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(Defendants CDE and Tony Thurmond in his Official Capacity as SPI are Governmental Parties Exempt from the Provisions of FRCP 7.1 and L.R. 7-1.1)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and JONATHAN LOFFMAN, on their own behalf and on behalf of their minor child M.L.; FEDORA NICK and MORRIS TAXON, on their own behalf and on behalf of their minor child K.T.; SARAH PERETS and ARIEL PERETS, on their own behalf and on behalf of their minor child N.P.; JEAN & JERRY FRIEDMAN SHALHEVET HIGH SCHOOL; and SAMUEL A. FRYER YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF EDUCATION; TONY THURMOND, in his official capacity as Superintendent of Public Instruction; LOS ANGELES UNIFIED SCHOOL DISTRICT; and ANTHONY AGUILAR, in his official capacity as Chief of Special Education, Equity, and Access,

Defendants.

Case No. 2:23-cv-01832-JLS-MRW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS

Hearing: July 21, 2023
Time: 10:30 a.m.
Courtroom: 8A
Judge: Hon. Josephine L. Staton

Action Filed: March 13, 2023
Trial Date: Not set

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The California Department of Education ("CDE") and Tony Thurmond in his official capacity as Superintendent of Public Instruction ("SPI") (collectively, the "State Defendants") submit the following memorandum in support of their motion to dismiss.

I. INTRODUCTION

Plaintiffs – two Orthodox Jewish private schools (the "Schools") and three sets of Orthodox Jewish parents suing on behalf of themselves and their respective children with disabilities (the "Families") – commenced this action claiming that a California law implementing an aspect of the federal Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*. ("IDEA") violates their rights under the Free Exercise Clause and the Equal Protection Clause. Plaintiffs challenge the requirement that "nonpublic schools" ("NPSs") – a statutory term for state contractors that help the state provide the state's public education to public school students whose disabilities are so severe that existing public programs are insufficient – be nonsectarian (*i.e.*, not owned, controlled or formally affiliated with a religious sect). (Educ. Code §§ 56034, 56365.) Plaintiffs characterize that requirement as infringing the free exercise of their religion by depriving religious private schools and religious families from using "generally available public funds" to provide/receive a private religious education. But a complete understanding of the IDEA and California's law implementing it reveals that Plaintiffs' characterization is simply wrong. Section II of this brief presents the highly relevant legal framework, which must be well understood to properly assess Plaintiffs' case.

With such understanding, a careful examination of the Complaint's allegations reveals that all Plaintiffs – both the Schools and the Families – lack Article III standing to bring their case before this Court. (§VI below.) It is also clear that California's Eleventh Amendment immunity requires dismissal of the CDE, and of Plaintiffs' actual and nominal damages claims. (§V below.) And to the extent that the Court does not dismiss for lack of jurisdiction, it can and should find that each of Plaintiffs' "Counts" fail to state a viable claim for multiple reasons. (*See* §VII regarding the Free Exercise Clause-based counts, and §VIII regarding the Equal Protection Clause-based count).

II. THE HIGHLY RELEVANT LEGAL FRAMEWORK

A. Under the IDEA, Families Have a Choice to Enroll Their Child in a Private School or to Accept Their State's Free Public Education; in Either Case the IDEA Provides Services.

The primary purpose of the IDEA is to ensure that all children with disabilities "have *available* to them a free appropriate *public* education" that includes supports. (Emphasis added.) 20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1(a). Thus, to receive IDEA funds, states generally must make a "free appropriate public education" ("FAPE") available to all children with disabilities. 34 C.F.R. §§ 300.100, 300.101(a).

A FAPE is special education and related services that are "provided at public expense, under public supervision and direction, and without charge[,]" that meet the state's educational standards, and that are provided in accordance with a proper individualized education program ("IEP"). 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

While a state is required to make its publicly developed and directed FAPE option available, the IDEA recognizes that families may instead choose a private education, including a religious education. 34 C.F.R. § 300.130 (defining "parentally-placed private school children with disabilities" to include placement in "religious schools").

The IDEA does not ignore families that choose a private education, including a religious education. Indeed, the IDEA requires a state government's local educational agencies ("LEAs") to locate such "parentally-placed private school children with disabilities" and to spend a proportionate share of the LEA's IDEA funds on providing special education and related services to those children, based on a plan developed by the LEA in consultation with representatives of parents of such students and private schools. 34 C.F.R. §§ 300.131–300.138.

B. The IDEA's Provision of Services Differs Based on the Family's Choice, but Plaintiffs do not Challenge that Difference, and its Constitutionality has been Upheld.

While the IDEA supports all children with disabilities, an LEA's obligations and

a family's IDEA rights differ based on whether the family has chosen private school or enrolled in the state's public schools. *See* 34 C.F.R. §§ 300.137(a), 300.138(a)(2) (both providing that specific rights and obligations differ based on that initial choice). For children whose parents have chosen a ***private*** education (including a religious school), an LEA creates a "services plan" that describes the specific special education services that the LEA will provide "in light of the services that the LEA has determined" that it will make available to parentally-placed private school students, based on its IDEA-mandated consultation with relevant stakeholders. 34 C.F.R. §§ 300.137(b)-(c), 300.138(b). For children enrolled in ***public*** school, the LEA oversees the development of an IEP that, *inter alia*, describes what will be provided to enable the child to advance toward meeting specified annual goals tailored to the child, and to participate and make "progress *in the general education curriculum* (*i.e.*, the **same** curriculum as for nondisabled children)." (Emphasis added.) 34 C.F.R. § 300.320(a)(1)(i).

Plaintiffs do not challenge those IDEA distinctions here, and federal courts have squarely rejected claims that the IDEA's differences based on family choice of private over public education offend the Constitution, even when families choose private religious school for religious purposes. *See Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19-21 (1st Cir. 2004), *cert. denied*, 543 U.S. 988 (2004) (rejecting family's Free Exercise and Equal Protection challenge to the IDEA's differences based on decision to attend private religious school or accept the state's free public education).

C. When a Family Accepts the State's Free Public Education, the State Directs and Supervises the Provision of *its* Curriculum, even in the Rare Case Where the Law's "Least Restrictive Environment" Rules Permit NPS Placement by the State.

When families accept the state's free public education, IDEA-sponsored special education and related services is provided along with and in the context of the state's public curriculum, and it is directed, controlled and supervised by the state's public educational agencies. *See*, *e.g.*, 20 U.S.C. § 1401(9) (definition of FAPE requiring, *inter*

alia, that the education and services "meet the standards of the State educational agency" and are provided "under public supervision and direction."); 34 C.F.R. § 300.600 (requiring state to monitor implementation of, and to enforce the IDEA's requirements, including LEAs' "[p]rovision of FAPE in the least restrictive environment" and "exercise of general supervision"); 34 C.F.R. §§ 300.28, 300.41 (respectively, defining "local educational agencies" and "state educational agency" as public governmental agencies responsible under state law for administering "public" education).

The IDEA requires LEAs to ensure that, to "the maximum extent appropriate," their children with disabilities are "educated with children who are nondisabled" and that learning in anything other than the LEA's regular classes "occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114. Because of the broad range of disabilities and special needs children may have, the IDEA requires states to "ensure that a continuum of alternative placements is available" to meet such needs, and it states that such alternative placements may include "private institutions." 34 C.F.R. §§ 300.115, 300.118. However, LEAs must ensure that all placement decisions comply with the above-described "least restrictive environment" rules, are based on the child's IEP, result in a placement "as close as possible to the child's home" and, unless some other arrangement is required, provide that "the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116. The IDEA requires states to ensure that these requirements are "effectively implemented," including, if necessary, by "making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures)." 34 C.F.R. § 300.118. Thus, the IDEA expressly contemplates states contracting with private entities to help the state provide necessary and specialized supports, to families that enroll in public school accepting the state's free public education, that are not otherwise available in an existing public program. *Id.*

But, critically, in this context under the IDEA, the necessary placement of a child

in the private institution is "**by the state**" – in contrast to the "parentally-placed" scenario discussed above where the child's parents have chosen a private education. *See* and *compare* 20 U.S.C. § 1412(a)(10)(B) (children placed in private institutions "by the State or appropriate local educational agency") *with* § 1412(a)(10)(A) (regarding children "enrolled in private schools by their parents"). In this context of placement in a private institution "by the state," responsibility for carrying out the IDEA "remains with the public agency" that placed the child. 34 C.F.R. § 300.325(c). And, significantly, the IDEA requires the state to ensure that the child: (a) "is provided an education that meets the standards that apply to education provided by" the state's *public* educational agencies; (b) has "all of the rights of a child with a disability who is served by a public agency"; and (c) is provided, at no cost, special education and related services that conform to a properly developed IEP. 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B). To satisfy those responsibilities, the IDEA requires states to, *inter alia*, "[m]onitor compliance through procedures such as written reports, on-site visits, and parent questionnaires." 34 C.F.R. § 300.147.

