No. 24-012

In the Supreme Court of the United States

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

v.

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

BRIEF FOR PETITIONERS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

Anonymous Team ID #3

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1. Whether § 502 of the Tourvania Education Code violates the Petitioners' rights under (a) the First Amendment's Free Exercise Clause, and/or (b) the Fourteenth Amendment's Equal Protection Clause.
2. Whether the extension of IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This appeal arises from the denial of the motion for summary judgement by the defendant, Tourvania Department of Education ("Tourvania"), in the United States District Court for the State of Tourvania. Tourvania appealed to the Eighteenth Circuit Court of Appeals. Tourvania's appeal was granted: the District Court's decision was vacated and remanded with instructions to grant summary judgment on behalf of the defendants. The Petitioners filed for a Writ of Certiorari, which the United States Supreme Court granted.

II. STATEMENT OF FACTS

a. The Families Harmed

This case concerns two families, the Flynns and the Klines, and the schools where they seek to enroll their children. *Flynn v. Tourvania Dep't of Educ*., No. 23-022, (D. Tourvania October 1, 2023) at 8. Both families are Jewish; they assert that their religious beliefs obligate them to give their children an Orthodox Jewish education. *Id.* The schools in this case, the Joshua Abraham High School and the Bethlehem Hebrew Academy, are Orthodox Jewish secondary schools. *Id*. at 9. These schools focus on the Orthodox Jewish values that are most

important to the Flynns and the Klines: promotion of Jewish values, heritage, and to develop passion for the Torah. *Id.* These are critical values not taught in secular institutions.

Both families also have a child with high-functioning autism: H.F. and B.K. The children's conditions require additional attention and treatment that can be best addressed by specialized disability services. *Id.* at 8-9. H.F. currently attends the Fuchsberg Academy, an Orthodox Jewish learning center. *Id*. at 8. There, she receives sixteen hours of therapies per week, at the personal expense of her parents, in order to get the services that she requires for her disability while still being able to attend an Orthodox Jewish school. *Id.* B.K., by contrast, attends a public school where she is getting the disability services that she requires, but at the expense of her Jewish values. *Id.* at 9. She is often served non-Kosher food, in direct violation of her religion. B.K. also does not receive her disability services on Jewish holidays. *Id.* at 9 n. 4. B.K. has not performed well academically in public school. *Id.*

b. The IDEA

The Individuals with Disabilities Education Act ("IDEA") was first enacted in 1975 and serves the mission of providing funds to schools for children in need of special education services. 20 U.S.C. §1409. The IDEA expressly provides for children in both public and private schools, including religious schools. 20 U.S.C. §1412(a)(10)(A)(i). Those private schools are entitled to equitable services. 20 U.S.C. §1412(a)(10)(A)(ii)(II). Even in religious schools, those services must be "secular, neutral, and non-ideological." 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Students in religious schools do not have a right to IDEA funding or services by virtue of being students – decisions about funding and services must be made in tandem with their local educational agency ("LEA"). 34 C.F.R. § 300.137(a). In consultation with the student, parents, and private school, LEAs are required to create a "service plan" which details the special education services that will be provided to the student. 34 C.F.R. §§ 300.137(b)–(c), 300.138(b).

There is a wide range of disabilities and services required, so LEAs must ""ensure that a continuum of alternative placements is available." 34 C.F.R § 300.115. Alternative placements may include private institutions. 34 C.F.R § 300.118.

The Tourvania Education Code ("TEC") is largely in accordance with the IDEA, save for a key provision related to private nonsecular schools. TEC §502 states:

> (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.
> …
> [(d)(ii)](1) When a nonpublic school applies for certification, it cannot petition for a waiver of the nonsectarian requirement.

Both Joshua Abraham High School and Bethlehem Jewish Academy applied for certification under TEC §502 in compliance with all relevant portions of the code. *Flynn* No. 23-022 at 10. However, the Superintendent of Tourvania determined that the schools were not eligible because there could be no waiver of the nonsectarian requirement. *Id.* Therefore, they could not be eligible for IDEA funding for their students.

Petitioners brought suit against defendants for violation of the First Amendment right to Free Exercise and Fourteenth Amendment right to Equal Protection.

SUMMARY OF THE ARGUMENT

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (U.S. 1925). It is well established by the Supreme Court that it is parents, not the state, who should have the final say in their child's education.

