In The

SUPREME COURT OF THE UNITED STATES

October Term 2024

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;
KAYLA PATTERSON, in her official capacity as
Superintendent of Public Instruction,

Respondents.

On Writ of Certiorari

TO the United States Courts of Appeals

For the Eighteenth Circuit

BRIEF FOR RESPONDENT

March 4, 2024 **Team 6**

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QUESTIONS PRESENTED

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

Petitioners Cheryl Flynn and Leonard Flynn (the "Flynns") and Barbara Kline and Matthew Kline (the "Klines") are Orthodox Jewish parents who have brought suit on behalf of their respective children. R. 1. The Respondent Tourvania Department of Education and Superintendent of Public Instruction Kayla Patterson ("Respondents") moved for summary judgment, asking for dismissal of Petitioners' claims regarding the First Amendment and Fourteenth Amendment on the grounds that extending Individuals with Disabilities Education Act ("IDEA") funding to religious institutions would violate the Establishment Clause of the First Amendment. R. 2.

The District Court denied the Defendant's motion for summary judgment is denied in its entirety. R. 16. Additionally, because the Defendants have expressed their desire to appeal any adverse ruling, the District Court also found for the purpose of interlocutory appeal under 28 U.S.C.§1292(b) that (i) today's ruling involves substantial questions of law as to which there is substantial ground for difference of opinion, and (ii) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Id.

The United States Court of Appeals for the Eighteenth Circuit vacated the judgment of the trial court denying summary judgment to the Appellants, and remanded the case. R. 20. The Appellate Court also directed the district court to enter summary judgment in favor of the Appellants. Id. The Supreme Court has granted certiorari to consider two issues, the first on 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, and the second issue on whether the extension of IDEA funds to religious institutions violates the Establishment Clause of the First Amendment. R. 21.

II. Factual History

To promote the facilitation of free appropriate public education ("FAPE") and to ensure compliance with the First Amendment, Tourvania enacted the "nonsectarian" requirement of § 502(a) of the Tourvania Education Code ("TEC"). R. 6. Petitioners The Orthodox Jewish secondary schools, Joshua Abraham High School and Bethlehem Hebrew Academy ("the Schools") (also Petitioners in this case), provide a curriculum with both religious and secular studies. R. 9. The Schools' missions seek to promote tenants of the Orthodox Jewish faith including, among other things, values of Jewish heritage, living Torah values, stimulation of Torah learning, passion for the Torah itself, and a love for the State of Israel. Id. The Schools sought certification under § 502 to receive IDEA funds and were denied because of their religious, nonsectarian, curriculum. R. 9-10. The Flynns and the Klines are seeking to enroll their disabled children in the Schools to ensure they receive a secondary education that promotes their Orthodox Jewish faith. R. 8-10.

The Flynns' disabled child, H.F., attended a Orthodox Jewish pre-school and received occupational, behavioral, and speech therapy paid out-of-pocket by the Flynns. R. 8. Currently, H.F. attends an Orthodox Jewish learning center where that provides H.F. with behavioral and occupational therapy, paid out-of-pocket by the Flynns. Id. The Flynns have not sought FAPE from the Tourvania Central School District ("TCSD") and have not sought an evaluation for H.F. by the TCSD. Id.

The Klines' disabled child, B.K., has, since pre-school, attended public school where she has received the special education and related services required to provide a FAPE. R. 9 n.4. Since the TCSD does not recognize secular holidays or consistently provide kosher food, B.K. has not received equitable services that are in line with the Kline's Orthodox Jewish faith. Id. The Klines have a non-disabled child currently attending an Orthodox Jewish school without receiving the services required by B.K. R. 9.

SUMMARY OF THE ARGUMENT

The Court should find that the nonsectarian requirement in § 502 of the TEC extending public funding to private institutions is not in violation of the Free Exercise Clause of the First Amendment, as well as the Equal Protection Clause under the Fourteenth Amendment. The Court should also find that extending IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Under the Free Exercise Clause, individuals are free to engage in activities that one would consider to be an exercise of their religious beliefs, without any direct and indirect prohibitions, penalties, or bans on the exercise. *Trinity Lutheran Church of Colombia v. Comer*, 582 U.S. 449, 461 (2012). This broad allowance under the Free Exercise Clause is not unlimited. For cases involving public educations, states have discretionary power to allocate and choose institutions that will receive the benefits of educational funding. *Mozert v. Hawlings Cnty. Bd. of Ealuc*, 827 F.3d 1058 (6th Cir. 1987). An individual cannot, with the power of the Free Exercise Clause "dictate" governmental conduct. *Lyng*, 485 U.S. at 448.