D. The IDEA's "Free and Appropriate Public Education" Need Not Account for a Family's Desire for Religious Instruction; and Ultimately, Private Placement Decisions are Made by State Officials, with Courts Giving Due Weight to Their Expertise.

LEAs are responsible for assembling "IEP Teams" to develop IEPs for eligible children, which include one or more of the child's teachers, other LEA representatives that are knowledgeable and qualified to make decisions, as well as the child's parents. 34 C.F.R. § 300.121. While LEAs must include parents and consider their views, the LEA: should develop its own views; must abide by the IDEA's above-discussed "least restrictive environment" rules; and can ultimately disagree with the parents about IEP specifics, including placement in an alternative setting. *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1134 (9th Cir. 2021) (reaffirming that the law "does not require school authorities automatically to defer to [parents'] concerns" and that school

authorities can listen, consider and "just disagree[]."); *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131-33 (9th Cir. 2003) (recognizing that school districts and a pupil's parents may have "a difference of educational philosophy," but that "districts have expertise in educational methods that may be given appropriate weight in addressing an IEP's compliance with the IDEA" and that a district "has no obligation to grant [the pupil's parents] a veto over any individual IEP provision."); *K.M. v. Tustin Unified Sch. Dist.*, 775 F.3d 1088, 1101 (9th Cir. 2013), *cert. denied*, 571 U.S. 1237 (2014) (IEP development under the IDEA "does not require that parental or child requests be assigned 'primary' weight.")

Under the IDEA, "[a]n 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). Rather, an LEA must offer a program reasonably calculated to enable a child to make progress in its general education curriculum in light of the child's disability. *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 399-401 (2017). If a parent challenges an LEA's decision, then the court "must focus primarily on the District's proposed placement, not on the alternative that the family preferred." *Gregory K.*, 811 F.2d at 1314. That is because even if the parent's preferred placement "was better for [the student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate." *Id*. Courts "must uphold the appropriateness of the [LEA's] placement if it was reasonably calculated to provide [the student] with educational benefits." *Id*.

Moreover, in reviewing whether a school district's proposed IEP was appropriate, courts "are not free to substitute [their] own notions of sound educational policy for those of the school authorities which [they] review.'" *Capistrano Unified Sch. Dist.*, 21 F.4th at 1132. Rather, courts "must defer" to the school authorities' "'specialized knowledge and experience' by giving 'due weight' to the decisions of the states' administrative bodies." *Id*.

While an IEP team considers the child's needs for accessing the state's general

education curriculum due to their disability, the family's religious and cultural needs do not require the LEA to include any religious or cultural instruction as part of an IEP. *M.L. v. Smith*, 867 F.3d 487, 495-98 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 752 (2018).

E. When an LEA Places a Child in a Private School, IDEA Funds Benefit the Child Whose Family Has Accepted *the State's* Free *Public* Education (not the Private School Itself) and May Not be Used for Religious Instruction.

When an LEA's IEP Team determines that it is both permissible and appropriate to involve a private contractor in a child's public education, the LEA (and via contract, the private entity) is bound by federal regulations that prohibit use of IDEA funds for "[r]eligious worship, instruction, or proselytization." 34 C.F.R. § 76.532; *M.L.*, 867 F.3d at 496 ("[F]ederal regulations support the conclusion that states may not use IDEA funds to provide religious and cultural instruction.")

Indeed, even in the context where LEAs provide services to "parentally-placed private school children" whose families have chosen to enroll in a private school, including a religious school, the IDEA contains a number of provisions requiring that funds are only used for education that is "secular" and "neutral," and to benefit the eligible children, as opposed to the private school itself or its general student population. *See*, *e.g.*, 20 U.S.C. § 1412(a)(10)(A)(vi) ("Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological."); 34 C.F.R. §§ 300.138(c)(2) (same), 300.141(a) ("An LEA may not use [IDEA] funds . . . to finance the existing level of instruction in a private school or to otherwise benefit the private school."), 300.141(b) (funds must be used to meet the special education needs of the eligible child, but not the needs of the private school or the general needs of its students).

F. California's "Nonsectarian" Requirement Only Comes into Play When a Family Accepts the State's Free Public Education, and Only When No Appropriate Public Program is Available.

Approximately 30 years ago, recognizing the broad range of disabilities and needs children may have, and in accordance with the IDEA's requirement that states provide for "a continuum of alternative placements" (34 C.F.R. § 300.115), California enacted statutes and regulations that allow for "NPSs" to provide IEP-designated special education services to children placed there by the LEA under a contract "if no appropriate public education program is available" and if various other requirements are met. Educ. Code § 56365(a).

Significantly, such services must be provided "in accordance with section 300.146 of title 34 of the Code of Federal Regulations" (*id.*) – an IDEA regulation that imposes oversight obligations on a State Educational Agency with respect to children placed in a private school "by a public agency" (34 C.F.R. § 300.146), and that applies "*only to* children with disabilities who are or have been placed in or referred to a private school or facility ***by a public agency*** as a means of providing special education and related services" (34 C.F.R. § 300.145, emphasis added). In other words, California's provision for "nonpublic, nonsectarian schools" only has application in the context where families have chosen to accept a free public education from their LEA (the context addressed by 20 U.S.C. § 1412(a)(10)(B) and 34 C.F.R. §§ 300.145–300.147), rather than invoke their right to obtain a private education for their children (the context addressed by 20 U.S.C. § 1412(a)(10)(A) and 34 C.F.R. §§ 300.130–300.144).

G. An NPS Assists an LEA in Providing California's Public Education Under the IEP – including Through the Use of State-Approved Textbooks and Curriculum – pursuant to a Contract; however, the Child is Deemed Enrolled in Public School and Graduates with a Diploma from the LEA.

An LEA's placement of one of its students in an NPS allows the LEA to receive state education funding for the student, because such students are "deemed to be enrolled in public schools" for such purposes. Educ. Code § 56365(b). The NPS is paid by the LEA "pursuant to" a contract, which must meet legal requirements. Educ. Code §

56365(d); *see also* Educ. Code § 56366.5 (payment provisions, and requirement that NPS only use funds for the cost of providing the contract's specified special education services). In order to place a student in an NPS, an LEA must enter a "master contract" with the NPS, which may not exceed one year and must be "re-negotiated" each fiscal year. Educ. Code § 56365(a); Cal. Code Regs., tit. 5 ["5 C.C.R."] § 3062(a), (d).

A "master contract" must "specify the administrative and financial agreements" between the LEA and the NPS, and must include, *inter alia*, provisions for "disputes, contractor's status, conflicts of interest, inspection and audits, compliance with applicable state and federal laws and regulations, attendance, record-keeping," "reporting requirements[,]" "payment amounts, payment demand," and "right to withhold and audit exceptions[.]" 5 C.C.R. § 3062(b). It also must include an "individual services agreement" for each pupil "placed by" an LEA with the NPS to cover the special education "specified in" the pupil's IEP. Educ. Code § 56366(a)(2)(A). Notably, a master contract must recognize that the NPS cannot make changes in the instruction or services that it provides to any pupil under the contract unless they are based on revisions made to the pupil's IEP. Educ. Code § 56366(a)(3)(A). In addition, a master contract must recognize that the NPS is subject to the state's accountability system "in the same manner as public schools" and that each pupil placed in the NPS "by" an LEA shall be tested by qualified staff at the NPS in accordance with that system. Educ. Code § 56366(a)(8).

An NPS must be certified by the SPI (5 C.C.R. § 3060(a)), but to receive certification, the NPS must meet a number of requirements. Importantly, the NPS must certify that it will utilize the State Board of Education (SBE)-adopted, standards-aligned core curriculum and instructional materials for kindergarten and grades 1 to 8, and will utilize the state standards-aligned core curriculum and instructional materials used by an LEA that contracts with the NPS for grades 9-12. Educ. Code § 56366.10(b)(1); 5 C.C.R. § 3001(a). To that end, an NPS's application must describe, *inter alia*, the "SBE-adopted core curriculum (K-8) and standards-aligned core curriculum (9-12) and

instructional materials used by general education students." 5 C.C.R. § 3060(c)(9).

The NPS's administrators and staff must "hold a certificate, permit, or other document equivalent to that which staff in a public school are required to hold." Educ. Code § 56366.1(n); 5 C.C.R. § 3064(a). Thus, an NPS's application must include the names of its teachers with a credential authorizing service in special education, and copies of the credentials. Educ. Code § 56366.1(a)(3); 5 C.C.R. § 3060(a)(4); *see also* 5 C.C.R. § 3062(g) (requiring NPSs to provide contracting LEAs with copies of current valid California credentials and licenses for staff providing services), and § 3064(e) (requiring NPSs to "comply with the personnel standards and qualifications" in the Education Code regarding instructional aides and teacher assistants).

An NPS applicant also must agree that it will "maintain compliance" with not only the IDEA, but other federal laws including the Civil Rights Act, Fair Employment Act, and Section 504 of the Rehabilitation Act. 5 C.C.R. § 3060(d).