The two families in this case, the Flynns and the Klines, are faced with an impossible choice: to provide their children with the education that they require because of their religion or the education that they require because of their disabilities. The restrictions promulgated by the Tourvania School Board create an unnecessary dichotomy of choice that results in undue burden, hardship, and violates their rights under the First and Fourteenth amendments.

The Tourvania Education Code §502 violates the Petitioners' First Amendment Free Exercise rights because it creates an unconstitutional choice for the students between their religious education and the IDEA funds. TEC §502 is not neutral or generally applicable – it impermissibly targets religious institutions. Since the statute is not neutral or generally applicable, it must pass strict scrutiny, which it does not. A categorical ban on religion, like the one promulgated here, fails strict scrutiny. Since there is disparate treatment to the Petitioners and similarly situated students on the basis of their religion, the Petitioners' 14th Amendment right to equal protection has been violated.

A grant of funds under the IDEA to the Petitioner schools would not violate the Establishment Clause because it is a neutral benefit program based on independent choice. A neutral benefit program, like the one here, may be given to religious institutions without any violation of the Establishment Clause. Further, the assignment of IDEA funds to students is based on the private choice of those students, not a state choice. Finally, the statute itself ensures

that IDEA funds will only be used for secular instruction. There is simply no risk of state establishment of religion in the present case.

ARGUMENT

III. Tourvania Education Code §502 violates the Petitioners' rights under the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause

The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof . . . .*" *U. S. Const., Amdt I* (emphasis added). Laws restricting the free exercise of religion are, therefore, generally deemed unconstitutional. The Free Exercise Clause of the First Amendment has been made applicable to the States by incorporation into the Fourteenth Amendment. (see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Equal Protection Clause of the Fourteenth Amendment ensures equal protection of the laws under the constitution. (see *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 582 U.S. 449, 458 (2017).

The state of Tourvania has unlawfully enforced a nonwaivable nonsectarian requirement denying IDEA funding to religious institutions through its enactment of TEC §502. TEC §502 violates the Petitioner's free exercise of religion as the statute, specifically the nonwaivable nonsectarian requirement, impermissibly targets religious institutions thereby denying generally available resources to educational institutions solely on the basis of religion. The enforcement TEC §502 results in a violation of the Equal Protection Clause as the statute prescribes disparate treatment under the law on the basis of a school's religious status. There could be no clearer violation of the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause against the Petitioners.

a. Denying IDEA funds to sectarian educational institutions restricts the free exercise of religion

1. Petitioner's right to free exercise of religion has been violated

TEC §502's nonwaivable nonsectarian requirement restricts the free exercise of religion by forcing parents to choose between crucial IDEA funding or religious adherence. Petitioners adamantly believe that placing their children in a religious educational institution is a fundamental pillar of their free exercise of the Orthodox Jewish faith. There, their children learn the foundations of the Orthodox Jewish faith and can be present in a setting where all students, faculty, and staff adhere to the faith's religious teachings, including recognition of holidays and dietary practices. For the Petitioners, their children's school is not simply providing them with a religious education; it is providing their children with a foundation for their unique way of life as adherents of the Orthodox Jewish faith.

Petitioners simultaneously believe their children should have the opportunity to receive IDEA funding. The IDEA was enacted to ensure that students with disabilities are provided with individually tailored resources to aid their learning. IDEA funds may generally reach school children in both private and public educational institutions. Yet, the state of Tourvania prevents these funds, that serve a secular purpose, from reaching children in religious educational institutions.

Petitioners, having to choose between IDEA assistance and adhering to their religious beliefs, are harmed by TEC §502's nonsectarian waiver requirement. The Petitioner's free exercise of religion is clearly being infringed upon as families choosing to place their children in religious schools are being forced to choose between a religious educational experience or IDEA assistance for their children experiencing disabilities.

Supreme Court precedent has clearly forbidden state actors from denying generally available public funds to religious institutions solely on the basis of religion. *Trinity Lutheran,* 528 U.S. at 458. In this case, Missouri enacted a categorical ban on churches (and other religious institutions) receiving public funds to resurface playgrounds. *Id.* at 454. The Supreme Court reasoned that because churches were forced to choose between being a religious institution or receiving public funds, the Missouri law was found to be a violation of the Free Exercise Clause. *Id.* at 465. Ultimately, the Supreme Court held that denying religious institutions generally available public funds solely on the basis of religion fails strict scrutiny and is unconstitutional under the Free Exercise Clause. *Id.* at 466.

