SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID CARSON, AS PARENT AND NEXT   )

FRIEND OF O.C., ET AL.,   )

       Petitioners,   )

         v.   ) No. 20-1088

A. PENDER MAKIN,   )

       Respondent.   )

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Pages: 1 through 124

Place: Washington, D.C.

Date: December 8, 2021

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11   Washington, D.C.

12   Wednesday, December 8, 2021

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14   The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:01 a.m.

17 APPEARANCES:

18 MICHAEL BINDAS, ESQUIRE, Seattle, Washington; on

19   behalf of the Petitioners.

20 CHRISTOPHER C. TAUB, Chief Deputy Attorney General,

21   Augusta, Maine; on behalf of the Respondent.

22 MALCOLM L. STEWART, Deputy Solicitor General,

23   Department of Justice, Washington, D.C.; for the

24   United States, as amicus curiae, supporting the

25   Respondent.

C O N T E N T S

1   P R O C E E D I N G S

2   (10:01 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 20-1088,

5 Carson versus Makin.

6   Mr. Bindas.

7   ORAL ARGUMENT OF MICHAEL BINDAS

8   ON BEHALF OF THE PETITIONERS

9   MR. BINDAS: Mr. Chief Justice, and

10 may it please the Court:

11   Maine's sectarian exclusion

12 discriminates based on religion. Like all

13 discrimination based on religion, it should be

14 subjected to strict scrutiny and held

15 unconstitutional, unless Maine can show that it

16 is necessary to achieve a compelling government

17 interest.

18   Maine cannot make such a showing, and

19 the First Circuit never held that it could.

20 Instead, the First Circuit held that there are

21 two kinds of religious discrimination, the bad

22 kind and the good kind.

23   The First Circuit recognized that

24 Maine cannot discriminate against students or

25 schools because they are religious, but it held

1   the state is perfectly free to discriminate

2   against students or schools because they do

3   religious things, such as teach or receive

4   instruction in religion.

5   The First Circuit was wrong.

6   Religious discrimination is religious

7   discrimination, and unless it can survive strict

8   scrutiny, it is unconstitutional.

9   The First Circuit's refusal to apply

10   strict scrutiny based on a supposed status use

11   distinction was baseless. There's no basis for

12   a use-based departure from strict scrutiny in

13   the text of the Free Exercise Clause. There's

14   no basis for it in this Court's free exercise

15   precedent. And there is no basis for it in

16   common sense.

17   Religious schools, after all, teach

18   religion, just as a soccer team plays soccer or

19   a book club reads books. Yes, it is part of

20   what they do. It is also part of who they are.

21   Of course, religious schools also

22   teach secular subjects and satisfy every secular

23   requirement to participate in the tuition

24   assistance program. It is only because of

25   religion that they are excluded.

1   You can call that discrimination based

2   on religious use. You can call it

3   discrimination based on religious status. Call

4   it what you will. Either way, it is

5   discrimination based on religion, and either

6   way, it is unconstitutional.

7   I welcome the Court's questions.

8   JUSTICE THOMAS: Counsel, the --

9   neither of the two schools that you talk about,

10   discuss, has indicated that it -- it will accept

11   students who receive state funding or subsidies.

12   So would you discuss just briefly then

13   your -- whether or not you have standing?

14   MR. BINDAS: Absolutely, Your Honor.

15   The First Circuit correctly held that whether or

16   not these two particular schools ultimately will

17   or will not participate was beside the point

18   because the constitutional injury here is the

19   denial of the opportunity to even seek out

20   religious education under this program.

21   That constitutional injury is directly

22   attributable to the sectarian exclusion, and it

23   is unquestionable that holding the sectarian

24   exclusion unconstitutional would redress that

25   injury.

1   And this Court's decisions in cases

2   such as Northeastern Florida Chapter of

3   Associated General Contractors, Heckler versus

4   Mathews make clear that when a plaintiff is

5   challenging the -- a barrier, a discriminatory

6   barrier to a public benefit, the plaintiff need

7   not show, indeed, need not even allege, that

8   they would actually obtain the benefit but for

9   the discriminatory provision.

10   In fact, in Heckler versus Mathews, it

11   was a foregone conclusion that if the plaintiffs

12   -- plaintiff was successful in challenging the

13   discriminatory provision in the public benefit

14   program, he would not get the benefit because

15   there was a unique severability provision in the

16   program that said if this provision is

17   invalidated the benefit goes away. It doesn't

18   get extended to the excluded class. It goes

19   away.

20   This Court held that, nevertheless,

21   even though it was a foregone conclusion the

22   plaintiff would not get the benefit, he

23   nevertheless had standing --

24   JUSTICE KAGAN: So, Mr. --

25   MR. BINDAS: -- to challenge.

1   JUSTICE KAGAN: -- Bindas, does that

2 mean that if there were only two schools in the

3 state that met the Petitioners' religious

4 requirements, so only two schools that the

5 Petitioners would go to, would use this money

6 for, and both of -- and we knew that both of

7 those schools were not going to accept the money

8 or were very unlikely to accept the money, still

9 we would say that there was standing?

10   MR. BINDAS: Your Honor, in Heckler,

11 the Court held that even the stigmatic injury of

12 being subjected to the discriminatory treatment

13 in that case was sufficient for standing

14 purposes, even though it was a foregone

15 conclusion that the plaintiff would not get the

16 benefit if successful in his challenge in that

17 case.

18   JUSTICE KAGAN: So the answer --

19   MR. BINDAS: Now --

20   JUSTICE KAGAN: -- to my question is

21 yes, that even if they're -- even if all the

22 schools that meet the Petitioners' religious

23 requirements make clear that they're not going

24 to accept this money, we still have a case

25 before us?

1   MR. BINDAS: Your Honor, what I would

2   want to know in that situation is whether the

3   plain -- the plaintiffs had alleged that they

4   will not go to any other school but these two

5   schools, whether -- I mean, you also have to

6   remember that this sectarian exclusion has been

7   on the books for four decades. So, to the

8   extent there's a dearth of religious schools

9   that are acceptable to the plaintiff in that

10 situation, that's probably attributable to the

11 fact that Maine has been discriminating against

12 schools for four decades. There's a lot I would

13 want to know there, but --

14   JUSTICE BARRETT: Well, would the

15 Nelsons go to any place besides Temple Academy?

16   MR. BINDAS: Well, Your Honor, the --

17 the Nelsons alleged and I -- more importantly,

18 Maine stipulated that -- and this is at the

19 Joint Appendix page 78 -- that what they want is

20 an education that aligns with their sincerely

21 held religious beliefs.

22   JUSTICE BARRETT: But I thought they

23 identified Temple Academy as the place that they

24 wanted to send their child.

25   MR. BINDAS: They did. Well, and they

        1   had been sending their child to Temple Academy,

        2   so -- when it came to high school, they could no

        3   longer afford the tuition. They were

        4   statutorily entitled to the tuition benefit, but

        5   they could not use the benefit at that

        6   particular --

        7   JUSTICE BARRETT: Okay.

        8   MR. BINDAS: -- school.

        9   JUSTICE BARRETT: But you're saying

       10   that they would be open to sending their child

       11   to someplace other than Temple Academy if Temple

       12   Academy didn't accept the funds?

       13   MR. BINDAS: If -- if Temple Academy

       14   ultimately, at the end of the day, did not

       15   accept the funds, yes, I believe what they want

       16   is an education that aligns with their sincerely

       17   held religious beliefs.

       18   JUSTICE KAGAN: Do you know whether

       19   there are other schools that align with their

       20   sincerely held religious beliefs in that way?

       21   MR. BINDAS: Your Honor, I -- I

       22   suspect there are. Can I point you to a

       23   particular school in the record that they would

       24   absolutely attend otherwise? I can't. But, as

       25   the First Circuit correctly held, it's the

 1   denial of the opportunity to even seek out such

 2   a school that is the constitutional injury here.

 3   And I should also point out that to

 4   the extent Maine is claiming that we lack

 5   standing to challenge ongoing religious

 6   discrimination based on the fact that some

 7   schools at some point down the road might mull

 8   -- might ultimately decide not to participate

 9   here, I -- I -- I -- I think the -- the problem

10   here is that we don't know that, right? Maine's

11   argument is essentially that these schools might

12   be excluded at step 2, 3, 4. The problem is

13   there is an absolute barrier at step 1.

14   Maine stipulated -- this is at page --

15   page 70 -- I'm sorry -- yes, page 79 of the

16   Joint Appendix -- that it would be, in Maine's

17   words, futile for our clients to even ask their

18   school districts to pay tuition funds to these

19   schools because they are sectarian.

20   Maine stipulated at pages 90 and 99 of

21   the Joint Appendix that it would be, again,

22   futile for the schools to ask the state whether

23   they could accept tuitioning funds. Why?

24   Because they are sectarian. There is an

25   absolute barrier at step 1.

1   Maine wants to say, well, we might do

2   this or that at step 2, 3, or 4 that might bear

3   on whether these schools ultimately decide to

4   participate or not. But the problem is we can't

5   even get that answer because they're excluded at

6   step 1.

7   JUSTICE BARRETT: So this --

8   JUSTICE BREYER: Sorry, but on -- on

9   this particular point, I take it the reason is

10   something like that they're -- they're religious

11   beliefs in the school's belief. They don't want

12   to have gay students, they can't. They can't

13   have gay teachers. They have to teach that the

14   man is the boss of the women and a bunch of

15   other things like that.

16   Am I right about that?

17   MR. BINDAS: Your Honor, that -- that

18   these schools hold traditional --

19   JUSTICE BREYER: No. Did I state it

20   roughly right?

21   MR. BINDAS: Your Honor, I -- I -- I

22   don't know that that's --

23   JUSTICE BREYER: Well, then tell me

24   whether -- I mean, what -- what is -- I've read

25   this. I mean, is -- is it right or not right?

1   Because I -- I have a question, and it depends,

2   but this is not my question. I'm -- I -- I need

3   to know this as background.

4   MR. BINDAS: Well, Your Honor --

5   JUSTICE BREYER: There are -- there

6   are beliefs that no gay students, no gay

7   teachers, the man is superior to the woman, and

8   a few other things like that. Is that right?

9   MR. BINDAS: Your Honor, I don't know

10   that it's correct to say no gay students. No, I

11   don't believe that's the case. Do --

12   JUSTICE BREYER: No gay teachers?

13   MR. BINDAS: Would they -- do the

14   schools consider that in hiring decisions? Yes.

15   But the Maine Human Rights Act absolutely

16   protects the right to do so. There is a

17   provision --

18   JUSTICE BREYER: So what happens to

19   the Temple school? If that's their religious

20   belief, they don't want sincerely to have a gay

21   teacher and the Human Rights Act says, yes, you

22   have to, what happens?

23   MR. BINDAS: The Maine Human Rights

24   Act says the opposite, Your Honor. There is an

25   absolute religious --

 1   JUSTICE BREYER: All right, it says

 2   you cannot discriminate on the basis of sexual

 3   orientation. Is that what it says?

 4   MR. BINDAS: In hiring, there is an

 5   absolute protection, Your Honor, for -- that

 6   allows a --

 7   JUSTICE BREYER: All right. And

 8   suppose the religious belief is the opposite.

 9   MR. BINDAS: Your Honor --

10   JUSTICE BREYER: Oh, I see. The Maine

11   rights act says the religion can do this. Well,

12   what does it say? I'm sorry.

13   MR. BINDAS: There's a provision that

14   says a religious employer can require that its

15   employees adhere to the religion's tenets --

16   religion's tenets. There is an absolute

17   exemption --

18   JUSTICE BREYER: I see. I see.

19   MR. BINDAS: -- that Maine neglects to

20   mention in its briefing.

21   JUSTICE BREYER: And so what's the

22   problem with the school accepting the money?

23   MR. BINDAS: Your Honor, insofar as I

24   see it, there is no problem. Maine never --

25   JUSTICE BREYER: So maybe there isn't

1   a standing problem.

2   JUSTICE KAGAN: And -- and --

3   JUSTICE BREYER: But if -- what's

4   worrying me underlying all this is that there

5   are 65 religions or more in this country and

6   they believe a lot of different things.

7   And what's worrying me is -- is that

8   if the school -- if the state must give money to

9   the schools, they're going to get into all kinds

10   of religious disputes. One state says, no, you

11   -- in this kind of a situation, you've got to

12   hire the gay teacher. The other says yes, you

13   -- yes. The other says no. The other says one

14   thing. The other says the other.

15   And religious beliefs, of course, are

16   -- are very sincere and held very strongly. And

17   so there was a reason why this Court's cases

18   have said we do not want to get into a situation

19   where the state is going to pay for the teaching

20   of religion by religious -- you know, practicing

21   religious organizations, and -- and that seems

22   to me to stick its head up in a lot of different

23   aspects of this case.

24   That's what's underlying my problem.

25   MR. BINDAS: Sure, Your Honor. And I

1   think the Court has already addressed that in --

2   in Zelman. This program does not fund schools.

3   And if religious schools were allowed to

4   participate, it does not fund schools. It funds

5   families.

6   And not a penny can go to any school

7   but for the genuine private choice of

8   individuals. As this Court held in Zelman, as

9   this Court held in Locke, that private

10   independent choice severs the link between

11   government funds and religious instruction.

12   If there is --

13   CHIEF JUSTICE ROBERTS: Well -- well,

14   let's consider whether that's not the case.

15   Let's say a state has -- thinks the schools

16   around the state are -- you know, they need

17   better physical facilities. They have a program

18   that they're going to give money to schools so

19   long as they spend it on building. And they're

20   going to give it to private schools too because

21   building is good for education there. And

22   they're going to give it to religious schools.

23   But, with religious schools, they say,

24   look, you can't use this money to build a

25   chapel, but you can use it for anything else.

1   Is that discrimination against the

2   religious schools?

3   MR. BINDAS: Is it --

4   CHIEF JUSTICE ROBERTS: I mean, it is.

5   But is that okay or not?

6   MR. BINDAS: I suspect the government

7   would very well have a compelling interest in

8   that case, Your Honor, because we're talking

9   about direct institutional aid. And when you're

10   dealing with direct institutional aid, the

11   government is quite literally funding the thing.

12   But, here, government is simply doing

13   this: It's providing a benefit, a financial

14   benefit to families, and it's saying use it

15   where you will --

16   JUSTICE SOTOMAYOR: And --

17   MR. BINDAS: -- public school,

18   private.

19   JUSTICE SOTOMAYOR: -- can I ask you,

20   what is the discrimination? I think all parents

21   in Maine are given the chance to send their

22   children to free public secular schools.

23   Correct?

24   MR. BINDAS: To free pub --

25   JUSTICE SOTOMAYOR: All parents can do

1   that?

2   MR. BINDAS: To free public secular

3   schools or to the private school of their

4   choice, Your Honor, yes.

5   JUSTICE SOTOMAYOR: Well, wait a

6   minute. Let's take a step at a time. The

7   ultimate choice is send -- you get a free public

8   education. That's what they're promised,

9   correct?