An NPS's application must also include other information to assist the SPI in making a decision about whether to certify the application, including "a description of the special education and designated instruction and services provided to individuals with exceptional needs[.]" Educ. Code § 56366.1(a)(1).

The SPI is authorized to "certify, conditionally certify, or deny certification." Educ. Code § 56366.1(f). Certification may last for one year, however, an NPS may update its application each year for potential renewal. *Id.*; Educ. Code § 56366.1(h).

Finally, underscoring that a child's enrollment in an NPS is enrollment in the state's public education system, when a child placed by an LEA in an NPS completes the IEP's prescribed course of study, "the public education agency which developed the IEP shall award the diploma." 5 C.C.R. § 3070.

H. NPS Placement Involves Extensive and Continuing State Monitoring, Evaluation and Direction, with the Required Shared Goal of Transitioning a Pupil Back to Less Restrictive Environments in the LEA.

Not surprisingly given all of the above, an important part about serving as an NPS is agreeing to continued oversight by the state and its LEAs, and providing services with the goal of transitioning pupils to less restrictive environments in the pupils' respective LEAs. For example, a master contract must "include a description of the process being utilized by the [LEA] to oversee and evaluate placements in [NPSs], as required by federal law[,]" which must "include a method for evaluating whether each pupil is making appropriate educational progress." Educ. Code § 56366(a)(2)(B). Such evaluation must occur at least once every year, and must include whether or not the needs of the pupil placed in an NPS "continue to be best met" at the NPS, and whether changes to the IEP are necessary, "including whether the pupils may be transitioned to a public school setting." *Id.* Furthermore, an NPS must certify that its teachers and staff will provide instruction and support "with the goal of integrating pupils into the least restrictive environment pursuant to federal law." Educ. Code § 56366.10(c). To that end, an NPS's application must describe the school's "exit criteria for transition back to the public school setting." 5 C.C.R. § 3060(c)(8).

An NPS also must agree to "make available any books and records associated with the delivery of education and related services to individuals with exceptional needs for audit inspection" by the SPI or the SPI's representatives. 5 C.C.R. § 3061(a).

The SPI must conduct an initial "validation review" before granting "an initial conditional certification," and then must conduct an "on-site review" within 90 days of that. 5 C.C.R. § 3063(a). The SPI must conduct further on-site reviews at least every three years, or at least annually in the case of an NPS that has been the subject of a formal complaint. *Id.*; Educ. Code § 56366.1(e)(1). Such on-site reviews must include, *inter alia*, "a review and examination of files and documents, classroom observations and interviews with the site administrator, teachers, students, volunteers and parents to determine compliance with all applicable state and federal laws and regulations." 5 C.C.R. § 3063(e)(2). Such reviews are followed by a written report detailing any noncompliance findings. 5 C.C.R. §§ 3063(e)-(h).

In addition, an LEA that has placed one or more of its pupils at an NPS must conduct "at least" one on-site monitoring visit during each school year, which must include, *inter alia*, "a review of progress the pupil is making toward the goals set forth in the pupil's [IEP]," "an observation of the pupil during instruction, and a walkthrough of the facility." Educ. Code § 56366.1(e)(3).

The SPI is also required to "monitor" existing NPSs with respect to: "facilities, the educational environment, and the quality of the educational program, including the teaching staff, the credentials authorizing service, the standards-based core curriculum being employed, and the standards-focused instructional materials used[.]" Educ. Code § 56366.1(j). In addition, the SPI is required to "conduct an investigation," which "may include an unannounced onsite visit," if the SPI receives evidence of certain matters, including "a significant deficiency in the quality of educational services provided[.]" Educ. Code § 56366.1(i)(3). The SPI "may revoke or suspend the certification" of an NPS for any one of ten enumerated reasons, including: (a) violation of an applicable state or federal rule or regulation; (b) failure to comply with a master contract; (c) "[f]ailure to implement recommendations and compliance requirements following an onsite review"; and (d) failure to implement a pupil's IEP. Educ. Code § 56366.4.

III. LEGAL STANDARDS UNDER RULE 12(b)(1) and 12(b)(6)

A Rule 12(b)(6) motion "tests the legal sufficiency" of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The motion is granted if there is no cognizable legal theory to grant relief or sufficient facts to support a such theory. *Balistreri v. Pac. Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The complaint must state sufficient factual matter to plausibly (not merely possibly) allow the reasonable inference that the defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). While well-pleaded factual allegations are accepted, a court need not accept conclusory factual allegations, legal conclusions, unwarranted deductions of fact or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

A Rule 12(b)(1) motion asserts jurisdictional defenses, including plaintiffs' lack

of standing and a defendant's sovereign immunity. A Rule 12(b)(1) motion mounts a facial or a factual challenge to jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (explaining differences). Reserving their right to present a factual attack later if necessary, the State Defendants bring a facial challenge, because the jurisdictional failures are apparent from the Complaint. In assessing such challenges, courts apply the familiar 12(b)(6) plausibility standards. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (applying *Iqbal*); *Lacano Investments, LLC v. Balash*, 765, F.3d 1068, 1071-1072 (9th Cir. 2014) (conclusory allegations disregarded); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (plaintiff has burden of "clearly" alleging "facts demonstrating each element" for Article III standing).

IV. PLAINTIFFS' CLAIMS

Plaintiffs invoke 42 U.S.C. Section 1983 ("§ 1983"), claiming violations of the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause stemming from California's provision for contracting with nonsectarian NPSs (but not sectarian NPSs). Plaintiffs outline six "Counts" – five based on the Free Exercise Clause (discussed in §VII below), and one on the Equal Protection Clause (*see* §VIII.) Plaintiffs ask this Court to declare California law unconstitutional and to issue permanent injunctive relief, as well as an award of "actual damages in an amount to be determined," nominal damages, and attorneys' fees. (Comp. at 37.)

V. SOVEREIGN IMMUNITY AND § 1983 REQUIRE DISMISSAL OF CDE AND THE DAMAGE CLAIMS (RULE 12(b)(6))

Through the Eleventh Amendment, a state is immune from suit brought in federal court by its citizens or citizens of another state. *Papasan v. Allain*, 478 U.S. 265, 275 (1986); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984). That immunity extends to a state's agencies, as well as to its officials acting in their official capacity. *Krainski v. State ex rel. Bd. of Regents*, 616 F.3d 963, 967 (9th Cir. 2010). That immunity was not abrogated by § 1983, and California has not waived its immunity to § 1983 suits. *Quern v. Jordan*, 440 U.S. 332, 344-45 (1979); *Brown v.*

Calif. Dept. of Corr., 554 F.3d 747, 752 (9th Cir. 2009); *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999). Furthermore, for purposes of suits under § 1983, a state, its agencies, and its officials acting in their official capacity are not considered "persons" subject to suit. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989); *Wolfe v. Strankman*, 392 F.3d 358, 364-65 (9th Cir. 2004).

The *Ex Parte Young* doctrine provides a limited exception that allows a § 1983 action to proceed against a state *official* sued in their official capacity (but *not* against the state or its agencies) if the action *only* seeks prospective injunctive relief to address an ongoing violation of federal law (as opposed to remedying past unlawful conduct) and the official has a sufficient connection with the law and direct responsibility for enforcing it. *Papasan*, 478 U.S. at 277-278.

Because CDE is a state entity (*see* Comp., ¶35; Cal. Gov't. Code § 900.6 ["state" includes any "department" or "agency" of the state]) and California does not waive its sovereign immunity, all claims against CDE are barred, and CDE must be dismissed. In addition, claims against the SPI must be limited to the narrow exception noted above, which requires dismissal of the claims for "actual" and for "nominal" damages. *Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021).

VI. PLAINTIFFS LACK STANDING (RULE 12(b)(1))

Article III grants a limited power to federal courts, not "a freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2205 (2021). Thus, the Constitution requires that federal courts dismiss cases where the plaintiffs lack Article III standing, a doctrine built on the foundational idea of separation of powers. *Id*. at 2203.

To establish Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id*. Strict application of these elements "ensures that federal courts decide only 'the rights of individuals,' and that federal courts exercise 'their proper

function in a limited and separated government.'" *Id.* (citations omitted). In light of the standing requirement's importance, courts "must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013).

Plaintiffs bear the burden of establishing standing at the time they brought suit and maintaining it thereafter. *Carney v. Adams*, 141 S.Ct. 493, 499 (2020). Where, as here, a case is at the pleading stage, the plaintiffs must "clearly" "allege facts demonstrating each element." *Spokeo*, 578 U.S. at 338. "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion*, 141 S.Ct. at 2208.