Additionally, opening up the doors to public education is one of the most important roles of both federal and state governments. See Brown v. Board of Education, 47 U.S. 483, 496 (1954). Because of a lack of substantial burden on the Petitioners due to the availability of public education and lack of discriminatory intent against Orthodox Jews in implementing the nonsectarian requirement, § 502 of the Tourvania Code of Education should not be subject to strict scrutiny. However, if it were to be subject to strict scrutiny, there is a compelling enough

state interest of providing neutral public education and narrowly tailored means that would allow for the statute to survive the highest level of scrutiny by the court.

The Establishment Clause of the First Amendment is dispositive of this case for two reasons: A) the nonsectarian requirement of § 502 TEC ensures that IDEA funds are not used to create "excessive entanglement" between the state and Federal Government and religious institutions, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970); and B) the administration of equitable services under the IDEA to religious schools would have the "effect of advancing religion," forcing the government to take a non-neutral stance, *Tilton v. Richardson*, 403 U.S. 672, 683 (1971).

For the foregoing reasons and forthgoing rationales, the Court should find that § 502 of the TEC and its nonsectarian requirement does not violate the Free Exercise Clause and the Equal Protection Clause under the Fourteenth Amendment, and that removing the requirement to include religious institutions within the scope of the IDEA funds would violate the Establishment Clause.

ARGUMENT

The Court should find that the nonsectarian requirement in § 502 of the Tourvania Education Code extending public funding to private institutions is not in violation of the Free Exercise Clause of the First Amendment, as well as the Equal Protection Clause under the Fourteenth Amendment. The Court should also find that extending IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

I. § 502 OF THE TOURVANIA EDUCATION CODE DOES NOT VIOLATE THE PETITIONERS' RIGHTS UNDER BOTH THE FREE EXERCISE CLAUSE AND THE EQUAL PROTECTION CLAUSE.

Because Section § 502 of the Tourvania Education Code that enumerates requirements a private institution applying to qualify for funding under the Education for All Handicapped Children Act of 1975, also known as IDEA, must adhere to does not violate the Free Exercise Clause under the First Amendment and the Equal Protection Clause under the Fourteenth Amendment, motion for summary judgment should be granted in favor of the Defendant.

For a favorable ruling of summary judgment, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it can affect the litigation's substantive outcome. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1988). "A dispute over a material fact is considered 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Id. at 24. Petitioners have failed to show that §502 of the Tourvania Code of Education must be subject to strict scrutiny and that it would fail the standard. Further,

the Petitioners have failed to show that their right to a religious education is a fundamental right protected under the Fourteenth Amendment. Therefore, the Court should grant summary judgment in favor of the defendant.

A. The nonsectarian requirement under Section 502 is not in violation of the First Amendment's Free Exercise Clause.

The section being challenged as unconstitutional under the Tourvania Code of Education does not violate the Petitioners' rights under the Free Exercise Clause. Additionally, even if the statute poses a burden on the Petitioners, the section should not be subject to strict scrutiny because it does not prohibit the Petitioners from their belief system. However, even if strict scrutiny were applied, the State's interest in implementing the nonsectarian requirement and its means of doing so is narrowly tailored to achieving its goal, thus surviving the strict scrutiny analysis.

1. § 502 of the Tourvania Code of Education does not violate the meaning of what is considered applicable as an infringement under the Free Exercise Clause.

The nonsectarian rule in the Tourvania Code of Education for private institutes to qualify under the IDEA Act designed for public schools does not infringe upon the Petitioners' rights as guaranteed by the Free Exercise Clause. The First Amendment protects against both direct and indirect prohibitions on the exercise of one's religion, including "penalties" as well as an "outright" ban. *Trinity Lutheran Church of Colombia*, 582 U.S. at 461. Specifically, the Free

Exercises Clause ensures that the government does not impose any regulation that would treat different religions in a discriminatory manner, including the receipt of "public benefits." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). If a regulation imposes a burden on one party, the courts have often characterized it as a violation of the First Amendment with the case being subject to strict scrutiny.

In *Trinity Lutheran*, the Church brought suit against the Missouri Department of Resources because they refused to approve the Church's grant application on the grounds that they denied applications of any religious applicants. The Court ruled that this denial was subject to the highest level of scrutiny and ruled that the Church being denied for a "public benefit" because of its character as a religious institution fell under the definition of "infringement," because it was imposing a penalty on the Church based on its status. The Court analogized the case to *McDaniel v. Paty*, where it had previously determined that the "rejection of clergymen for public office" was also subject to the same level of scrutiny and that it was a burden on the individual's First Amendment to exclude him for his background as a clergyman. 435 U.S. 618, 626 (1978).

However, the Government has the power of choice when it comes to selecting what or what not to provide funding for, particularly in public programs. Without clear evidence proving it was a penalty being imposed on a religious group or specific religious belief, courts have ruled the significance of having to distinguish between "state interference . . . and state encouragement of an alternate activity." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Reagan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983). The Court applied this rule when the government denied federal funding for counseling programs regarding abortion and family planning. In doing so, the Court reasoned that the legislature withholding funding was not the

legislature "infringing the right," but rather its decision "not to subsidize the exercise" thereof. *Rust*, 461 U.S. at 193. The Free Exercise Clause, the Court held, was not for a religious group to "receive a benefit" but simply for the government to refrain from violating a religious group's rights to do so. *Reagan*, 461 U.S. at 545.