10   MR. BINDAS: No, Your Honor. So the

11   benefit is defined by the statute.

12   JUSTICE SOTOMAYOR: No, no, no. The

13   benefit is, if I'm a parent and there's a public

14   school, the choice is send your child to that

15   public school, you get no benefit, right?

16   MR. BINDAS: If you live in a district

17   that has a public school, you do not, yes.

18   JUSTICE SOTOMAYOR: All right. So, in

19   that case, are you arguing that the state has to

20   finance the parent?

21   MR. BINDAS: Oh, not at all, Your

22   Honor, no.

23   JUSTICE SOTOMAYOR: No, because

24   they're offering a free public education,

25   correct?

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1               MR. BINDAS:  Not for that reason, Your
2   Honor.  There is no constitutional requirement.
3   As this Court held in Espinoza --
4               JUSTICE SOTOMAYOR:  Exactly.  All
5   right.
6               MR. BINDAS:  -- a state needn't --
7               JUSTICE SOTOMAYOR:  In that situation,
8   the parent pays for the religious training of
9   their child.
10              MR. BINDAS:  If they desire a
11  religious school as opposed to going to the
12  public school, yes.
13              JUSTICE SOTOMAYOR:  All right.  And
14  the pub -- the district could contract with a
15  school to provide the public education, correct?
16              MR. BINDAS:  If the district lacks a
17  public school, then it can contract with a
18  school to send its resident students, yes.
19              JUSTICE SOTOMAYOR:  Do you take the
20  position that the school has to -- that the
21  district has to permit or contract with a
22  religious school to provide --
23              MR. BINDAS:  No, Your Honor.  At
24  Footnote 9 in our opening brief, we say the
25  opposite, that in that situation where the
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1   government is contracting with a school to

2   educate its resident students, that school would

3   have to provide secular instruction.

4   JUSTICE SOTOMAYOR: And the parents

5   have to pay then for the religious training of

6   their children?

7   MR. BINDAS: If they don't want to go

8   to the school with which the government has

9   contracted and they desire a religious

10   education, yes.

11   JUSTICE SOTOMAYOR: So it's only

12   because the school has this -- the district has

13   decided to give you money to find a secular

14   education that you say there's discrimination?

15   MR. BINDAS: No, Your Honor. Again, I

16   would return to the statute defining the

17   benefit. I think Maine tries to redefine the

18   benefit as a public education.

19   The benefit is defined in the statute

20   itself, and the benefit is tuition to attend the

21   public or the approved private school of the

22   parent's choice at which the child is accepted.

23   That is the benefit.

24   JUSTICE SOTOMAYOR: No, no, no,

25   because you leave out what they say is you can

1   pick any school you want for a secular

2   education.

3   MR. BINDAS: Well --

4   JUSTICE SOTOMAYOR: They don't say --

5   because they permit religious schools that --

6   that are -- that don't teach or describe

7   themselves as non-sectarian to receive benefits.

8   These parents are put to the same choice that

9   every other parent in Maine is put to: either

10   get a free public secular education or pay for

11   your religious training. They're being treated

12   as everybody else is.

13   MR. BINDAS: They are not, Your Honor.

14   In some school districts in Maine, government

15   provides a financial benefit that can be used at

16   the public or private school of the parent's

17   choice. That is --

18   JUSTICE SOTOMAYOR: They're getting

19   more than other parents.

20   MR. BINDAS: Just as --

21   JUSTICE SOTOMAYOR: Most other parents

22   have only one choice: send them to the public

23   school if it exists, send them to the contracted

24   school that exists, or don't.

25   MR. BINDAS: And that's always true

1   with a school choice program, Your Honor. That

2   was true in Zelman. That program was specific

3   to Cleveland schools --

4   JUSTICE KAGAN: I mean, one way to

5   make Justice Sotomayor's point, I think, is --

6   is to ask whether this is different from a

7   typical school choice program.

8   You know, this is not a state or a

9   locality basically saying: We just love choice.

10   We think everybody should get as many choices as

11   they want.

12   This is really a default program for a

13   very small number of students living in isolated

14   areas where the state has decided it cannot --

15   it does not have the resources to provide public

16   schools.

17   And the state would wish to say public

18   schools for everybody. You know, you go to

19   Portland, Maine, it's just public schools for

20   everybody. The state would wish to do that. It

21   can't do that in communities in northern Maine,

22   so it instead has come up with this extremely

23   cabined program.

24   And I think, you know, one question

25   here is whether we should view that in the same

     1   way as a kind of Zelman "we love choice" sort of

     2   program.

     3   MR. BINDAS: A couple points there,

     4   Your Honor. Zelman was a program for children

     5   in a school district where the public schools

     6   were failing. It was because of a lack of

     7   opportunity in the public school system that the

     8   state -- that the state provided the benefit

     9   that --

    10   JUSTICE KAGAN: Yes, but it was a

    11   districtwide program, these -- this is not

    12   working for us, we want to use an entirely

    13   different system. That's not Maine's issue

    14   here.

    15   MR. BINDAS: Oh, well, Your Honor, I

    16   -- I -- I think it is. And we -- we should

    17   remember that for more than a century, Maine

    18   allowed religious schools to participate in this

    19   program, which belies the whole notion that this

    20   is a substitute for a public education.

    21   For a century, religious schools could

    22   participate. And for a century, that was fine.

    23   And there were secular options and there were

    24   private options. There were public options.

    25   There were private options. There were options

1   in Maine. There were options outside of Maine.

2   In 1980, the state does a reverse

3   course based on an erroneous interpretation of

4   the Establishment Clause that says, you know

5   what, no longer can you attend -- yes, we'll

6   continue to send you to Miss Porter's or Avon

7   Old Farms, but don't you dare think about going

8   to a Jewish day school or an Islamic school or

9   your local Catholic parish's school. For a

10   century, that had been fine.

11   This was not about providing a

12   substitute for a public education. This was

13   about a turn in 1980 based on an erroneous

14   interpretation of the Establishment Clause that

15   for some reason, if it wasn't clear after

16   Mueller, if it wasn't clear after Witters, if it

17   wasn't clear after Zobrest, if it wasn't clear

18   after Zelman that that was wrong, it was

19   certainly clear and certainly -- well, it

20   certainly was clear after Zelman. Yet, the

21   state continues to stand by this decision --

22   JUSTICE KAGAN: Can I take you back to

23   Justice Breyer's point and also the Chief

24   Justice's hypothetical, is you said, well,

25   there's this, you know, strange use-status

 1   decision and we all know that doing religious

 2   things is just as protected as being religious.

 3   And, of course, nobody would argue

 4   with that. I mean, you couldn't put somebody in

 5   jail for being religious, and you couldn't put

 6   somebody in jail for doing religious things.

 7   So, you know, in -- in that -- no -- nobody

 8   argues that.

 9   The status-use concept is -- is really

10   a concept that applies in subsidy cases, and

11   it's a -- and -- and -- and what is -- it -- it

12   has been intended to say is that the state

13   generally doesn't have to subsidize exercise of

14   a right. You know, we can't put you in jail for

15   saying something. We also can't deprive you of

16   an unrelated benefit for saying something. We

17   can't say you don't get food stamps because we

18   don't like your speech.

19   But that doesn't mean we have to pay

20   for your speech. And we do that all over the

21   place in constitutional law. We do it in the

22   Free Speech Clause. We do it in other areas as

23   well.

24   And so the question here that the

25   status-use distinction raises is, why is

        1   religion different? Why does the state have

        2   to -- not like -- some states want to, but this

        3   state doesn't want to. Why does the state have

        4   to exercise -- have to subsidize the exercise of

        5   a right?

        6   MR. BINDAS: Your Honor, this is not

        7   subsidizing the -- the -- the exercise of a

        8   right. It is conditioning the availability of

        9   an otherwise available public benefit on the

       10   surrender of a constitutional right.

       11   As this Court held in Thomas, the

       12   government cannot compel a citizen to choose

       13   between exercise of a right protected by the

       14   First Amendment and participation in an

       15   otherwise available public program.

       16   And there's no question that these --

       17   JUSTICE KAGAN: The state can define

       18   the nature of the program. So just like the

       19   state defines the nature of the program in a

       20   case like Rust v. Sullivan and in countless of

       21   other of our cases, so here the state is

       22   defining the nature of the program and saying,

       23   for various of the reasons that Justice Breyer

       24   gave, that we just -- we don't want to define

       25   the program so broadly as to raise all these

 1   questions of religious favoritism, religious

 2   division, and so forth.

 3   MR. BINDAS: Your Honor, in a program

 4   like Rust or Regan for that matter, which the

 5   United States briefs extensively, you're dealing

 6   with government speech. First of all, this is

 7   not a government speech program, and no one can

 8   credibly claim it is.

 9   To the extent it is government speech,

10   however, as this Court made clear in Pleasant

11   Grove, the Establishment -- government speech

12   must comport with the Establishment Clause,

13   which requires neutrality toward religion.

14   Moreover, in Rust, the doctors were

15   not forced to choose between receipt of the

16   benefit and the exercise of their right to

17   engage in abortion counseling. They just

18   couldn't use the benefit to do it.

19   Here, you are forced to make a choice.

20   You can get your statutorily entitled benefit to

21   attend the public or private school of your

22   choice, or you can exercise your free exercise

23   --

24   JUSTICE GORSUCH: Well, counsel --

25   MR. BINDAS: -- your free exercise

 1   right. You cannot get both. It's one or the

 2   other.

 3   JUSTICE GORSUCH: Counsel, on that, I

 4   believe the government's response -- and I think

 5   this is what Justice Kagan's getting at -- is in

 6   -- in -- in -- in Rust, you know, the question

 7   is whether you're put to a choice. And -- and,

 8   here, the government says there is no choice

 9   that you're put to because individuals can still

10   educate their -- their children in religion by

11   sending them to -- I think it's after-school

12   programs or Saturday or Sunday programs.

13   What are your thoughts about that?

14   MR. BINDAS: Well -- well, Your Honor,

15   the Court in Espinoza held that parents have a

16   right to direct the religious upbringing of

17   their children and that many parents exercise

18   that right by sending their children to

19   religious schools, which is protected by the

20   Constitution. So there's no question that

21   parents have a constitutional right to send

22   their children to a religious secondary school.

23   Now, in making that argument that

24   somehow this is all okay, this discrimination is

25   okay because you can go to a weekly Bible study,

 1   number one, that's insulting to parents, who are

 2   in the position of determining what's an

 3   appropriate education, religious education, for

 4   the child.

 5   But it also ignores the excluded

 6   activity. In Rust, the excluded activity was

 7   abortion counseling. You could still do that.

 8   In Regan, it was substantial lobbying activity.

 9   You could still do that simply by adopt --

10   adopting the 501(c)(3), (c)(4) designation. In

11   Locke, the excluded activity was a degree in

12   devotional theology, which the Court noted

13   Joshua Davey could still do and still get the

14   promised scholarship.

15   Here, the excluded activity is a

16   religious secondary education. You cannot get

17   that if you get the benefit.

18   JUSTICE GORSUCH: Does this affect

19   different religions differently, the

20   government's argument? I mean, some religions

21   might find a -- a -- a Sunday school perfectly

22   appropriate; others, perhaps, may not.

23   MR. BINDAS: I -- I -- I think it does

24   affect different religions generally and --

25   differently, Your Honor. And I think this also

 1   goes to the Establishment Clause problem here.

 2   The fact of the matter is some schools

 3   that are religious in what the government would

 4   call status, perhaps that do some things that

 5   look religious, are allowed to participate. But

 6   there is a regulator in Augusta, Maine, who

 7   looks into the curriculum and the activities of

 8   -- of the school and sits in judgment on whether

 9   that school is sufficiently irreligious and

10   therefore a permissible choice for a parent or

11   too religious and thus sectarian and excluded as

12   a permissible choice for the parent.

13   Put aside the Free Exercise Clause

14   problem. That is a substantial Establishment

15   Clause problem, as Judge McConnell makes very

16   clear in his amicus brief.

17   JUSTICE BREYER: Well, the thing is

18   under -- I don't know if you can think about it

19   at this level or advance my thinking on it,

20   which is what we've seen, of course, is that the

21   religious clauses are there to prevent the

22   religious wars. You teach your religion. I

23   teach mine. Okay? And to our children.

24   Now, when you get to education, the

25   route you're taking is not unknown. France

 1   takes that route. And you could say, well, the

 2   -- the state will pay all the religious

 3   education, as well as all the secular, and treat

 4   everybody alike. We've never taken that really.

 5   The opposite is none. Don't pay the

 6   priest's salary and don't pay the teaching of

 7   devotion and some -- you know, the teaching of

 8   actually devotional activity. And then there's

 9   the middle, where you say give the money to the

10   parents and let them choose. Okay.

11   So what this is, is it's closer to the

12   second -- I mean it's closer to the first, the

13   state's going to pay for it. And the reason I

14   think we've stayed out of that is because we

15   have too many religions, 60, 70, and they're

16   going to get into too many arguments with each

17   other about everything under the sun, you know,

18   and you start getting into arguments about

19   whether the -- it should be like this way in the

20   window or the other way in the window or this is

21   the kind of thing to teach or that.

22   It's really awful. I mean, I'm not

23   saying the arguments are bad. I understand

24   them. But you get the state in as the

25   arbitrator or the courts, and you're right in

1   the middle of religious activity. So, as I look

2   at these cases in bulk, not the exact words, I

3   see a big push, with our 60 or 70 religions,

4   towards keeping the state out of it. And so

5   that is a -- a theme that probably influences

6   the way I -- I -- I approach these problems.

7   I'm not saying I'm right. I'm asking you

8   because I want to know what you have to -- to

9   help me or -- yeah, what do you want to say?

10   MR. BINDAS: Well, Your Honor, going

11   back to your three approaches, I -- I -- I

12   respectfully disagree that this mirrors the

13   first approach. This is the third approach,

14   provide the money to the family and let them

15   decide. And as this Court held in Zelman, as

16   this Court held in Locke, that private choice

17   severs the link between government funds and

18   religious instruction.

19   So, to the extent there is any

20   advancement of a religious mission, that's

21   attributable to the choice of a parent. It can

22   in no way be attributed to the government.

23   And, Your Honor --

24   JUSTICE BREYER: The problem is the

25   government's paying for it, right, directly --

1   MR. BINDAS: But it's paying --

2   JUSTICE BREYER: -- and -- and they

3   say -- one -- one -- one church says, my God,

4   you certainly cannot pay for a classroom that's

5   of this size because we're using it to worship

6   and it has to be bigger than that.

7   And the others say that's just what

8   you shouldn't do. Worship is private and you

9   should have a smaller space for it. And -- and

10   then they're going to have to articulate, you

11   see, and -- and, ultimately -- well, the -- of

12   course, the parents can choose which of those

13   two, it's paid for by the state, and they start

14   suing each other. It's government money here

15   going.

