

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

DAVID CARSON, AS PARENT AND NEXT)
FRIEND OF O.C., ET AL.,)
) Petitioners,)
) v.) No. 20-1088
A. PENDER MAKIN,)
) Respondent.)

Pages: 1 through 125
Place: Washington, D.C.
Date: December 8, 2021

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5 Petitioners,)
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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:
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19 behalf of the Petitioner.
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 there -- 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, yes.
13 The other says no. The other says one thing.
14 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 --

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: That -- all right.

5 MR. BINDAS: -- a state needn't --

6 JUSTICE SOTOMAYOR: In that situation,
7 the parent pays for the religious training of
8 their child.

9 MR. BINDAS: If they desire a
10 religious school as opposed to going to the
11 public school, yes.

12 JUSTICE SOTOMAYOR: All right. And
13 the pub -- the district could contract with a
14 school to provide the public education, correct?

15 MR. BINDAS: If the district lacks a
16 public school, then it can contract with a
17 school to send its resident students, yes.

18 JUSTICE SOTOMAYOR: Do you take the
19 position that the school has to -- that the
20 district has to permit or contract with a
21 religious school to provide --

22 MR. BINDAS: No, Your Honor. At
23 Footnote 9 in our opening brief, we say the
24 opposite, that in that situation where the
25 government is contracting with a school to

1 educate its resident students, that school would
2 have to provide secular instruction.

3 JUSTICE SOTOMAYOR: And the parents
4 have to pay then for the religious training of
5 their children?

6 MR. BINDAS: If they don't want to go
7 to the school with which the government has
8 contracted and they desire a religious
9 education, yes.

10 JUSTICE SOTOMAYOR: So it's only
11 because the school has this -- the district has
12 decided to give you money to find a secular
13 education that you say there's discrimination?

14 MR. BINDAS: No, Your Honor. Again, I
15 would return to the statute defining the
16 benefit. I think Maine tries to redefine the
17 benefit as a public education.

18 The benefit is defined in the statute
19 itself, and the benefit is tuition to attend the
20 public or the approved private school of the
21 parent's choice at which the child is accepted.

22 That is the benefit.

23 JUSTICE SOTOMAYOR: No, no, no,
24 because you leave out what they say is you can
25 pick any school you want for a secular

1 education.

2 MR. BINDAS: Well --

3 JUSTICE SOTOMAYOR: They don't say --
4 because they permit religious schools that --
5 that are -- that don't teach or describe
6 themselves as non-sectarian to receive benefits.
7 These parents are put to the same choice that
8 every other parent in Maine is put to: Either
9 get a free public secular education or pay for
10 your religious training. They're being treated
11 as everybody else is.

12 MR. BINDAS: They are not, Your Honor.
13 In some school districts in Maine, government
14 provides a financial benefit that can be used at
15 the public or private school of the parent's
16 choice. That is --

17 JUSTICE SOTOMAYOR: They're getting
18 more than other parents.

19 MR. BINDAS: Just as --

20 JUSTICE SOTOMAYOR: Most other parents
21 have only one choice: Send them to the public
22 school if it exists, send them to the contracted
23 school that exists, or don't.

24 MR. BINDAS: And that's always true
25 with a school choice program, Your Honor. That

1 was true in Zelman. That program was
2 specifically --

3 JUSTICE KAGAN: I mean, one way to
4 make Justice Sotomayor's point, I think, is --
5 is to ask whether this is different from a
6 typical school choice program.

7 You know, this is not a state or a
8 locality basically saying: We just love choice.
9 We think everybody should get as many choices as
10 they want.

11 This is really a default program for a
12 very small number of students living in isolated
13 areas where the state has decided it cannot --
14 it does not have the resources to provide public
15 schools.

16 And the state would wish to say public
17 schools for everybody. You know, you go to
18 Portland, Maine, it's just public schools for
19 everybody. The state would wish to do that. It
20 can't do that in communities in northern Maine,
21 so it instead has come up with this extremely
22 cabined program.

23 And I think, you know, one question
24 here is whether we should view that in the same
25 way as a kind of Zelman "we love choice" sort of

1 program.

2 MR. BINDAS: A couple points there,
3 Your Honor. Zelman was a program for children
4 in a school district where the public schools
5 were failing. It was because of a lack of
6 opportunity in the public school system that the
7 state -- that the state provided the benefit
8 that --

9 JUSTICE KAGAN: Yes, but it was a
10 districtwide program, these -- this is not
11 working for us, we want to use an entirely
12 different system. That's not Maine's issue
13 here.

14 MR. BINDAS: Oh, well, Your Honor, I
15 -- I -- I think it is. And we -- we should
16 remember that for more than a century, Maine
17 allowed religious schools to participate in this
18 program, which belies the whole notion that this
19 is a substitute for a public education.

20 For a century, religious schools could
21 participate. And for a century, that was fine.
22 And there were secular options and there were
23 private options. There were public options.
24 There were private options. There were options
25 in Maine. There were options outside of Maine.

1 In 1980, the state does a reverse
2 course based on an erroneous interpretation of
3 the Establishment Clause that says, you know
4 what, no longer can you attend -- yes, we'll
5 continue to send you to Miss Porter's or Avon
6 Old Farms, but don't you dare think about going
7 to a Jewish day school or an Islamic school or
8 your local Catholic parish's school. For a
9 century, that had been fine.

10 This was not about providing a
11 substitute for public education. This was about
12 a turn in 1980 based on an erroneous
13 interpretation of the Establishment Clause that
14 for some reason, if it wasn't clear after
15 Mueller, if it wasn't clear after Witters, if it
16 wasn't clear after Zobrest, if it wasn't clear
17 after Zelman that that was wrong, it was
18 certainly clear and certainly -- well, it
19 certainly was clear after Zelman. Yet, the
20 state continues to stand by this --

21 JUSTICE KAGAN: Can I take you back to
22 Justice Breyer's point and also the Chief
23 Justice's hypothetical, is you said, well,
24 there's this, you know, strange use-status
25 decision and we all know that doing religious

1 things is just as protected as being religious.

2 And, of course, nobody would argue
3 with that. I mean, you couldn't put somebody in
4 jail for being religious, and you couldn't put
5 somebody in jail for doing religious things.
6 So, you know, in -- in that -- no -- nobody
7 argues that.

8 The status-use concept is -- is really
9 a concept that applies in subsidy cases, and
10 it's a -- and -- and -- and what is -- it -- it
11 has been intended to say is that the state
12 generally doesn't have to subsidize exercise of
13 a right. You know, we can't put you in jail for
14 saying something. We also can't deprive you of
15 an unrelated benefit for saying something. We
16 can't say you don't get food stamps because we
17 don't like your speech.

18 But that doesn't mean we have to pay
19 for your speech. And we do that all over the
20 place in constitutional law. We do it in the
21 Free Speech Clause. We do it in other areas as
22 well.

23 And so the question here that the
24 status-use distinction raises is, why is
25 religion different? Why does the state have

1 to -- not like -- some states want to, but this
2 state doesn't want to. Why does the state have
3 to exercise -- have to subsidize the exercise of
4 a right?

5 MR. BINDAS: Your Honor, this is not
6 subsidizing the exercise -- the -- the exercise
7 of a right. It is conditioning the availability
8 of an otherwise available public benefit on the
9 surrender of a constitutional right.

10 As this Court held in Thomas, the
11 government cannot compel a citizen to choose
12 between exercise of a right protected by the
13 First Amendment and participation in an
14 otherwise available public program.

15 And there's no question that these --

16 JUSTICE KAGAN: The state can define
17 the nature of the program. So just like the
18 state defines the nature of the program in a
19 case like Rust v. Sullivan and in countless of
20 other of our cases, so here the state is
21 defining the nature of the program and saying,
22 for various of the reasons that Justice Breyer
23 gave, that we just -- we don't want to define
24 the program so broadly as to raise all these
25 questions of religious favoritism, religious

1 division, and so forth.

2 MR. BINDAS: Your Honor, in a program
3 like Rust or Regan for that matter, which the
4 United States briefs extensively, you're dealing
5 with government speech, first of all. This is
6 not a government speech program, and no one can
7 credibly claim it is.

8 To the extent it is government speech,
9 however, as this Court made clear in Pleasant
10 Grove, the Establishment -- government speech
11 must comport with the Establishment Clause,
12 which requires neutrality toward religion.

13 Moreover, in Rust, the doctors were
14 not forced to choose between receipt of the
15 benefit and the exercise of their right to
16 engage in abortion counseling. They just
17 couldn't use the benefit to do it.

18 Here, you are forced to make a choice.
19 You can get your statutorily entitled benefit to
20 attend the public or private school of your
21 choice, or you can exercise your free exercise
22 -- your free exercise right. You cannot get
23 both. It's one or the other.

24 JUSTICE GORSUCH: Counsel, on that, I
25 believe the government's response -- and I think

1 this is what Justice Kagan's getting at -- is in
2 -- in -- in -- in Rust, you know, the question
3 is whether you're put to a choice. And -- and,
4 here, the government says there is no choice
5 that you're put to because individuals can still
6 educate their -- their children in religion by
7 sending them to -- I think it's after-school
8 programs or Saturday or Sunday programs.

9 What are your thoughts about that?

10 MR. BINDAS: Well -- well, Your Honor,
11 the Court in Espinoza held that parents have a
12 right to direct the religious upbringing of
13 their children and that many parents exercise
14 that right by sending their children to
15 religious schools, which is protected by the
16 Constitution. So there's no question that
17 parents have a constitutional right to send
18 their children to a religious secondary school.

19 Now, in making that argument that
20 somehow this is all okay, this discrimination is
21 okay because you can go to a weekly Bible study,
22 number one, that's insulting to parents, who are
23 in the position of determining what's an
24 appropriate education, religious education, for
25 the child.

1 But it also ignores the excluded
2 activity. In Rust, the excluded activity was
3 abortion counseling. You could still do that.
4 In Regan, it was substantial lobbying activity.
5 You could still do that simply by adopt --
6 adopting the 501(c)(3), (c)(4) designation. In
7 Locke, the excluded activity was a degree in
8 devotional theology, which the Court noted
9 Joshua Davey could still do and still get the
10 promised scholarship.

11 Here, the excluded activity is a
12 religious secondary education. You cannot get
13 that if you get the benefit.

14 JUSTICE GORSUCH: Does this affect
15 different religions differently, the
16 government's argument? I mean, some religions
17 might find a -- a -- a Sunday school perfectly
18 appropriate; others, perhaps, may not.

19 MR. BINDAS: I -- I -- I think it does
20 affect different religions generally and --
21 differently, Your Honor. And I think this also
22 goes to the Establishment Clause problem here.

23 The fact of the matter is some schools
24 that are religious in what the government would
25 call status, perhaps that do some things that

1 look religious, are allowed to participate. But
2 there is a regulator in Augusta, Maine, who
3 looks into the curriculum and the activities of
4 -- of the school and sits in judgment on whether
5 that school is sufficiently irreligious and
6 therefore a permissible choice for a parent or
7 too religious and thus sectarian and excluded as
8 a permissible choice for the parent.

9 Put aside the Free Exercise Clause
10 problem. That is a substantial Establishment
11 Clause problem, as Judge McConnell makes very
12 clear in his amicus brief.

