirements, not the ceiling. *See Carson*, 142 S. Ct. at 1998 (holding "an 'interest in separating church and state 'more fiercely' than the Federal Constitution 'cannot qualify as compelling' in the face of the infringement of free exercise.'"). Sending children to religious schools as an LEA placement would promote excessive government entanglement and violate the Establishment Clause.

To determine that a child may be sent to a placement school, countless meetings and visits occur. *See* § 300.147 (2024). (stating the LEA must "[m]onitor compliance through procedures such as written reports, on-site visits, and parent questionnaires.") and *Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d at 649. Typically, parents raise a concern to set the whole process in motion. It is a highly involved back and forth between the home school district, the parents, and the potential new school. *Id.* IEPs are revisited, the potential schools are scrutinized to ensure they are

up to the standards necessary. *Bd. of Educ.*, 990 F.3d at 159. The whole process should happen fairly quickly because parents and students are guaranteed Due Process. 20 U.S.C.S. § 1415 (LEXIS through Publ. L. No. 118-34). A plan must be laid within 30 days to resolve the parent's complaint either by moving the student or modifying the IEP. *Bd. of Educ.*, 990 F.3d at 161.

If the government was forcing its hand into a religious school while operating on a strict timeline, the Establishment Clause would be violated. Forcing a child into School Petitioners' buildings would promote excessive entanglement due to all the visits and requirements. School Petitioners would not have the opportunity to deny a placement; alternatively, if School Petitioners did have the opportunity to deny a placement, the clock would continue running and a placed student's Due Process Rights could be violated.

B. Narrowly Tailored Advancement

§502 is narrowly tailored to protecting Petitioners' Free Exercise Rights and the Establishment Clause. §502 keeps the government from coming into religious schools and having a hand in the curriculum for students. There is such a narrow corridor between the Free Exercise Clause and the Establishment Clause, but they must coexist. §502 fits "within the corridor between the Religion Clauses." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

For the LEA to conduct such an inquiry to make sure that students who are religious are properly situated in a religious school would violate both Religion Clauses. The LEA would be asking too many inappropriate questions, and Petitioners Flynn and Klines would be forced to answer questions the government should not be asking. Considering how quickly the placement process must occur, the general operations nature of §502 protects student and parent's free exercise rights by not requiring them to disclose what their religious beliefs are and if they wish to be accommodated by the government or not.

While Petitioners are unhappy because of this nonsectarian requirement, the practical implications must be considered. The reason why private schools are included in §502 is because when an LEA seeks a placement, the placement must have better accommodations that the public school. *Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d at 647. Students are not being sent to placements otherwise. § 1412 (LEXIS). There are many highly specialized private schools designed to provide high levels of intervention. *See Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d at 648 and *Bd. of Educ.*, 990 F.3d at 157. In reality, even if School Petitioners were allowed to become §502 placement schools, they likely would never receive a student because School Petitioners would not have more interventions than a public school. Instead of fluffing a statute with unnecessary, false considerations, §502 is written plainly and efficiently to provide a proper education to all students who choose to have a FAPE.

c. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment guarantees "equal protection under the law." U.S. Const. amend. XIV, § 1. Rational basis review is applied to religious Equal Protection claims. *Locke*, 540 U.S. at 721 n.3. As in *Locke*, "for the reasons stated herein, the [statute] passes such review." *Id.* All of Respondent's compelling government interests easily satisfies rational basis's government interest standard, and the statute is reasonably related to achieving those interests. *See* **a. 502 is a neutral and general applicable law that passes rational basis review** and **b. Though §502 is neutral and generally applicable, § 502 still satisfies strict scrutiny.**

d. §502 does not violate Petitioners' Free Exercise or Equal Protection rights since §502 deals only with LEA placed students.

IDEA requires "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their

unique needs and prepare them for further education, employment, and independent living." § 1400 (LEXIS). §502 guarantees all children who seek a public education will receive one. § 1400 (LEXIS). If §502 is deemed unconstitutional, there would be "substantial consequences." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014).