In the case at bar, the Act in question is the Education for All Handicapped Children Act of 1975. This Act is a federal funding statute and has been implemented "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") . . ." R. 2. The primary focus of IDEA funding is not private institutions but public schools, but the State has agreed to extend the application of IDEA funds to certain private institutions that comply with certain requirements. The Kline family describes several reasons they hope to relocate to an Orthodox Jewish private institution, rather than remain at the public school. For example, their child, H.F., has not "performed well" and there are certain services like "non-kosher food" that clash with their religious practices.

First and foremost, this case is distinguishable from all precedent cases because the Petitioners in question are asking for the State to expand a statute providing federal public funding to private institutions, which the government does on a case-by-case basis, rather than to all those who apply. It is also important to note the level of what appears to be a "burden" on the family compared to the Petitioners in precedent cases. For example, in Trinity Lutheran, the Church was unable to receive the necessary grant to make improvements in operating its daycare services. Further, in *McDaniel*, an individual was deprived of his right to public office. In the immediate case, however, the Petitioner child is already receiving the benefits she needs but hopes to extend the benefits even further by relocating to a school to which the funds do not apply.

The local education agency, also known as the LEA, has chosen to "make available to parentally-placed private school students" based on certain requirements. In other words, the government and agencies are broadening the application of public funds to include a few other institutions so that more students can receive the benefit. The Court, therefore, should decide as it did in Rust and rule that the government here was not "denying a benefit" nor imposing a substantial burden on the Petitioners, but rather opting out of extending the public funding in this specific instance. Therefore, § 502 of the Tourvania Code of Education is not a violation of the Petitioners' Free Exercise Clause under the First Amendment.

2. The application requirements for private institutions listed in the Tourvania Code of Education does not warrant strict scrutiny.

The nonsectarian requirement under the Tourvania Code of Education for private institutions applying to qualify for IDEA funds cannot be subject to strict scrutiny because it does not restrain the Petitioners' ability to get a religious education. The Free Exercise Clause is not an unlimited right: Courts have defined the scope of how an individual can practice his religion. When a government or State policy is involved, the Free Exercise Clause is written in terms of "what the government cannot do to the individual" and not "what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1998). Consequently, without a substantial burden or prohibition, courts have refrained from ruling that there was a violation of the Free Exercise Clause. *Id.* at 447. States have the power to decide to allocate the funding accordingly, particularly for public education. *Mozert v. Hawlings Cnty. Bd. of Ealuc*, 827 F.3d 1058 (6th Cir. 1987). Although the Free Exercise Clause "affords

individual protection" from certain forms of governmental action, the individual cannot "dictate" governmental conduct. *Lyng*, 485 U.S. at 448.

In *Strout v. Albanese*, the Court held that there was no discrimination in a funding policy that provided grants to nonsectarian schools. In ruling the way it did, the Court reasoned that the parents were not restricted from "choosing a religious education for their children." *Eulitt ex rel. Eulitt v. Maine, Dept. of Educ*., 386 F.3d 344, 354 (1st Cir. 2004) (quoting *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999). The Court also ruled in *Eulitt* that Maine's tuition assistance program showed no religious animosity and intent to discriminate against sectarian institutions, but rather exists to serve the goal of an accessible education. The program did not violate the Free Exercise Clause because it was not forcing anyone to surrender their religious faith for education. *Eulitt*, 386 F.3d at 355. The Court also added that it would be "illogical" to presume "hostility" whenever State decisions involved the First Amendment.

The Supreme Court upheld governmental actions of approving the Forest Service's plan to proceed with construction in a forest used for "religious purposes." *Lyng*, 485 U.S. at 443. In doing so, the Court reasoned that the approved action did not violate the Petitioners' right to practice and live "according to their own religious beliefs." *Id.* at 449. Furthermore, the Court believed that the individuals in question would not be forced to make decisions that would go against their religious upbringing or prohibit other activities affiliated with their religion.

The immediate case also involves parents who want their children to go beyond the education they are currently receiving at public schools and opt for a private education that aligns with their beliefs. It is crucial to distinguish between receiving an education and receiving a "religious education" as identified by *Our Lady of Guadalupe School* because a violation of the latter would be the government violating the Petitioners' Free Exercise Clause under the First

Amendment. Additionally, the weight of the burden posed on the Petitioners is another factor to consider in determining whether there was a violation of the Free Exercise Clause. 140 S.Ct. at 2065 (2020).