A. The Plaintiff Schools Lack Standing.

The Schools cannot show that the nonsectarian NPS requirement is causing them to suffer a concrete, particularized, and actual or imminent injury that would be redressed through this action. The Schools are "Orthodox Jewish schools." (Comp., ¶3.) They say that they exist to provide a religious Jewish education to students (Comp., ¶¶31, 33) – the "primary goal" of which is "the study of the Torah[,]" which is to the Schools "itself a form of religious worship" (*id.*, ¶71). The Schools allege that they "help parents to meet their obligation to provide Jewish education to their children[,]" and that "*inculcation* and transmission *of Jewish religious beliefs* and practices *to children* is *the very reason that [they] exist*." (Emphasis added.) (Comp., ¶76.) Significantly, the Schools allege that they seek to qualify as an NPS in order to provide a Jewish religious education to children. (Comp., ¶¶32, 34, 152, 154, 162, 170.) That is not surprising given the above-noted "very reason" that the Schools exist. Indeed, the Schools say that their "religious beliefs and identity permeate their entire school and mission." (*Id.*, ¶177.)

The Schools' premise is that if the nonsectarian requirement were removed, then they could provide their religious education to the children with disabilities that LEAs

might place there. As a matter of law, that premise is false. As discussed above (§II), NPSs only potentially work with students whose families have enrolled in public school and accepted the state's free, state-developed, state-directed and state-supervised education. When an LEA deems it necessary to place one of its students in an NPS, the state must ensure that the student "is provided an education that meets the standards that apply to education provided by the SEA and LEAs" (*i.e.*, the state's *public* educational agencies) and has "all of the rights of a child with a disability who is served by a public agency." 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B). The state also must ensure that the child is provided special education that conforms to a properly developed IEP (*id.*), which is defined, in part, by its focus on ensuring that the child can make "progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children)." 34 C.F.R. § 300.320(a); *see also* 20 U.S.C. § 1401(9) (defining FAPE as requiring, *inter alia*, that education and services "meet the standards of the State educational agency" and are provided "under public supervision and direction."). An NPS must agree to use the SBE-adopted, standards-aligned core curriculum and instructional materials for kindergarten and grades 1 to 8, and to use the state standards-aligned core curriculum and instructional materials used by an LEA that contracts with the NPS. Educ. Code § 56366.10(b)(1); 5 C.C.R. § 3001(a). Moreover, an application must describe the state-adopted and state standards-aligned curriculum and instructional materials that are "used by general education students." 5 C.C.R. § 3060(c)(9). And, significantly, federal regulations flatly prohibit use of IDEA funds for "[r]eligious worship, instruction, or proselytization." 34 C.F.R. § 76.532; *M.L.*, 867 F.3d at 496.

Because removal of the nonsectarian requirement would not allow the Schools to ignore the state's public (and secular) curricular standards and instructional materials and to, instead, provide their own religious education to publicly-placed students, the Schools cannot show that the requirement has caused them to suffer an individualized actual or imminent concrete harm. Under Article III, "an injury in law is not an injury in fact." *TransUnion*, 141 S.Ct. at 2205; *see also Carney*, 141 S.Ct. at 498 ("[A] citizen's

interest in the proper application of the law does not count as an 'injury in fact.'")

The Schools' above-discussed allegations about their purpose and intent suggest a lack of attention to the many requirements (other than the nonsectarian requirement) that apply to would-be NPSs. The Complaint's only reference to such other requirements is the general and conclusory allegation – made only on "information and belief" – that the Schools "either otherwise meet[] or [are] capable of meeting California's other certification requirements to become an NPS." (Comp., ¶¶156, 166.) Such a general allegation is insufficient. *Spokeo*, 578 U.S. at 338*; Iqbal*, 556 U.S. at 678-79. This is particularly true here, where the Schools' other allegations clearly reflect a mission and goal that is counter to some of those other certification requirements. But more fundamentally, the fact that the Schools could or might apply to be certified as an NPS if the nonsectarian requirement were removed, is not sufficient to establish Article III standing. *Carney*, 141 S.Ct. at 499-501. Rather, the Schools must show that they are "likely" and "able and ready" to be NPSs in the "reasonably imminent future" were it not for the nonsectarian requirement." *Id*. at 500-02.

Carney is instructive. There, a Delaware lawyer registered as a political independent sought to bring a federal constitutional challenge against a Delaware state law that disqualified lawyers with his party affiliation from serving on certain state courts. Even though the plaintiff was a lawyer and otherwise able to apply for a judicial appointment, and even though the plaintiff provided sworn testimony that he believed that he was qualified to serve as a judge and that he "would seriously consider and apply for" judicial positions if the law were changed, the Supreme Court concluded that the plaintiff lacked standing. *Carney*, 141 S.Ct. 499-500. The Court explained that the plaintiff's words – that he "would apply" – stood alone without supporting evidence and anticipated timeframes. *Id*. at 501. The Court also found that the record suggested that the plaintiff was primarily concerned with vindicating his view of the law, rather than by an actual intent to become a judge. *Id*. The Court observed that "some day intentions" "do not support a finding of the 'actual or imminent' injury that [its] cases

require[,]" and that if it were to hold that plaintiff's "few words of general intent" to apply were sufficient in the case, then it "would significantly weaken the longstanding legal doctrine preventing this Court from providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law." *Id*. at 501-502. For all those reasons, the plaintiff could not show that "he was 'able and ready' to apply for a vacancy in the reasonably imminent future." *Id*.

The only clear and specific allegations about the School's actions, purposes and intentions show that they likely would not, and could not, agree to all of the many NPS requirements aside from the nonsectarian requirement. As discussed, the Schools' allegations run directly counter to the requirement to use state-adopted textbooks, provide state standards-aligned instruction and refrain from religious instruction.

In addition, while the Complaint alleges that the Schools offer a "rigorous," religion-infused education (Comp., ¶¶31, 33), it does not demonstrate that they are prepared to meet the needs of children with disabilities so severe that their needs could not be met in any public school. The "least restrictive environment" rules – (discussed in §II.C. above, and the rule that precludes NPS placement unless "no appropriate public education program is available" [Educ. Code § 56365(a)]) – mean that NPSs only potentially serve children with the most severe disabilities and challenges. Merely being a private school with a "rigorous" (Comp., ¶¶31, 33) "college preparatory" (*id*., 31) curriculum does not make an NPS. But, it is absolutely essential that an NPS have a willingness, the capability, *and* a plan to provide highly specialized services and instruction to a unique population of children. For example, an NPS applicant must identify the "types of disabling conditions served" (5 C.C.R. § 3060(c)(5)) and describe "the special education and designated instruction and services provided to individuals with exceptional needs" (Educ. Code § 56366.1(a)(1)). In addition, an NPS's administrators and staff must hold the same state-issued credential that those at a public school would be required to hold (Educ. Code § 56366.1(n); 5 C.C.R. § 3064(a)), and an NPS must identify their teachers holding state-issued credentials authorizing service

in special education, and provide copies of the credentials (Educ. Code § 56366.1(a)(3); 5 C.C.R. § 3060(a)(4)). The Complaint does not allege that the Schools are set up to serve as an NPS and comply with these NPS requirements; it suggests the opposite.

Moreover, the Schools do not allege that they will serve the students placed there with the goal of transitioning the students "back to the public school setting," as an NPS must. 5 C.C.R. § 3060(c)(8); Educ. Code § 56366.10(c). Indeed, the Schools' allegation that it is their purpose to "help parents to meet their obligation to provide a Jewish education to their children" (Comp., ¶76), suggests that the Schools would not favor transition back to a public school setting.

Nor do the Schools allege that they will agree to the extensive and continued oversight and monitoring by the state discussed in §II.H. above.

The Complaint also does not allege that the Schools are willing to agree to "maintain compliance" with Section 504 of the Rehabilitation Act, and with the Civil Rights Act and the Fair Employment Act, which prohibit practices that discriminate on the basis of religion. 5 C.C.R. § 3060(d). The Schools do, however, allege that they seek certification to serve "Jewish" students (but apparently no others), and that their Orthodox Jewish "beliefs and identity permeate their entire school." (Comp., ¶¶ 3, 177.)

B. The Plaintiff Families Lack Standing.

The Families also lack Article III standing. The Families "send their school-age non-disabled children to Orthodox Jewish religious schools." (Comp., ¶75.) The Families would like to enroll their children with disabilities in Orthodox Jewish religious schools as well, so that they too can receive a religious education. (*Id.*, ¶¶74, 84, 100, 124.) The Families complain that California's nonsectarian NPS requirement harms them by preventing them from having IDEA funds pay for an Orthodox Jewish education for their children with disabilities at a sectarian NPS. (*Id.*, ¶¶2, 21.) However, for several reasons, the Families cannot show that the challenged requirement is causing them to suffer a concrete, particularized, and actual or imminent injury that would be redressed through this action.

First, similarly as with the Schools, the Families' alleged harm assumes that removal of the nonsectarian requirement would allow sectarian NPSs to ignore the state's public education and to provide, instead, the religious education that they desire. As discussed above (§§II.D. and II.E.), that is simply not the case.