Considering the alternative and allowing School Petitioners to become §502 schools means violating the Establishment Clause, but also the free exercise rights of students who need disability services but do not practice the Jewish religion. *See Hobby Lobby*, 573 U.S. at 726 (holding that under a RFRA strict scrutiny claim, the Government must demonstrate that the compelling interest test is satisfied through application of the challenged law by looking "'beyond broadly formulated interests' and to 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants.'"). §502 allows LEAs to place any student in any school when necessary. The added step of considering religion is not only burdensome to the LEA, but also abhorrent under the First Amendment; to do so would "contradict both constitutional tradition and common sense." *Smith*, 494 U.S. at 884.

Just because there is a public benefit available that Petitioners Flynn are choosing not to take advantage of, does not make the benefit unconstitutional. *See Lee*, syllabus, 455 U.S. (where Amish employer "failed to withhold social security taxes from his employees or to pay the employer's share of such taxes because he believed that payment of the taxes and receipt of benefits would violate the Amish faith." However, the Court held this to be an incidental burden). Just like in *Lee*, Petitioners Flynn seek to have "the limits they accept on their own conduct as a matter of conscience and faith… superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261.

While §502 is entirely inapplicable to Petitioners Flynn because they have parentally placed H.F., Petitioners Klines could seek change but not here. Petitioners Klines have expressed how B.K. does not perform well, but the Petitioners Klines have the opportunity to discuss this with the school and modify B.K.'s IEP. *See Bd. of Educ.*, 990 F.3d at 158 (where parents were dissatisfied with the disability services provided in the IEP, so the parents appropriately sought a meeting with the IEP team to make changes in their daughter's schooling). Petitioners Klines cannot dress up their dissatisfaction in their daughter's schooling as Free Exercise violation when they have other avenues for change. Though Petitioners Klines are taking advantage of the available FAPE, §502 is still inapplicable because B.K. is not an LEA placed student.

Regardless, what petitioners seek is "that compelling-interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion." *Smith*, 494 U.S. at 889 n.4. However, this is not how the Free Exercise functions, nor does it fit into Free Exercise jurisprudence. It is a sentiment repeated throughout the Court: a "balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions." *Lee*, 455 U.S. at 259. Maintaining "an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Id.* (citations omitted).

CONCLUSION

Because of the expansiveness of IDEA, it would be difficult to regulate IDEA in the manner all Petitioner's seek. In *Lee*, the Court held,

> [t]he tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Lee, 455 U.S. at 259-260. Much like in *Lee*, the purposes of the IDEA would be extremely frustrated if LEAs were required to violate the Establishment Clause and strictly monitor IDEA funds in religious schools.

There is no longer "a lack of adequate resources within the public school system forc[ing] families to find services outside the public school system." § 1400(LEXIS). Instead, there is a free appropriate public education available to Petitioners Flynn and Klines that they, like the Amish in *Lee*, are consciously choosing to not utilize. IDEA is available to Petitioners, but no statute can "compel anyone to accept benefits," to do so would violate Petitioner's Free Exercise rights. *Lee*, 455 U.S. at PAGE n.12 page 261.

Petitioners argue that they cannot receive IDEA funding without removing the nonsectarian requirement from §502 of the Tourvania Education Code. However, although they cannot receive the funding under §502, they are not precluded from other sources of IDEA funding. Under 20 U.S.C. §1412, petitioners can have the opportunity to receive a proportionate share of funding for the special education they may need. Thus, the petitioners' argument that they must sacrifice their religious beliefs in order to receive funding from the IDEA is a gross overstatement and incorrectly implies that religious institutions cannot receive any IDEA fund.

It is important that the decision to direct government funding to religious institutions is left to the discretion of parents. *Zelman v. Simmons-Harris*, 536 U.S. at 662. We do not want the government to have the opportunity to favor one religion over another in its distribution of funds. *Id.* §502 only applies to individuals who are placed in private schools by LEAs, not their parents.

Without the nonsectarian requirement of §502, government actors would be making the decision to send children to religious institutions and which religious intuitions would receive IDEA funding. Giving the LEAs the discretion to make these decisions would be a clear violation of the Establishment Clause.

It is clear "[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," our present suit does not disqualify a religious school *because* of its religious nature; rather, religious schools are not given LEA placements because to do so would violate the Free Exercise Clause, the Establishment Clause, and hinder IDEA's timeliness requirement. *Espinoza*, 140 S. Ct. at 2262.

For the foregoing reasons, the judgement of the court of appeals regarding the Free Exercise Clause should be affirmed, and their judgement regarding the Establishment Clause should be reversed.

/s/ Team 17

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