13 JUSTICE BREYER: Well, the thing is
14 under -- I don't know if you can think about it
15 at this level or advance my thinking on it,
16 which is what we've seen, of course, is that the
17 religious clauses are there to prevent the
18 religious wars. You teach your religion. I
19 teach mine. Okay? And to our children.

20 Now, when you get to education, the
21 route you're taking is not unknown. France
22 takes that route. And you could say, well, the
23 -- the state will pay all the religious
24 education, as well as all the secular, and treat
25 everybody alike. We've never taken that really.

1 The opposite is none. Don't pay the
2 priest's salary and don't pay the teaching of
3 devotion and some -- you know, the teaching of
4 actually devotional activity. And then there's
5 the middle, where you say give the money to the
6 parents and let them choose. Okay.

7 So what this is, is it's closer to the
8 second -- I mean it's closer to the first, the
9 state's going to pay for it. And the reason I
10 think we've stayed out of that is because we
11 have too many religions, 60, 70, and they're
12 going to get into too many arguments with each
13 other about everything under the sun, you know,
14 and you start getting into arguments about
15 whether the -- it should be like this way in the
16 window or the other way in the window or this is
17 the kind of thing to teach or that.

18 It's really awful. I mean, I'm not
19 saying the arguments are bad. I understand
20 them. But you get the state in as the
21 arbitrator or the courts, and you're right in
22 the middle of religious activity. So, as I look
23 at these cases in bulk, not the exact words, I
24 see a big push, with our 60 or 70 religions,
25 towards keeping the state out of it. And so

1 that is a -- a theme that probably influences
2 the way I -- I -- I approach these problems.
3 I'm not saying I'm right. I'm asking you
4 because I want to know what you have to -- to
5 help me or -- yeah, what do you want to say?

6 MR. BINDAS: Well, Your Honor, going
7 back to your three approaches, I -- I -- I
8 respectfully disagree that this mirrors the
9 first approach. This is the third approach,
10 provide the money to the family and let them
11 decide. And as this Court held in Zelman, as
12 this Court held in Locke, that private choice
13 severs the link between government funds and
14 religious instruction.

15 So, to the extent there is any
16 advancement of a religious mission, that's
17 attributable to the choice of a parent. It can
18 in no way be attributed to the government.

19 And, Your Honor --

20 JUSTICE BREYER: The problem is the
21 government's paying for it, right, directly --

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

23 JUSTICE BREYER: -- and -- and they
24 say -- one -- one -- one church says, my God,
25 you certainly cannot pay for a classroom that's

1 of this size because we're using it to worship
2 and it has to be bigger than that.

3 And the others say that's just what
4 you shouldn't do. Worship is private and you
5 should have a smaller space for it. And -- and
6 then they're going to have to articulate, you
7 see, and -- and, ultimately -- well, the -- of
8 course, the parents can choose which of those
9 two, it's paid for by the state, and they start
10 suing each other. It's government money here
11 going.

12 MR. BINDAS: Your Honor, as this Court
13 held in Zelman, any constitutional test that
14 would turn on supposed avoidance of -- well, let
15 me rephrase that. When you're dealing with a
16 program of individual choice, the possibility,
17 what the Court called the specter of
18 divisiveness, religious strife, does not bear on
19 the constitutional analysis because of the fact
20 that it is an individual.

21 No one would suggest that a Social
22 Security beneficiary couldn't tithe to her
23 church because that would somehow be funneling
24 government funds to religion. Her private
25 choice as to where to use those funds is her

1 private choice.

2 JUSTICE KAGAN: Zelman --

3 JUSTICE BREYER: Which you cannot
4 refer --

5 JUSTICE KAGAN: -- Mr. --

6 JUSTICE BREYER: -- as a number. I
7 mean, you cannot insist that the Social Security
8 Administration refer to you by a name rather
9 than a number? Forget it. Forget it. Go on to
10 Justice Kagan.

11 JUSTICE KAGAN: I mean, Zelman was a
12 -- was a case in which the question was could a
13 locality implement such a program. And the
14 question here is different, is does the locality
15 have to implement such a program.

16 And what -- what we have often talked
17 about in our First Amendment religion cases is
18 this idea of play in the joints, that not
19 everybody has to follow the same model and that
20 there is some amount of funding which is neither
21 prohibited by the First Amendment nor -- nor
22 commanded by the First Amendment.

23 And -- and, essentially, what Maine is
24 saying here is like, all well and good if a
25 locality or if a state wants to do this, but --

1 but we weigh the interests differently, and
2 shouldn't we be allowed to weigh the interests
3 differently?

4 MR. BINDAS: Your Honor, the -- the
5 quintessential play in the joints is whether or
6 not to have a school choice program. We know
7 the Establishment Clause allows it.

8 Mr. Chief Justice, may I finish?

9 CHIEF JUSTICE ROBERTS: You can finish
10 your thought.

11 MR. BINDAS: Okay.

12 We know that the Establishment Clause
13 allows it. Zelman tells us. We also know that
14 the Free Exercise Clause doesn't require it.

15 In *Espinoza*, the Court held a state
16 need not subsidize private education.

17 Whether to have such a program is the
18 quintessential play in the joints.

19 JUSTICE KAGAN: But the point here, I
20 suppose, is this, is that some states would, you
21 know, have such programs and love them. And
22 another state says, for the reasons that Justice
23 Breyer gave, you know, we think that this would
24 be incredibly divisive in our community, and you
25 can think of a wide variety of reasons why that

1 would be. It would lead to too great
2 entanglement. It's not good for the religion
3 itself. Or other people in our community won't
4 understand why we're funding this program.

5 I mean, these schools are overtly
6 discriminatory. They're proudly discriminatory.
7 Other people won't understand why in the world
8 their taxpayer dollars are going to
9 discriminatory schools.

10 For any of a number of reasons, a
11 state can say we don't want to play in this
12 game. And the question is, isn't this
13 play-in-the-joints idea, wasn't it specifically
14 understood to allow different kinds of solutions
15 in different sorts of areas?

16 MR. BINDAS: Mr. Chief Justice, may I
17 -- my -- my time is well --

18 CHIEF JUSTICE ROBERTS: You can answer
19 the question.

20 MR. BINDAS: Thank you, Your Honor.

21 In Espinoza, this Court specifically
22 rejected any test that would turn on weighing
23 the benefit and the exclusion against some
24 general state interest in avoiding religious
25 conflict.

1 I -- I mean, I -- I -- I think the
2 Court has already rejected any such test when
3 you're dealing with a program, at least one that
4 operates and turns exclusively on the private
5 choice of parents. It might be a different
6 situation if we were talking institutionally,
7 but not in a program like this, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 Just one additional question, counsel,
10 or request. Could you articulate for me your --
11 your -- your best distinction of -- of Locke
12 before you get to the argument that you think it
13 should be overruled?

14 MR. BINDAS: Yes, Your Honor,
15 absolutely. So, as Espinoza and Trinity
16 Lutheran held, Locke really does need to be
17 cabined to its facts, and so let's look at those
18 facts.

19 Students could attend religious
20 schools, including what the Court called
21 pervasively religious schools. They could take
22 devotional theology classes, including
23 compulsory classes in such things as
24 spirituality, evangelism, Bible, and religious
25 doctrine.

1 The one thing and the only thing they
2 could not do was pursue a major in a degree for
3 entry into the ministry for -- for basically the
4 instruction of future clergy. Even then,
5 however, a student was not required to choose
6 between receipt of the benefit and pursuing a
7 devotional theology major. As the Court noted
8 in Footnote 4, they could do both.

9 Now let's look at the facts of this
10 case. Miles apart from Locke. This is not a
11 situation where, as Locke put it, government's
12 going a long way toward accommodating religion.
13 It is a wholesale exclusion of religion.

14 If a school teaches a single class in
15 religion or it doesn't even teach any religion,
16 it just teaches secular subjects, if it happens
17 to teach those secular subjects through what a
18 regulator in Augusta determines to be the lens
19 of faith, that school is out. So the exclusion
20 is completely different.

21 Moreover, Locke, Joshua Davey was not
22 forced to choose. Here, parents must choose.

23 CHIEF JUSTICE ROBERTS: So what if the
24 state has funding vocational education? They've
25 got a school for kids who want to learn the

1 trades. They've got one for kids who want to
2 learn the -- the fishing industry, one for kids
3 who want to focus on tourism, and there's -- and
4 a seminary that prepares individuals to be
5 priests or pastors.

6 Can they decide not to fund the
7 seminary?

8 MR. BINDAS: Your Honor, I think if --
9 so long as Locke is good -- remains good law,
10 yes. And, moreover, in the program Your Honor
11 described, it sounded like it was a direct
12 institutional aid type program. And I think
13 even more so than in Locke, the Court -- the --
14 the state could make that choice.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: Nothing for me,
19 Chief.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer, anything further?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: Yes. I have -- I
25 have one follow-up. I have a great deal of

1 difficulty here. I think, following up Justice
2 Gorsuch's point and your own, that you admit
3 that the reason why this school is important to
4 these parents is because they don't teach just
5 secular subjects, that they teach all subjects
6 through the lens of their religion.

7 Am I correct?

8 MR. BINDAS: They -- they -- religion
9 is a part of -- of their curriculum, yes, Your
10 Honor.

11 JUSTICE SOTOMAYOR: I thought, if I
12 understood the materials from the schools that
13 were here, that the very point is that they
14 teach all subjects through the lens of the
15 religion.

16 MR. BINDAS: Well --

17 JUSTICE SOTOMAYOR: That -- and I
18 repeat -- even their science courses are limited
19 in their reach because of their belief in
20 certain -- or disbelief in certain -- in certain
21 theories of science.

22 MR. BINDAS: I don't know that there's
23 anything in the record on that, Your Honor. And
24 to the extent the state can -- desires to say,
25 hey, if you're going to participate in this

1 program or if you even want to be an approved
2 private school to operate at all in the -- in
3 the State of Maine, you have to teach certain
4 curriculum and you have to teach the theory of
5 evolution, I -- you know, that might well --

6 JUSTICE SOTOMAYOR: That's okay?

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

8 JUSTICE SOTOMAYOR: Is it okay to say
9 to -- to a school you have to take every student
10 and not discriminate on the basis of sex, color,
11 religion, that they don't practice your
12 religion, the student -- I understand that
13 there's an exemption in Maine for who they hire
14 to teach -- but if this program is supposed to
15 -- which I think it is -- to give students a
16 choice, is this program permitted to say with
17 respect to the students, if they meet your
18 academic requirements, you can't discriminate?

19 MR. BINDAS: Well, Your Honor, that --
20 that's not this case. But could the state do
21 that? I think you're looking analytically at a
22 totally different situation there because, at
23 least on its face, that's a religiously neutral
24 requirement.

25 Now could there be some evidence of a

1 discriminatory object in the -- in the adoption
2 of that provision? Perhaps. But at least it's
3 facially neutral, which means, if it's neutral,
4 you're not even getting strict scrutiny at that
5 point.

6 Moreover, I would say, Your Honor,
7 it's important to remember that schools that
8 welcome students of all stripes, that do not
9 consider sexual orientation or gender identity
10 in hiring, in admissions, or for any other
11 basis, are just as excluded from this program if
12 they teach that message of inclusiveness and
13 diversity through the lens of faith, and there's
14 record evidence of that in the Kent School.