16   MR. BINDAS: Your Honor, as this Court

17   held in Zelman, any constitutional test that

18   would turn on supposed avoidance of -- well, let

19   me rephrase that. When you're dealing with a

20   program of individual choice, the possibility,

21   what the Court called the specter of

22   divisiveness, religious strife, does not bear on

23   the constitutional analysis because of the fact

24   that it is an individual.

25   No one would suggest that a Social

 1   Security beneficiary couldn't tithe to her

 2   church because that would somehow be funneling

 3   government funds to religion. Her private

 4   choice as to where to use those funds is her

 5   private choice.

 6   JUSTICE KAGAN: Zelman --

 7   JUSTICE BREYER: Which you cannot

 8   refer --

 9   JUSTICE KAGAN: -- Mr. --

10   JUSTICE BREYER: -- as a number. I

11   mean, you cannot insist that the Social Security

12   Administration refer to you by a name rather

13   than a number? Forget it. Forget it. Go on to

14   Justice Kagan.

15   JUSTICE KAGAN: I mean, Zelman was a

16   -- was a case in which the question was could a

17   locality implement such a program. And the

18   question here is different, is does the locality

19   have to implement such a program.

20   And what -- what we have often talked

21   about in our First Amendment religion cases is

22   this idea of play in the joints, that not

23   everybody has to follow the same model and that

24   there is some amount of funding which is neither

25   prohibited by the First Amendment nor -- nor

         1   commanded by the First Amendment.

         2   And -- and, essentially, what Maine is

         3   saying here is, like, all well and good if a

         4   locality or if a state wants to do this, but --

         5   but we weigh the interests differently, and

         6   shouldn't we be allowed to weigh the interests

         7   differently?

         8   MR. BINDAS: Your Honor, the -- the

         9   quintessential play in the joints is whether or

        10   not to have a school choice program. We know

        11   the Establishment Clause allows it.

        12   Mr. Chief Justice, may I finish?

        13   CHIEF JUSTICE ROBERTS: You can finish

        14   your thought.

        15   MR. BINDAS: Okay.

        16   We know that the Establishment Clause

        17   allows it. Zelman tells us. We also know that

        18   the Free Exercise Clause doesn't require it.

        19   In Espinoza, the Court held a state

        20   need not subsidize private education.

        21   Whether to have such a program is the

        22   quintessential play in the joints.

        23   JUSTICE KAGAN: But the point here, I

        24   suppose, is this, is that some states would, you

        25   know, have such programs and love them. And

1   another state says, for the reasons that Justice

2   Breyer gave, you know, we think that this would

3   be incredibly divisive in our community, and you

4   can think of a wide variety of reasons why that

5   would be. It would lead to too great

6   entanglement. It's not good for the religion

7   itself. Or other people in our community won't

8   understand why we're funding this program.

9   I mean, these schools are overtly

10   discriminatory. They're proudly discriminatory.

11   Other people won't understand why in the world

12   their taxpayer dollars are going to

13   discriminatory schools.

14   For any of a number of reasons, a

15   state can say we don't want to play in this

16   game. And the question is, isn't this

17   play-in-the-joints idea, wasn't it specifically

18   understood to allow different kinds of solutions

19   in different sorts of areas?

20   MR. BINDAS: Mr. Chief Justice, may I

21   -- my -- my time is well --

22   CHIEF JUSTICE ROBERTS: You can answer

23   the question.

24   MR. BINDAS: Thank you, Your Honor.

25   In Espinoza, this Court specifically

        1   rejected any test that would turn on weighing

        2   the benefit and the exclusion against some

        3   general state interest in avoiding religious

        4   conflict.

        5   I -- I mean, I -- I -- I think the

        6   Court has already rejected any such test when

        7   you're dealing with a program, at least one that

        8   operates and turns exclusively on the private

        9   choice of parents. It might be a different

       10   situation if we were talking institutional aid,

       11   but not in a program like this, Your Honor.

       12   CHIEF JUSTICE ROBERTS: Thank you.

       13   Just one additional question, counsel,

       14   or request. Could you articulate for me your --

       15   your -- your best distinction of -- of Locke

       16   before you get to the argument that you think it

       17   should be overruled?

       18   MR. BINDAS: Yes, Your Honor,

       19   absolutely. So, as Espinoza and Trinity

       20   Lutheran held, Locke really does need to be

       21   cabined to its facts, and so let's look at those

       22   facts.

       23   Students could attend religious

       24   schools, including what the Court called

       25   pervasively religious schools. They could take

 1   devotional theology classes, including

 2   compulsory classes in such things as

 3   spirituality, evangelism, Bible, and religious

 4   doctrine.

 5   The one thing and the only thing they

 6   could not do was pursue a major in a degree for

 7   entry into the ministry for -- for basically the

 8   instruction of future clergy. Even then,

 9   however, a student was not required to choose

10   between receipt of the benefit and pursuing a

11   devotional theology major. As the Court noted

12   in Footnote 4, they could do both.

13   Now let's look at the facts of this

14   case. Miles apart from Locke. This is not a

15   situation where, as Locke put it, government's

16   going a long way toward accommodating religion.

17   It is a wholesale exclusion of religion.

18   If a school teaches a single class in

19   religion or it doesn't even teach any religion,

20   it just teaches secular subjects, if it happens

21   to teach those secular subjects through what a

22   regulator in Augusta determines to be the lens

23   of faith, that school is out. So the exclusion

24   is completely different.

25   Moreover, Locke, Joshua Davey was not

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 1   forced to choose.  Here, parents must choose.
 2              CHIEF JUSTICE ROBERTS:  So what if the
 3   state has funding vocational education?  They've
 4   got a school for kids who want to learn the
 5   trades.  They've got one for kids who want to
 6   learn the -- the fishing industry, one for kids
 7   who want to focus on tourism, and there's -- and
 8   a seminary that prepares individuals to be
 9   priests or pastors.
10              Can they decide not to fund the
11   seminary?
12              MR. BINDAS:  Your Honor, I think if --
13   so long as Locke is good -- remains good law,
14   yes.  And, moreover, in the program Your Honor
15   described, it sounded like it was a direct
16   institutional aid type program.  And I think
17   even more so than in Locke, the Court -- the --
18   the state could make that choice.
19              CHIEF JUSTICE ROBERTS:  Thank you,
20   counsel.
21              Justice Thomas?
22              JUSTICE THOMAS:  Nothing for me,
23   Chief.
24              CHIEF JUSTICE ROBERTS:  Justice
25   Breyer, anything further?
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 1              Justice Alito?

 2              Justice Sotomayor?

 3              JUSTICE SOTOMAYOR:  Yes.  I have -- I

 4    have one follow-up.  I have a great deal of

 5    difficulty here.  I think, following up Justice

 6    Gorsuch's point and your own, that you admit

 7    that the reason why this school is important to

 8    these parents is because they don't teach just

 9    secular subjects, that they teach all subjects

10    through the lens of their religion.

11              Am I correct?

12              MR. BINDAS:  They -- they -- religion

13    is a part of -- of their curriculum, yes, Your

14    Honor.

15              JUSTICE SOTOMAYOR:  I thought, if I

16    understood the materials from the schools that

17    were here, that the very point is that they

18    teach all subjects through the lens of the

19    religion.

20              MR. BINDAS:  Well --

21              JUSTICE SOTOMAYOR:  That -- and I

22    repeat -- even their science courses are limited

23    in their reach because of their belief in

24    certain -- or disbelief in certain -- in certain

25    theories of science.
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1   MR. BINDAS: I don't know that there's

2   anything in the record on that, Your Honor. And

3   to the extent the state can -- desires to say,

4   hey, if you're going to participate in this

5   program or if you even want to be an approved

6   private school to operate at all in the -- in

7   the State of Maine, you have to teach certain

8   curriculum and you have to teach the theory of

9   evolution, I -- you know, that might well --

10   JUSTICE SOTOMAYOR: That's okay?

11   MR. BINDAS: That -- but that's --

12   JUSTICE SOTOMAYOR: Is it okay to say

13   to -- to a school you have to take every student

14   and not discriminate on the basis of sex, color,

15   religion, that they don't practice your

16   religion, the student -- I understand that

17   there's an exemption in Maine for who they hire

18   to teach, but if this program is supposed to --

19   which I think it is -- to give students a

20   choice, is this program permitted to say, with

21   respect to the students, if they meet your

22   academic requirements, you can't discriminate?

23   MR. BINDAS: Well, Your Honor, that --

24   that's not this case. But could the state do

25   that? I think you're looking analytically at a

 1   totally different situation there because, at

 2   least on its face, that's a religiously neutral

 3   requirement.

 4   Now could there be some evidence of a

 5   discriminatory object in the -- in the adoption

 6   of that provision? Perhaps. But at least it's

 7   facially neutral, which means, if it's neutral,

 8   you're not even getting strict scrutiny at that

 9   point.

10   Moreover, I would say, Your Honor,

11   it's important to remember that schools that

12   welcome students of all stripes, that do not

13   consider sexual orientation or gender identity

14   in hiring, in admissions, or for any other

15   basis, are just as excluded from this program if

16   they teach that message of inclusiveness and

17   diversity through the lens of faith, and there's

18   record evidence of that in the Kent School.

19   CHIEF JUSTICE ROBERTS: Justice Kagan,

20   anything?

21   Justice Gorsuch?

22   JUSTICE GORSUCH: Yeah, I -- I just

23   want to follow up on that. I just want to be

24   clear in my mind that we're not -- we're not

25   being called upon today to interpret Maine's

 1   anti-discrimination laws, and we don't need to

 2   do that to decide this case?

 3   MR. BINDAS: Not at all, Your Honor.

 4   Maine has never said these schools will be

 5   excluded.

 6   JUSTICE GORSUCH: And -- and -- and

 7   the Kent School example, that -- that was a -- a

 8   -- a religious school that actually applied, as

 9   I -- as I remember it -- just correct me if I'm

10   wrong -- to participate but was rejected even

11   though it -- it -- it said it was not a

12   sectarian school and said that it was willing to

13   abide by Maine's anti-discrimination laws?

14   MR. BINDAS: In the record, I don't

15   know whether it specifically talks about the

16   Maine Human Rights Act at that point because

17   Maine excluded it solely because it was

18   religious. This goes back to the step 1 --

19   JUSTICE GORSUCH: Yeah.

20   MR. BINDAS: -- absolute barrier.

21   But, if you get on to the Kent School's website

22   and look at its policies regarding employment

23   and -- and admissions, it's plain as day, the

24   school does not discriminate on any of the

25   grounds we're talking about.

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1           JUSTICE GORSUCH:  So religious schools
2     are forbidden regardless whether or not they're
3     going to participate?
4           MR. BINDAS:  Solely because they are
5     religious.
6           JUSTICE KAVANAUGH:  Two questions
7     about how far your argument goes.  With respect
8     to Locke, to follow up on the Chief Justice's
9     question, you're saying that that is limited or
10    could be limited to cases involving the training
11    of clergy?  Is that an accurate description?
12          MR. BINDAS:  Well, Your Honor, I think
13    the Court itself limited it in that -- in that
14    way in Locke itself.  The Court went so far as
15    to say the only state interest, the Court's
16    words, that we're addressing is the state's
17    interest in not funding the training of clergy.
18    So I think, on its own terms, it's limited to
19    that.
20          JUSTICE KAVANAUGH:  Okay.  And then,
21    second, just to clarify, you're not arguing, but
22    correct me if I'm wrong, that the mere funding
23    of public schools would entitle the parents to
24    funding for religious schools?  You're saying,
25    but correct me if I'm wrong, that once the state
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 1   starts funding private schools, it can't exclude

 2   religious private schools and fund secular

 3   private schools, is that correct?

 4   MR. BINDAS: That is correct, Your

 5   Honor. We -- we are not arguing that there is a

 6   constitutional right to a publicly funded

 7   religious education, nor could we. Espinoza

 8   said point blank a state need not subsidize

 9   private education.

10   JUSTICE KAVANAUGH: Okay. Thank you.

11   JUSTICE BARRETT: One follow-up on the

12   same lines as Justice Kavanaugh.

13   I -- I gather, in drawing the

14   distinction that Zelman drew between choice and

15   direct funding, that you would concede that if

16   Maine retooled its program so that payments went

17   directly to private schools, like, say, to

18   Miss Porter's, you know, we will pay you X

19   number of dollars to reserve 40 seats in each

20   class for schools -- for students from districts

21   that lack a public school, you're conceding, I

22   take it, that in the case of that kind of direct

23   subsidy, there would not be a problem with Maine

24   not subsidizing a private religious school as

25   well?

1   MR. BINDAS: Well, Your Honor, in that

2   situation, what I'd want to know is -- is

3   whether the -- so we're talking about basically

4   a per capita program where payment is to the

5   institution but is determined on a per student

6   basis of how many students the -- the district

7   is sending? Is that --

8   JUSTICE BARRETT: Well, I'm just

9   trying to press on how important to your

10   argument this severed link is where the money is

11   going to the parents and then going to the

12   school, as opposed to we'll just pay you a flat

13   rate. Whether 40 students enroll or not --

14   MR. BINDAS: Oh.

15   JUSTICE BARRETT: -- we want 40 -- 40

16   seats for students that lack a public school in

17   their district.

18   MR. BINDAS: If -- if -- if we're

19   bringing choice out of the equation and we're

20   talking about a direct institutional aid type

21   program, then we're talking about a much, much

22   different case, Your Honor.

23   JUSTICE BARRETT: And -- and you --

24   when you say much, much different case, are you

25   talking about then a case where there would not

1   be a free exercise claim that could succeed?

2   MR. BINDAS: I think, if the

3   government's paying a flat rate to schools that

4   doesn't turn on whether a student is choosing to

5   attend that school, I -- I -- you know, again, I

6   would want to know the particulars, but I think

7   that that would be permissible in that situation

8   for the state to say we're not going to pay a

9   flat rate, we're not going to contract with a

10   school that's providing religious instruction.

11   But there are a lot of variables

12   there, Your Honor. If the --

13   JUSTICE BARRETT: I understand.

14   MR. BINDAS: -- if the payment is

15   based on defraying the cost of tuition for the

16   number of kids that -- but it's --

17   JUSTICE BARRETT: No, I understand.

18   I'm just -- I'm just clarifying that you're not

19   defending the notion of that kind of direct

20   subsidy, as opposed to saying that this program

21   functions like choice, like a -- like a school

22   choice program, particularly given that kids can

23   go as far as California and to elite boarding

24   schools all over the country with the money?

25   MR. BINDAS: Not a penny flows to any

 1   school under this program but for the private

 2   and independent choice of families.

 3   JUSTICE BARRETT: Thank you.

 4   CHIEF JUSTICE ROBERTS: Thank you,

 5   counsel.

 6   MR. BINDAS: Thank you, Your Honor.

 7   CHIEF JUSTICE ROBERTS: Mr. Taub.

 8   ORAL ARGUMENT OF CHRISTOPHER C. TAUB

 9   ON BEHALF OF THE RESPONDENT

10   MR. TAUB: Mr. Chief Justice, and may

11   it please the Court:

12   With respect to justiciability, this

13   case is now about one family who wants to send

14   one child to one specific religious school. The

15   record clearly demonstrates, though, that this

16   one school has zero interest in taking Maine's

17   money. Under well-established principles, the

18   Petitioners do not have standing because, even

19   if they were to prevail, they would receive no

20   redress for their alleged injury.