As in *Trinity Lutheran,* where religious institutions were effectively forced to choose between maintaining a religious status and having access to public funds, Petitioners in this case are effectively being forced to choose between having their children receive a religious education or having access to IDEA funding for their children. Under *Trinity Lutheran*, Tourvania's nonwaivable nonsectarian requirement is clearly unconstitutional as it restricts the free exercise of religion and creates an unlawful requirement of choice for the Petitioners.

2. <u>The nonwaivable nonsectarian requirement of TEC §502 is not neutral or generally applicable.</u>

For a law that restricts religious exercise to be upheld, it must be neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990). In *Smith,* the Petitioners sought to invalidate a state law that criminalized the use of peyote, despite peyote being a central component of their religious practice. *Id.* at 878. The court held that the state law did not violate the free exercise clause as it was neutral and generally applicable; the law did not target the Petitioners' religion alone, and illicit substances were otherwise within the state's power to

regulate. *Id.* at 878. In assessing a law's neutrality and generally applicability, the Supreme Court has reasoned that, "[n]eutrality and general applicability are interrelated, and...failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Unlike the neutral and generally applicable state restriction in *Smith*, Tourvania Education Code §502 is neither neutral toward religion nor generally applicable. TEC §502's nonwaivable nonsectarian requirement specifically targets religious educational institutions despite the IDEA allowing religious institutions to receive funds to aid children with disabilities. In other words, the IDEA's mission to provide disabled students with resources in all kinds of educational institutions is being restricted by TEC §502 which blocks funding only to religious institutions. As both neutrality and generally applicability are interrelated factors, TEC §502's nonwaivable nonsectarian requirement fails to meet the standard set forth in *Smith* as the statute is anything *but* neutral toward religion.

Even if TEC §502 was deemed neutral and generally applicable by this court, it may still not be upheld as the only time the Supreme Court, "has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections. *Smith,* 494 U.S. at 874. TEC §502 is not a violation of the Free Exercise Clause alone; it simultaneously violates the Fourteenth Amendment's Equal Protection Clause, and it disturbs well settled precedent under *Pierce v. Society of Sisters* (holding that parents have a constitutionally protected liberty interest to have authority over the education of their children). *Pierce* 268 U.S. at 535. Therefore, whether this Court deems the law neutral and generally applicable or not, the constitutional violation against the Petitioners remains.

Furthermore, the appellate court erred in requiring Petitioners to show that the challenged state action "substantially burdens the exercise of religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690 (2014). The "substantial burden" standard, as applied in *Hobby Lobby*, is inapplicable because, unlike the Petitioners in *Hobby Lobby*, the Petitioners in this case are not seeking a remedy under the Religious Freedom Restoration Act (hereinafter RFRA). RFRA was enacted by congress to prohibit state actors from substantially burdening the free exercise of religion unless the state actor pursuing a compelling governmental interest. *City of Boerne v. Flores*, 521 U.S. 507, 512, (1997). However, in *City of Boerne v. Flores*, the Supreme Court held that Congress acted beyond its constitutional authority in enacting RFRA. *Id.* at 527. Because of *City of Boerne*, RFRA is inapplicable as it relates to state action. *Id.* As the Petitioners are suing under the First and Fourteenth Amendments and not under RFRA, the *Hobby Lobby* "substantial burden" test is inapplicable in analyzing a violation of the Free Exercise Clause. Instead, this court should apply the "neutral and generally applicable" test set forth in *Employment Division.*

3. TEC §502 does not survive strict scrutiny

When a law restricting the free exercise of religion is neither neutral nor generally applicable, the law is subject to strict scrutiny. *Church of Lukumi* 508 U.S. at 531-32. Therefore, to be upheld, Tourvania Education Code §502's nonwaivable nonsectarian requirement must serve a compelling government interest and be narrowly tailored to that interest (using the least restrictive means to achieve a compelling end). *Id.* The Supreme Court has consistently held that categorical bans based on religion do not serve a compelling government interest and fail the strict scrutiny analysis, violating the Free Exercise Clause.