15 CHIEF JUSTICE ROBERTS: Justice Kagan,
16 anything?

17 Justice Gorsuch?

18 JUSTICE GORSUCH: Yeah, I -- I just
19 want to follow up on that. I just want to be
20 clear in my mind that we're not -- we're not
21 being called upon today to interpret Maine's
22 anti-discrimination laws, and we don't need to
23 do that to decide this case?

24 MR. BINDAS: Not at all, Your Honor.
25 Maine has never said these schools will be

1 excluded.

2 JUSTICE GORSUCH: And -- and -- and
3 the Kent School example, that -- that was a -- a
4 -- a religious school that actually applied, as
5 I -- as I remember it -- just correct me if I'm
6 wrong -- to participate but was rejected even
7 though it -- it -- it said it was not a
8 sectarian school and said that it was willing to
9 abide by Maine's anti-discrimination laws?

10 MR. BINDAS: In the record, I don't
11 know whether it specifically talks about the
12 Maine Human Rights Act at that point because
13 Maine excluded it solely because it was
14 religious. This goes back to the step 1 --

15 JUSTICE GORSUCH: Yeah.

16 MR. BINDAS: -- absolute barrier.
17 But, if you get on to the Kent School's website
18 and look at its policies regarding employment
19 and -- and admissions, it's plain as day, the
20 school does not discriminate on any of the
21 grounds we're talking about.

22 JUSTICE GORSUCH: So religious schools
23 are forbidden regardless whether or not they're
24 going to participate?

25 MR. BINDAS: Solely because they are

1 religious.

2 JUSTICE KAVANAUGH: Two questions
3 about how far your argument goes. With respect
4 to Locke, to follow up on the Chief Justice's
5 question, you're saying that that is limited or
6 could be limited to cases involving the training
7 of clergy? Is that an accurate description?

8 MR. BINDAS: Well, Your Honor, I think
9 the Court itself limited it in that -- in that
10 way in Locke itself. The Court went so far as
11 to say the only state interest, the Court's
12 words, that we're addressing is the state's
13 interest in not funding the training of clergy.
14 So I think, on its own terms, it's limited to
15 that.

16 JUSTICE KAVANAUGH: Okay. And then,
17 second, just to clarify, you're not arguing, but
18 correct me if I'm wrong, that the mere funding
19 of public schools would entitle the parents to
20 funding for religious schools? You're saying,
21 but correct me if I'm wrong, that once the state
22 starts funding private schools, it can't exclude
23 religious private schools and fund secular
24 private schools, is that correct?

25 MR. BINDAS: That is correct, Your

1 Honor. We -- we are not arguing that there is a
2 constitutional right to a publicly funded
3 religious education, nor could we. Espinoza
4 said point blank a state need not subsidize
5 private education.

6 JUSTICE KAVANAUGH: Okay. Thank you.

7 JUSTICE BARRETT: One follow-up on the
8 same lines as Justice Kavanaugh.

9 I -- I gather, in drawing the
10 distinction that Zelman drew between choice and
11 direct funding, that you would concede that if
12 Maine retooled its program so that payments went
13 directly to private schools, like, say, to
14 Miss Porter's, you know, we will pay you X
15 number of dollars to reserve 40 seats in each
16 class for schools -- for students from districts
17 that lack a public school, you're conceding, I
18 take it, that in the case of that kind of direct
19 subsidy, there would not be a problem with Maine
20 not subsidizing a private religious school as
21 well?

22 MR. BINDAS: Well, Your Honor, in that
23 situation, what I'd want to know is -- is
24 whether the -- so we're talking about basically
25 a per capita program where payment is to the

1 institution but is determined on a per student
2 basis of how many students the -- the district
3 is sending? Is that --

4 JUSTICE BARRETT: Well, I'm just
5 trying to press on how important to your
6 argument this severed link is where the money is
7 going to the parents and then going to the
8 school, as opposed to we'll just pay you a flat
9 rate. Whether 40 students enroll or not --

10 MR. BINDAS: Oh.

11 JUSTICE BARRETT: -- we want 40 -- 40
12 seats for students that lack a public school in
13 their district.

14 MR. BINDAS: If -- if -- if we're
15 bringing choice out of the equation and we're
16 talking about a direct institutional aid type
17 program, then we're talking about a much, much
18 different case, Your Honor.

19 JUSTICE BARRETT: And -- and you --
20 when you say much, much different case, are you
21 talking about then a case where there would not
22 be a free exercise claim that could succeed?

23 MR. BINDAS: I think, if the
24 government's paying a flat rate to schools that
25 doesn't turn on whether a student is choosing to

1 attend that school, I -- I -- you know, again, I
2 would want to know the particulars, but I think
3 that that would be permissible in that situation
4 for the state to say we're not going to pay a
5 flat rate. We're not going to contract with a
6 school that's providing religious instruction.

7 But there are a lot of variables
8 there, Your Honor. If the --

9 JUSTICE BARRETT: I understand.

10 MR. BINDAS: -- if the payment is
11 based on defraying the cost of tuition for the
12 number of kids that -- but it's --

13 JUSTICE BARRETT: No, I understand.
14 I'm just -- I'm just clarifying that you're not
15 defending the notion of that kind of direct
16 subsidy, as opposed to saying that this program
17 functions like choice, like a -- like a school
18 choice program, particularly given that kids can
19 go as far as California and to elite boarding
20 schools all over the country with the money?

21 MR. BINDAS: Not a penny flows to any
22 school under this program but for the private
23 and independent choice of families.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. BINDAS: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Mr. Taub.

4 ORAL ARGUMENT OF CHRISTOPHER C. TAUB

5 ON BEHALF OF THE RESPONDENT

6 MR. TAUB: Mr. Chief Justice, and may
7 it please the Court:

8 With respect to justiciability, this
9 case is now about one family who wants to send
10 one child to one specific religious school. The
11 record clearly demonstrates, though, that this
12 one school has zero interest in taking Maine's
13 money. Under well-established principles, the
14 Petitioners do not have standing because, even
15 if they were to prevail, they would receive no
16 redress for their alleged injury.

17 As to the merits, Maine law entitles
18 every child to a free public education. Maine's
19 highest court has recognized that the tuition
20 program at issue here is intended solely to
21 ensure that those few children who live in
22 districts that have not made appropriate
23 schooling arrangements are still able to receive
24 a free public education.

25 That is the benefit at issue here, a

1 free public education. That private schools are
2 sometimes enlisted to deliver the benefit is of
3 no constitutional significance. States
4 frequently outsource the delivery of public
5 benefit programs, and that does not change the
6 public nature of the program. It should be no
7 different when it comes to education.

8 The reason that schools that promote a
9 particular faith are not eligible to participate
10 is simple. Maine has determined that, as a
11 matter of public policy, public education should
12 be religiously neutral. This is entirely
13 consistent with this Court's holdings that
14 public schools must not inculcate religion and
15 should instead promote tolerance of divergent
16 religious views.

17 The Petitioners want an entirely
18 different benefit, instruction designed to
19 instill religious beliefs at taxpayer expense.
20 They are not being discriminated against. They
21 simply are not being offered a benefit that no
22 family in Maine is entitled to.

23 Coming at this from a different
24 perspective, this Court has made clear that the
25 government is entitled to define the scope of a

1 financial benefit in order to advance its own
2 value judgments, even when doing so might
3 disadvantage activity protected by the First
4 Amendment.

5 If the federal government can provide
6 funding to family planning services on the
7 condition that it not be used to discuss
8 abortion, a state should be allowed to condition
9 paying a child's tuition on the condition that
10 the school not promote religious beliefs.

11 JUSTICE THOMAS: Counsel, in Maine,
12 can a parent decide that they simply do not want
13 to send their child to any school at all?

14 MR. TAUB: They -- they could
15 home-school the child --

16 JUSTICE THOMAS: No, I -- I mean zero
17 education.

18 MR. TAUB: No, no, there is compulsory
19 attendance laws which would satisfy the --

20 JUSTICE THOMAS: So you require them
21 to go to school, and you -- in certain areas,
22 you don't have schools available?

23 MR. TAUB: That's correct.

24 JUSTICE THOMAS: So, if you -- you
25 require them to go and you don't have schools

1 available and you make provisions for them to
2 comply with that compulsory law, then how can
3 you say that going to a particular school is a
4 subsidy?

5 MR. TAUB: How can we say that going
6 to a particular school is a subsidy?

7 JUSTICE THOMAS: Yes. You say -- you
8 require them to go to schools to do something
9 that you haven't provided for, but then you make
10 a way for them to do that, and you have now --
11 now -- you now say it is a benefit or a subsidy.

12 But it is you who require them to do
13 it. In certain places, you can provide them
14 with a public school, and in other places, you
15 can't. But they still have to comply with the
16 law.

17 MR. TAUB: Yes, Your Honor. But --
18 but this Court has made clear that -- that
19 states have a legitimate interest in compulsory
20 education laws. And --

21 JUSTICE THOMAS: Well, I agree. I
22 understand that. I'm not arguing with that.
23 But you have required them to go. It's one
24 thing if you said, look, you -- we will pay for
25 your -- your attendance at a particular -- at

1 college, at the University of Maine, but we
2 won't pay for you to go to a religious college
3 as a substitute for that.

4 You don't have a compulsory
5 requirement that anyone attend college, but you
6 do for primary and secondary school. And I just
7 -- I just want you to explain to me how that is
8 a -- a -- is a -- it's a subsidy if you require
9 them to attend, but you make no provision for
10 it.

11 MR. TAUB: Well, Your Honor, in this
12 case, what the benefit that's being offered is a
13 free public education, and so the Maine
14 legislature has decided that it's critical that
15 every student in Maine obtain, if he or she
16 wants it, a -- a free public education.

17 And so the state has made certain
18 provisions. It requires school districts to
19 make provisions to ensure that every child gets
20 that benefit. In certain cases, though --

21 JUSTICE THOMAS: Well, I don't know
22 how it can be a benefit when you -- you've
23 required it. I -- I'm not saying it can't be a
24 benefit. I think it's a benefit. But you're
25 required. It's a requirement. Anyway, I'm not

1 going to belabor that.

2 The -- the -- but I am interested in
3 your -- you explaining to me what your term
4 "rough equivalent" of a public education is.
5 What do you mean by "rough equivalent"?

6 MR. TAUB: So, in the state's view,
7 Your Honor, the most significant and defining
8 feature of a public education is that it is a
9 sectarian education that is religiously --

10 JUSTICE THOMAS: And what do you mean
11 by that?

12 MR. TAUB: So what -- what we would
13 consider is an education that doesn't promote
14 one particular set of religious beliefs at the
15 exclusion of others. So -- so a school that --
16 that might teach about different religions but
17 doesn't instruct students that they are to
18 follow any particular religion, so it's -- it's
19 neutral and silent when it comes to -- to what
20 religion a child should follow.

21 JUSTICE THOMAS: So let's say I'm in
22 Bangor, Maine, or -- and I'm in a public school.
23 Where is it written in the charter of that
24 particular school that it be non-sectarian? It
25 would seem to me that your interest would be on

1 -- on academic subjects.