The facts provide that the Petitioner children would be able to receive certain benefits at public schools. One child is currently attending a public institution and receiving benefits, albeit without kosher food options and religious holidays. The family hopes to receive identical benefits at a private school of their choosing. The special care these children need and have been receiving includes occupational, behavioral, and speech therapy, which one of the families is currently paying outside of the private school their child attends. With IDEA funding, Petitioner parents would need to pay for their children's tuition at private schools as they are today. Receiving the full benefit of IDEA funding would not be sufficient to cover the religious education that the parents hope their children will receive. Limitations on funding to sectarian private schools are not restricting the Petitioners' ability to provide their children with an Orthodox Jewish education, which is what the parents are doing now. Additionally, the parents have "concede[d]" that moving to a public school would open up "more services" than their child is currently receiving. The funding policy exists not to discriminate against any religion on its face but to allow children with disabilities to reap the benefits of a public school education without placing religious ties on the funding itself. As did the Petitioners in *Lyng*, the parents can continue raising their child under the Orthodox Jewish belief while reaping the benefits of the public school system under the IDEA Act. In other words, the families are not being coerced to give up their faith in any way. The Court should rule as it did in Lyng and determine that absent a direct prohibition and substantial burden lacking alternative solutions, a burden on the families making a choice cannot be considered a violation of the Free Exercise Clause.

3. Even if strict scrutiny were to be applied, § 502 would likely pass the standards because the State has a compelling state interest and narrowly tailored goal in implementing the policy.

The nonsectarian requirement in Section 502 of the Tourvania Code of Education would pass the highest standard of strict scrutiny because of the compelling state interest in implementing the policy and tight fit with the goals the state hopes to achieve. Courts have applied the same test for strict scrutiny when a classification occurs based on categories, one of which includes religion. This requires the state to show a "compelling state interest," and the government must also additionally show that their actions are "narrowly framed to accomplish that purpose." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003); *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The fit between the government's desired ends and the "means" that they are applying must be "so close" as to prove that their behavior of classification is not "illegitimate." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Therefore, it must not be too "underinclusive" or "overinclusive" in its application. *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The Court ruled in *Church of Lukumi Bablu Aye* that conduct with religious motivation would not "survive strict scrutiny," only in "rare cases." 508 U.S. at 546. When the government prohibited the religious practice of animal sacrifice, they asserted their compelling interest as "preventing the disposal of animal carcasses." *Id.* at 530. The goal was compelling but the statute itself was too "overbroad," because there were other ways in which the state could narrow the statute down and "burden religion to a lesser degree." *Id.* at 547. Further, the Court ruled that

because the only conduct affected were those motivated by religion, the ordinances could not be justified. *Id.*

On the contrary, the State's goal in the case at bar for implementing the IDEA Act is to provide public education to students, specifically one 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. 2 (quoting 20 U.S.C. § 1400(d)(1)(A)). Courts have long regarded education as a crucial property interest. Therefore, excluding students from the "educational process" would have a "serious" impact on their lives. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (quoting *Brown v. Board of Education*, 347 U.S. at 493 (1954)).

The Court should rule that § 502 of the Tourvania Education Code is narrowly tailored because it applies solely to students who attend public school because the funding is a federal program targeted primarily for public schools. Any student attending public school will receive the benefits of the funding. The government's decision to extend the act to private schools should not be considered a burden on education because private schools receiving the funding is not the norm but rather an exception. Because the option of attending a public school with the full range of funding and benefits, as conceded by the Petitioners, is open to all students, the State's goal of promoting public education has been met, without evidence of over or under-inclusivity. Furthermore, because the Tourvania Code was implemented with no religious motivation targeting to exclude specific religious groups, the Court should rule as it did in Church of Lukumi and hold that this statute survives strict scrutiny.

B. The nonsectarian requirement does not violate the Equal Protection Clause under the Fourteenth Amendment because there is no burden of choice or burden on the fundamental right of education to the Petitioners.

§ 502 of the Tourvania Education Code does not violate the Petitioners' rights under the Equal Protection Clause because there is no burden on the Petitioners' abilities to get an education, which has traditionally been considered the fundamental rights acknowledged by courts in precedent cases. Further, because the funding in question is not being "extended" to public schools but is a federal funding system focused on public schools but inclusive of certain private schools according to what the government decides, the state is able to make its own decisions regarding how to allocate public school funding.

1. When the government makes a decision about public funding, the state is able to do what they have to do with a public school funding act without violating the Equal Protection Clause of the Fourteenth Amendment.

Because the requirements laid out in § 502 of the Tourvania Education Code were for public school funding to be extended to select private schools, the state can make decisions that may not satisfy all parties involved without violating the Equal Protection Clause. Private education is a choice that parents can make for their children as they see fit. *Norwood v. Harrison*, 413 U.S. 455, 461 (1973). This choice is constitutionally protected, although courts

have often distinguished the choice from the government's responsibility to provide aid to private schools.