21   As to the merits, Maine law entitles

22   every child to a free public education. Maine's

23   highest court has recognized that the tuition

24   program at issue here is intended solely to

25   ensure that those few children who live in

 1   districts that have not made appropriate

 2   schooling arrangements are still able to receive

 3   a free public education.

 4   That is the benefit at issue here, a

 5   free public education. That private schools are

 6   sometimes enlisted to deliver the benefit is of

 7   no constitutional significance. States

 8   frequently outsource the delivery of public

 9   benefit programs, and that does not change the

10   public nature of the program. It should be no

11   different when it comes to education.

12   The reason that schools that promote a

13   particular faith are not eligible to participate

14   is simple. Maine has determined that, as a

15   matter of public policy, public education should

16   be religiously neutral. This is entirely

17   consistent with this Court's holdings that

18   public schools must not inculcate religion and

19   should instead promote tolerance of divergent

20   religious views.

21   The Petitioners want an entirely

22   different benefit, instruction designed to

23   instill religious beliefs at taxpayer expense.

24   They are not being discriminated against. They

25   simply are not being offered a benefit that no

 1   family in Maine is entitled to.

 2   Coming at this from a different

 3   perspective, this Court has made clear that the

 4   government is entitled to define the scope of a

 5   financial benefit in order to advance its own

 6   value judgments, even when doing so might

 7   disadvantage activity protected by the First

 8   Amendment.

 9   If the federal government can provide

10   funding to family planning services on the

11   condition that it not be used to discuss

12   abortion, a state should be allowed to condition

13   paying a child's tuition on the condition that

14   the school not promote religious beliefs.

15   JUSTICE THOMAS: Counsel, in Maine,

16   can a parent decide that they simply do not want

17   to send their child to any school at all?

18   MR. TAUB: They -- they could

19   home-school the child --

20   JUSTICE THOMAS: No, I -- I mean zero

21   education.

22   MR. TAUB: No, no, there is compulsory

23   attendance laws which would satisfy the --

24   JUSTICE THOMAS: So you require them

25   to go to school, and you -- in certain areas,

1   you don't have schools available?

2   MR. TAUB: That's correct.

3   JUSTICE THOMAS: So, if you -- you

4   require them to go and you don't have schools

5   available and you make provisions for them to

6   comply with that compulsory law, then how can

7   you say that going to a particular school is a

8   subsidy?

9   MR. TAUB: How can we say that going

10   to a particular school is a subsidy?

11   JUSTICE THOMAS: Yes. You say -- you

12   require them to go to schools to do something

13   that you haven't provided for, but then you make

14   a way for them to do that, and you have now --

15   now -- you now say it is a benefit or a subsidy.

16   But it is you who require them to do

17   it. In certain places, you can provide them

18   with a public school, and in other places, you

19   can't. But they still have to comply with the

20   law.

21   MR. TAUB: Yes, Your Honor. But --

22   but this Court has made clear that -- that

23   states have a legitimate interest in compulsory

24   education laws. And --

25   JUSTICE THOMAS: Well, I agree. I

 1   understand that. I'm not arguing with that.

 2   But you have required them to go. It's one

 3   thing if you said, look, you -- we will pay for

 4   your -- your attendance at a particular -- at

 5   college, at the University of Maine, but we

 6   won't pay for you to go to a religious college

 7   as a substitute for that.

 8   You don't have a compulsory

 9   requirement that anyone attend college, but you

10   do for primary and secondary school. And I just

11   -- I just want you to explain to me how that is

12   a -- a -- is it -- it's a subsidy if you require

13   them to attend, but you make no provision for

14   it.

15   MR. TAUB: Well, Your Honor, in this

16   case, what the benefit that's being offered is a

17   free public education, and so the Maine

18   legislature has decided that it's critical that

19   every student in Maine obtain, if he or she

20   wants it, a -- a free public education.

21   And so the state has made certain

22   provisions. It requires school districts to

23   make provisions to ensure that every child gets

24   that benefit. In certain cases, though --

25   JUSTICE THOMAS: Well, I don't know

1   how it can be a benefit when you -- you've

2   required it. I -- I'm not saying it can't be a

3   benefit. I think it's a benefit. But you're

4   required. It's a requirement. Anyway, I'm not

5   going to belabor that.

6   The -- the -- but I am interested in

7   your -- you explaining to me what your term

8   "rough equivalent" of a public education is.

9   What do you mean by "rough equivalent"?

10   MR. TAUB: So, in the state's view,

11   Your Honor, the most significant and defining

12   feature of a public education is that it is a

13   sectarian education that is religiously neutral.

14   JUSTICE THOMAS: And what do you mean

15   by that?

16   MR. TAUB: So what -- what we would

17   consider is an education that doesn't promote

18   one particular set of religious beliefs at the

19   exclusion of others, so -- so a school that --

20   that might teach about different religions but

21   doesn't instruct students that they are to

22   follow any particular religion, so it's -- it's

23   neutral and silent when it comes to -- to what

24   religion a child should follow.

25   JUSTICE THOMAS: So let's say I'm in

 1 Bangor, Maine, or -- and I'm in a public school.

 2 Where is it written in the charter of that

 3 particular school that it be non-sectarian? It

 4 would seem to me that your interest would be on

 5 -- on academic subjects.

 6   MR. TAUB: Well, I mean, Your Honor,

 7 if -- if I understand your question, this --

 8 this Court has recognized that public schools

 9 must be secular, that they --

10   JUSTICE THOMAS: No, I'm just -- I

11 think, as far as education, you wouldn't care --

12 if you're in a public school, religion doesn't

13 come up. It's a non-issue.

14   MR. TAUB: Well, religion doesn't come

15 up because it can't come up. I mean, that --

16 that is the very defining feature of a public

17 school, is that -- is that it doesn't have

18 mandatory prayer. It doesn't have mandatory

19 worship services.

20   JUSTICE THOMAS: I know, but that's

21 not the reason you go. I'm trying to figure

22 out, when you say that there are these features

23 of a public school education, I don't think you

24 go -- if you're in a public school in -- in

25 Maine, that your interest isn't, oh, I'm so glad

 1   I'm here because you don't have a lot of

 2   Catholicism here. I think you go for other

 3   reasons. And I'm trying to figure out, so when

 4   you say a "rough equivalent" of that, what are

 5   you talking about?

 6   MR. TAUB: Again, a rough equivalent

 7   is an education that is religiously neutral.

 8   That is the defining feature of a public

 9   education. That is the education that the state

10   wants to provide to children.

11   Now, if families and children want a

12   different benefit, if they want an education

13   that inculcates religious beliefs, that's their

14   right, but that's not --

15   JUSTICE ALITO: Suppose parents want

16   to send their child, using this money, to an

17   elite private school, Exeter, Andover, Miss

18   Porter's. That would be okay, right?

19   MR. TAUB: Yes, those schools would

20   likely be approved.

21   JUSTICE ALITO: And -- and they would

22   provide the equivalent of the -- a rough

23   equivalent of a public education?

24   MR. TAUB: Yes, they would.

25   JUSTICE ALITO: They would?

1   MR. TAUB: Yes. The defining feature

2 of a public education is that it's religiously

3 neutral. Now you could go to Andover --

4   JUSTICE ALITO: So, when you say a

5 public education, all you mean is a secular

6 education. That's what you mean?

7   MR. TAUB: That is the defining

8 feature. And -- and what I would say, Your

9 Honor --

10   JUSTICE ALITO: So you have to have a

11 --

12   MR. TAUB: -- is that if you went to

13 --

14   JUSTICE ALITO: -- that that's -- you

15 have to have a compelling interest in providing

16 a purely secular education in the funded -- in

17 the schools to which these students wish to go?

18   MR. TAUB: Your Honor, if you went

19 into any private school, even take Andover

20 Academy, I mean, certainly, there are going to

21 be trappings there that are going to be much

22 different than -- than trappings in a public

23 school.

24   But, at the end of the day, your

25 chemistry class is going to be taught the same

1   as a public school chemistry class. Your

2   science and religion -- and math classes are

3   going to be taught the same way. And -- and the

4   one thing that's not going to be occurring in

5   those schools is that they're not going to be

6   inculcating children with a particular religion.

7   So, yes, an Andover or a Phillips

8   Exeter may be different from Bangor Public High

9   School in many different ways, but what they

10   share in common is the most important feature,

11   which is that they are not inculcating religion.

12   JUSTICE GORSUCH: So, counsel --

13   CHIEF JUSTICE ROBERTS: Counsel --

14   JUSTICE GORSUCH: I'm sorry, Chief.

15   After you.

16   CHIEF JUSTICE ROBERTS: I just --

17   let's suppose you have two schools. School A is

18   run by Religion A, and -- and that religion has

19   a doctrine that they should provide service to

20   their -- their neighbors. So they're running --

21   set up and running a school, but there's nothing

22   in their -- in their doctrine about propagating

23   the faith or whatever, so it does look just like

24   a public school, but it's owned by religion.

25   Religion B also has a school, but its

1   doctrine requires adherence to educate children

2   in the faith, and the -- the school is infused

3   in every subject with their view of the faith.

4   Now would the first school get the

5   funds?

6   MR. TAUB: Yes.

7   CHIEF JUSTICE ROBERTS: Okay. Would

8   the second school?

9   MR. TAUB: No.

10   CHIEF JUSTICE ROBERTS: And that's

11   because of the difference between the two

12   religions, right?

13   MR. TAUB: That's because they are --

14   their -- their program is specifically

15   instilling and promoting --

16   CHIEF JUSTICE ROBERTS: Right.

17   MR. TAUB: -- religion in students,

18   and --

19   CHIEF JUSTICE ROBERTS: And the other

20   religion does not?

21   MR. TAUB: That -- that is correct.

22   CHIEF JUSTICE ROBERTS: So you're

23   discriminating among religions based on their

24   belief, right?

25   MR. TAUB: No, I would not say that.

 1   Religions can have whatever belief they want,

 2   but if they want to take part in Maine's tuition

 3   program, the education service they have to

 4   provide has to be the service that Maine is

 5   purchasing.

 6   CHIEF JUSTICE ROBERTS: Well, and one

 7   religion says that's what they do with

 8   education, and the other religion says, no, we

 9   use it to propagate the faith.

10   So it is the beliefs of the two

11   religions that determines whether or not their

12   schools are going to get the funds or not.

13   And -- and we have said that that is

14   the most basic violation of the -- the First

15   Amendment religion clauses, for the government

16   to draw distinctions between religions based on

17   their doctrine.

18   MR. TAUB: Again, Your Honor, we're

19   not -- we're not drawing those distinctions

20   based on doctrine. We are drawing those

21   distinctions based on -- on what the school is

22   going to promote.

23   And let me just give you a

24   hypothetical. If -- if -- if there were a

25   school that was -- that was -- that was run by

 1   an organization that felt it was critical to

 2   have part of the program be to inculcate

 3   religious beliefs, if -- if that school

 4   otherwise provided a public education, and let's

 5   say it had chapel services and a class that was

 6   intended to instill religion, if -- if those

 7   classes were optional, it's likely that that

 8   state -- that that school would -- would be

 9   eligible for the Maine tuition program.

10   What the state is not going to provide

11   public funding to is a school that is going to

12   require students to take part in programs that

13   are intended to instill religion.

14   CHIEF JUSTICE ROBERTS: Well, to

15   follow that up, you say likely. I mean, are we

16   supposed to put weight on that in deciding the

17   case, that that is, in fact, what's going to

18   happen?

19   MR. TAUB: Well, Your Honor, what we

20   have in this record, we have a facial challenge

21   and we have an as-applied challenge, and the

22   as-applied challenge relates to two very

23   specific schools. And it's completely clear

24   from the record that -- that those two schools

25   are -- are not of the type of the school that

1   I'm hypothesizing about.

2   And so, if we ever had a school like

3   that, the Department of Education would look

4   carefully at it. But, you know, I think you'll

5   see in the record that -- that one of the

6   questions the Department has asked in the past

7   is: I see you have a chapel service. Is that a

8   mandatory chapel service?

9   CHIEF JUSTICE ROBERTS: Okay. So

10   let's say the school is -- you know, some

11   subjects are more susceptible to religious

12   infusion than others. So half of the classes

13   are religious. You know, when they teach

14   literature, it's from a religious perspective.

15   You know, when they teach calculus or chemistry,

16   it's -- it's -- it's not. So they -- what do

17   they do? Do they get the full amount of the

18   credit, or do they get half the amount?

19   MR. TAUB: No, this is -- I mean, what

20   Maine is doing is it's paying the tuition for

21   that student to attend that school. This isn't

22   -- this isn't the kind of program where we can

23   segregate out certain funds to go to one part

24   and certain --

25   CHIEF JUSTICE ROBERTS: Okay. So you

 1   make a judgment of whether the school qualifies

 2   and you look at how much -- how -- how serious

 3   are they about infusing the subjects with

 4   religion?

 5   MR. TAUB: Not how serious they are,

 6   Your Honor, but -- but if --

 7   CHIEF JUSTICE ROBERTS: Or to what

 8   extent they do.

 9   MR. TAUB: So -- and -- and -- and

10   what I will say is that -- is that the schools

11   self-identify themselves. This is not a

12   situation where you have government officials --

13   CHIEF JUSTICE ROBERTS: Okay. A

14   school comes in and says, I identify myself as a

15   50 percent sectarian school and a 50 percent

16   non-sectarian. They get the full credit?

17   MR. TAUB: We would ask them what are

18   you doing as -- as part of the sectarian portion

19   of your program. And -- and if that portion of

20   the program is -- is designed to instill

21   religious beliefs --

22   CHIEF JUSTICE ROBERTS: Right.

23   MR. TAUB: -- and students are

24   required to attend that part of the program,

25   then it's unlikely that that school would --

1 would -- would be eligible for -- for any

2 portion of the tuition program.

3   CHIEF JUSTICE ROBERTS: Well, I don't

4 understand. I think we've gone from likely to

5 -- to -- to unlikely.

6   MR. TAUB: Well --

7   CHIEF JUSTICE ROBERTS: Are you saying

8 that if they just had one chapel service every

9 -- every day or -- or let's just say that they

10 take a religious perspective on -- on history,

11 just that. Are they going to likely be

12 qualified or likely -- unlikely?

13   MR. TAUB: So, you know, these are

14 hypotheticals that the Department of Education

15 would have to look at. But -- but what I can

16 say is that if a school had a mandatory chapel

17 service where this was a religious chapel

18 service --

19   CHIEF JUSTICE ROBERTS: All right.

20 Let's skip the chapel service and say it's just

21 mandatory history class, but they have a

22 particular view of the Crusades that not

23 everybody might share.