Second, the allegations do not show that any of the Families' disabled children could ever be placed in ***any*** NPS; indeed, the facts demonstrate that they could not. As discussed (§II.C.), the IDEA requires that provision of the state's free public education to children with disabilities take place in the least restrictive environment, beginning with their local public school's "regular classes," and then, "only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," allowing for instruction in more specialized classes or programs within that school, and then, if necessary, in one of the LEA's other schools or programs. 34 C.F.R. §§ 300.114–300.116. It is only "if no appropriate public education program is available" due to the severity of the disability that NPS placement is even possible. Educ. Code § 56365(a).

Here, the Families all "reside within the boundaries of the Los Angeles Unified School District" ("LASUD") (Comp., ¶2). The Peretses' child, N.P., was diagnosed with autism at age 3 and with a "WAC gene mutation that results in speech delays, behavioral issues, and learning disabilities" at age 6. (Comp., ¶120.) He is now 14 years old, in grade 7, and has been attending public school in LAUSD. (*Id.*, ¶28.) The Complaint alleges that N.P. has been "placed in classes with peers that the Peretses believe operate at a lower level of functioning than N.P." (*id.*, ¶135), and that "[s]ince N.P. was removed from a mainstream setting, his academic progress and his speech development has regressed." (*Id.*, ¶136.) Those, however, are concerns that N.P.'s current IEP with LAUSD is *too restrictive* for him, not that his condition is so severe that no available public program would be appropriate. The IDEA provides due process procedures for parents to challenge IEPs (20 U.S.C. § 1415(b)(6)(A), (f)(1)(A)), which allow for reimbursed private school tuition as a remedy if the parents successfully prove

that their district failed to offer a "FAPE" and that the parents' resulting unilateral private school placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii).) Those procedures must be exhausted before bringing a civil action under the IDEA (20 U.S.C. § 1415(i)(2)(A), (l)), and there is a two-year statute of limitations for such actions (20 U.S.C. § 1415(b)(6)(B), (f)(3)(C)). However, the Complaint does not allege that the Peretses ever invoked available due process procedures to challenge (successfully or not) any of N.P.'s IEPs over the years.

Similarly, the Taxons' child, K.T., was diagnosed with autism at age 2, which results in cognitive deficiencies. (Comp., ¶94.) He is now 14 years old, in grade 8, and has attended a public elementary school and a public middle school in LAUSD, and currently attends a public charter school within LAUSD. (*Id*., ¶¶93, 104.) The Complaint does not allege that K.T.'s disability is so severe that no available public program would be appropriate. Rather, it alleges that "from kindergarten through eighth grade, K.T. has received a mainstreamed classroom education in public school" and that LAUSD has provided, through its IEP, "a full-time aide, a supervisor for the aide, speech and occupational therapists, adaptive physical education, resource specialists for English and math, and a private reading tutor." (Comp., ¶¶105-107.) Nor does the Complaint allege that the Taxons ever invoked (successfully or not) the available due process procedures to challenge any of K.T.'s IEPs over the years.

The Loffmans allege that their 4-year son, M.L., "is diagnosed with high functioning autism." (Comp., ¶78.) Because of their "desire to enroll M.L. in an Orthodox Jewish school," the Loffmans enrolled him in private religious preschools, where he has received "behavioral, occupational, and speech therapy." (*Id*., ¶¶84-87.) The Loffmans allege that they "recognize that M.L. might be eligible for more services in public school as part of an IEP[.]" (*Id*., ¶90.) However, they are paying for him to receive behavioral and occupational therapies at a private, religious preschool. (*Id*., ¶¶88-89.) The Loffmans do not allege that they have asked LAUSD for an IEP for M.L., or that they have otherwise explored LAUSD's capabilities for children with "high

functioning autism" like M.L. But the Complaint admits that LAUSD has the capabilities to provide things like "a full-time aide, a supervisor for the aide, speech and occupational therapists, adaptive physical education, resource specialists for English and math, and a private reading tutor." (*Id*., ¶106.) Thus, the Loffmans do not plausibly allege that M.L.'s disability is so severe that LAUSD could legally place him in *any* NPS. And public placements in NPSs only occur for children found eligible for special education and for whom an IEP has been developed under the IDEA (Educ. Code §§ 56034, 56365); however, the Complaint does not allege that that M.L. meets that criteria.

The Families may feel that their religious beliefs pose unique problems for their children in public school, and that an IEP should therefore call for placement in a religious NPS. However, as the Fourth Circuit held in *M.L.* (in which an Orthodox Jewish family claimed that an IEP was insufficient because it failed to account for the child's religious needs and sought reimbursement for private school tuition as a remedy), the IDEA precludes religious instruction, and a family's religious needs do *not* require an LEA to include religious instruction as part of an IEP. *M.L.*, 867 F.3d at 495-98.

In sum, the Families have not alleged, and cannot allege, that it is even possible (let alone likely) for their children to be legally placed in an NPS if the nonsectarian requirement were removed. Thus, they cannot demonstrate that the requirement causes them to suffer a concrete, particularized and actual or imminent injury in fact.

Finally, the Families also cannot make that showing because, even if placement of their children in any NPS were legally possible, it is the LEA, and not the parents, that makes the ultimate decision on whether it can and should offer FAPE at an NPS or not, and if so, which one. (*See* §II.D., *supra*.) While LEAs must allow for parents to participate in IEP meetings, the LEA ultimately makes the placement offer, and courts must give due weight to the LEA officials' educational expertise. (*Id*.) Therefore, even if NPS placement were a theoretical possibility, the Families and the Court could only speculate that LAUSD would decide to place their children in a sectarian NPS if the nonsectarian requirement were removed. However, Article III standing is never based

on speculation; rather, harm must be likely soon. *TransUnion*, 141 S.Ct. at 2212 (speculation that events may occur in the future is insufficient to support standing for injunctive relief; there must be a "serious likelihood" of impending harm); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (speculative possibilities that plaintiffs may be injured by allegedly unconstitutional policy insufficient to demonstrate Article III standing for injunctive relief).

VII. THE FREE EXERCISE-BASED CLAIMS FAIL (RULE 12(b)(6))

The five free exercise-based Counts all attack the nonsectarian NPS requirement, although they characterize or approach the provision in a slightly different way. Count I alleges that the requirement violates Plaintiffs' free exercise rights because it "categorically excludes" religious entities from what it describes as "otherwise available government benefits." (Comp., ¶¶171-183.) Count II notes that state action "burdening religious practice" is subject to strict scrutiny if it is not generally applicable, and alleges that California's NPS system is not generally applicable because it does not allow for sectarian NPSs and does not include sectarian NPSs among those who can petition the SPI for a waiver of certain requirements. (*Id*., ¶¶184-195.) Count III alleges that California's NPS system is not generally applicable because the state can grant a petition to waive certain requirements in certain circumstances, but "Defendants have refused to waive the 'nonsectarian' requirement for the NPS process." (*Id*., ¶¶196-204.) Count V repackages Plaintiffs' initial "exclusion from generally available public benefits" claim as a violation of the "unconstitutional conditions doctrine." (*Id*., ¶¶210-215.) In Count VI, Plaintiffs allege that there is a "Free Exercise Clause Right to Religious Education" that is violated by the challenged nonsectarian requirement. (*Id*., ¶¶ 216-222.)

None of these Counts state a viable claim. As discussed immediately below, they all fail because Plaintiffs cannot show an actual and substantial burden on their exercise of religion, a threshold element of a free exercise claim. Count V's reliance on the "unconstitutional conditions doctrine" is misplaced (§VII.B.), and Count VI's assertion of a "free exercise right to religious education" is unavailing (§VII.C.). Finally, even if

strict scrutiny were required, California's law satisfies it. (§VII.D.)

A. Plaintiffs Cannot Demonstrate the Threshold Element of a Substantial Burden on Their Religious Exercise.

The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*[.]" U.S. Const. amend. I. To state a claim under the Free Exercise Clause, a plaintiff must show that the challenged state action substantially burdens the plaintiff's exercise of their religion. *Sabra v. Maricopa County Community College Dist.*, 44 F.4th 867, 809 (9th Cir. 2022); *California Parents for the Equalization of Educational Materials v. Torlakson* ("*CAPEEM*"), 973 F.3d 1010, 1019-20 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2583 (2021). Being offended by government actions that address religion in some way does not suffice; the government's action must actually operate as a burden on the plaintiff's practice of their religion. *Id.*

It is easy to see how laws affirmatively proscribing the public's conduct can burden religious practice. In addition, the Supreme Court has recognized that a state disqualifying otherwise eligible recipients from *generally available public benefits or rights* based on their religious exercise constitutes a burden on such exercise. *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246, 2254-55 (2020); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (recognizing infringement when individuals are excluded "from receiving the benefits of public welfare legislation" based solely on their faith); *Hobbie v. Unemployment Appeals Com'n of Fla.*, 480 U.S. 136, 140-141 (1987) (characterizing generally available unemployment benefits as an "important benefit" the loss of which would unmistakably put "substantial pressure" on a religious adherent "to modify his behavior and to violate his beliefs[.]")