Once a state decides to subsidize private education, it may not discriminate against private, religious institutions on the basis of religion. *Espinoza v. Mont. Dep't of Revenue*, 140 S.

Ct. 2246, 2262 (2020). In *Espinoza*, Montana enacted a program in which taxpayers received a tax credit for donating to student-scholarship organizations that awarded children scholarships for private-school tuition. *Id.* at 2251-3. The Montana Department of Revenue prohibited the use of these scholarships from funding a student's education at religious institutions to avoid a violation of the Establishment Clause. *Id.* Petitioners, seeking to use the scholarships for their children to attend religious educational institutions, filed suit for violation of the Free Exercise Clause. Reasoning that the program, "bars parents who wish to send their children to a religious school from those same benefits, ... solely because of the religious character of the school," the Supreme Court found the program to be a violation of the Free Exercise Clause. *Id.* at 2255. Therefore, a state has no obligation to fund private education, but once it decides to, it may not deny funds to qualifying sectarian private schools based on religious status. *Id.*

Under *Espinoza*, TEC §502's nonwaivable nonsectarian requirement is clearly a violation of the Free Exercise clause as the state is discriminating based on religious *status*, not religious *use*. Similarly to how Montana denied generally available scholarship funds from reaching private, religious schools, Tourvania denies generally available IDEA funds from reaching sectarian educational institutions. Following precedent, the denial of generally available funds to religious institutions solely based on their religious status is a clear violation of the Free Exercise Clause. Thus, TEC §502 should be struck down as unconstitutional.

When faced with another Free Exercise claim, the Supreme Court once again held that a state subsidizing private education may not deny funds to religious educational institutions solely based on religion. *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). In *Carson*, Maine created a tuition-assistance program for families in school districts without public high schools but denied tuition assistance to schools instructing religious curriculum; when the schools did not qualify for

tuition assistance because religious-based instruction was provided, petitioners sued under the First Amendment for violations of their right to Free Exercise of religion. Ultimately, the Supreme Court held, "Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment." *Id.*

The nonsectarian requirement enacted by Maine's legislature to prevent religious institutions from receiving tuition aid is highly similar to Tourvania's nonwaivable nonsectarian requirement to prevent IDEA funds from reaching children in religious educations institutions. The desire of the schools to instruct using religious curriculum should not be a basis for restriction of IDEA funds. Under *Carson,* the court should clearly find that TEC §502 is an explicit violation of Petitioner's right to free exercise as, "the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.*

b. Tourvania Education Code §502 violates the Petitioners' rights under the Fourteenth Amendment's Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment ensures equal protection of the laws and incorporates the right to Free Exercise to the states. The Supreme Court has established that, "any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2154 (2023). Thus, in the face of an Equal Protection violation of a suspect class (religion in this case), the government must show that its action furthers a compelling government interest and is narrowly tailored to achieve that interest. *Id.*

Children with disabilities in religious educational institutions are not afforded the same protections, under the law, as children with disabilities in nonsectarian educational institutions. Through its enactment of TEC §502, Tourvania unlawfully restricts funding from reaching

disabled children within sectarian schools unlike the state's other disabled students within nonsectarian schools, whether public or private. The state of Tourvania argues that it has enacted TEC §502 with a compelling interest to avoid an Establishment Clause violation. However, the district court correctly found that, "overt discrimination against religious schools could not possibly be the least restrictive means of furthering any compelling governmental interest." *Flynn*, No. 23-022 at 13. The government's compelling interest in enacting the IDEA was to provide aid to disabled students in *all* kinds of institutions; therefore, by denying IDEA funding to *only* religious institutions, the state of Tourvania is, in fact, hindering a compelling government interest, not advancing it.

IV. IDEA funds given to the Flynns and the Klines does not violate the establishment clause because it is a neutral benefit program based on independent choice.

a. Public funds given to private religious institutions do not inherently violate the establishment clause.

The Establishment Clause of the First Amendment serves to protect citizens from state action that advances or inhibits religion. *Zelman v. Simmons-Harris*, 536 U.S. 648, 122 S. Ct. 2460 (2002). This does not mean, however, that every law enacted by the state must be entirely neutral to religion, as the establishment clauses sits in balance with the free exercise clause of the First Amendment. *Id.* at 679. Therefore, much of the analysis school funding cases turns on individual choice: "a neutral benefit program in which public funds flow to religious organizations through *the independent choices* of private benefit recipients does not offend the Establishment Clause." *Carson* 596 U.S. at 781 (2022).