24   MR. TAUB: You know, Your Honor, as I

25 sit here today, I cannot answer that -- that

 1   question. That -- that would be a much tougher

 2   situation. It's one that's never presented

 3   itself in Maine.

 4   And what we have here are -- are two

 5   schools that are very much different from --

 6   from those kinds of hypothetical schools. It --

 7   it -- it might be that there could be an

 8   as-applied challenge brought down the line. If

 9   -- if you had a school come forward like Your

10   Honor is -- is speculating about and we denied

11   funding for that school because we didn't like

12   the fact that religion was taught or that the

13   Crusades were taught from a particular

14   perspective, that school could easily bring a

15   challenge, and -- and then a court would decide

16   whether what -- whether what Maine did is

17   appropriate or not.

18   But -- but what I don't think is

19   appropriate is -- is for the Court to decide the

20   case based on hypothetical situations that --

21   that have never occurred in the state.

22   JUSTICE ALITO: Well, suppose that a

23   -- a school is affiliated with a religious group

24   and they say, we do infuse our religious beliefs

25   into all aspects of the community, but our

         1   salient -- our salient religious beliefs are

         2   that all people are created equal and that

         3   nobody should be treated -- should be subjected

         4   to any form of invidious discrimination and that

         5   everybody is worthy of respect and should be

         6   treated with dignity and that everybody has an

         7   obligation to make contributions to the

         8   community and engage in charitable work, those

         9   are our religious beliefs and we don't -- we

        10   don't really have any dogma, but these are

        11   principles that we think our students should

        12   keep in mind, consistent with the religious

        13   outlook of our community.

        14   Would that school be disqualified?

        15   MR. TAUB: So, I mean, that would be

        16   very close to a public school. Public schools

        17   often have a set of values that they want to

        18   instill: public service, be kind to others, be

        19   generous.

        20   I think what -- what -- what the

        21   defining feature or what -- or -- or what would

        22   make the difference is -- is whether children

        23   are being taught that your religion demands that

        24   you do these things, that -- that your religion

        25   demands --

 1   JUSTICE ALITO: Well, then you really

 2   are discriminating on the basis of religious

 3   belief. What I described is, I think, pretty

 4   close to Unitarian Universalism, isn't it? And

 5   that is a -- that is a religious community.

 6   So that would be okay. That religious

 7   community is okay. They can have a school that

 8   inculcates students with their beliefs because

 9   those are okay religious beliefs, but other

10   religious beliefs, no. Isn't that -- is that

11   what Maine is doing?

12   MR. TAUB: Well, what I'm saying, Your

13   Honor, is that -- and -- and, again, this is

14   what I said in response to the Chief Justice's

15   questions -- is that -- is that we have two

16   schools here at issue. There are other schools

17   that could come in the future that are going to

18   pose thornier questions, and, again, those might

19   be challenges that could be brought at that

20   point.

21   So, you know, I can't sit here and --

22   and tell you whether or not the Department of

23   Education would approve a Unitarian school. We

24   would just have to know more information about

25   what their curriculum is and -- and how they're

 1   teaching it. It would be a process where they

 2   --

 3   JUSTICE ALITO: Well, unless you can

 4   say that you would treat a Unitarian school the

 5   same as a Christian school or an Orthodox Jewish

 6   school or a Catholic school, then I think you've

 7   got a problem of discrimination among religious

 8   groups --

 9   MR. TAUB: So, I mean --

10   JUSTICE ALITO: -- regardless of the

11   --

12   MR. TAUB: -- part of the challenge

13   here --

14   JUSTICE ALITO: -- regardless of

15   religious group that is affiliated with the

16   particular school that is at issue in the case

17   before us.

18   MR. TAUB: So -- so part of the

19   challenge here, I think, you know, is -- is in

20   part the definition of religion itself, and --

21   and that is an issue that this Court has

22   struggled with over the years in cases like IRS

23   tax exemptions and conscientious objector

24   status. And so questions always come up about

25   whether -- is this thing a religion or is it

1   something else?

2   And I think that most people, you

3   know, would believe that Unitarianism is a

4   religion. It --- it might be not be premised on

5   the existence of a supreme being, but I think

6   most people would -- would agree that

7   Unitarianism is a kind of religion. I might be

8   wrong about that, but -- but I think that

9   Unitarianism is commonly considered a religion.

10   And so, if that is the case, then --

11   then a school that is promoting Unitarian

12   beliefs would not be eligible for the program.

13   JUSTICE GORSUCH: Counsel, my -- my

14   understanding of the record is that this theory

15   that Miss Porter's and the -- and the Cate

16   School in California provide a public education

17   or rough equivalent to one in Maine is a -- a

18   relatively recent phenomenon, that -- that

19   before I believe it was 1980, Maine did allow

20   local religious schools to participate in this

21   program and that it changed course only because

22   of a perhaps mistaken view about Establishment

23   Clause precedents and that the Maine Supreme

24   Court found that that was the only reason why

25   Maine changed course.

1 　　　　　So isn't this whole discussion of

2 rough equivalent of public schools something of

3 a post hoc justification?

4 　　　　　MR. TAUB: It's not, Your Honor. It

5 is true that -- that -- that there was a time

6 period when religious schools were eligible for

7 the program. The Attorney General authored an

8 opinion which I think most scholars and courts

9 at the time would have concluded was accurate

10 that included --

11 　　　　　JUSTICE GORSUCH: Well, I don't doubt

12 it was in good faith, but you'd agree that that

13 was the reason why Maine changed course?

14 　　　　　MR. TAUB: That -- that was the

15 reason, but I think what's significant is then

16 after -- after Zelman came out, the Maine

17 legislature understood that maybe that they

18 could include religious schools in the program,

19 and so there was debate about whether to remove

20 the religious exemption.

21 　　　　　And if you look at -- at -- at -- at

22 the statements made during the debate, it's --

23 it's clear that the -- that -- that the

24 legislators who were opposed to -- to -- to --

25 to removing the exclusion had interests

1   different than Establishment Clause concerns.

2   They had concerns about making sure that a

3   public education is religiously neutral, that

4   it's -- it's -- it's inclusive, that it's not

5   discriminatory.

6   So I think -- and -- and the fact that

7   --

8   JUSTICE GORSUCH: There were debates

9   after the Attorney General changed position, but

10   the -- the change was due to the Attorney

11   General's opinion? Is that right?

12   MR. TAUB: That -- that -- that was

13   the change that was made in 1981.

14   JUSTICE GORSUCH: Okay. All right.

15   And then I -- I do want to understand this

16   theory. So a -- a -- a private entity can

17   provide a -- a public education in Maine?

18   MR. TAUB: Yes.

19   JUSTICE GORSUCH: A private entity in

20   California can?

21   MR. TAUB: A private -- yes.

22   JUSTICE GORSUCH: It just can't have

23   too much religious entanglement?

24   MR. TAUB: It's not that it has too

25   much religious entanglement. It's that --

1   JUSTICE GORSUCH: Well, some might be

2   okay, but some --

3   MR. TAUB: It's --

4   JUSTICE GORSUCH: -- some might not

5   be --

6   MR. TAUB: Well --

7   JUSTICE GORSUCH: -- I believe was

8   your answer to the Chief Justice.

9   MR. TAUB: -- the ones that would not

10   be okay are the ones that are instilling

11   religious beliefs in children.

12   JUSTICE GORSUCH: Okay. How does that

13   not discriminate against minority religious

14   viewpoints or ones that are unorthodox because

15   some -- and favor religions that are more

16   watered down, some might say, or more -- more

17   majoritarian, more comfortable with what a --

18   what a -- a bureaucrat in Bangor might say?

19   MR. TAUB: I don't see that that's --

20   that's an issue at all. This isn't an issue

21   about how watered down the religion is. This is

22   an issue just about -- about whether religious

23   beliefs are -- are being instilled.

24   Whether those are watered-down

25   religious beliefs or more vigorous --

1   JUSTICE GORSUCH: Oh, but -- but I
2   thought some were okay, but there comes a line
3   that it's too much.
4   MR. TAUB: No, there -- there's --
5   there's -- there's no -- there -- there -- there
6   is not a school that instills religious beliefs
7   that would be eligible for -- for our program.
8   JUSTICE GORSUCH: Thank you.
9   CHIEF JUSTICE ROBERTS: Justice
10   Thomas?
11   Justice Breyer?
12   JUSTICE BREYER: I would like to ask
13   you, because Mr. Bindas said, which is --
14   leaving my views out of it, which have been in
15   dissents and so forth, that this really is the
16   same as Zelman. I mean, in Zelman, the -- the
17   state provides -- provided tuition money so that
18   the children's parents could choose what
19   religious school to go to.
20   That's pretty much, I think, my
21   recollection is. And so what's the difference
22   here?
23   MR. TAUB: So --
24   JUSTICE BREYER: This parent chooses a
25   school and the state supplies some money.

 1   MR. TAUB: So the first important

 2   point is that Zelman was about what a state is

 3   permitted to do, not what about a state is

 4   required to do.

 5   So -- so, in Zelman, this Court said

 6   that it was permissible for the state to allow

 7   the school vouchers to be used at religious

 8   schools. But -- but the other significant

 9   aspect is that in Zelman, the state was

10   providing a program for -- for parents who

11   wanted to opt out of the public school system,

12   for -- for parents who wanted to send their kids

13   to private schools because of a failing public

14   school system.

15   In Maine, our -- our tuition program

16   is part and parcel to our public schools. It's

17   -- it's available for that very tiny percentage

18   of kids who live in districts who otherwise

19   wouldn't be able to receive a public education.

20   It is only those children who are allowed to

21   participate in this tuition program. And so --

22   JUSTICE BREYER: So you're -- for you

23   to basically win, it seems to me, you would have

24   to fall within the -- what Justice Kagan said is

25   this -- this area where the state has a degree

 1   of leeway, is that right?

 2   MR. TAUB: Yes. I think -- I think

 3   there's two ways that we win. I think the one

 4   -- the first way we win is if the Court agrees

 5   that this is part of Maine's public education

 6   program.

 7   And then I think the other way that we

 8   can win is if the Court agrees that when -- that

 9   when it comes to spending programs, just like

10   with free speech, the state is allowed to use

11   its pocketbook to promote the values that it has

12   decided it wants to promote. And so this is a

13   spending program, and what Maine wants to --

14   wants to advance is religious neutrality. We

15   want schools to be neither --

16   JUSTICE BREYER: I --

17   MR. TAUB: -- for nor against any

18   particular religion.

19   JUSTICE BREYER: -- I got it. Okay.

20   CHIEF JUSTICE ROBERTS: Justice Alito?

21   JUSTICE ALITO: Well, on that point,

22   suppose a school inculcates a purely

23   materialistic view of life.

24   Would that be -- would that be okay?

25   MR. TAUB: So, I mean, this is

 1   something that we -- that we've thought about,

 2   and I think there -- there are other aspects of

 3   -- of -- of what a school could do that would be

 4   inconsistent with a public education.

 5   Now what the Maine legislature had in

 6   front of it was it had a set of -- of sectarian

 7   schools and it had a set of secular schools, and

 8   -- and the one thing that the legislature knew

 9   is that it did not want to have schools that

10   inculcate religion as part of the public

11   education program.

12   Now it's possible that, you know, down

13   the road some school might pop up that is

14   teaching something else, not religion but

15   something else, say, Marxism or Leninism or, you

16   know, white supremacy. Clearly, those kinds of

17   schools would be doing something completely

18   inconsistent with a public education.

19   JUSTICE ALITO: But, as of now, that

20   would not prohibit a parent from getting funding

21   to send a child to one of those schools?

22   MR. TAUB: So, be -- be -- because

23   those are hypothetical situations that the

24   legislature has never had to confront, it hasn't

25   addressed that in the legislation.

1   But there's no doubt, Your Honor, that

2   if a white supremacy school tried to participate

3   in Maine's program, the legislature would

4   swiftly act to say, no, you know, beyond being

5   religiously neutral, you also can't teach

6   principles of -- of -- of hatred.

7   JUSTICE ALITO: I understand that.

8   But, as of now, the only thing that you want to

9   make sure that the schools that are covered by

10   this cannot do is that they can't inculcate

11   religion --

12   MR. TAUB: Yeah, I mean -- I mean --

13   JUSTICE ALITO: -- even if it's -- you

14   know, even if it's a religion that promotes

15   tolerance of all religious beliefs, if it's

16   religiously based, no?

17   MR. TAUB: Again, I mean, I don't want

18   to quibble with -- with words, but it's not just

19   that it's religiously based. It's that it's

20   instilling religion in the children who attend

21   that. And -- and that is because that is the

22   defining characteristic and I think this Court

23   has recognized that that's a defining

24   characteristic of a public education.

25   And so -- so that is the thing that

1   the legislature has controlled for because

2   that's what actually exists on the ground. We

3   actually have schools that instill religious

4   beliefs. We -- we don't have schools that are

5   instilling Leninism or white supremacy.

6   CHIEF JUSTICE ROBERTS: Justice

7   Sotomayor?

8   JUSTICE KAGAN: But just to follow up

9   on that point, you're confident that that would

10   -- that kind of school would not be funded

11   because -- a white supremacist school, because

12   it's outside the bounds of your program, is that

13   right?

14   MR. TAUB: I mean, yes, Your Honor. I

15   -- I think it's -- it's -- it's unfair for --

16   for the -- for a legislature to be expected to

17   legislate against every hypothetical outlandish

18   situation that could come forward. So it's

19   incredibly unlikely that we would ever have a

20   white supremacy school applying to become part

21   of our public school program.

22   But knowing what I know about Maine

23   and our legislature, that school would -- there

24   -- a way would be found to ensure that that

25   school is not allowed to participate.

1   JUSTICE ALITO: Well --

2   JUSTICE KAGAN: Do you --

3   JUSTICE ALITO: -- could I follow up?

4   I'm sorry.

5   JUSTICE KAGAN: No, please.

6   JUSTICE ALITO: No, go ahead.

7   JUSTICE KAGAN: Go ahead.

8   JUSTICE ALITO: Would you say the same

9   thing about a school that teaches critical race

10   theory?

11   MR. TAUB: Whether that school would

12   be eligible?

13   JUSTICE ALITO: Yeah.

14   MR. TAUB: So I think that that is

15   something that the legislature would have to

16   look at. I mean, that one's closer because,

17   frankly, I don't -- I don't really know exactly

18   what it means to teach critical race theory. So

19   I think -- I think the Maine legislature would

20   have to look at what that actually means.

21   But -- but I -- I will say this, that

22   -- that if -- that -- that if teaching critical

23   race theory is -- is -- is antithetical to a

24   public education, then the legislature would

25   likely address that.

1   CHIEF JUSTICE ROBERTS: Justice Kagan?

2   JUSTICE KAGAN: You've been asked

3 quite a number of questions on your time up

4 there about, you know, hard cases, also sort of

5 odd cases.

6   I just want to know what's the hardest

7 case you have actually -- the Department of

8 Education has actually ever been confronted with

9 in this area?

10   MR. TAUB: So we've never really had a

11 hard case. In 20 years worth of records, we've

12 identified three schools where there was any

13 issue raised about whether they were eligible.