2 MR. TAUB: Well, I mean, Your Honor,
3 if -- if I understand your question, this --
4 this Court has recognized that public schools
5 must be secular, that they --

6 JUSTICE THOMAS: No, I'm just -- I
7 think, as far as education, you wouldn't care --
8 if you're in a public school, religion doesn't
9 come up. It's a non-issue.

10 MR. TAUB: Well, religion doesn't come
11 up because it can't come up. I mean, that --
12 that is the very defining feature of a public
13 school, is that -- is that it doesn't have
14 mandatory prayer. It doesn't have mandatory
15 worship services.

16 JUSTICE THOMAS: I know, but that's
17 not the reason you go. I'm trying to figure
18 out, when you say that there are these features
19 of a public school education, I don't think you
20 go -- if you're in a public school in -- in
21 Maine, that your interest isn't, oh, I'm so glad
22 I'm here because you don't have a lot of
23 Catholicism here. I think you go for other
24 reasons. And I'm trying to figure out, so when
25 you say a "rough equivalent" of that, what are

1 you talking about?

2 MR. TAUB: Again, a rough equivalent
3 is an education that is religiously neutral.
4 That is the defining feature of a public
5 education. That is the education that the state
6 wants to provide to children.

7 Now, if families and children want a
8 different benefit, if they want an education
9 that inculcates religious beliefs, that's their
10 right, but that's not --

11 JUSTICE ALITO: Suppose parents want
12 to send their child, using this money, to an
13 elite private school, Exeter, Andover, Miss
14 Porter's. That would be okay, right?

15 MR. TAUB: Yes, those schools would
16 likely be approved.

17 JUSTICE ALITO: And -- and they would
18 provide the equivalent of the -- a rough
19 equivalent of a public education?

20 MR. TAUB: Yes, they would.

21 JUSTICE ALITO: They would?

22 MR. TAUB: Yes. The defining feature
23 of a public education is that it's religiously
24 neutral. Now you could go to Andover --

25 JUSTICE ALITO: So, when you say a

1 public education, all you mean is a secular
2 education. That's what you mean?

3 MR. TAUB: That is the defining
4 feature. And -- and what I would say, Your
5 Honor --

6 JUSTICE ALITO: So you have to have a
7 --

8 MR. TAUB: -- is that if you went to
9 --

10 JUSTICE ALITO: -- that that's -- you
11 have to have a compelling interest in providing
12 a purely secular education in the funded -- in
13 the schools to which these students wish to go?

14 MR. TAUB: Your Honor, if you went
15 into any private school, even take Andover
16 Academy, I mean, certainly, there are going to
17 be trappings there that are going to be much
18 different than -- than trappings in a public
19 school.

20 But, at the end of the day, your
21 chemistry class is going to be taught the same
22 as a public school chemistry class. Your
23 science and religion -- and math classes are
24 going to be taught the same way. And -- and the
25 one thing that's not going to be occurring in

1 those schools is that they're not going to be
2 inculcating children with a particular religion.

3 So, yes, an Andover or a Phillips
4 Exeter may be different from Bangor Public High
5 School in many different ways, but what they
6 share in common is the most important feature,
7 which is that they are not inculcating religion.

8 JUSTICE GORSUCH: So, counsel --

9 CHIEF JUSTICE ROBERTS: Counsel --

10 JUSTICE GORSUCH: I'm sorry, Chief.
11 After you.

12 CHIEF JUSTICE ROBERTS: Let's suppose
13 you have two schools. School A is run by
14 Religion A, and -- and that religion has a
15 doctrine that they should provide service to
16 their -- their neighbors. So they're running --
17 set up and running a school, but there's nothing
18 in their -- in their doctrine about propagating
19 the faith or whatever, so it does look just like
20 a public school, but it's owned by religion.

21 Religion B also has a school, but its
22 doctrine requires adherence to educate children
23 in the faith, and the -- the school is infused
24 in every subject with their view of the faith.

25 Now would the first school get the

1 funds?

2 MR. TAUB: Yes.

3 CHIEF JUSTICE ROBERTS: Okay. Would
4 the second school?

5 MR. TAUB: No.

6 CHIEF JUSTICE ROBERTS: And that's
7 because of the difference between the two
8 religions, right?

9 MR. TAUB: That's because they are --
10 their -- their program is specifically
11 instilling and promoting --

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. TAUB: -- religion in students,
14 and --

15 CHIEF JUSTICE ROBERTS: And the other
16 religion does not?

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

18 CHIEF JUSTICE ROBERTS: So you're
19 discriminating among religions based on their
20 belief, right?

21 MR. TAUB: No, I would not say that.
22 Religions can have whatever belief they want,
23 but if they want to take part in Maine's tuition
24 program, the education service they have to
25 provide has to be the service that Maine is

1 purchasing.

2 CHIEF JUSTICE ROBERTS: Well, and one
3 religion says that's what they do with
4 education, and the other religion says, no, we
5 use it to propagate the faith.

6 So it is the beliefs of the two
7 religions that determines whether or not their
8 schools are going to get the funds or not.

9 And -- and we have said that that is
10 the most basic violation of the -- the First
11 Amendment religion clauses, for the government
12 to draw distinctions between religions based on
13 their doctrine.

14 MR. TAUB: Again, Your Honor, we're
15 not -- we're not drawing those distinctions
16 based on doctrine. We are drawing those
17 distinctions based on -- on what the school is
18 going to promote.

19 And let me just give you a
20 hypothetical. If -- if -- if there were a
21 school that was -- that was -- that was run by
22 an organization that felt it was critical to
23 have part of the program be to inculcate
24 religious beliefs, if -- if that school
25 otherwise provided a public education, and let's

1 say it had chapel services and a class that was
2 intended to instill religion, if -- if those
3 classes were optional, it's likely that that
4 state -- that that school would -- would be
5 eligible for the Maine tuition program.

6 What the state is not going to provide
7 public funding to is a school that is going to
8 require students to take part in programs that
9 are intended to instill religion.

10 CHIEF JUSTICE ROBERTS: Well, to
11 follow that up, you say likely. I mean, are we
12 supposed to put weight on that in deciding the
13 case, that that is, in fact, what's going to
14 happen?

15 MR. TAUB: Well, Your Honor, what we
16 have in this record, we have a facial challenge
17 and we have an as-applied challenge. And the
18 as-applied challenge relates to two very
19 specific schools. And it's completely clear
20 from the record that -- that those two schools
21 are -- are not of the type of the school that
22 I'm hypothesizing about.

23 And so, if we ever had a school like
24 that, the Department of Education would look
25 carefully at it. But, you know, I think you'll

1 see in the record that -- that one of the
2 questions the Department has asked in the past
3 is: I see you have a chapel service. Is that a
4 mandatory chapel service?

5 CHIEF JUSTICE ROBERTS: Okay. So
6 let's say the school is -- you know, some
7 subjects are more susceptible to religious
8 infusion than others. So half of the classes
9 are religious. You know, when they teach
10 literature, it's from a religious perspective.
11 You know, when they teach calculus or chemistry,
12 it's -- it's -- it's not. So they -- what do
13 they do? Do they get the full amount of the
14 credit, or do they get half the amount?

15 MR. TAUB: No, this is -- I mean, what
16 Maine is doing is it's paying the tuition for
17 that student to attend that school. This isn't
18 -- this isn't the kind of program where we can
19 segregate out certain funds to go to one part
20 and certain --

21 CHIEF JUSTICE ROBERTS: Okay. So you
22 make a judgment of whether the school qualifies
23 and you look at how much -- how -- how serious
24 are they about infusing the subjects with
25 religion?

1 MR. TAUB: Not how serious they are,
2 Your Honor, but -- but if --

3 CHIEF JUSTICE ROBERTS: Or to what
4 extent they do.

5 MR. TAUB: So -- and -- and -- and
6 what I will say is that -- is that the schools
7 self-identify themselves. This is not a
8 situation where you have government officials --

9 CHIEF JUSTICE ROBERTS: Okay. A
10 school comes in and says, I identify myself as a
11 50 percent sectarian school and a 50 percent
12 non-sectarian. They get the full credit?

13 MR. TAUB: We would ask them what are
14 you doing as -- as part of the sectarian portion
15 of your program. And -- and if that portion of
16 the program is -- is designed to instill
17 religious beliefs --

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. TAUB: -- and students are
20 required to attend that part of the program,
21 then it's unlikely that that school would --
22 would -- would be eligible for -- for any
23 portion of the tuition program.

24 CHIEF JUSTICE ROBERTS: Well, I don't
25 understand. I think we've gone from likely to

1 -- to -- to unlikely.

2 MR. TAUB: Well --

3 CHIEF JUSTICE ROBERTS: Are you saying
4 that if they just had one chapel service every
5 -- every day or -- or let's just say that they
6 take a religious perspective on -- on history,
7 just that. Are they going to likely be
8 qualified or likely -- unlikely?

9 MR. TAUB: So, you know, these are
10 hypotheticals that the Department of Education
11 would have to look at. But -- but what I can
12 say is that if a school had a mandatory chapel
13 service where this was a religious chapel
14 service --

15 CHIEF JUSTICE ROBERTS: All right.
16 Let's skip the chapel service and say it's just
17 mandatory history class, but they have a
18 particular view of the Crusades that not
19 everybody might share.

20 MR. TAUB: You know, Your Honor, as I
21 sit here today, I cannot answer that -- that
22 question. That -- that would be a much tougher
23 situation. It's one that's never presented
24 itself in Maine.

25 And what we have here are -- are two

1 schools that are very much different from --
2 from those kinds of hypothetical schools. It --
3 it -- it might be that there could be an
4 as-applied challenge brought down the line. If
5 -- if you had a school come forward like Your
6 Honor is -- is speculating about and we denied
7 funding for that school because we didn't like
8 the fact that religion was taught or that the
9 Crusades were taught from a particular
10 perspective, that school could easily bring a
11 challenge, and -- and then a court would decide
12 whether what -- whether what Maine did is
13 appropriate or not.

14 But -- but what I don't think is
15 appropriate is -- is for the Court to decide the
16 case based on hypothetical situations that --
17 that have never occurred in the state.

18 JUSTICE ALITO: Well, suppose that a
19 -- a school is affiliated with a religious group
20 and they say, we do infuse our religious beliefs
21 into all aspects of the community, but our
22 salient -- our salient religious beliefs are
23 that all people are created equal and that
24 nobody should be treated -- should be subjected
25 to any form of invidious discrimination and that

1 everybody is worthy of respect and should be
2 treated with dignity and that everybody has an
3 obligation to make contributions to the
4 community and engage in charitable work, those
5 are our religious beliefs and we don't -- we
6 don't really have any dogma, but these are
7 principles that we think our students should
8 keep in mind, consistent with the religious
9 outlook of our community.

10 Would that school be disqualified?

11 MR. TAUB: So, I mean, that would be
12 very close to a public school. Public schools
13 often have a set of values that they want to
14 instill: public service, be kind to others, be
15 generous.

16 I think what -- what -- what the
17 defining feature or what -- or -- or what would
18 make the difference is -- is whether children
19 are being taught that your religion demands that
20 you do these things, that -- that your religion
21 demands --

22 JUSTICE ALITO: Well, then you really
23 are discriminating on the basis of religious
24 belief. What I described is, I think, pretty
25 close to Unitarian Universalism, isn't it? And

1 that is a -- that is a religious community.