The Supreme Court ruled in *Norwood* that a State was not permitted to "prohibit the maintenance of private schools" because this would intervene with parents' abilities to choose "private or parochial schools" instead of public schools for their children. However, the Court also ruled that this did not obligate the State to provide the same amount of funding to private schools as it did to public institutions. The Norwood case further highlighted that the State could remain "neutral" as a matter of public policy in refusing to provide aid to certain sectarian institutions. The Court also held in Rust that the government could "selectively fund" certain programs or deny funding for programs based on its determination of what it considers as "in the public interest." *Rust*, 500 U.S. at 193. More importantly, the Court ruled that this decision would not violate the Constitution. Their decision was not motivated to discriminate but rather a mere choice of what program to "fund" over another. *Id.*

Additionally, when there is no substantial burden on the Petitioners to exercise their rights, there is no obligation under which the government must provide funding to all individuals. In Harris v. McRae, for example, the Court held that while a woman has the freedom to opt for an abortion, this choice does not mean that the Constitution entitles her to "the financial resources . . . of the full range of protected choices." 448 U.S. 297, 316 (1980).

The intent behind the legislation in the present case is to "open the door of public education to handicapped children on appropriate terms," as established in *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 189, 192 (1982). The State, in complying with the statute, must ensure that students are being provided with a "free appropriate public education." R-3.

2. The Equal Protection Clause has not been violated because there is no violation of a fundamental right to education, and extending the public funding to more private schools may burden the quality of education at public schools, which was the original aim for the act in question.

No fundamental right has been deprived under the Equal Protection Clause because the section in question of the Tourvania Education Code does not burden the Petitioners' right to education. For there to be a violation of one's fundamental rights under the Fourteenth Amendment, one must prove the existence of a fundamental right protected by the Constitution. The deprivation must exceed a "de minimis" requirement to be considered a fundamental right. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Education has long been considered a protected right, recognized as a property interest under the "life, liberty, and property" interests explicitly enumerated in the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Brown*, 347 U.S. at 493. There are differences between a religious education and a secular education. Religious education entails a formal religious education, while a secular education does not. *Our Lady of Guadalupe School*, 140 S.Ct. at 2066. The traditionally recognized interest of education has been one of secular education, one that is "available to all on equal terms," and where students learn not about specific religious traditions but general principles such as "good citizenship" and "cultural values." *Brown*, 347 U.S. at 493 (1954). By contrast, a religious education is one that courts have considered as a form of "religious exercise." *Our Lady of Guadalupe*, 140 S.Ct. at 2065.

In the monumental case *Brown v. Board of Education*, the Court ruled that it was unconstitutional to deny public education to students based on race, highlighting public education as one of the most crucial "function of state and local governments." On a narrower scale, the Court ruled in *Goss v. Lopez* that a 10-day suspension could not be considered a "de minimis burden on students because depriving them of the "educational process" would have a "serious" impact on their lives. *Goss*, 419 U.S. at 576.

The Supreme Court in *Our Lady of Guadalupe* lists qualities that differentiate a religious institution from a typical education system. Teachers are trained specifically in "religious instruction," 140 S.Ct. at 2065, and "children are instructed in the faith." *Id.* Religious schools themselves often view their way of education as entirely different from that of public schools because public schools "do not reflect their values." *Id.*

It seems evident that the Petitioner parents in the case at bar hope to exercise their religious belief by ensuring their children receive a religious education. The families hope to send their children to an Orthodox Jewish private school because they believe that their religion "obligates" them to "instill and strengthen" their beliefs in the children by allowing them to attend school surrounded by "Orthodox Jewish culture and heritage." The reason why the parents want to send their children to private school is irrelevant when considering whether a fundamental right to education has been taken away by the Petitioner children. The record reveals that no fundamental right to education was taken away from the Petitioners. Currently, one of the two children is attending public school and reaping the benefits of IDEA funding at these schools. While the other child is attending a private institution, the family can choose public school because it will provide their child with the necessary services that she requires. Unlike students in *Brown* and *Lopez*, who were wholly deprived of the right to their education,

the Petitioners are merely alleging that they want to opt for private school and are being denied their right to do so. This is not similar to precedent cases because although one option is being burdened, the Petitioners have others available.

Furthermore, as a matter of public policy, it is important to take into consideration that the funding system in question is not being extended to public schools as the Petitioners allege, R-2, but rather being extended to a restricted number of private institutions while remaining a federal policy targeted towards promoting public education. Increased funding to an excessive number of private schools may lead to the goal of providing "FAPE" including special services for more students futile, due to money being "divert[ed]" away from its original use. Iris Hinh, *State Policymakers Should Reject K-12 School Voucher Plans*, Center on Budget and Policy Priorities, Mar. 21, 2023. The significance of education is not limited to the Petitioners in question but anyone who qualifies to reap the benefits provided by IDEA. The burden on education, rather than religious education, is one the Court should consider when determining whether § 502 of the Tourvania Education Code violates the Equal Protection Clause. Recognizing this specific burden on religious education for Orthodox Jewish families may open a floodgate of litigation for the Court from other religious backgrounds, which would further this policy concern and exacerbate the issue of public education funds being diverted to private education programs. The Court should therefore find that a burden on religious education and not the fundamentally recognized right of secular public education is not a violation of the Equal Protection Rights under the Fourteenth Amendment.