14   The first school was a seminary

15 school, and so that was clearly ineligible. We

16 told them that, and we never heard back.

17   There was another school that, even

18 though it indicated it was -- it was

19 non-sectarian, it -- it disclosed or -- or a

20 Department of Education official learned that --

21 that "its" -- "its student life centers around

22 our chapel." And it also had a religious

23 affiliation. And so the state responded that it

24 doesn't look like you're eligible, but, if you

25 want to provide us with more information, we'll

1   consider it, and we never heard anything more

2   from that school.

3   And then the third -- the third

4   school, the Cardigan Mountain School, was a -- a

5   school that we identified as having a chapel,

6   and so we -- we wrote to the school and said, is

7   this a mandatory chapel service? And they said,

8   well, it is, but the chapel is just the biggest

9   building that we have on campus, and so, when we

10   have our student assemblies, that's where we

11   hold them, but there's nothing religious that

12   goes on there. And so we said, okay, that's

13   fine.

14   Those are the only -- in 20 years,

15   those are the only situations that we have had

16   where we've had to make those kinds of

17   decisions.

18   JUSTICE KAGAN: I mean, I would think

19   all the religious schools I know of -- and, you

20   know, it could be Catholic schools or it could

21   be evangelical Christian schools or it could be

22   Muslim schools or Jewish schools of any

23   persuasion, not just Orthodox but any Jewish

24   schools, I mean, if somebody said to them, are

25   you a religious school, they would have no

1   trouble saying, yes, we are, right?

2   MR. TAUB: They're not trying to hide

3   this, Your Honor. They're proud of it, and they

4   should be. I mean, these schools have an

5   important place in our community. And so

6   they're not trying to hide or -- or pull a fast

7   one over us. They're proud of -- of being a

8   school that instills religion, and they will

9   tell us that.

10   JUSTICE KAGAN: Thank you.

11   CHIEF JUSTICE ROBERTS: Justice

12   Gorsuch?

13   JUSTICE GORSUCH: Yeah, just to follow

14   up on that. So the Cardigan school had a chapel

15   in the middle of campus, and it was allowed to

16   participate.

17   MR. TAUB: Yes.

18   JUSTICE GORSUCH: But the Kent school,

19   which was the second one you mentioned, though

20   you didn't identify it by name, an Episcopal

21   school, said it's not owned or affiliated with

22   the church, but it was not allowed to

23   participate, right?

24   MR. TAUB: Well, what we told the

25   school is that, based on our review, because you

1   say that your life centers around your chapel

2   and be -- because --

3   JUSTICE GORSUCH: Right. It was not

4   allowed to participate, right?

5   MR. TAUB: Well, they were invited to

6   provide more information.

7   JUSTICE GORSUCH: More information,

8   but they were denied at that time?

9   MR. TAUB: Yes.

10   JUSTICE GORSUCH: Okay. So somebody

11   in Maine, in Bangor, has to sit down and decide

12   Cardigan good/Kent bad, right?

13   MR. TAUB: Yes, Your Honor, but these

14   were easy calls to make.

15   CHIEF JUSTICE ROBERTS: Justice

16   Kavanaugh?

17   JUSTICE KAVANAUGH: If -- if the state

18   said that you can use the funds for a secular

19   private school or a Protestant private school

20   but not a Catholic or Jewish or Muslim private

21   school or any other religious private school, I

22   assume you would agree that would be

23   problematic?

24   MR. TAUB: Of course, Your Honor.

25   JUSTICE KAVANAUGH: Okay. So, when it

 1   says that you can use it for a secular private

 2   school but not a Protestant, Catholic, Jewish,

 3   or Muslim or any other religious private school,

 4   you say that's -- that's okay, though?

 5   MR. TAUB: Well, I mean, I think that

 6   this Court has recognized, for example, in the

 7   school prayer cases that -- that the -- the

 8   absence of religion isn't -- isn't animosity

 9   towards religion.

10   So what we are trying to achieve are

11   schools that are religiously neutral. And --

12   and -- and just to be clear --

13   JUSTICE KAVANAUGH: But if you -- keep

14   going.

15   MR. TAUB: -- if -- if -- if -- if

16   there were a school that -- that teached sort of

17   antireligion, that -- that -- that taught kids

18   that there is no God, that you should reject all

19   religion, that school wouldn't be eligible

20   either. What we want is religious neutrality.

21   JUSTICE KAVANAUGH: But the -- the

22   problem, I think, and the tension with what you

23   just said as to those two questions is that our

24   case law suggests that discriminating against

25   all religions, as compared to secular,

 1   comparable secular, is discriminatory, just as

 2   it is discriminatory to say exclude the Catholic

 3   and the Jewish and include the Protestant.

 4   And so it's not exclusion of religious

 5   people and religious institutions from public

 6   benefits solely because they're religious is

 7   itself discriminatory.

 8   So how do -- I mean, we said that

 9   Trinity Lutheran said odious to our

10   Constitution. How do you deal with -- with

11   that?

12   MR. TAUB: So I think there's a nuance

13   going on here that I just want to make sure I

14   can clarify, that -- that I think that there --

15   there is a difference between sort of state

16   regulations, in other words, like state

17   prohibitions, and -- and state programs that are

18   providing funding.

19   And so I think, when it comes -- when

20   it comes to prohibitions, a state can't

21   discriminate based on status or use. So you

22   can't -- you -- you can't say a person can't be

23   Catholic and you also can't say that a person

24   can't take Communion.

25   I also think, when it comes to subsidy

1   programs, there, you can't discriminate based on

2   status. So you can't say that we have a

3   playground program, but you can't -- you're not

4   eligible if you're religious.

5   But I think that there's a fourth

6   category, and -- and the fourth category is a

7   subsidy program that -- where -- where the

8   subsidy is being used for a specific purpose,

9   and it excludes purposes that are -- that are

10   contrary to what the government is trying to

11   establish and are going to be used to directly

12   advance religion. I think that is the one very

13   narrow category where there is a real

14   distinction between status and use.

15   JUSTICE KAVANAUGH: One last question,

16   which is to pick up on Justice Breyer's

17   questions earlier, which I think identified a

18   real issue here, which is strife that is

19   created.

20   But what do you say to -- to those who

21   would say, by excluding someone who's religious

22   from a state program and creating this feeling

23   of exclusion for people who are told your school

24   isn't good enough solely because it's religious,

25   go to Exeter or Andover, but you can't go to the

 1   Bangor Christian or the DeMatha or whatever the

 2   religious school is, doesn't that also create a

 3   possibility of -- of strife?

 4   MR. TAUB: So a few points there, Your

 5   Honor. I -- I think what the real strife would

 6   be, first of all, I think there would be strife

 7   among parents who live in districts that have

 8   public schools or contract with schools, because

 9   I think the strife there would be, how come I

10   can't send my kids to religious schools at

11   public expense but these other kids can?

12   So I think that -- that -- that's one

13   source of strife. I think another source of

14   strife would be trying to explain to taxpayers

15   in Maine why your money is being used to go to a

16   school that teaches that boys are better than

17   girls, that actively discriminates against

18   certain protected classes. So I think that's --

19   that that's a second element of strife.

20   But I think the other point I want to

21   make is -- is we are not telling people that you

22   can't go to a school because you're religious.

23   There are plenty of people in Maine who want to

24   send their kids to religious schools for reasons

25   wholly unrelated to the religious aspects of the

1   school. It might be because they have a better

2   hockey team or they have better academics or

3   they just have more discipline.

4   And -- and we tell the same thing to

5   those parents. It's not that you're religious

6   that you can't go to that school. It's just

7   those schools aren't eligible for our program.

8   JUSTICE KAVANAUGH: Appreciate your

9   answers. Thank you.

10   CHIEF JUSTICE ROBERTS: Justice

11   Barrett?

12   JUSTICE BARRETT: I have one -- I have

13   a question, but I have one quick follow-up to an

14   answer you gave Justice Kavanaugh.

15   You said that if a private secular

16   school taught that all religions were bad,

17   religions were bigoted, that they would not be

18   eligible for participation in Maine's program.

19   Why? That's not sectarian, is it?

20   MR. TAUB: Well, the -- the goal of

21   the program is religious neutrality. And so,

22   you know, we've -- we've never heard of a school

23   that's sort of antireligious, a school that

24   teaches that all religion is bad. But -- but

25   it's clear that such a school would not be

 1   religiously neutral. And so, because the whole

 2   purpose of the program is to --

 3   JUSTICE BARRETT: But the statute says

 4   non-sectarian. It doesn't say religiously

 5   neutral, right?

 6   MR. TAUB: Well, that's true. But --

 7   but I think that -- that -- that the spirit and

 8   purpose of the program -- and -- and -- and

 9   we've talked about this with the commissioner of

10   the Department of Education, and -- and -- and

11   her position is -- is the same as ours, that --

12   that a school that is -- that is antireligious

13   is not religiously neutral, and so it would not

14   qualify for this program.

15   JUSTICE BARRETT: Thank you. And my

16   question is as follows. It kind of goes back to

17   Justice Thomas's questions about rough

18   equivalent of a public school.

19   So all schools, in making choices

20   about curriculum and the formation of children,

21   have to come from some belief system. And in

22   public schools, the public school -- the school

23   boards, the districts are making that choice,

24   those choice of classes to be taught and the

25   kind of values that they want to inculcate in

 1   the students.

 2   Is there any kind -- I mean, how would

 3   you even know if a -- if a school taught all

 4   religions are bigoted and biased or, you know,

 5   Catholics are bigoted or, you know -- or we take

 6   a position on the Jewish-Palestinian conflict

 7   because of our position on, you know, Jews,

 8   right?

 9   How would they even know? Because

10   it's my understanding that in choosing whether a

11   non-sectarian school can be funded or not,

12   you're not engaging in that kind of oversight

13   about what the belief systems are of the school.

14   So long as they're not sectarian, it's a

15   thumbs-up?

16   MR. TAUB: So I will answer that --

17   that question, Your Honor. Obviously, I will

18   answer your -- your question, but -- but I -- I

19   just -- I just want to make this point first

20   because this might be lost in -- in the record.

21   Over 99.8 percent of children in Maine

22   go either to a public school or one of what we

23   call the Big 11, which are schools that enroll

24   at least 60 percent publicly funded students but

25   -- but, in reality, enroll more like 95 percent

 1   publicly funded students. So it's -- it's

 2   only .2 percent of students that are going to

 3   other private schools.

 4   And the Department of Education is

 5   very familiar with the curriculum at the Big 11.

 6   So -- so the Department is very comfortable that

 7   when it comes to those schools where almost

 8   every student is going, we know what's being

 9   taught there.

10   But -- but, to answer Your Honor's

11   question, there is a process that schools have

12   to go through to become part of our program, and

13   through that process, if a Department of

14   Education official says -- sees information that

15   -- that -- that the school seems to be teaching

16   antireligious views, that would raise a red

17   flag, and -- and that would result in the kind

18   of inkling --

19   JUSTICE BARRETT: But it was my

20   understanding that that wasn't part of -- just

21   based on the record, and I may not understand

22   it, but as it was laid out in the briefs, it was

23   my understanding that if the school is

24   accredited, that there weren't particular

25   curricula requirements the school had to satisfy

 1   to be eligible for participation in the program.

 2   You know, a school, for example, could be single

 3   sex. It didn't have to be co-ed. And I assume

 4   all the public schools in Maine are co-ed.

 5   I mean, it didn't have to match up

 6   along all of those metrics and that there was no

 7   formal examination into what kinds of values

 8   that the school was seeking to inculcate in

 9   students.

10   MR. TAUB: That is true, but -- but

11   what the Department of Education does when it

12   gets a new school apply is it does a little

13   homework, and so it'll go to the school's

14   website and say, okay, I've never heard of this

15   school before, I want to learn a little about

16   it. Or maybe it takes a look at the student

17   handbook.

18   And, you know, if the first sentence

19   in the handbook says that our school is designed

20   to promote white supremacy interests or our

21   school is designed to promote antireligion, that

22   is going to be a flag that's going to get

23   tripped, and that's going to result in the kind

24   of inquiry.

25   So you're absolutely right, Your

 1   Honor, that -- that -- that the schools are not

 2   submitting their curriculum to us as part of

 3   this process.

 4   JUSTICE BARRETT: And there's no visit

 5   to the school? There's no talking to the

 6   teachers? There's no -- it's just kind of what

 7   you can find on the website? And that's not --

 8   that's not pertinent to the statute because the

 9   statutory requirement is simply

10   sectarian/non-sectarian?

11   MR. TAUB: Yeah. I mean, in just the

12   run-of-the-mill cases, these schools are

13   well-known to us. They check off a box saying

14   they're either sectarian or non-sectarian.

15   JUSTICE BARRETT: Okay. I -- I

16   understand the Big 11.

17   MR. TAUB: Yeah.

18   JUSTICE BARRETT: But I think you

19   answered my question for these.

20   MR. TAUB: No, but -- but that's true

21   for -- for all schools.

22   JUSTICE BARRETT: Okay. Thank you.

23   CHIEF JUSTICE ROBERTS: Thank you,

24   counsel.

25   Mr. Stewart.

 1   ORAL ARGUMENT OF MALCOLM L. STEWART

 2   FOR THE UNITED STATES, AS AMICUS CURIAE,

 3   SUPPORTING THE RESPONDENT

 4   MR. STEWART: Thank you, Mr. Chief

 5   Justice, and may it please the Court:

 6   The judgment of the court of appeals

 7   upholding Maine's sectarian school exclusion

 8   should be affirmed. That is so for three basic

 9   reasons.

10   First, the government has far greater

11   latitude when it simply declines to fund

12   particular speech or religious exercise than

13   when it imposes affirmative barriers to that

14   speech or exercise.

15   Second, Maine has a legitimate

16   anti-establishment interest in declining to fund

17   the religious exercise in which Temple Academy

18   and BCS engage, even if the federal

19   Establishment Clause would permit the state to

20   fund those schools.

21   Third, the religious instruction these

22   schools provide is, by the schools' own account,

23   not severable from the secular components of

24   their instructional programs.

25   I welcome the Court's questions.

 1   JUSTICE THOMAS: Mr. Stewart, what

 2   exactly is an anti-establishment interest and

 3   where does it come from?

 4   MR. STEWART: The frame -- the framers

 5   adopted the anti- -- the Establishment Clause

 6   out of concern that excessive closeness between

 7   government and religion could harm both

 8   government and religion and cause public

 9   discord. And when we refer to an

10   anti-establishment interest, what we mean is

11   state, local, and the federal government should

12   have significant latitude, the play in the

13   joints to which Justice Kagan referred, to

14   attempt to prevent those harms from occurring,

15   even in circumstances where the federal

16   Establishment Clause would not compel them to

17   act.

18   For example, this Court has held that

19   state and local legislatures can begin their

20   sessions with a brief prayer. But I think it

21   would be extravagant to suggest that any

22   legislative body is required to do so.