2 So that would be okay. That religious
3 community is okay. They can have a school that
4 inculcates students with their beliefs because
5 those are okay religious beliefs, but other
6 religious beliefs, no. Isn't that -- is that
7 what Maine is doing?

8 MR. TAUB: Well, what I'm saying, Your
9 Honor, is that -- and -- and, again, this is
10 what I said in response to the Chief Justice's
11 questions -- is that -- is that we have two
12 schools here at issue. There are other schools
13 that could come in the future that are going to
14 pose thornier questions, and, again, those might
15 be challenges that could be brought at that
16 point.

17 So, you know, I can't sit here and --
18 and tell you whether or not the Department of
19 Education would approve a Unitarian school. We
20 would just have to know more information about
21 what their curriculum is and -- and how they're
22 teaching it. It would be a process where they
23 --

24 JUSTICE ALITO: Well, unless you can
25 say that you would treat a Unitarian school the

1 same as a Christian school or an Orthodox Jewish
2 school or a Catholic school, then I think you've
3 got a problem of discrimination among religious
4 groups.

5 MR. TAUB: So, I mean --

6 JUSTICE ALITO: Regardless of the --

7 MR. TAUB: -- part of the challenge
8 here --

9 JUSTICE ALITO: -- regardless of
10 religious group that is affiliated with the
11 particular school that is at issue in the case
12 before us.

13 MR. TAUB: So -- so part of the
14 challenge here, I think, you know, is -- is in
15 part the definition of religion itself, and --
16 and that is an issue that this Court has
17 struggled with over the years in cases like IRS
18 tax exemptions and conscientious objector
19 status. And so questions always up about
20 whether -- is this thing a religion or is it
21 something else?

22 And I think that most people, you
23 know, would believe that Unitarianism is a
24 religion. It --- it might be not be premised on
25 the existence of a supreme being, but I think

1 most people would -- would agree that
2 Unitarianism is a kind of religion. I might be
3 wrong about that, but -- but I think that
4 Unitarianism is commonly considered a religion.

5 And so, if that is the case, then --
6 then a school that is promoting Unitarian
7 beliefs would not be eligible for the program.

8 JUSTICE GORSUCH: Counsel, my -- my
9 understanding of the record is that this theory
10 that Miss Porter's and the -- and the Cate
11 School in California provide a public education
12 or rough equivalent to one in Maine is a -- a
13 relatively recent phenomenon, that -- that
14 before I believe it was 1980, Maine did allow
15 local religious schools to participate in this
16 program and that it changed course only because
17 of a perhaps mistaken view about Establishment
18 Clause precedents and that the Maine Supreme
19 Court found that that was the only reason why
20 Maine changed course.

21 So isn't this whole discussion of
22 rough equivalent of public schools something of
23 a post hoc justification?

24 MR. TAUB: It's not, Your Honor. It
25 is true that -- that -- that there was a time

1 period when religious schools were eligible for
2 the program. The Attorney General authored an
3 opinion which I think most scholars and courts
4 at the time would have concluded was accurate
5 that included --

6 JUSTICE GORSUCH: Well, I don't doubt
7 it was in good faith, but you'd agree that that
8 was the reason why Maine changed course?

9 MR. TAUB: That -- that was the
10 reason, but I think what's significant is that
11 after -- after Zelman came out, the Maine
12 legislature understood that maybe that they
13 could include religious schools in the program,
14 and so there was debate about whether to remove
15 the religious exemption.

16 And if you look at -- at -- at -- at
17 the statements made during the debate, it's --
18 it's clear that the -- that -- that the
19 legislators who were opposed to -- to -- to --
20 to removing the exclusion had interests
21 different than Establishment Clause concerns.
22 They had concerns about making sure that a
23 public education is religiously neutral, that
24 it's -- it's inclusive, that it's not
25 discriminatory.

1 So I think -- and -- and the fact that
2 --

3 JUSTICE GORSUCH: So there were
4 debates after the Attorney General changed
5 position, but the -- the change was due to the
6 Attorney General's opinion? Is that right?

7 MR. TAUB: That -- that was the change
8 that was made in 1981.

9 JUSTICE GORSUCH: Okay. All right.
10 And then I -- I do want to understand this
11 theory. So a -- a -- a private entity can
12 provide a public education in Maine?

13 MR. TAUB: Yes.

14 JUSTICE GORSUCH: A private entity in
15 California can?

16 MR. TAUB: A private -- yes.

17 JUSTICE GORSUCH: It just can't have
18 too much religious entanglement?

19 MR. TAUB: It's not that it has too
20 much religious entanglement. It's that --

21 JUSTICE GORSUCH: Well, some might be
22 okay, but some --

23 MR. TAUB: It's --

24 JUSTICE GORSUCH: -- some might not --

25 MR. TAUB: Well --

1 JUSTICE GORSUCH: -- I believe was
2 your answer to the Chief Justice.

3 MR. TAUB: -- the ones that would not
4 be okay are the ones that are instilling
5 religious beliefs in children.

6 JUSTICE GORSUCH: Okay. How does that
7 not discriminate against minority religious
8 viewpoints or ones that are unorthodox because
9 some -- and favor religions that are more
10 watered down, some might say, or more -- more
11 majoritarian, more comfortable with what a --
12 what a -- a bureaucrat in Bangor might say?

13 MR. TAUB: I don't see that that's --
14 that's an issue at all. This isn't an issue
15 about how watered down the religion is. This is
16 an issue just about -- about whether religious
17 beliefs are -- are being instilled.

18 Whether those are watered-down
19 religious beliefs or more vigorous --

20 JUSTICE GORSUCH: Oh, but -- but I
21 thought some were okay, but there comes a line
22 that it's too much.

23 MR. TAUB: No, there -- there's --
24 there's -- there's no -- there -- there -- there
25 is not a school that instills religious beliefs

1 that would be eligible for -- for our program.

2 JUSTICE GORSUCH: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 Justice Breyer?

6 JUSTICE BREYER: I would like to ask
7 you, because Mr. Bindas said, which is --
8 leaving my views out of it, which have been in
9 dissents and so forth, that this really is the
10 same as Zelman. I mean, in Zelman, the -- the
11 state provides -- provided tuition money so that
12 the children's parents could choose what
13 religious school to go to.

14 That's pretty much, I think, my
15 recollection is. And so what's the difference
16 here?

17 MR. TAUB: So --

18 JUSTICE BREYER: This parent chooses a
19 school and the state supplies some money.

20 MR. TAUB: So the first important
21 point is that Zelman was about what a state is
22 permitted to do, not what about a state is
23 required to do.

24 So -- so, in Zelman, this Court said
25 that it was permissible for the state to allow

1 the school vouchers to be used at religious
2 schools. But -- but the other significant
3 aspect is that in Zelman, the state was
4 providing a program for -- for parents who
5 wanted to opt out of the public school system,
6 for -- for parents who wanted to send their kids
7 to private schools because of a failing public
8 school system.

9 In Maine, our -- our tuition program
10 is part and parcel to our public schools. It's
11 -- it's available for that very tiny percentage
12 of kids who live in districts who otherwise
13 wouldn't be able to receive a public education.
14 It is only those children who are allowed to
15 participate in this tuition program. And so --

16 JUSTICE BREYER: So you're -- for you
17 to basically win, it seems to me, you would have
18 to fall within the -- what Justice Kagan said is
19 this -- this area where the state has a degree
20 of leeway, is that right?

21 MR. TAUB: Yes. I think -- I think
22 there's two ways that we win. I think the one
23 -- the first way we win is if the Court agrees
24 that this is part of Maine's public education
25 program.

1 And then I think the other way that we
2 can win is if the Court agrees that when -- that
3 when it comes to spending programs, just like
4 with free speech, the state is allowed to use
5 its pocketbook to promote the values that it has
6 decided it wants to promote. And so this is a
7 spending program, and what Maine wants to --
8 wants to advance is religious neutrality. We
9 want schools to be neither --

10 JUSTICE BREYER: I --

11 MR. TAUB: -- for nor against any
12 particular religion.

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

14 CHIEF JUSTICE ROBERTS: Justice Alito?

15 JUSTICE ALITO: Well, on that point,
16 suppose a school inculcates a purely
17 materialistic view of life.

18 Would that be -- would that be okay?

19 MR. TAUB: So, I mean, this is
20 something that we -- that we've thought about,
21 and I think there -- there are other aspects of
22 -- of what a school could do that would be
23 inconsistent with a public education.

24 Now what the Maine legislature had in
25 front of it was it had a set of -- of sectarian

1 schools and it had a set of secular schools, and
2 -- and the one thing that the legislature knew
3 is that it did not want to have schools that
4 inculcate religion as part of the public
5 education program.

6 Now it's possible that, you know, down
7 the road some school might pop up that is
8 teaching something else, not religion but
9 something else, say, Marxism or Leninism or, you
10 know, white supremacy. Clearly, those kinds of
11 schools would be doing something completely
12 inconsistent with a public education.

13 JUSTICE ALITO: But, as of now, that
14 would not prohibit a parent from getting funding
15 to send a child to one of those schools?

16 MR. TAUB: So, be -- be -- because
17 those are hypothetical situations that the
18 legislature has never had to confront, it hasn't
19 addressed that in the legislation.

20 But there's no doubt, Your Honor, that
21 if a white supremacy school tried to participate
22 in Maine's program, the legislature would
23 swiftly act to say, no, you know, beyond being
24 religiously neutral, you also can't teach
25 principles of -- of -- of hatred.

1 JUSTICE ALITO: I understand that.
2 But, as of now, the only thing that you want to
3 make sure that the schools that are covered by
4 this cannot do is that they can't inculcate
5 religion --

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

7 JUSTICE ALITO: -- even if it's -- you
8 know, even if it's a religion that promotes
9 tolerance of all religious beliefs, if it's
10 religiously based, no?

11 MR. TAUB: Again, I mean, I don't want
12 to quibble with -- with words, but it's not just
13 that it's religiously based. It's that it's
14 instilling religion in the children who attend
15 that. And -- and that is because that is the
16 defining characteristic and I think this Court
17 has recognized that that's a defining
18 characteristic of a public education.

19 And so -- so that is the thing that
20 the legislature has controlled for because
21 that's what actually exists on the ground. We
22 actually have schools that instill religious
23 beliefs. We -- we don't have schools that are
24 instilling Leninism or white supremacy.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE KAGAN: But just to follow up
3 on that point, you're confident that that would
4 -- that kind of school would not be funded
5 because -- a white supremacist school, because
6 it's outside the bounds of your program, is that
7 right?

8 MR. TAUB: I mean, yes, Your Honor. I
9 -- I think it's -- it's -- it's unfair for --
10 for the -- for a legislature to be expected to
11 legislate against every hypothetical outlandish
12 situation that could come forward. So it's
13 incredibly unlikely that we would ever have a
14 white supremacy school applying to become part
15 of our public school program.

16 But knowing what I know about Maine
17 and our legislature, that school would -- there
18 -- a way would be found to ensure that that
19 school is not allowed to participate.