II. ESTABLISHMENT CLAUSE IS DISPOSITIVE

The court should find that the Establishment Clause of the First Amendment is dispositive of this case for two reasons: A) without provisions like § 502 of the TEC, IDEA funds would intertwine the states and Federal Government with religion; and B) the administration of equitable services under the IDEA to religious schools has the effect of forcing the government to sponsor religious dogma.

A. Allowing government aid to support religious curriculum invariably intertwines the government and religion and forces government officials to make determinations resulting in scholastic indoctrination

The Court should find that extending IDEA aid to religious institutions would violate the Establishment Clause of the First Amendment. Supporting religious-based school curriculum would "excessively entangle" the states and Federal Government with religious endeavors. *Walz*, 397 U.S. at 670. Furthermore, requiring government officials to adopt and approve Individual Education Plans ("IEP") would constitute religious indoctrination that effectively "subsidizes religion." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

1. Aid supporting religious curriculum intertwines the government with religion

The Court should find that Petitioners' school curriculum is so intertwined with religion that government involvement in helping teach the curriculum unconstitutionally entangles the government with religious doctrine and practices.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause applies to the states through the Fourteenth Amendment. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

The Establishment Clause, alongside the Free Exercise Clause of the First Amendment, "seeks to mark boundaries to avoid excessive entanglement" between the states and Federal Government and religion. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970). By avoiding government entanglement with religion, we attempt to halt the "employ[ment of] the machinery of the State to enforce a religious" doctrine and practices. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Simply put, neither a state nor the Federal Government can "pass laws which aid one religion, aid all religions, or prefer one religion over another." *People of State of Illinois ex rel McCollum v. Board of Education*, 333 U.S 203, 210 (1948).

The purpose behind the IDEA was to "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that includes special education and related services designed to meet their unique needs." 20 U.S.C.A § 1400(d)(1)(A) (West 2016). Through the IDEA, the disabled students must receive "equitable services" aimed at fulfilling their individual needs. *Id.*, at § 1412(a)(10)(A)(vi)(II).

Extending financial support to religious schools favors one religion in this case alone, and potentially all religions if applied to similar cases. It is no less a violation of the Establishment clause to provide IDEA aid to all religious schools as it is to provide IDEA to the Petitioners only. Providing IDEA aid to teach a religious curriculum entangles the State and religious institutions. Simply by providing the IDEA aid, the machinery of the State promotes the religious endeavor of sectarian schooling.

Government attempts to sponsor, favor, or support religion, or tenants thereof, will be held unconstitutional by the Court. See *Walz*, 397 U.S. at 664. The Establishment Clause bars government action akin to the "sponsorship, financial support, [or] active involvement" in religious practices and the teaching of religious doctrine. *Walz*, 397 U.S. at 668. While the Court

has held that government aid can be granted to individuals attending religious schools, government promotion of schooling as an "essentially religious endeavor" violates the Establishment Clause. See *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Locke v. Davey*, 540 U.S. 712, 721 (2004).

Under the IDEA, the equitable services requirement would not be satisfied if Making it impossible for the government to sponsor the secular side of the curriculum without sponsoring the religious side as well, under the equitable services requirement of the IDEA. The Schools' curriculum is so intertwined with religion that government involvement in helping teach the curriculum unconstitutionally entangles the two. The Schools' dual-curriculum does not absolve the Petitioners from a clear endeavor to provide a religious schooling experience for their students. Further, the Klines and the Flynns have made it clear in the record that they endeavor to provide such religious schooling to honor their familys' faith. Financial support to this religious endeavor would entangle the government with religious teachings because providing government aid to the schools directly sponsors, not only their secular studies, but the religious one's as well.

Here, the Schools are seeking certification to receive IDEA funding, not the individuals, breaking the connection between government aid and the student receiving it. Certifying the Schools is not the same as providing aid directly to the children who need it. Providing aid to religious schools creates an entanglement between the government and the school's curriculum and not simply their ability to provide the disabled student with appropriate services. While providing aid to an individual may not violate the establishment clause, providing aid to the school would.