23   If a particular state or a particular

24   local legislature said, within our jurisdiction,

25   this practice has caused more harm than it has

1   good, it has caused discord, people believe that

2   we are preferring particular religions even

3   though that was not our intent, it could

4   discontinue the practice.

5   It would be going beyond what the

6   federal Establishment Clause requires, but it

7   would still be pursuing legitimate

8   anti-establishment interests in the sense of

9   attempting to prevent the general harms at which

10   the Establishment Clause is directed.

11   And I'd say it's entirely clear that's

12   the way it works on the Free Exercise Clause --

13   on the free exercise side. That is, it's

14   uncontroversial that governments can do more to

15   accommodate religion than the Free Exercise

16   Clause requires.

17   And so sometimes this is done at a

18   fairly particular level where there's a -- a

19   specific state law, a specific prohibition, and

20   a specific religious exemption. Sometimes it's

21   done at a more wholesale level, like with RFRA

22   and RLUIPA, where the federal -- the Congress

23   says, in a wide variety of context, you have to

24   make certain accommodations to religious

25   practice, even though the Free Exercise Clause

  1   itself would not require that.

  2   It's natural in that circumstance to

  3   speak of the government vindicating free

  4   exercise values or pursuing free exercise

  5   interests, even though the Free Exercise Clause

  6   doesn't compel that sort of action.

  7   And as Justice Kagan also suggested,

  8   different states and localities could decide to

  9   do it differently. One state could decide we

 10   will adopt religious exemptions to generally

 11   applicable laws only when the Free Exercise

 12   Clause requires us to do that.

 13   Another state or locality could say

 14   we're going to be significantly more

 15   accommodating because that's more in keeping

 16   with our traditions and it's more in keeping

 17   with what we perceive to be the likely public

 18   reaction to the various steps that we might

 19   take.

 20   So -- so there -- there -- as the

 21   Court has often emphasized, the Establishment

 22   Clause and the Free Exercise Clause, they may in

 23   some sense be in tension, but they don't compel

 24   a single course of action, that there is room

 25   for play in the joints, room for the -- the

1 government to exercise discretion as to what

2 balance it wants to strike.

3   The -- the next thing I'd want to say

4 is this is a case about what the government has

5 to subsidize, what it has to fund. It's not a

6 case about the government either imposing

7 affirmative restraints on religion or denying

8 generally applicable benefits to persons based

9 on religious exercise outside the program.

10   And I did want to speak to the

11 question that Justice Gorsuch raised about the

12 part in our brief that said parents can still

13 send their children for religious instruction

14 after school or on weekends. It was not our

15 intent to suggest that most religious parents

16 will or should regard that as a fully

17 satisfactory alternative.

18   Our principal point --

19   JUSTICE GORSUCH: I mean, in fact,

20 that would be pretty offensive to religious

21 beliefs, right?

22   MR. STEWART: It would be -- it -- we

23 are not trying to tell the parents what they

24 should do with their children.

25   JUSTICE GORSUCH: Well --

 1   MR. STEWART: Our -- our primary --

 2   JUSTICE GORSUCH: -- and -- and -- and

 3   you'd agree that, you know, in Thomas, for

 4   example, this Court's made clear that -- that

 5   you -- you don't have to choose between

 6   receiving a public benefit and your faith,

 7   right?

 8   MR. STEWART: That -- that's correct.

 9   But the question is -- the question is not

10   whether you can be denied the unrelated benefit

11   based on your faith or based on your religious

12   practice. It's whether the government has to

13   subsidize the religious practice itself, and --

14   JUSTICE GORSUCH: Fair -- fair enough.

15   But, once it creates the program, here, we have

16   a program that's been created, and I think that

17   goes back to the Chief Justice's point that, you

18   know, maybe they didn't have to create a

19   program.

20   But, once -- once they do, to suggest

21   that you don't have to choose between

22   participation in the program and your faith

23   because you can send your children to Sunday

24   School or to a Bible Study program at night

25   seems to suggest favoritism toward religions --

1   just react to this -- seems to favor religions

2   for whom that is an adequate substitute and

3   discriminate against religions for whom that is

4   not an adequate substitute.

5   MR. STEWART: I -- I think the state

6   is behaving neutrally in the sense that it says

7   we will fund secular education. We will not

8   fund religious instruction or an inculcation.

9   And it may be that to members of some religions

10   that will be a greater practical burden than to

11   others, but that doesn't --

12   JUSTICE GORSUCH: So, to the Orthodox

13   Jewish family, it is a burden, and to the

14   Protestant family, it may not be?

15   MR. STEWART: I -- I guess I would

16   speak -- I -- I -- I --

17   JUSTICE GORSUCH: You agree that's the

18   practical reality of the program?

19   MR. STEWART: I mean, obviously,

20   parents who would like to send their children to

21   religious schools full time during the day are

22   burdened by this rule in a way that parents who

23   have no interest in doing so would not be.

24   But -- but, to speak to a -- a

25   hypothetical that the Chief Justice raised, if

 1   -- if, for instance, the state decided we will

 2   provide aid for refurbishing athletic facilities

 3   and it will be available to secular and to

 4   religious schools alike, and -- some religious

 5   schools have robust athletic programs and they

 6   would benefit significantly from the assistance.

 7   Another religious school might say:

 8   Participation in athletics is contrary to our

 9   religious values. This money is useless to us.

10   If it's confined to -- to that parameter --

11   within those parameters, we would like the money

12   to use it for something that is as important to

13   us as athletics is to some other schools.

14   Clearly, they'd have no valid free

15   exercise claim. The state has chosen to

16   subsidize certain activities and not others.

17   It's done so on a religiously neutral basis. It

18   may be that that aid will be, practically

19   speaking, more valuable to members of some

20   religions than to others, but that doesn't

21   create a constitutional violation.

22   JUSTICE KAVANAUGH: But, at its core,

23   Mr. Stewart, you're suggesting that with, say,

24   two neighbors in -- in Maine, in a neighborhood,

25   and they both -- there's not a public school

1   available, and the first neighbor says: We're

2   going to send our child, children, to secular

3   private school, they get the benefit.

4   The next-door neighbor says: Well, we

5   want to send our children to a religious private

6   school, and they're not going to get the

7   benefit. And I don't see how your suggestion

8   that the subsidy changes the analysis. That's

9   just discrimination on the basis of religion

10   right there at -- at the neighborhood level.

11   MR. STEWART: Well, first, as Mr. Taub

12   said, it's not discrimination based on the --

13   the religion of the parents. Some parents

14   obviously send their children to religious

15   schools because they share the religious values.

16   Other parents may send the -- the children to

17   religious schools for a combination of other

18   reasons.

19   And -- and so there is a disparity in

20   treatment. It's not necessarily a disparity

21   based on the religion of the parents. But the

22   --

23   JUSTICE KAVANAUGH: Well, that's

24   slicing it pretty thin in the real world, I

25   think. It's discrimination against the

 1   different schools because of the religion and

 2   people who prefer those schools, prefer

 3   religious schools over secular schools.

 4   MR. STEWART: But -- but I think the

 5   -- still, the -- the response is the state is

 6   behaving neutrally in the sense that it will

 7   fund secular education and not religious

 8   education. And that -- that seems especially

 9   appropriate in a program like this one that, as

10   Justice Kagan was -- was saying earlier, it's

11   not intended to provide the broadest range of

12   possible choices. It's intended to provide a

13   substitute for public education in Maine.

14   JUSTICE KAVANAUGH: Why isn't it

15   treating people neutrally to tell them you're

16   all equal citizens without respect to your

17   religion, and so too all the schools that are

18   accredited are equal without respect to their

19   religion, whether you're secular, Catholic,

20   Jewish, what have you, you're all going to be

21   treated equally?

22   Isn't that the -- the neutral

23   position, is to suggest your religion does not

24   affect your qualification for a particular

25   public benefit, your religion or lack of

 1   religion doesn't affect your -- your

 2   qualifications in our society?

 3   MR. STEWART: I -- I mean, first, the

 4   state, as your question pointed out earlier,

 5   certain -- certainly couldn't distinguish among

 6   religions. It couldn't provide the funds to the

 7   Catholic school but --

 8   JUSTICE KAVANAUGH: Okay. And to stop

 9   you there, I think the lesson of some of the

10   cases is discriminating against all religions

11   versus secular is itself a kind of

12   discrimination that the Court has said is odious

13   to the Constitution at least in certain

14   contexts.

15   MR. STEWART: I -- I think that's a --

16   a valid general principle. I think the question

17   is whether to decline to fund religious

18   instruction while you are funding secular

19   instruction is a form of discrimination.

20   JUSTICE BREYER: Well, what is it --

21   MR. STEWART: And I think that -- that

22   there -- there is a sort of secular analog to

23   this where, in cases like Regan and in Cammarano

24   versus United States, if -- if a federal or

25   state tax code says a business can take a

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1    business expense deduction for the money it

2    spends advertising its product, but it can't

3    take a deduction for lobbying expenses or for

4    expenses on electoral advocacy, that -- that --

5    a distinction like that doesn't rest on any idea

6    that electoral advocacy and lobbying are

7    disfavored speech or that they are less

8    important.  To -- to the contrary, they're the

9    most important types of speech.

10            But the government in the secular

11   sphere can legitimately decide that precisely

12   because the topics addressed in lobbying and

13   electoral advocacy are so important and because

14   there is such a diversity of views on those

15   subjects, the government is going to stay clear

16   of anything that looks like funding or

17   subsidizing that speech.

18            And -- and, historically, the

19   government has had the same latitude with

20   respect to religious inculcation.  It can't

21   penalize people in some unrelated sphere because

22   they have engaged in religious instruction of

23   their children, but it can decline to fund the

24   religious instruction itself.

25            JUSTICE ALITO:  If a state -- if a law
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 1   like this drew a distinction between schools

 2   that teach that all religion is bad and schools

 3   that teach that religion is good, would that be

 4   permissible in the view of the government?

 5   MR. STEWART: No, it would not be, I

 6   think essentially for the same reason that a law

 7   that provided the money to Catholic schools but

 8   not to Jewish schools would -- would be no good,

 9   it would be a denominational preference.

10   We don't think, though, that --

11   JUSTICE ALITO: Well, do you see

12   anything in the Maine statute that would rule

13   out a subsidy for a parent who sends a child to

14   a school that teaches all religions are bad?

15   MR. STEWART: I don't see anything in

16   the Maine statute as currently written that

17   would naturally be construed in that way. The

18   -- the -- either the Department of Education or

19   a court in Maine could adopt a limiting

20   construction, or I think more likely, as Mr.

21   Taub said, if it -- if that became a prevalent

22   practice, the legislature could step in.

23   So, while we don't think it would be

24   constitutional for Maine to distinguish on that

25   basis, we don't think that the absence of an

 1 express provision in the statute to that effect

 2 is a basis for striking the statute.

 3   JUSTICE ALITO: Don't we have to judge

 4 the constitutionality of the statute as it now

 5 stands?

 6   MR. STEWART: Well, I think what they

 7 are -- I think we should be asking, is the

 8 statute constitutional as applied to these

 9 particular Petitioners? And if these

10 Petitioners could point to an example in which a

11 school was approved for funding even though it

12 provided atheistic or antireligious instruction,

13 then that might be a valid basis for an

14 as-applied claim.

15   But the -- the theoretical possibility

16 that could happen is -- is not a ground for

17 invalidating the statute. And, obviously, the

18 -- the Court has dealt with a lot of funding

19 programs and a lot of issues under both the

20 Establishment Clause and the Free Exercise

21 Clause, deciding certain practices are

22 constitutional or not.

23   I don't know of any case in which the

24 Court has said the absence from this statute of

25 some express exclusion for atheist schools is

 1   itself a basis for striking the law down.

 2   If -- if I may, I'd like to say just

 3   one -- if I may, I'd like to say just --

 4   JUSTICE GORSUCH: Mr. Stewart, I do --

 5   I do have one question. I -- I -- I just want

 6   to confirm my understanding. I -- I didn't see

 7   in the government's brief any strict reliance or

 8   suggestion that the Court should rely on a

 9   status-use distinction. Rather, I saw this

10   analogy to government speech. Is that right?

11   MR. STEWART: Well, I think we are

12   advocating the status-use distinction, but I

13   think -- not -- not the analogy to government

14   speech so much because I don't think it's

15   necessary to treat this as government speech.

16   We are relying on the principle in the

17   Free Speech Clause cases that the government has

18   substantially more latitude when it declines --

19   JUSTICE GORSUCH: I -- I'm sorry.

20   That's what I meant to say, as opposed to a

21   strict reliance on a status-use distinction.

22   MR. STEWART: I -- I think our view is

23   the status-use distinction is just different

24   words for the same concept. That is, the --

25   JUSTICE GORSUCH: Well, the government

1 -- the government wouldn't -- I mean, maybe it

2 would. Does the government see a basis for

3 distinguishing between a tax on persons who wear

4 yarmulkes as opposed to a tax on Jewish persons,

5 to borrow from one of our cases?

6 MR. STEWART: No, but we don't view

7 the status-use distinction as being based, as --

8 as Justice Kagan was saying earlier, on a

9 distinction between religious belief and

10 religious conduct. We -- we think the

11 status-use distinction means, on the one hand,

12 the state can decline to fund your religious

13 exercise, but it cannot define -- decline to

14 give you an unrelated benefit based on the fact

15 that you have engaged in religious exercise

16 outside the program.

17 CHIEF JUSTICE ROBERTS: Thank you,

18 Mr. Stewart. What is your answer to the

19 questions I -- I posed to your friend from Maine

20 about the two churches, one that doesn't have a

21 religious interest in infusing the school with

22 its -- with its religion but -- or -- or it

23 does? Its -- its religious value is service to

24 others, and they're doing that by providing a

25 perfectly secular school, and the other that has

 1   the religious teaching that it should infuse its

 2   children with the values of the faith and they

 3   have a school like that?

 4   As I understood it, we have -- the

 5   former school can participate in this program,

 6   but the latter cannot.

 7   MR. STEWART: I -- I -- that is

 8   correct. And I think, even though it might

 9   appear in -- in one sense to be discriminatory,

10   it actually avoids a more insidious form of

11   discrimination. That is, there are a lot of

12   circumstances in which the government decides to

13   fund or subsidize activities that it believes to

14   be in the public interest.

15   And the general rule is, as long as

16   you are prepared to do those things, you're

17   entitled to the funding whether you're religious

18   or not. And if we said that the person who did

19   those things with a religious reason in mind is

20   going to be treated differently from the person

21   who did them with purely secular motivations,

22   that would be problematic.

23   And to -- to take your hypothetical

24   and -- and compare it to a situation in the

25   public schools, as Mr. Taub was pointing out,

1   public schools attempt to teach virtues like

2   honesty, trustworthiness, kindness,

3   consideration for those less fortunate, and,

4   certainly, those are essentially secular values.

5   They certainly correspond to values that many

6   people hold as a matter of religious conviction.

