

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.)
- - - - -

Pages: 1 through 124
Place: Washington, D.C.
Date: December 8, 2021

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4 FRIEND OF O.C., ET AL.,)
5 Petitioners,)
6 v.) No. 20-1088
7 A. PENDER MAKIN,)
8 Respondent.)
9 - - - - -
10
11 Washington, D.C.
12 Wednesday, December 8, 2021
13
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.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-1088, Carson versus Makin.

Mr. Bindas.

ORAL ARGUMENT OF MICHAEL BINDAS

ON BEHALF OF THE PETITIONERS

MR. BINDAS: Mr. Chief Justice, and may it please the Court:

Maine's sectarian exclusion discriminates based on religion. Like all discrimination based on religion, it should be subjected to strict scrutiny and held unconstitutional, unless Maine can show that it is necessary to achieve a compelling government interest.

Maine cannot make such a showing, and the First Circuit never held that it could. Instead, the First Circuit held that there are two kinds of religious discrimination, the bad kind and the good kind.

The First Circuit recognized that Maine cannot discriminate against students or 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 Mat --
4 versus Mathews make clear that when a plaintiff
5 is challenging the -- a barrier, a
6 discriminatory barrier to a public benefit, the
7 plaintiff need not show, indeed, need not even
8 allege, that they would actually obtain the
9 benefit but for 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, more importantly, Maine
18 stipulated that -- and this is at the Joint
19 Appendix page 78 -- that what they want is an
20 education that aligns with their sincerely held
21 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 woman 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: It says you cannot
2 discriminate on the basis of sexual orientation.
3 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?

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

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
3 specifically 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 --

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 exercise -- the -- the exercise
8 of a right. It is conditioning the availability
9 of 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 --
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

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?

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.

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.

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

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 a -- 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: Let's suppose
17 you have two schools. School A is run by
18 Religion A, and -- and that religion has a
19 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 that
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 was the change
13 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 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: Okay. 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 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: -- can 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 taught 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 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 this.

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 contexts, 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 are -- 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 -- we are
23 not trying to tell the parents what they should
24 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 --

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

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

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 -- either the Department of Education or a court
19 in Maine could adopt a limiting construction, or
20 I think more likely, as Mr. Taub said, if it --
21 if that became a prevalent practice, the
22 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 it does? Its
23 -- its religious value is service to others, and
24 they're doing that by providing a perfectly
25 secular school, and the other that has the

1 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 -- that is correct.
8 And I think, even though it might appear in --
9 in one sense to be discriminatory, it actually
10 avoids a more insidious form of discrimination.
11 That is, there are a lot of circumstances in
12 which the government decides to fund or
13 subsidize activities that it believes to be in
14 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? You see? And you say I have an answer
17 to the discrimination, there aren't enough of
18 you. 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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