Previously, the Court has held that a state may extend IDEA funds to private secular students without violating the Establishment Clause. See *Zobrest*, 509 U.S. 1. Respectfully, the facts

before the Court in *Zobrest* are dissimilar to those before the Court in the present case that *Zobrest* may not control here. In *Zobrest*, this Court held that it was not a violation of the Establishment Clause to provide IDEA funds to provide a sign-language interpreter to a deaf student attending a private Roman Catholic school. *Id*. The court's finding hinged on a three-pronged rationale. First, that the IDEA distributes benefits, "without regard to the sectarian-nonsectarian... nature of the school." *Id.*, at 2. Second, that aid it provided to students "rather than directly to sectarian schools." Lastly, the Court reasoned that because "a sign-language interpreter would do [no] more than accurately interpret whatever material is presented to the class as a whole," a sign-language interpreter is different from "a teacher or guidance counselor." *Id*. at 13. The nature of the IDEA aid in *Zobrest* led the Court to conclude that it would not "add or subtract from" the material so as to make government involvement non-neutral. *Id*.

First, the IDEA does make give regard to the sectarian-nonsectarian nature of the aid it provides. 20 U.S.C.A. § 1412(a)(10)(A)(vi)(II) (West 2016)(requiring that services provided under the IDEA must be "secular, neutral, and non-ideological); *Id*. § 1412(a)(10)(A)(vi)(I) (allowing aid to religious private school students "to the extent consistent with law"). These provisions of the IDEA show a clear intent by the legislature to be mindful of the nature of the school's religious mission regarding their curriculum.

Second, the Schools are seeking to certify themselves under the Tourvania Education Code ("TEC") to receive IDEA funds, not the Flynns and Klines. While, eventually, IDEA aid will reach B.K. and H.F., it will nevertheless pass through their respective schools that they receive the aid. A deliberate choice, made by the school, to apply for IDEA funding does not equate to a deliberate choice made by the parents to put their children in private schools. That

intervening step breaks the chain between government aid reaching the individual by way of their deliberate choices to seek funding for equitable services.

Lastly, because of the nature of the aid required here, any government official involved in the Petitioners' IEP plans will play a non-neutral role by doing more than relaying information. For example, the occupational therapy required by the Petitioners would be used to teach physical acts, such as prayer, religious dancing, and religious ceremonies. Likewise, speech therapy that fulfills the dual curriculum of the Schools will help sponsor teaching religious texts, teaching Torah values, and stimulating Torah learning. Far from being a passive relayer of information, the personal aid required by the Petitioners includes taking an active role in the development and understanding of the information, crossing the line from relaying information to teaching it.

2. A government official would be making a determination that promotes scholastic indoctrination

A government official cannot make a determination to direct aid to a religious institution without facilitating scholastic indoctrination of the school's religious curriculum.

The question of scholastic indoctrination "is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. 809. Answering the question of indoctrination requires a determination of "whether a program of educational aid 'subsidizes' religion." *Id*., (quoting *Agostini v. Felton*, 521 U.S. 203, 230-231 (1997)).

Unable to divide the dual curriculum, as previously discussed, providing aid to the Schools subsidizes a curriculum that teaches religion. Certifying the schools under Tourvania law

endorses more than the secular curriculum, but the religious one as well. Because the school is seeking certification under Tourvania law. The development of an IDEA-appropriate IEP for a student at a religious school must involve the endorsement of the religious curriculum by a government official.

Furthermore, because the local educational agency ("LEA") is required to work with representatives of the school to develop the IEP, the government must adhere to the curriculum being taught to the students to which it provides aid. Providing aid to Petitioners would promote the religious endeavor of teaching a centrally Orthodox Jewish school curriculum. The Petitioners have made clear that their intent in sending their children to Orthodox Jewish secondary schools lies in their desire to give an Orthodox Jewish education. An IEP would have to adhere to the principles of the curriculum sought by the Petitioners, under the equitable services requirement of the IDEA.

It is impossible for the Tourvania Department of Education to provide aid to the religious aspects of the curriculum without becoming intertwined with religion. Further, it is impossible to provide aid solely to the secular aspects of the Schools' curriculum without violating the equitable services requirement of the IDEA. Thus, providing any aid, in line with the provisions of the IDEA, to schools which promote non-secular tenants of faith would violate the Establishment Clause.

B. The proper administration of equitable services under the IDEA to religious institutions would have the effect of sponsoring religion

In order to properly provide or administer the equitable services required under the IDEA to religious institutions, the IDEA would cease to be neutral and have the effect of promoting religion.

The Establishment Clause of the First Amendment "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002) (quoting *Agostini v.Felton*, 521 U.S. 203, 222-223 (1997)). Under the IDEA, the disabled students must receive "equitable services" aimed at fulfilling their individual needs. 20 U.S.C.A. § 1412(a)(10)(A)(vi)(II).The services provided must be "secular, neutral, and non-ideological." *Id*. Secular, meaning "not spiritual," provides guidance for a local education agency ("LEA") when considering how equitable services will be administered. Black's Law Dictionary (11th ed. 2019), "Secular" (2019). A neutrality analysis of the statute at issue, "extends beyond facial discrimination," and asks whether "the effect of a law in its real operation" promotes or targets religion. *Locke*, 524 U.S. at 534-535. Federal Government grants which have the "effect of advancing religion" or effectively promote religion are not neutral. *Tilton v. Richardson*, 403 U.S. 672, 683 (1971).