In an attempt to analogize this case to that line of cases, the Complaint repeatedly characterizes the challenged nonsectarian requirement as limiting Plaintiffs' access to "generally available public funds" from a "government benefit program[.]" (Comp., ¶¶2-3, 12, 175, 178.) However, as shown in §II, California's provision for contracts

with NPSs is *not* a program to bestow generally available "public benefits" upon private schools or families seeking a private or religious education. Rather, it is California securing *for itself* the help *it* needs in order for *it* to meet *its* obligations to provide *its* public education to the children with disabilities enrolled in *its* public schools.

The cases that Plaintiffs attempt to analogize to are inapposite. *Espinoza* involved a Montana state "scholarship program," intended "to provide parental and student choice in education," which "provide[d] tuition assistance to parents who send their children to private school." 140 S.Ct. at 2251-52. Under the program, a family whose child was awarded a scholarship could direct funds to virtually any private school in the state, of their own private choice. *Id*. A free exercise challenge was brought against a subsequent administrative rule (based on an application of the state constitution's "no aid" provision) that prohibited recipient families from selecting a *religious* private school. *Id*. at 2252. The Court concluded: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id*. at 2261.

Similarly, *Carson v. Makin* involved "a program of tuition assistance for parents" whose local school district did not operate a public secondary school or contract with a private entity for such schooling. 142 S. Ct. 1987, 1993 (2022). The program directed funds to pay tuition at the private or public school of the parents' choice; however, the state later imposed a requirement disqualifying sectarian schools. *Id*. at 1993-94. After noting that "the curriculum taught at participating private schools need not even resemble that taught in the Main public schools" and that those private schools "need not administer state assessments" and "need not hire state-certified teachers[,]" the Court characterized the state's program as a public benefit program where "[t]he benefit 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." *Id*. at 1998-99.

And *Trinity Lutheran Church of Columbia, Inc. v. Comer* involved a "grant" program to help public and private schools, nonprofit daycare centers, and other

nonprofit entities purchase rubber playground surfaces, but excluded otherwise eligible religious entities. 137 S. Ct. 2012, 2017 (2017).

The "through line" in these cases is a state program that broadly confers a public benefit or right, such that a religious-based disqualification could actually be viewed as having a coercive effect against a plaintiff's exercise of religion. That line simply cannot be drawn to *this* case. With respect to the Schools, the Complaint characterizes their loss as one of the ability "to provide a *religious* education" with "generally available public funds *for children to receive* a free appropriate *public* education[.]" (Emphasis added.) (Comp., ¶¶ 32, 34.) That allegation reveals a flaw in Plaintiffs' position. California's NPS system is *not* a means to generally fund private schools to provide their own religious education (or any other kind of a "private" education) so that children with disabilities can receive a private school's particular brand of private education. Rather, an NPS *contracts* with the state knowing that it *cannot* use funds for religious instruction, and that it *must* provide the state's *public* education while providing services described in the *LEA-developed* IEP to benefit the eligible child whose family has accepted the state's free public education. The ability to *contract* for *that* is not a "generally available public benefit" the loss of which could be said to burden a would-be NPS's exercise of religion. For example, in *Teen Ranch, Inc. v. Udow*, the Sixth Circuit rejected a religious organization's free exercise claim based on the notion that the ability to contract with the state of Michigan to provide youth residential services was a "public benefit." 479 F.3d 403, 409-410 (6th Cir. 2007), *cert denied*, 128 S.Ct. 653 (2007). The court affirmed the district court's conclusion that "[u]nlike unemployment benefits or the ability to hold public office, a state contract for youth residential services is not a public benefit" and that "[t]he *Sherbert v. Verner* line of cases does not stand for the proposition that the State can be required under the Free Exercise Clause to contract with a religious organization." *Teen Ranch Inc. v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005), *aff'd* 479 F.3d at 409-10.

With respect to the Families, it is even more clear that the nonsectarian NPS

requirement does not substantially burden their exercise of religion, because they do not allege to be schools seeking certification. The Complaint generally alleges that the challenged nonsectarian requirement violates the Families' "right to free exercise of religion by categorically 'exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise.'" (Compl., ¶178.) However, that general and vague legal conclusion is entitled to no weight. *Spokeo*, 578 U.S. at 338*; Iqbal*, 556 U.S. at 678-79. While the Families allege that sending their children to Orthodox Jewish schools is critical to their faith, both the IDEA and California law recognize the right of parents to choose a private religious education instead of the state's free public education, and the IDEA and California law expressly require LEAs to spend a fully proportionate amount of their IDEA funds on providing special education services to "parentally-placed" children in private schools in their boundaries, including in private religious schools. (§§II.A. and II.B.) California's nonsectarian requirement only comes into play with respect to children whose families have chosen to accept the state's free public education. (§II.) Therefore, it cannot be said that California's nonsectarian NPS requirement substantially burdens the Families' right to choose a private religious education.

Moreover, as previously discussed, to the extent the Families' claim is predicated on the notion that, but for the nonsectarian requirement, they would be able to choose the state's *free public* education and *also* use IDEA funds to have their tuition paid at a private religious school that provides a religious education, the claim fails because the notion is legally incorrect. Setting aside the fact that *any* NPS placement is only possible in very rare circumstances (§§II.C. and II.F.) and that families do not get to select the NPS of their choice (§II.D.), the fact remains that IDEA funds may not be used for religious education (§II.E.), and an NPS is only contracted to provide the state's public (and secular) education (§§II.F.–II.H.). In other words, once a family chooses to accept the state's free public education, a religious education at an NPS would not be "available" even if the nonsectarian requirement did not exist. *Cf. Gary*

S., 374 F.3d at 19-20 (holding that a religious family choosing to enroll its child with disabilities in a private religious school for religious purposes was not denied a "generally available public benefit" by the IDEA's provisions that granted greater rights to eligible children that enrolled in public school: "Unlike unemployment benefits that are equally available to all, private school parents can have no legitimate expectancy that they or their children's schools will receive the same federal or state financial benefits provided to public schools . . . Persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools. They cannot insist, as a matter of constitutional rights, that the disadvantages be cured by the provision of public funding.")

B. Reliance on the Unconstitutional Conditions Doctrine is Misplaced.

Plaintiffs' fifth Count characterizes California's nonsectarian requirement as an "unconstitutional condition" that violates Plaintiffs' rights under the Free Exercise Clause through application of the "unconstitutional conditions doctrine." (Comp., ¶¶ 211-214.) That Count cites two cases regarding that doctrine, but neither case involved free exercise rights, religion or education: *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595 (2013) (Fifth Amendment "takings clause" context) and *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006) (Fourth Amendment prohibition on unreasonable searches context). However, an important lesson from those two cases is that the unconstitutional conditions doctrine is *not* a simple and separate mechanical rule, but rather a general principle that derives from, and must account for, the precise constitutional right and circumstances raised in each case. In *Koontz*, for example, the Court did *not* hold that conditioning approval of a land use permit on the dedication of property to the public is always unconstitutional; rather, it held that doing so was unconstitutional only if there was no "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. 570 U.S. at 605-606. Those factors accounted for the specific constitutional right at issue, as well as the practical "realities" that framed the parties' interests and reasonable expectations in the land use

permit context. *Id*. And in *Scott*, the Ninth Court noted that the "government *may* sometimes condition benefits on waiver of Fourth Amendment rights – for instance, *when dealing with contractors*[.]" (Emphasis added.) *Scott*, 450 F.3d at 867.

The unconstitutional conditions doctrine aims to limit conditions that are "impermissible" because they seek a waiver of constitutional rights through "coercive pressure." *Koontz*, 570 U.S. at 607; *see also Scott*, 450 F.3d at 866 (doctrine intended to protect against "the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.") Thus, a condition on even "a valuable government benefit" does not run afoul of the doctrine unless it produces a denial "on a basis that infringes [one's] constitutionally protected interests." *Bingham v. Holder*, 637 F.3d 1040, 1046 (9th Cir. 2011). "Also, the government may condition the grant of a discretionary benefit on a waiver of rights 'if the condition is rationally related to the benefit conferred." *Id*.

Here, as discussed in the preceding section, the NPS system and its nonsectarian requirement cannot be viewed as an attempt by California to pressure religious entities into forsaking their identity in order to qualify for generally available public benefits. The NPS system is not a mechanism to subsidize private schools (religious or otherwise), or to create and bestow a public right to a free *private* education. Rather, it is a mechanism to allow the state to meet its obligation to give access to its free public (and secular) education to certain children with disabilities whose families had the option of enrolling in private religious school, but who enrolled in LEAs instead. The system accomplishes that through government contracts, which obligate the contractor to perform many specific tasks and that grant many specific rights to the state's public educational agencies. As argued in more detail elsewhere in this brief (§§II, VII.A. and VII.D.), given the nature of those tasks and rights, the nonsectarian requirement is a legitimate provision tailored to the state's IDEA implementation, not a disqualification from a valuable or important public benefit that would tend to put substantial pressure on a religious entity to forsake their religious identity. Plaintiffs' repackaging of their

earlier "denial of generally available public benefits" argument as a separate "unconstitutional conditions doctrine" argument does not materially change the analysis, because that doctrine does not turn a constitutional condition into an unconstitutional one. *Bingham*, 637 F.3d at 1046 (condition must actually operate to "infringe" plaintiff's "constitutionally protected interests," and if placed on a "discretionary benefit," is proper "if rationally related to the benefit conferred.")