7   But there's no question those values

8   could be taught in the public schools. And if a

9   particular public school teacher was especially

10   committed to those values because of her

11   religion, that wouldn't be a problem. But, if

12   the teacher at the public school said you should

13   behave in this way because that was the way that

14   Jesus Christ behaved and he was the son of God,

15   that would be problematic.

16   We would look at the content of the

17   instruction the public school teacher was

18   providing, not her internal motivation for

19   speaking as she did.

20   CHIEF JUSTICE ROBERTS: Thank you.

21   Justice Thomas?

22   JUSTICE THOMAS: No questions, Chief.

23   CHIEF JUSTICE ROBERTS: Justice

24   Breyer?

25   JUSTICE BREYER: I -- I might ask this

 1   because it's related to what Justice Kavanaugh

 2   said and -- and what you're saying.

 3   I mean, it is discriminatory against

 4   religion, but I think the Establishment Clause

 5   problem or interest underlying it forever has

 6   been beware if the government gets too involved.

 7   One, people will think the government favors

 8   some things as opposed to others and that that

 9   will cause strife.

10   Two, the Vietnamese boat people will

11   have no problem in Los Angeles, but they sure

12   will in Maine because there aren't enough of

13   them. And there are a lot of religious people

14   who will say, why are you preferring the

15   Catholics or the Jews to the Vietnamese boat

16   people? See? And you say I have an answer to

17   the discrimination, there aren't enough of you.

18   Oh, oh, I see. Minority, okay.

19   But there's a third one which you

20   haven't mentioned, which I learned out of a case

21   in the First Circuit, which was really tough,

22   religious reason for teaching about Honduras in

23   the geography class in way X. School board says

24   way X, you can't do it; you're disqualified as a

25   teacher. They say but that's how we're supposed

 1   to do it, okay? And I have never seen emotions

 2   rise so high in a courtroom.

 3   And, suddenly, you get into teaching

 4   that involves worship and religious principle.

 5   You don't know what kinds of inter-religion or

 6   why are you doing it for the religious people

 7   but not me, I'm not religious, dah, dah, dah,

 8   dah, dah. The strife that can be involved.

 9   All right. Now I thought that was a

10   good reason why Zelman was wrong, but my

11   colleagues did not. Now we have, in fact, a

12   different issue: Can a state have a different

13   judgment than Ohio? Can Maine differ from Ohio?

14   That's the issue.

15   All right? Hey, we have a principle,

16   we have 50 states and a huge country, and so why

17   not, I say, let some decide one way, let some

18   decide the other. They have different kinds of

19   populations.

20   Now you see what I have? I have a

21   great theory. Is there any law supporting that?

22   MR. STEWART: Oh, I think there's the

23   law that I referred to and that Justice Kagan

24   referred to, the idea of the play in the joints,

25   the idea that there is a fairly significant

 1   sphere of activity in which the state can

 2   legitimately choose either to fund or not to

 3   fund religious institutions.

 4   And in making that decision, state and

 5   local legislators can -- cannot just decide what

 6   would be the best solution for the whole

 7   country. Legislators in a particular part of

 8   the country can decide, where we live, excluding

 9   the religious schools would be more likely to be

10   perceived as a form of religious discrimination

11   and to cause turmoil, and, therefore, we won't

12   do it. In another part of the country, the

13   legislators might say including the religious

14   institutions is more likely to cause strife.

15   Obviously, there are limits. Espinoza

16   and Trinity Lutheran made clear that you can't

17   exclude the institution all -- altogether with

18   respect to secular activities, but there is

19   significant room for regional variation.

20   CHIEF JUSTICE ROBERTS: Justice Alito?

21   JUSTICE ALITO: If the program allowed

22   parents to send their children to any accredited

23   school anywhere in the country, which is what

24   this program seems to allow, with the exception

25   of so-called sectarian schools, would -- how

 1   would that cause strife? And add into that the

 2   fact we're told that Maine didn't rule out these

 3   schools until -- for many, many years, the

 4   parents were permitted to send their -- their

 5   children to those schools.

 6   Was there -- are you aware of a

 7   history of strife? Explain -- you know, it's

 8   one thing to say strife. Could you explain in

 9   more concrete terms how you see a potential for

10   religious strife arising out of the acceptance

11   of the Petitioners' argument here?

12   MR. STEWART: I think, first, to speak

13   to the history briefly, until 19 -- it was in

14   1980 that the Maine attorney general first

15   analyzed the question, and the attorney general

16   said, I think it would be unconstitutional under

17   then extant Supreme Court precedent to fund

18   sectarian schools, and he explained that he

19   meant schools whose dominant purpose is the

20   promotion of religious beliefs.

21   And -- but, after Zelman was decided

22   in 2003, the Maine legislature reexamined the

23   question, decided to maintain the bar in effect

24   on the books based on independent reasons.

25   But, to -- to speak to the strife

1   point in particular, I think it is likely,

2   contrary to what was said earlier, that allowing

3   the subsidy for religious schools will tend to

4   favor -- favor majoritarian religions because,

5   in order to have a religious school, you don't

6   have -- you have to have more than a single

7   adherent to a particular belief system. You

8   have to have a critical mass of people within

9   the community who are willing to support the

10   school.

11   And so those are going to tend to be

12   religions of majoritarian schools. And there is

13   at least the spectacle as -- the specter, as Mr.

14   Taub said, of people in the community saying:

15   You are funding religions other than our own,

16   and you are funding religious schools that

17   promulgate beliefs that are antithetical to

18   ours.

19   CHIEF JUSTICE ROBERTS: Justice

20   Sotomayor?

21   JUSTICE SOTOMAYOR: You know, I look

22   at the history in this area and what I see is

23   that at the founding there weren't public

24   schools. They were self-taught, but most of the

25   schools were private. And, yes, there's a

1   history of some states, not all, subsidizing

2   some religious schools. And then we have later

3   a movement -- much later -- a movement towards

4   public schools. But what I don't see after the

5   creation of public schools is a tradition of

6   history -- or history of continued support of

7   religious schools.

8   Am I reading the history right?

9   MR. STEWART: I mean, I don't -- I

10   don't want to speak too categorically. I think

11   you're right, there was a movement in the

12   direction of public education. It, of course,

13   wasn't until the 1960s that this Court issued

14   the school prayer decision, so -- so it wasn't

15   even until fairly recently that the Court said

16   you can't have an overt religious component in

17   the public schools.

18   So I -- I think what we would draw

19   from the history is different governmental units

20   have done it different ways at different points

21   in time, and that may weigh in favor of an

22   argument that particular practices should be

23   permissible under the Establishment Clause, but

24   it shouldn't preclude particular states from

25   deciding we don't want to do this here.

1   JUSTICE SOTOMAYOR: Thank you.

2   CHIEF JUSTICE ROBERTS: Justice Kagan?

3   JUSTICE KAGAN: Mr. -- Mr. Stewart,

4   how should we analyze the standing question

5   here? I mean, the Petitioners here say, look,

6   your -- what this legislation does is to prevent

7   us from even seeking a school that would accept

8   the money, and so the fact that we haven't come

9   up with a particular school that would accept

10   the money and that meets our religious criteria

11   is irrelevant. Why isn't that right?

12   MR. STEWART: I mean, the cases they

13   were relying on were the Northeastern Florida

14   General Contractors case and Heckler versus

15   Mathews, which I believe was a sex-based

16   disparity in public benefits. And -- and in

17   both of those cases, the plaintiff himself was

18   saying, I have suffered direct overt

19   discrimination in the sense that the law I am

20   challenging subjects me to unfavorable treatment

21   based upon my own characteristics.

22   And -- and we don't have that here.

23   Maine law doesn't distinguish between religious

24   and non-religious parents. The Petitioners are

25   not challenging any aspect of the Maine statute

1   that defines the class of parents who can seek

2   the tuition subsidy.

3   The provision it challenges is the

4   provision that says what characteristics does

5   the school have to have in order for the school

6   to be -- get approved school status and

7   potentially be eligible for the funds. And I

8   think it's entirely clear that if the schools

9   were the plaintiffs and all they were willing to

10   say is, if this is struck down, we would think

11   about accepting the money, that wouldn't be good

12   enough under a case -- a more recent case like

13   Carney versus Adams.

14   And so, if the plaintiffs' claim is

15   essentially derivative of an alleged

16   constitutional wrong done to the schools, it

17   would be anomalous to say that the plaintiffs

18   have standing even though the schools do not.

19   CHIEF JUSTICE ROBERTS: Justice

20   Gorsuch?

21   JUSTICE GORSUCH: Would the government

22   -- I -- I -- I can't believe it would, but --

23   but would the government permit an argument of

24   -- for discrimination against persons based on

25   an unsupported hypothetical possibility of

 1   strife if the discrimination were based on race

 2   or sex or some other basis like that?

 3   MR. STEWART: It -- it depends on what

 4   you mean by discrimination. Ordinarily, you

 5   could not impose affirmative disadvantages, but

 6   government can make funding decisions all the

 7   time, can decide what activities to subsidize

 8   and what activities not to subsidize based on

 9   fairly speculative inferences about what results

10   might occur.

11   That -- that's -- that's the whole

12   point of the government's -- of the Court's free

13   speech cases that say the government has a lot

14   more latitude when it's making funding

15   decisions.

16   JUSTICE GORSUCH: Including on the

17   basis of sex and race and other personal

18   characteristics like that?

19   MR. STEWART: No. And I -- if -- if

20   the statute here said that religious parents

21   generally or parents of a particular religion

22   can't apply for the school subsidy, that would

23   clearly be no good. Here -- here, what the

24   state is saying is we don't want to subsidize --

25   JUSTICE GORSUCH: So, if we viewed the

 1   statute as you just described it, it would be no

 2   good in your terms?

 3   MR. STEWART: If -- if you read the

 4   statute to say that religious parents can't seek

 5   the subsidy even for a secular school, but --

 6   JUSTICE GORSUCH: Then the statute

 7   would be no good.

 8   MR. STEWART: Then the statute would

 9   be unconstitutional.

10   JUSTICE GORSUCH: Okay. Thank you.

11   MR. STEWART: But nobody is reading

12   that way. Petitioners are not arguing that

13   that's what the statute says.

14   CHIEF JUSTICE ROBERTS: Justice

15   Kavanaugh?

16   JUSTICE KAVANAUGH: I just want to

17   follow up on that question from Justice Gorsuch.

18   I think it's important on this public discord or

19   -- or strife issue to emphasize that, as I

20   understand it, they are seeking equal treatment,

21   not special treatment.

22   They're -- they're saying don't treat

23   me worse because I want to send my children to a

24   religious school rather than a secular school.

25   Treat me the same as the secular parent next

      1   door. I think that's what they're asking for,

      2   is equal treatment.

      3   Special treatment cases are where

      4   you're asking for an exemption from generally

      5   applicable law. That's the Smith kind of cases.

      6   Those are -- those are hard cases. But, here, I

      7   think all they're asking for is equal treatment.

      8   And the question then becomes public

      9   discord from equal treatment -- to follow up on

     10   Justice Gorsuch's question -- how should we

     11   think about that?

     12   MR. STEWART: I mean, I -- they are

     13   certainly characterizing what they are asking

     14   for as equal treatment. But Maine's view and

     15   our view is they are seeking a benefit different

     16   from the one that Maine is willing to provide.

     17   Maine is willing to provide a secular

     18   education, an education that is the rough analog

     19   to what the public school would give you at

     20   state expense. It's not willing to pay for

     21   religious inculcation.

     22   And so it's -- it's like a case where

     23   the school that doesn't believe in athletics

     24   says, I'm being treated unequally because you

     25   are willing to fund a thing that is important to

1   some other schools but not to me.

2   That -- that's not the kind of equal

3   treatment that either the Free Speech Clause or

4   the Free Exercise Clause would prohibit.

5   JUSTICE KAVANAUGH: Thank you.

6   CHIEF JUSTICE ROBERTS: Justice

7   Barrett?

8   Thank you, counsel.

9   MR. STEWART: Thank you.

10   CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

11   Bindas.

12   REBUTTAL ARGUMENT OF MICHAEL BINDAS

13   ON BEHALF OF THE PETITIONERS

14   MR. BINDAS: Starting with the United

15   States' arguments, this absolutely discriminates

16   against parents. It says you can get an

17   otherwise available public benefit you are

18   statutorily entitled to so long as you don't

19   exercise a right that this Court recognized in

20   Espinoza.

21   You get one or the other. If you're

22   the Carsons, you can afford it, great, you keep

23   your free exercise rights. If you're the

24   Nelsons, you can't afford it, you forego your

25   free exercise rights. That is discrimination no

1 matter how you slice it, and this Court should

2 not allow that to stand.

3   Now my friend from Maine, you know,

4 throughout the briefing has recast the benefit

5 in this case. Now we're recasting the facts and

6 saying based on how the spirit, I believe I

7 heard correctly, how the spirit of the program

8 works.

9   Well, the spirit of the program

10 doesn't look at whether or not religious

11 instruction or activities are optional. After

12 all, the Kent school was excluded. Chapel was

13 optional. Theology was offered. No one had to

14 take it. Yet they were excluded.

15   My friend from Maine also says that

16 this -- this only triggers -- the sectarian

17 exclusion only triggers if the school is

18 actually instilling, inculcating, requiring you

19 to believe.

20   Well, what did the Commissioner

21 testify? That it's triggered if the school

22 promotes the faith or belief system with which

23 it is associated and/or presents the material

24 taught through the lens of this faith.

25   You don't have to -- you don't have to

 1   say you must believe this to be excluded. In a

 2   philosophy class, apparently, you can teach

 3   Aquinas and Augustine. But, if you say

 4   Augustine and Aquinas were right, then,

 5   apparently, you're out, again, based on the

 6   decision of a bureaucrat in Augusta about

 7   whether the way the material is being presented

 8   is through the lens of faith.

 9   And the last thing I would say, the

10   benefit here is not a free public education.

11   It's certainly not free. Miss Porter's charges

12    $66,400 a year. You have to pay much of that,

13   most of that, if you go there with a tuition

14   benefit. This is not a free education.

15   Nor are the participating private

16   schools like a public school or providing a

17   public education in any sense of the word. They

18   need not follow the public school curriculum.

19   They can discriminate on bases that public

20   schools may not.

21   They can, as I just mentioned, charge

22   tuition to the tune of $66,000 a year. They

23   need not hire cert -- state-certified teachers,

24   which Maine public schools must do. They can be

25   run by religious organizations and orders.

1   Obviously, a public school in Maine may not.

2   It can be unlike a public school in

3   every one of those respects and participate in

4   this program. But a religious school that is

5   like a public school in every one of those

6   respects is excluded if it teaches a single

7   religion class or presents material that someone

8   in Augusta determines to be presented through

9   the lens of faith.

10   That is discrimination. This Court

11   should not allow it to stand. It should hold

12   the sectarian exclusion unconstitutional.

13   Thank you.

14   CHIEF JUSTICE ROBERTS: Thank you,

15   counsel. The case is submitted.

16   (Whereupon, at 11:57 a.m., the case

17   was submitted.)

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