20 JUSTICE ALITO: Well --

21 JUSTICE KAGAN: Do you --

22 JUSTICE ALITO: -- can I follow up?

23 I'm sorry.

24 JUSTICE KAGAN: No, please.

25 JUSTICE ALITO: No, go ahead.

1 JUSTICE KAGAN: Go ahead.

2 JUSTICE ALITO: Would you say the same
3 thing about a school that teaches critical race
4 theory?

5 MR. TAUB: Whether that school would
6 be eligible?

7 JUSTICE ALITO: Yeah.

8 MR. TAUB: So I think that that is
9 something that the legislature would have to
10 look at. I mean, that one's closer because,
11 frankly, I don't -- I don't really know exactly
12 what it means to teach critical race theory. So
13 I think -- I think the Maine legislature would
14 have to look at what that actually means.

15 But -- but I -- I will say this, that
16 -- that if -- that -- that if teaching critical
17 race theory is -- is -- is antithetical to a
18 public education, then the legislature would
19 likely address that.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: You've been asked
22 quite a number of questions on your time up
23 there about, you know, hard cases, also sort of
24 odd cases.

25 I just want to know what's the hardest

1 case you have actually -- the Department of
2 Education has actually ever been confronted with
3 in this area?

4 MR. TAUB: So we've never really had a
5 hard case. In 20 years worth of records, we've
6 identified three schools where there was any
7 issue raised about whether they were eligible.

8 The first school was a seminary
9 school, and so that was clearly ineligible. We
10 told them that, and we never heard back.

11 There was another school that, even
12 though it indicated it was -- it was
13 non-sectarian, it -- it disclosed or -- or a
14 Department of Education official learned that --
15 that "its" -- "its student life centers around
16 our chapel." And it also had a religious
17 affiliation.

18 And so the state responded that it
19 doesn't look like you're eligible, but, if you
20 want to provide us with more information, we'll
21 consider it. And we never heard anything more
22 from that school.

23 And then the third -- the third
24 school, the Cardigan Mountain School, was a -- a
25 school that we identified as having a chapel,

1 and so we -- we wrote to the school and said, is
2 this a mandatory chapel service? And they said,
3 well, it is, but the chapel is just the biggest
4 building that we have on campus, and so, when we
5 have our student assemblies, that's where we
6 hold them, but there's nothing religious that
7 goes on there. And so we said, okay, that's
8 fine.

9 Those are the only -- in 20 years,
10 those are the only situations that we have had
11 where we've had to make those kinds of
12 decisions.

13 JUSTICE KAGAN: I mean, I would think
14 all the religious schools I know of -- and, you
15 know, it could be Catholic schools or it could
16 be Evangelical Christian schools or it could be
17 Muslim schools or Jewish schools of any
18 persuasion, not just Orthodox but any Jewish
19 schools, I mean, if somebody said to them, are
20 you a religious school, they would have no
21 trouble saying, yes, we are, right?

22 MR. TAUB: They're not trying to hide
23 this, Your Honor. They're proud of it, and they
24 should be. I mean, these schools have an
25 important place in our community. And so

1 they're not trying to hide or -- or pull a fast
2 one over us. They're proud of -- of being a
3 school that instills religion, and they will
4 tell us that.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: Yeah, just to follow
9 up on that. So the Cardigan school had a chapel
10 in the middle of campus, and it was allowed to
11 participate.

12 MR. TAUB: Yes.

13 JUSTICE GORSUCH: But the Kent school,
14 which was the second one you mentioned, though
15 you didn't identify it by name, an Episcopal
16 school, said it's not owned or affiliated with
17 the church, but it was not allowed to
18 participate, right?

19 MR. TAUB: Well, what we told the
20 school is that, based on our review, because you
21 say that your life centers around your chapel
22 and be -- because --

23 JUSTICE GORSUCH: Right. It was not
24 allowed to participate, right?

25 MR. TAUB: Well, they were invited to

1 provide more information.

2 JUSTICE GORSUCH: More information,
3 but they were denied at that time?

4 MR. TAUB: Yes.

5 JUSTICE GORSUCH: Okay. So somebody
6 in Maine, in Bangor, has to sit down and decide
7 Cardigan good/Kent bad, right?

8 MR. TAUB: Yes, Your Honor, but these
9 were easy calls to make.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: If -- if the state
13 said that you can use the funds for a secular
14 private school or a Protestant private school
15 but not a Catholic or Jewish or Muslim private
16 school or any other religious private school, I
17 assume you would agree that would be
18 problematic?

19 MR. TAUB: Of course, Your Honor.

20 JUSTICE KAVANAUGH: Okay. So, when it
21 says that you can use it for a secular private
22 school but not a Protestant, Catholic, Jewish,
23 or Muslim or any other religious private school,
24 you say that's -- that's okay, though?

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

1 this Court has recognized, for example, in the
2 school prayer cases that -- that the -- the
3 absence of religion isn't -- isn't animosity
4 towards religion.

5 So what we are trying to achieve are
6 schools that are religiously neutral. And --
7 and -- and just to be clear --

8 JUSTICE KAVANAUGH: But if you -- keep
9 going.

10 MR. TAUB: -- if -- if -- if -- if
11 there were a school that -- that taught sort of
12 antireligion, that -- that -- that taught kids
13 that there is no God, that you should reject all
14 religion, that school wouldn't be eligible
15 either. What we want is religious neutrality.

16 JUSTICE KAVANAUGH: But the -- the
17 problem, I think, and the tension with what you
18 just said as to those two questions is that our
19 case law suggests that discriminating against
20 all religions, as compared to secular,
21 comparable secular, is discriminatory just as it
22 is discriminatory to say exclude the Catholic
23 and the Jewish and include the Protestant.

24 And so it's not exclusion of religious
25 people and religious institutions from public

1 benefits solely because they're religious is
2 itself discriminatory.

3 So how do -- I mean, we said that
4 Trinity Lutheran said odious to our
5 Constitution. How do you deal with -- with
6 that?

7 MR. TAUB: So I think there's a nuance
8 going on here that I just want to make sure I
9 can clarify, that -- that I think that there --
10 there is a difference between sort of state
11 regulations, in other words, like state
12 prohibitions, and -- and state programs that are
13 providing funding.

14 And so I think, when it comes -- when
15 it comes to prohibitions, a state can't
16 discriminate based on status or use. So you
17 can't -- you -- you can't say a person can't be
18 Catholic and you also can't say that a person
19 can't take Communion.

20 I also think, when it comes to subsidy
21 programs, there, you can't discriminate based on
22 status. So you can't say that we have a
23 playground program, but you can't -- you're not
24 eligible if you're religious.

25 But I think that there's a fourth

1 category, and -- and the fourth category is a
2 subsidy program that -- where -- where the
3 subsidy is being used for a specific purpose,
4 and it excludes purposes that are -- that are
5 contrary to what the government is trying to
6 establish and are going to be used to directly
7 advance religion.

8 I think that is the one very narrow
9 category where there is a real distinction
10 between status and use.

11 JUSTICE KAVANAUGH: One last question,
12 which is to pick up on Justice Breyer's
13 questions earlier, which I think identified a
14 real issue here, which is strife that is
15 created.

16 But what do you say to -- to those who
17 would say by excluding someone who's religious
18 from a state program and creating this feeling
19 of exclusion for people who are told your school
20 isn't good enough solely because it's religious,
21 go to Exeter or Andover, but you can't go to the
22 Bangor Christian or the DeMatha or whatever the
23 religious school is, doesn't that also create a
24 possibility of -- of strife?

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

1 Honor. I -- I think what the real strife would
2 be, first of all, I think there would be strife
3 among parents who live in districts that have
4 public schools or contract with schools, because
5 I think the strife there would be, how come I
6 can't send my kids to religious schools at
7 public expense but these other kids can?

8 So I think that -- that -- that's one
9 source of strife. I think another source of
10 strife would be trying to explain to taxpayers
11 in Maine why your money is being used to go to a
12 school that teaches that boys are better than
13 girls, that actively discriminates against
14 certain protected classes.

15 So I think that's -- that that's a
16 second element of strife.

17 But I think the other point I want to
18 make is -- is we are not telling people that you
19 can't go to a school because they're religious.
20 There are plenty of people in Maine who want to
21 send their kids to religious schools for reasons
22 wholly unrelated to the religious aspects of the
23 school. It might be because they have a better
24 hockey team or they have better academics or
25 they just have more discipline.

1 And -- and we tell the same thing to
2 those parents. It's not that you're religious
3 that you can't go to that school. It's just
4 those schools aren't eligible for our program.

5 JUSTICE KAVANAUGH: Appreciate your
6 answers. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: I have one -- I have
10 a question, but I have one quick follow-up to an
11 answer you gave Justice Kavanaugh.

12 You said that if a private secular
13 school taught that all religions were bad,
14 religions were bigoted, that they would not be
15 eligible for participation in Maine's program.

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

17 MR. TAUB: Well, the -- the goal of
18 the program is religious neutrality. And so,
19 you know, we've -- we've never heard of a school
20 that's sort of antireligious, a school that
21 teaches that all religion is bad. But -- but
22 it's clear that such a school would not be
23 religiously neutral. And so, because the whole
24 purpose of the program is to --

25 JUSTICE BARRETT: But the statute says

1 non-sectarian. It doesn't say religiously
2 neutral, right?

3 MR. TAUB: Well, that's true. But --
4 but I think that -- that -- that the spirit and
5 purpose of the program -- and -- and -- and
6 we've talked about this with the commissioner of
7 the Department of Education, and -- and -- and
8 her position is -- is the same as ours, that --
9 that a school that is -- that is antireligious
10 is not religiously neutral, and so it would not
11 qualify for this program.

12 JUSTICE BARRETT: Thank you. And my
13 question is as follows. It kind of goes back to
14 Justice Thomas's questions about rough
15 equivalent of a public school.

16 So all schools, in making choices
17 about curriculum and the formation of children,
18 have to come from some belief system. And in
19 public schools, the public school -- the school
20 boards, the districts are making that choice,
21 those choice of classes to be taught and the
22 kind of values that they want to inculcate in
23 the students.

24 Is there any kind of -- I mean, how
25 would you even know if a -- if a school taught

1 all religions are bigoted and biased or, you
2 know, Catholics are bigoted or, you know -- or
3 we take a position on the Jewish-Palestinian
4 conflict because of our position on, you know,
5 Jews, right?

6 How would they even know? Because
7 it's my understanding that in choosing whether a
8 non-sectarian school can be funded or not,
9 you're not engaging in that kind of oversight
10 about what the belief systems are of the school.
11 So long as they're not sectarian, it's a
12 thumbs-up?

13 MR. TAUB: So I will answer that --
14 that question, Your Honor. Obviously, I will
15 answer your -- your question, but -- but I -- I
16 just -- I just want to make this point first
17 because this might be lost in -- in the record.

18 Over 99.8 percent of children in Maine
19 go either to a public school or one of what we
20 call the Big 11, which are schools that enroll
21 at least 60 percent publicly funded students but
22 -- but, in reality, enroll more like 95 percent
23 publicly funded students. So it's -- it's
24 only .2 percent of students that are going to
25 other private schools.

1 And the Department of Education is
2 very familiar with the curriculum at the Big 11.
3 So -- so the Department is very comfortable that
4 when it comes to those schools where almost
5 every student is going, we know what's being
6 taught there.