C. The Assertion of a "Right to Religious Education" is Unavailing.

The Complaint's final Count is denominated "Free Exercise Clause Right to Religious Education." (Comp., p.35.) It speaks in terms of a parents' right "to direct the religious upbringing of their children" and to "direct the education of their children," and it claims that any state action that interferes with that right is subject to strict scrutiny. (Comp., p.35.) Plaintiffs misapprehend the law. The Free Exercise Clause "'is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government'" and it does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (italics in original). The Count cites *Wisconsin v. Yoder*, 406 U.S. 205 (1972), however, that case involved application of a *criminal statute requiring school attendance* after age 16 as applied to the Amish. It also cites *Emp. Div. v. Smith*, 494 U.S. 872 (1990), noting that that case cites *Yoder* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, *Emp. Div.* involved a state criminalizing peyote use, not parents' rights or education, and it famously *denied* plaintiffs' free exercise clause claim. 494 U.S. at 890. And *Pierce* (which makes no reference to religion or the free exercise clause) relied on the due process clause to hold that while a state could reasonably regulate all schools and require all children to attend "some school," it could not *criminalize* a family's decision to attend a private school instead of the state's public schools. 268 U.S. at 534-35.

Courts analyzing the scope of the substantive "right" asserted in Plaintiffs' final Count have clearly limited it to the right to choose a private education (which may cost

money) instead of the state's free public education, and they have stressed that if the family chooses the state's public system, they have no right to dictate the school's policies or to "expect the state to modify its curriculum to accommodate the[ir] personal, moral or religious concerns[.]" *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206-07 (9th Cir. 2005) (considering *Yoder* and *Pierce*); *CAPEEM*, 973 F.3d at 1020; *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1230, n.16 (9th Cir. 2020) ("*Yoder* supports the district courts recognition that parents have the right to remove their children from Dallas High School, but it does not support Plaintiffs' assertion that their parental rights go beyond that decision[.]").

Here, the law allows a family to choose a private religious education instead of the state's free public education, and the law requires LEAs to spend a proportionate amount of their IDEA funds to serve families that have chosen private schools. (§§II.A.–II.B.) California's decision to contract with nonsectarian NPSs only applies in the context of serving families who have accepted the state's free public education, and only applies in the rare instance where no existing public program is available. (§§II.C. and II.F.) Plaintiffs have no right to choose the state's free public education and then insist on a free private religious education from the state's contractors.

D. Even if Strict Scrutiny Were Required, the Challenged Requirement Satisfies it.

Even if Plaintiffs could show an actual, substantial infringement on the free exercise their religion, Plaintiffs' Free Exercise claims fail because California's law is narrowly tailored to serve compelling state interests. *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021) (strict scrutiny standard).

If the nonsectarian requirement were eliminated, then certain religious groups (those with sufficient resources and whose beliefs do not preclude them from performing the "master contracts") could be certified, and government officials at the state's more than 1,000 LEAs would be able to steer public school children with the most severe disabilities toward particular (favored) religious institutions for daily instruction. In

addition, if the requirement were eliminated, then government officials would have the power to, and would be required to, audit, monitor and assess whether and how those religious institutions are, *inter alia*, meeting California's public education standards, performing the LEA-developed IEPs, and complying with law prohibiting federal funding of religious instruction.

That scenario presents several serious problems, which California has a compelling interest in avoiding (and indeed, a Constitutional duty to avoid). The principle that the government must be neutral toward and among religions, and "may not aid, foster, or promote" religion, is "rooted in the foundation soil of our Nation" and "fundamental to freedom." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (law prohibiting teaching of evolution in any state-supported school violated the First Amendment's Religion Clauses). "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet* ("*Grumet*"), 512 U.S. 687, 696 (1994) (citations omitted). Thus, a state "may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." *Epperson*, 393 U.S. at 106. "This prohibition is absolute." *Id.*

There have been cases where the Supreme Court has upheld government programs that resulted in government aid flowing to private religious schools; however, the Court has repeatedly stressed that what saved those programs was the neutrality ensured by the fact that they were programs "of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," as distinct from programs where government officials could direct aid to religious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-52 (2002) (discussing cases); *see also Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (recognizing that when aid goes to a religious institution "only as a result of the genuinely independent and private choices of individuals" it "assur[es]

neutrality" by removing government officials' ability to direct aid and to "grant special favors," as well as by "mitigating the preference for pre-existing recipients that is arguably inherent in any government aid program," which "could lead to a program inadvertently favoring one religion[.]") And, in recently examining Maine's tuition assistance program, which allowed families to direct public funds to the public or private school of their own choosing, the Supreme Court harkened back to *Zelman's* holding "that a benefit program under which private citizens 'direct government aid to religious schools wholly as a result of their own genuine and independent private choice' does not offend the Establishment Clause." *Carson*, 142 S. Ct. at 1994.

In this case, government funds do **not** reach NPSs "*only* as a result of the genuine and *independent* choices of *private* individuals." (Emphasis added.) *Zelman*, 536 U.S. at 649; *see also id*. at 652 ("wholly as a result of" such choices). Indeed, an NPS only receives government funds if LEA officials decide that one of the LEA's pupils with disabilities should be placed in the NPS, and in reaching that decision, the LEA officials need not agree with the parents' preferences or account for the family's religious views. (§§II.D.–II.G.) While the pupil's parent/guardian must consent to the LEA's proposed placement, that consent is not independent. It comes only after the LEA tells the parent/guardian what it believes is the appropriate way to provide public education to the disabled child. And it comes in a context where administrative law judges and courts give "due weight" to the LEA officials' placement decision. (§II.D.) This gives LEA officials significant power to direct pupils (and IDEA funds) to particular favored religious institutions. This is the opposite of the government neutrality toward religion that the Constitution requires, and California's decision to avoid that breach justifies the nonsectarian requirement. *Cole*, 228 F.3d at 1101 (school district's policy barring sectarian graduation speeches was justified as necessary to avoid violating First Amendment's Religion Clauses); *see also Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District*, 896 F.3d 1132, 1151 (9th Cir. 2018) ("'There is no doubt that compliance with the Establishment Clause is a state interest sufficiently

compelling to justify content-based restrictions on speech,' including in public fora.").

There is, of course, another important way in which this case is clearly distinguishable from those neutral independent private choice programs that have been upheld in the past. Here, unlike in any of those cases, the private school is tasked with providing the *State's public* education, not its own private education. *Zelman*, 536 U.S. at 648-52 (discussing cases); *Carson*, 142 S. Ct. at 1998-99 (concluding that Maine's program offered the "benefit" of "tuition at a public or private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education[,]" noting that the private school's curriculum "need not even resemble that taught in the Maine public schools," and that the private schools did not have to hire state-certified teachers or administer state assessments). Here, as discussed in §§II.F.–II.G., an NPS assists California in meeting its IDEA obligation of providing its "free and appropriate public education" to children that have enrolled in public schools; and NPSs ***are*** required to teach state standards-aligned curriculum, use state-adopted textbooks, hire state-certified teachers, and administer state assessments.

Because of that feature of the IDEA/NPS program – (that the NPS is specifically contracted to provide the state's public education) – California's nonsectarian requirement is necessary to avoid the problematic delegation of authority over public schooling to an institution "defined by" its religious beliefs, selected in individual cases by government officials. *See Grumet*, 512 U.S. at 696 (striking down New York's creation of a school district because it departed from the "constitutional command" of neutrality toward religion "by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community," in a context that gave "no assurance that governmental power has been or will be exercised neutrally.")

In addition to the neutrality problem discussed above, such a delegation is problematic because it exposes vulnerable and impressionable children, whose parents enrolled them in public school districts expecting a secular education, to substantial risks of the inculcation of particular religious beliefs, and pressure or coercion to

conform to particular religious beliefs or practices, that may be either unwanted by the child and their family, or counter to the child's or family's own religious beliefs. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (recognizing that heightened vigilance is required in elementary and secondary schools, because attendance is mandatory, the students are "impressionable" and "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.") "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id*. at 584. These well-accepted and long-recognized understandings make K-12 education a "special context" requiring heightened protection against indoctrination and coercion that infringe on the rights of the students and their families. *Edwards*, 482 U.S. at 583-84; *see also Van Orden v. Perry*, 545 U.S. 677, 690-91 (2005) (recognizing that the reason that things like prayer and display of the Ten Commandments have been prohibited in public schools but allowed in other places is "a consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.'")