The provision of equitable services will be provided "by employees of a public agency; or through contract by the public agency with an individual, association, agency, organization, or other entity." 20 U.S.C.A. § 1412(a)(10)(A)(vi)(I)(aa)-(bb) (West 2016). Government employees will provide "such services to parentally placed private school children with disabilities… on the premises of private, including religious, schools, to the extent consistent with law." *Id*. § 1412(a)(10)(A)(vi)(I).

The purpose behind the IDEA was to "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that includes special education and related services designed to meet their unique needs." *Id*. § 1400(d)(1)(A). As opposed to typical public school curriculum, however, "religious instruction is of a different ilk." *Locke v. Davey*, 540 U.S. 712, 723, (2004). Public school officials and government employees are

prohibited from promoting, disparaging, or teaching religion. See, *e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *McCollum*, 333 U.S. 203 (no weekly religious teachings in public schools); *Engel v. Vitale*, 370 U.S. 421(1962) (no prayers in public schools); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (no Bible readings in public schools); *Epperson*, 393 U.S. 97 (no religiously tailored curriculum in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (no period of silence for meditation or prayer in public schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (no prayers during public school graduations); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (no prayers during public school football games).

While potentially not present in this case as it is unclear whether aid will be administered by the Schools' staff or government paid employees, government employees may be dispensed to provide personal aid under a similar disabled student's IEP not present here. The on-duty actions of government personnel under an IEP are an extension of the effects of the IDEA in its real operation. To pass muster under the Establishment Clause, effects of the IDEA, including the actions of those workers tasked to assist disabled students in their scholastic endeavors, must not have the effect of advancing religion. When occupational and speech therapists are deployed to religious schools, helping teach religious doctrine, there can be no government neutrality. Permitting IDEA in such a manner would, in effect, violate government neutrality under the Establishment Clause because it asks government personnel to effectively teach religious dogma.

This relationship between the student and the government personnel can at most turn government employees into full-fledged tutors of the school's curriculum, and at least require them to relay the information used to understand a particular religious curriculum. While a sign-language interpreter may be more analogous with the latter, the facts of the case present establish

that there is a need for a more intimate relationship between the government employee, the disabled student, and the material taught in their school than simple relay. Furthermore, as evidenced by the Flynns' and Klines' wish to provide education in line with their religious beliefs, the personnel providing aid will not only be required under the secular part of the Schools' curriculum, but the religious one as well. Having a government employee help ensure the Petitioner's understanding of the religious aspect of the curriculum invariably asks them to teach religious tenets in a non-neutral manner.

In this case, The Joshua Abraham High School and Bethlehem Hebrew Academy seek to receive government aid to sponsor and assist the teaching of students about Orthodox Jewish practices and doctrines. While their curriculum has a dual purpose, their mission seeking to teach the tenants of their faith is inextricably intertwined. Given this, providing government aid to students at either school would sponsor religious teachings. Government aid cannot be used to help students develop a passion for the Torah without becoming intertwined with Orthodox Judaism. While government aid can be used to facilitate learning of Tourvania's core curriculum, it cannot be used to stimulate Torah learning without having the effect of favoring the religion. Government employees, in their capacity within the student's IEP, cannot encourage students to live Torah values without sponsoring them.

In this case, while the teaching of religion happens outside the physical boundaries of public schools, it is still promoted by the machinery of public education through the use of public funds. IDEA funds are no less a part of the machinery of public education because of their express purpose to provide FAPE. It is impermissible to provide public funds for government employees within public school grounds with the purpose of promoting religion as it entangles the government with religion. It is no more permissible to provide public funds for government

employees to promote religion outside public school grounds. Just because the location is different, the use of the machinery of public education to promote religion at a private location is just as impermissible.

Thus, because the administration of aid will effectively require government employees as an extension of the government, to actively promote religion. If this were permitted to happen, the IDEA would have the effect of sponsoring religion. Such an effect would make the IDEA, as a whole, unconstitutional under the Establishment Clause.

CONCLUSION

The Court should find that the nonsectarian requirement in § 502 of the Tourvania Education Code does not violate the Free Exercise Clause of the First Amendment and the Equal Protection Clause under the Fourteenth Amendment. The Court should also find that extending IDEA funds to religious institutions violates the Establishment Clause of the First Amendment.

CERTIFICATION

We hereby certify that all members of Team No. 6 have received no assistance in the preparation of our brief; the work set forth in our brief is original; and, our brief has been prepared in accordance with all rules set forth in the Touro University's 10th Annual National Moot Court Competition In Law and Religion Rules.