7 But -- but, to answer Your Honor's
8 question, there is a process that schools have
9 to go through to become part of our program, and
10 through that process, if a Department of
11 Education official says -- sees information that
12 -- that -- that the school seems to be teaching
13 antireligious views, that would raise a red
14 flag, and -- and that would result in the kind
15 of inkling --

16 JUSTICE BARRETT: But it was my
17 understanding that that wasn't part of -- just
18 based on the record, and I may not understand
19 it, but as it was laid out in the briefs, it was
20 my understanding that if the school is
21 accredited, that there weren't particular
22 curricula requirements the school had to satisfy
23 to be eligible for participation in the program.
24 You know, a school, for example, could be single
25 sex. It didn't have to be co-ed. And I assume

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

2 I mean, it didn't have to match up
3 along all of those metrics and that there was no
4 formal examination into what kinds of values
5 that the school was seeking to inculcate in
6 students.

7 MR. TAUB: That is true, but -- but
8 what the Department of Education does when it
9 gets a new school apply is it does a little
10 homework, and so it'll go to the school's
11 website and say, okay, I've never heard of this
12 school before, I want to learn a little about
13 it. Or maybe it takes a look at the student
14 handbook.

15 And, you know, if the first sentence
16 in the handbook says that our school is designed
17 to promote white supremacy interests or our
18 school is designed to promote antireligion, that
19 is going to be a flag that's going to get
20 tripped, and that's going to result in the kind
21 of inquiry.

22 So you're absolutely right, Your
23 Honor, that -- that the schools are not
24 submitting their curriculum to us as part of
25 this process.

1 JUSTICE BARRETT: And there's no visit
2 to the school? There's no talking to the
3 teachers? There's no -- it's just kind of what
4 you can find on the website? And that's not --
5 that's not pertinent to the statute because the
6 statutory requirement is simply
7 sectarian/non-sectarian?

8 MR. TAUB: Yeah. I mean, in just the
9 run-of-the-mill cases, these schools are
10 well-known to us. They check off a box saying
11 they're either sectarian or non-sectarian.

12 JUSTICE BARRETT: Okay. I -- I
13 understand the Big 11.

14 MR. TAUB: Yeah.

15 JUSTICE BARRETT: But I think you
16 answered my question for this.

17 MR. TAUB: No, but -- but that's true
18 for -- for all schools.

19 JUSTICE BARRETT: Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Stewart.

23

24

25

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. Our -- our primary --

25 JUSTICE GORSUCH: And -- and -- and

1 you'd agree that, you know, in Thomas, for
2 example, this Court's made clear that -- that
3 you -- you don't have to choose between
4 receiving a public benefit and your faith,
5 right?

6 MR. STEWART: That -- that's correct.
7 But the question is -- the question is not
8 whether you can be denied the unrelated benefit
9 based on your faith or based on your religious
10 practice. It's whether the government has to
11 subsidize the religious practice itself, and --

12 JUSTICE GORSUCH: Fair -- fair enough.
13 But, once it creates the program, here, we have
14 a program that's been created, and I think that
15 goes back to the Chief Justice's point that, you
16 know, maybe they didn't have to create a
17 program.

18 But, once -- once they do, to suggest
19 that you don't have to choose between
20 participation in the program and your faith
21 because you can send your children to Sunday
22 School or to a Bible Study program at night
23 seems to suggest favoritism toward religions --
24 just react to this -- seems to favor religions
25 for whom that is an adequate substitute and

1 discriminate against religions for whom that is
2 not an adequate substitute.

3 MR. STEWART: I -- I think the state
4 is behaving neutrally in the sense that it says
5 we will fund secular education. We will not
6 fund religious instruction or an inculcation.
7 And it may be that to members of some religions
8 that will be a greater practical burden than to
9 others, but that doesn't --

10 JUSTICE GORSUCH: So, to the Orthodox
11 Jewish family, it is a burden, and to the
12 Protestant family, it may not be?

13 MR. STEWART: I -- I guess I would
14 speak --

15 JUSTICE GORSUCH: You agree that's the
16 practical reality of the program?

17 MR. STEWART: I mean, obviously,
18 parents who would like to send their children to
19 religious schools full time during the day are
20 burdened by this rule in a way that parents who
21 have no interest in doing so would not be.

22 But -- but, to speak to a -- a
23 hypothetical that the Chief Justice raised, if
24 -- if, for instance, the state decided we will
25 provide aid for refurbishing athletic facilities

1 and it will be available to secular and to
2 religious schools alike, and -- some religious
3 schools have robust athletic programs and they
4 would benefit significantly from the assistance.

5 Another religious school might say:
6 Participation in athletics is contrary to our
7 religious values. This money is useless to us.
8 If it's confined to -- to that parameter --
9 within those parameters, we would like the money
10 to use it for something that is as important to
11 us as athletics is to some other schools.

12 Clearly, they'd have no valid free
13 exercise claim. The state has chosen to
14 subsidize certain activities and not others. It
15 has done so on a religiously neutral basis.

16 It may be that that aid will be,
17 practically speaking, more valuable to members
18 of some religions than to others, but that
19 doesn't create a constitutional violation.

20 JUSTICE KAVANAUGH: But, at its core,
21 Mr. Stewart, you're suggesting that with, say,
22 two neighbors in -- in Maine, in a neighborhood,
23 and they both -- there is not a public school
24 available, and the first neighbor says we're
25 going to send our child, children, to secular

1 private school, they get the benefit.

2 The next-door neighbor says: Well, we
3 want to send our children to a religious private
4 school, and they're not going to get the
5 benefit. And I don't see how your suggestion
6 that the subsidy changes the analysis. That's
7 just discrimination on the basis of religion
8 right there at that -- at the neighborhood
9 level.

10 MR. STEWART: Well, first, as Mr. Taub
11 said, it's not discrimination based on the --
12 the religion of the parents. Some parents
13 obviously send their children to religious
14 schools because they share the religious values.
15 Other parents may send the -- the children to
16 religious schools for a combination of other
17 reasons.

18 And -- and so there is a disparity in
19 treatment. It's not necessarily a disparity
20 based on the religion of the parents. But the
21 --

22 JUSTICE KAVANAUGH: Well, that's
23 slicing it pretty thin in the real world, I
24 think. It's discrimination against the
25 different schools because of the religion and

1 people who prefer those schools, prefer
2 religious schools over secular schools.

3 MR. STEWART: But -- but I think the
4 -- still the -- the response is the state is
5 behaving neutrally in the sense that it will
6 fund secular education and not religious
7 education.

8 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.

13 It's intended to provide a substitute
14 for public education in --

15 JUSTICE KAVANAUGH: Why isn't it
16 treating people neutrally to tell them you're
17 all equal citizens without respect to your
18 religion, and so, too, all the schools that are
19 accredited are equal without respect to their
20 religion, whether you are secular, Catholic,
21 Jewish, what have you, you're all going to be
22 treated equally?

23 Isn't that the -- the neutral position
24 is to suggest your religion does not affect your
25 qualification for a particular public benefit,

1 your religion or lack of religion doesn't affect
2 your -- your qualifications in our society?

3 MR. STEWART: I -- I mean, first, the
4 state, as your question pointed out earlier,
5 certainly couldn't distinguish among religions.
6 It couldn't provide the funds to the Catholic
7 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 KAVANAUGH: Well, there --

21 MR. STEWART: And I think there --
22 there -- that there is a sort of secular analog
23 to this, where in cases like Regan and in
24 Cameron versus United States, if -- if a federal
25 or 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 take
3 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 are 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 government
19 has had the same latitude with respect to
20 religious inculcation. It can't penalize people
21 in some unrelated sphere because they have
22 engaged in religious instruction of their
23 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 --

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 is -- are
15 bad?

16 MR. STEWART: I don't see anything in
17 the Maine statute as currently written that
18 would naturally be construed in that way. The
19 -- either the Department of Education or a court
20 in Maine could adopt a limiting construction, or
21 I think more likely, as Mr. Taub said, if it --
22 if that became a prevalent practice, the
23 legislature could step in.

24 So while we don't think it would be
25 constitutional for Maine to distinguish on that

1 basis, we don't think that the absence of an
2 express provision in the statute to that effect
3 is a basis for striking the statute.

4 JUSTICE ALITO: Don't we have to judge
5 the constitutionality of the statute as it now
6 stands?

7 MR. STEWART: Well, I think what they
8 are -- I think we should be asking, is the
9 statute a -- constitutional as applied to these
10 particular Petitioners? And if these
11 Petitioners could point to an example in which a
12 school was approved for funding, even though it
13 provided atheistic or anti-religious
14 instruction, then that might be a valid basis
15 for an as-applied claim.

16 But the -- the theoretical possibility
17 that could happen is -- is not a ground for
18 invalidating the statute. And obviously the --
19 the Court has dealt with a lot of funding
20 programs and a lot of issues under both the
21 Establishment Clause and the Free Exercise
22 Clause, deciding certain practices are
23 constitutional or not.

24 I don't know of any case in which the
25 Court has said the absence from this statute of

1 some express exclusion for atheist schools is
2 itself a basis for striking the law down.

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

5 JUSTICE GORSUCH: Mr. Stewart, I do --
6 I do have one question.

7 I -- I just want to confirm my
8 understanding. I -- I didn't see in the
9 government's brief any strict reliance or
10 suggestion that the Court should rely on a
11 status use distinction. Rather, I saw this
12 analogy to government speech.

13 Is that right?

14 MR. STEWART: Well -- well, I think we
15 are advocating the status use distinction but I
16 think -- not -- not the analogy to government
17 speech so much because I don't think it's
18 necessary to treat this as government speech.

19 We are relying on the principle in the
20 Free Speech Clause cases that the government has
21 substantially more latitude when it declines --

22 JUSTICE GORSUCH: I'm sorry. That's
23 what I meant to say, as opposed to a strict
24 reliance on a status use distinction.

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

1 the status use distinction is just different
2 words for the same concept.

3 JUSTICE GORSUCH: Well, the government
4 -- the government wouldn't -- I mean, maybe it
5 would. Does the government see a basis for
6 distinguishing between a tax on persons who wear
7 yarmulkes as opposed to a tax on Jewish persons,
8 to borrow from one of our cases?

9 MR. STEWART: No, but we don't view
10 the status-use distinction as being based, as --
11 as Justice Kagan was saying earlier, on a
12 distinction between religious belief and
13 religious conduct. We -- we think the
14 status-use distinction means, on the one hand,
15 the state can decline to fund your religious
16 exercise, but it cannot decline to give you an
17 unrelated benefit based on the fact that you
18 have engaged in religious exercise outside the
19 program.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Stewart.

22 What is your answer to the questions I
23 -- I posed to your friend from Maine about the
24 two churches, one that doesn't have religious
25 interest in infusing the school with its -- with

1 its religion but -- or it does, it's religious
2 value is service to others, and they're doing
3 that by providing a perfectly secular school,
4 and the other that has the religious teaching
5 that it should infuse its children with the
6 values of the faith and they have a school like
7 that?

8 As I understood it, we have -- the
9 former school can participate in this program
10 but the latter cannot.

11 MR. STEWART: I -- that is correct.
12 And I think, even though it might appear in --
13 in one sense to be discriminatory, it actually
14 avoids a more insidious form of discrimination.
15 That is, there are a lot of circumstances in
16 which the government decides to fund or
17 subsidize activities that it believes to be in
18 the public interest.