California's nonsectarian requirement does not preclude religious *individuals* from owning and controlling an NPS; rather, the definition excludes organizations that are owned or operated by *a religious group or sect*. 5 § C.C.R. 3001(p). This is a material distinction, because when a group operating a school specifically organizes and defines itself by and for its religious beliefs and commitments, there is a particular concern that such beliefs and commitments will manifest themselves in the school's operation in ways that both violate the deeply rooted neutrality principle and infringe the rights of students and families. Courts recognize that "[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that *lie at the very core* of the mission of a private religious school[.]" *Carson*, 142 S. Ct. at 2001. That recognition finds proof in the Schools' allegation here

that "inculcation and transmission of Jewish religious beliefs and practices to children is the very reason that [they] exist." (Comp., ¶76.) California's nonsectarian requirement accounts for that recognition, but it does not pass judgment on religious schools' missions. The "NPS" concept only exists to help California meet its obligation to provide disabled children whose families have accepted the state's free public education with access to that public education, and imposing the nonsectarian requirement allows California to both meet its governmental needs and obligations, and avoid the above-discussed serious problems with certifying NPSs controlled by religious sects.

Finally, the nonsectarian requirement is necessary to avoid the serious problems caused when government is put in the position of supervising, evaluating and auditing religious institutions, particularly in the context of the providing of state standards-aligned education. As discussed in §§II.C. and II.H. above, both the IDEA and California's laws implementing it authorize and require state officials to supervise, evaluate and audit, and continued certification as an NPS depends upon compliance with rules and audit findings. Applying anything like that oversight regime with respect to sectarian NPSs would result in the sort of government entanglement with religion that has long been recognized as a chief concern of the Establishment Clause, as well as open the door for non-neutral enforcement. Indeed, in last year's *Carson* decision, the Supreme Court reaffirmed the principle that "scrutinizing whether and how a religious school pursues its educational mission" would "raise serious concerns about state entanglement with religion and denominational favoritism." *Carson*, 142 S. Ct. at 2001.

In sum, the nonsectarian requirement is narrowly tailored to serve compelling state interests in ensuring government neutrality toward and among religion, protecting against coercive non-secular environments in the special context of public K-12 education, and avoiding the serious entanglement and denominational favoritism concerns that would arise from the monitoring and auditing of sectarian NPSs.

VIII. THE EQUAL PROTECTION CLAIM FAILS (RULE 12(b)(6))

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Essentially, this is a direction that all persons similarly situated with respect to a law should be treated alike under that law. *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018). Thus, to determine if a law's classification discriminates, it is necessary to identify "a control group" of persons "similarly situated to those in the classified group in respects that are relevant to the state's challenged policy." *Id.* at 1016. It is only if and when such similarly situated groups are identified that a court need determine the appropriate level of scrutiny and apply it. *Id.*

Where the law does not discriminate on the basis of a suspect classification or the exercise of a fundamental right, the "rational basis" standard applies and the law "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Gallinger*, 898 F.3d at 1016.

For their equal protection claim, Plaintiffs simply assert that there is "discrimination based on religion" because "California's Education Code prohibits Plaintiffs from utilizing generally available, public funds to send their children to private religious schools merely because those schools are religious." (Comp., at 33:18, ¶206.) But that vague and overly generalized conclusion is entitled to no weight (*Sprewell*, 266 F.3d at 988), and as discussed throughout, it is not a fair characterization of California's "nonsectarian" requirement within the context of the IDEA and California law implementing it. A serious examination of the Complaint and the law reveals that the equal protection claim fails for several reasons.

As an initial matter, the Families cannot maintain an equal protection claim because the challenged nonsectarian requirement applies to private *schools* that would enroll and serve children with disabilities pursuant to an IEP. Educ. Code § 56034. In the absence of special and limited circumstances not present here, in order to state an equal protection claim, a plaintiff must show that the challenged law has operated to discriminate against *them* by treating *them* differently from a similarly situated group.

Barnes-Wallace v. City of San Diego, 704 F.3d 1067, 1085 (9th Cir. 2012). Appropriately, the Families do not allege that they are schools seeking NPS certification. Therefore, the Families do not show that the challenged nonsectarian requirement unlawfully discriminates against them, and their equal protection claim should be dismissed on that basis alone.

In addition, none of the Plaintiffs state an equal protection claim, because they cannot identify a "control group" that is similarly situated to the law's classified group in the requisite relevant way. *Gallinger*, 898 F.3d at 1016. The right to equal protection does not deny the power to treat different classes of persons in different ways; rather it denies "the power to legislate that different treatment be accorded to persons placed by a statute into different classes *on the basis of criteria wholly unrelated to the [legitimate] objective of that statute*." (Emphasis added.) *Johnson v. Robison*, 415 U.S. 361, 375, n.14 (1974). That is why the Ninth Circuit asks whether the control group and classified group is similarly situated "in respects that are relevant to the state's challenged policy." *Gallinger*, 898 F.3d at 1016. Thus, the relevant question is not whether nonsectarian private schools and sectarian private schools are "similarly situated" generally or in *some* ways; the question is whether they are similarly situated *for purposes of the NPS system*, which as previously discussed, involves, *inter alia*: (a) officials at the state's 1,000+ LEAs having the power to steer children with disabilities enrolled in its public schools to particular NPSs; (b) the NPS providing the state's public (and secular) education to the public school students placed there by the LEA; (c) the NPS refraining from spending IDEA funds on religious instruction; and (d) extensive and ongoing monitoring, evaluation and auditing of the NPS by government officials. Due to the previously discussed "neutrality re: religion" principle, the special context of K-12 education, legitimate recognitions about the express purposes of sectarian organizations, and the well-recognized and serious problems that arise when government officials monitor, evaluate and audit religious groups (*see* §VII.D.), it is clear that sectarian institutions and nonsectarian institutions

are not "similarly situated" for purposes of the NPS system. Moreover, parents that enroll a child in a private religious school are treated no differently than parents that enroll their child in a private, nonreligious school.

Next, because Plaintiffs' free exercise claim fails (*see* §VII), analysis of their equal protection claim is limited to the rational basis review standard, which the challenged nonsectarian requirement easily passes for reasons previously discussed (§VII.D.). *Johnson*, 415 U.S. at 375, n.14 (rejecting argument that strict scrutiny should apply to equal protection claim premised on interference with free exercise of religion rights after concluding that the challenged law did not violate the free exercise clause: "since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the rational-basis test."); *Locke v. Davey*, 540 U.S. 712, 720, n.3 (2004) (concluding that because the Court decided that the challenged state action did not violate the Free Exercise Clause, the rational basis standard of review was applicable to equal protection claim alleging religion-based discrimination); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (same); *see also Teen Ranch*, 389 F. Supp. 2d at 841, *aff'd* 479 F.3d 403 (same).

In the context of this case, "sectarian private schools" is not a "suspect" classification requiring heightened scrutiny. The Supreme Court has taken a limited approach in recognizing suspect classifications, focusing on the context of the case and the "underlying rationale" for the suspect classification theory, which is that where the law targets "discrete and insular minorities" for unequal treatment, "the presumption of constitutionality fades because traditional political processes may have broken down." *Johnson*, 415 U.S. at 375, n.14. California's nonsectarian requirement does not classify based on traditional indicia of a suspect classification, such as immutable traits determined by birth, like race, or membership in a "class 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the

majoritarian political process.'" *Id*. Indeed, the IDEA and California law have long recognized the right of parents to send their children to private religious schools, and they expressly require LEAs to spend a proportionate amount of their IDEA funds to provide special education and related services to students in their jurisdiction that attend private schools. (§§II.A.–II.B.) In this context, it does not make sense to view private schools controlled by any religious group (regardless of the religion) as a historically powerless class warranting extraordinary protection. *Johnson*, 415 U.S. at 375, n.14 (rejecting argument that "conscientious objectors" should be considered a "suspect class"). In fact, when it comes to religion, courts have reserved the concept of "suspect class" for cases of discrimination among religions or against groups because of their particular religious beliefs. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987) (in rejecting application of strict scrutiny to claim challenging disparate treatment between employees of religious employers and employees of nonreligious employers, emphasizing that prior case law indicated that laws "discriminating *among* religions are subject to strict scrutiny," italics in original); *Droz v. C.I.R.*, 48 F.3d 1120, 1124-1125 (9th Cir. 1995) ("For equal protection purposes, heightened scrutiny is applicable to a statute that applies selectively to religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular."); *St. John's United Church of Christ*, 502 F.3d at 638 ("Although religion may fit the bill [for suspect treatment in some cases], strict scrutiny has been reserved for laws that 'discriminate among religions.'")

Finally, even if heightened scrutiny applied, it is satisfied here. (*See* §VII.D.)

IX. CONCLUSION

The motion should be granted and the Complaint dismissed.

Dated: May 24, 2023

Respectfully submitted,

By: /s/ Thomas Prouty
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Attorney for the State Defendants

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the State Defendants, certifies that this memorandum contains 40 pages (excluding the caption and tables of contents and authorities), which complies with the page limit set by this Court's Order Approving Stipulation to Extend Page Limit for Motion to Dismiss and for Opposition, entered on May 16, 2023 (Doc. 27).

Dated: May 24, 2023

Respectfully submitted,

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