A neutral benefit program is one that neither promotes nor denies religious freedom and is centered on private choice. *Zelman*, 536 U.S. at 652. The Court has emphasized that "no reasonable observer would think a neutral program of private choice, where state aid reaches

religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id*. at 655. Therefore, where there is private choice and a neutral benefit program, there is no Establishment Clause issue.

The IDEA is a neutral benefit program – it clearly issues funds with both public and private schools in mind, secular and religious. See generally 20 U.S.C. § 1412(a)(10)(A)(i)(III) ("Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law"). The IDEA is centered on the needs of children in schools, not the specific schools that they attend. So long as the choice to attends those schools rests with the families rather than the state, there is no Establishment Clause violation.

b. The IDEA funds given to the families in this case are based on the personal choice of the families, not a state-sponsored decision maker.

In the present case, funds given from the IDEA to the Flynns and the Klines, on the basis of their religious choice, do not violate the Establishment Clause. Tourvania's policy as it stands is not neutral to religion – by rejecting the flow of any funds to religious institutions, the policy discriminates against religious choice. Tourvania has transformed an otherwise neutral program in the IDEA into one that is unnecessarily discriminatory. Tourvania argues that this serves to protect the state's interest in not establishing a religion. *Flynn v. Tourvania Dep't of Educ*., No. 24-157, 14-15 (18th Cir. January 19, 2024). But as stated in *Zelman*, it would be unreasonable to see the distribution of funds to religious institutions as a state action establishing religion. *Zelman* 536 U.S. at 655.

Tourvania's argument that they are avoiding the establishment of a state religion fails. As the district court stated, modern jurisprudence regarding the Establishment Clause does not require that the state be entirely uninvolved with the flow of funds to a religious institution in

order to be in compliance with the establishment clause. *Flynn*, No. 24-157 at 15. There is no requirement that Tourvania sponsor private education, but "once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Carson,* 596 U.S. at 785.

The present case is distinguishable from *Locke v. Davey*, 540 U.S. 712, 720 (2004). There, the Court held that the denial of state funds for a student's *religious* education was permissible under the establishment clause because that student was using the funds in training to be a minister. *Id.* at 721. It was not the use of the funds in a religious institution that the state took issue with – it was the use for the specific ministerial studies program. This is distinct from the present case, where the IDEA funds are to be used secularly and there is no evidence that the students are being instructed to become rabbis. Further, in *Locke* the Court when as far to list the ways that a state may disfavor religion and cross into violation of the Establishment Clause, among them to "require students to choose between their religious beliefs receiving a government benefit." *Id.* at 720. That is precisely what is happening in the present case.

Finally, there is language built into the IDEA that addresses the Establishment Clause concerns of the defendant. The IDEA specifies that where the funds are given, they cannot be used in a religious manner. 20 U.S.C. § 1412(a)(10)(A)(vi)(II). Presumably, this safeguard was built-in by the legislature to ensure that the Establishment Clause would be protected. There is no evidence in the present case that Bethlehem Jewish Academy or Joshua Abraham High School will use the funds in a way that would violate this statutory requirement. This adherence to legislative intent of the IDEA further diminishes risk of violation of the Establishment Clause.

Where, as here, there is a neutral benefit program centered on private choice, there is no Establishment Clause violation. Tourvania makes an unreasonable step into violation of Free Exercise where they seek to avoid an Establishment Clause violation. If IDEA funds are

permitted, there is no Establishment Clause risk here; the statute, the actors, and the Constitution itself protect the right of the Petitioners to receive IDEA funds. The safeguards built into the statute affirms what the Supreme Court has already stated: 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." *Carson*, 596 U.S. at 781.

CONCLUSION

In a country founded on religious freedom, citizens should not be faced with ultimatums that may force them to compromise their deeply held religious beliefs in exchange for generally available state assistance. Petitioners pray for religious neutrality, in line with Supreme Court precedent, as it relates to a school's eligibility for state aid. An otherwise qualifying school should not be denied crucial funds for disabled students because of religious status. Any decision holding otherwise would be a clear violation of the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. For the foregoing reasons, we ask this Court to reverse the 18th Circuit's decision and hold in accordance with the trial court.