19 And the general rule is as long as you
20 are prepared to do those things, you're entitled
21 to the funding, whether you're religious or not.
22 And if we said that the person who did those
23 things with a religious reason in mind is going
24 to be treated differently from the person who
25 did them with purely secular motivations, that

1 would be problematic.

2 And to -- to take your hypothetical
3 and -- and compare it to a situation in the
4 public schools, as Mr. Taub was pointing out,
5 public schools attempt to teach virtues like
6 honesty, trustworthiness, kindness,
7 consideration for those less fortunate. And,
8 certainly, those are essentially secular values.
9 They certainly correspond to values that many
10 people hold as a matter of religious conviction.
11 But there's no question those values could be
12 taught in the public schools.

13 And if a particular public school
14 teacher was especially committed to those values
15 because of her religion, that wouldn't be a
16 problem. But if the teacher at the public
17 school said you should behave in this way
18 because that was the way that Jesus Christ
19 behaved and he was the son of God, that would be
20 problematic.

21 We would look at the content of the
22 instruction the public school teacher was
23 providing, not her internal motivation for
24 speaking as she did.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas?

2 JUSTICE THOMAS: I have no questions.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: I -- I might ask this
6 because it's related to what Justice Kavanaugh
7 said and -- and what you're saying.

8 I mean, it is discriminatory against
9 religion, but I think the Establishment Clause
10 problem or interest underlying it forever has
11 been beware if the government gets too involved.
12 One, people will think the government favors
13 some things as opposed to others, and that that
14 will cause strife.

15 Two, the Vietnamese boat people will
16 have no problem in Los Angeles, but they sure
17 will in Maine because there aren't enough of
18 them. And there are a lot of religious people
19 who will say why are you preferring the
20 Catholics or the Jews to the Vietnamese boat
21 people? You see? And you say I have an answer
22 to the discrimination, there aren't enough of
23 you. Oh, oh, I see. Minority, okay.

24 But there's a third one which you
25 haven't mentioned, which I learned out of a case

1 in the First Circuit, which was really tough,
2 religious reason for teaching about Honduras in
3 the geography class in way X. School board says
4 way X, you can't do it; you're disqualified as a
5 teacher. They say but that's how we're supposed
6 to do it, okay? And I have never seen emotions
7 rise so high in a courtroom.

8 And, suddenly, you get into teaching
9 that involves worship and religious principle.
10 You don't know what kinds of inter-religion or
11 why are you doing it for the religious people
12 but not me, I'm not religious, dah-dah,
13 dah-dah-dah. The strife that can be involved.
14 All right.

15 Now, I thought that was a good reason
16 why Zelman was wrong. But my colleagues did
17 not. Now we have, in fact, a different issue:
18 Can a state have a different judgment than Ohio?
19 Can Maine differ from Ohio? That's the issue.

20 All right? Hey, we have a principle,
21 we have 50 states and a huge country, and so why
22 not, I say, let some decide one way; let some
23 decide the other. They have different kinds of
24 populations.

25 Now, you see what I have? I have a

1 great theory. Is there any law supporting that?

2 MR. STEWART: Oh, I think there's the
3 law that I referred to and that Justice Kagan
4 referred to, the idea of the play in the joints,
5 the idea that there is a fairly significant
6 sphere of activity in which the state can
7 legitimately choose either to fund or not to
8 fund religious institutions.

9 And in making that decision, state and
10 local legislators can -- cannot just decide what
11 would be the best solution for the whole
12 country. Legislators in a particular part of
13 the country can decide, where we live, excluding
14 the religious schools would be more likely to be
15 perceived as a form of religious discrimination
16 and to cause turmoil and, therefore, we won't do
17 it. In another part of the country, the
18 legislators might say including the religious
19 institutions is more likely to cause strife.

20 Obviously, there are limits. Espinoza
21 and Trinity Lutheran made clear that you can't
22 exclude the institution all -- altogether with
23 respect to secular activities, but there is
24 significant room for regional variation.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: If the program allowed
2 parents to send their children to any accredited
3 school anywhere in the country, which is what
4 this program seems to allow with the exception
5 of so-called sectarian schools, would -- how
6 would that cause strife? And add into that the
7 fact we're told that Maine didn't rule out these
8 schools until -- for many, many years, the
9 parents were permitted to send their -- their
10 children to those schools.

11 Was there -- are you aware of a
12 history of strife? Explain -- you know, it's
13 one thing to say strife. Could you explain in
14 more concrete terms how you see a potential for
15 religious strife arising out of the acceptance
16 of the Petitioners' argument here?

17 MR. STEWART: I think, first, to speak
18 to the history briefly, until 19 -- it was in
19 1980 that the Maine attorney general first
20 analyzed the question. And the attorney general
21 said I think it would be unconstitutional under
22 then extant Supreme Court precedent to fund
23 sectarian schools, and he explained that he
24 meant schools whose dominant purpose is the
25 promotion of religious beliefs. And -- but

1 after Zelman was decided in 2003, the Maine
2 legislature reexamined the question, decided to
3 maintain the bar in effect on the books, based
4 on independent reasons.

5 But to speak to the strife point in
6 particular, I think it is likely, contrary to
7 what was said earlier, that allowing the subsidy
8 for religious schools will tend to favor --
9 favor majoritarian religions, because in order
10 to have a religious school, you don't have --
11 you have to have more than a single adherent to
12 a particular belief system.

13 You have to have a critical mass of
14 people within the community who are willing to
15 support the school. And so those are going to
16 tend to be religions of majoritarian schools.
17 And there is at least the spectacle as --
18 specter, as Mr. Taub said, of people in the
19 community saying: You are funding religions
20 other than our own, and you are funding
21 religious schools that promulgate beliefs that
22 are antithetical to ours.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: You know, I look

1 at the history in this area and what I see is
2 that at the founding, there weren't public
3 schools. They were self-taught, but most of the
4 schools were private. And, yes, there's a
5 history of some states, not all, subsidizing
6 some religious schools. And then we have later
7 a movement -- much later -- a movement towards
8 public schools. But what I don't see after the
9 creation of public schools is a tradition of
10 history -- or history of continued support of
11 religious schools.

12 Am I reading the history right?

13 MR. STEWART: I mean, I don't -- I
14 don't want to speak too categorically. I think
15 you're right, there was a movement in the
16 direction of public education. It, of course,
17 wasn't until the 1960s that this Court issued
18 the school prayer decision, so -- so it wasn't
19 even until fairly recently that the Court said
20 you can't have an overt religious component in
21 the public schools.

22 So I -- I think what we would draw
23 from the history is different governmental units
24 have done it different ways at different points
25 in time, and that may weigh in favor of an

1 argument that particular practices should be
2 permissible understand the Establishment Clause,
3 but it shouldn't preclude particular states from
4 deciding we don't want to do this here.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Mr. -- Mr. Stewart,
8 how should we analyze the standing question
9 here? I mean, the Petitioners here say, look,
10 you -- what this legislation does is to prevent
11 us from even seeking a school that would accept
12 the money, and so the fact that we haven't come
13 up with a particular school that would accept
14 the money and that meets our religious criteria
15 is irrelevant.

16 Why isn't that right?

17 MR. STEWART: I mean, the cases they
18 were relying on were the Northeastern Florida
19 General Contractors case and Heckler versus
20 Matthews, which I believe was a sex-based
21 disparity and public benefits.

22 And -- and in both of those cases the
23 plaintiff himself was saying I have suffered
24 direct overt discrimination in the sense that
25 the law I am challenging subjects me to

1 unfavorable treatment based upon my own
2 characteristics.

3 And -- and we don't have that here.
4 Maine law doesn't distinguish between religious
5 and non-religious parents. The Petitioners are
6 not challenging any aspect of the Maine statute
7 that defines the class of parents who can seek
8 the tuition subsidy.

9 The provision it challenges is the
10 provision that says what characteristics does
11 the school have to have in order for the school
12 to be -- get approved school status and
13 potentially be eligible for the funds? And I
14 think it's entirely clear that, if the schools
15 were the plaintiffs and all they were willing to
16 say is, if this is struck down, we would think
17 about accepting the money, that wouldn't be good
18 enough under a case -- a more recent case like
19 Carney versus Adams.

20 And so if the Plaintiff's claim is
21 essentially derivative of an alleged
22 constitutional wrong done to the schools, it
23 would be anomalous to say that the Plaintiffs
24 have standing even though the schools do not.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Would the
3 government, I -- I can't believe it would, but
4 -- but would the government permit an argument
5 of -- for discrimination against persons based
6 on an unsupported hypothetical possibility of
7 strife if the discrimination were based on race
8 or sex or some other basis like that?

9 MR. STEWART: It -- it depends on what
10 you mean by discrimination. Ordinarily you
11 could not impose affirmative disadvantages, but
12 government can make funding decisions all the
13 time, can decide what activities to subsidize
14 and what activities not to subsidize based on
15 fairly speculative inferences about what results
16 might occur.

17 That -- that's -- that's the whole
18 point of the government's -- of the Court's free
19 speech cases that say the government has a lot
20 more latitude when it's making funding
21 decisions.

22 JUSTICE GORSUCH: Including on the
23 basis of sex and race and other personal
24 characteristics like that?

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

1 the statute here said that religious parents
2 generally or parents of a particular religion
3 can't apply for the school subsidy, that would
4 clearly be no good. Here -- here -- here what
5 the state is saying is we don't want to
6 subsidize --

7 JUSTICE GORSUCH: So if we viewed the
8 statute as you just described it, it would be no
9 good in your terms?

10 MR. STEWART: If -- if you read the
11 statute to say that religious parents can't seek
12 the subsidy even for a secular school, but --

13 JUSTICE GORSUCH: Then the statute
14 would be no good.

15 MR. STEWART: Then the statute would
16 be unconstitutional.

17 JUSTICE GORSUCH: Okay. Thank you.

18 MR. STEWART: But nobody is reading
19 that way. Petitioners are not arguing that
20 that's what the statute says.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: I just want to
24 follow up on that question from Justice Gorsuch.
25 I think it's important on this public discord or

1 strife issue to emphasize that, as I understand
2 it, they are seeking equal treatment, not
3 special treatment.

4 They're -- they're saying don't treat
5 me worse because I want to send my children to a
6 religious school rather than a secular school.
7 Treat me the same as the secular parent next
8 door. I think that's what they are asking for,
9 is equal treatment.

10 Special treatment cases are where
11 you're asking for an exemption from
12 generally-applicable law. That's the Smith kind
13 of cases. Those are -- those are hard cases.
14 But here I think all they are asking for is
15 equal treatment.

16 And the question then becomes public
17 discord from equal treatment -- to follow up on
18 Justice Gorsuch's question -- how should we
19 think about that?

20 MR. STEWART: I mean, I -- they are
21 certainly characterizing what they are asking
22 for as equal treatment. But Maine's view and
23 our view is they are seeking a benefit different
24 from the one that Maine is willing to provide.

25 Maine is willing to provide a secular

1 education, an education that is the rough analog
2 to what the public school would give you at
3 state expense. It's not willing to pay for
4 religious inculcation.

5 And so it's -- it's like a case where
6 the school that doesn't believe in athletics
7 says I'm being treated unequally because you are
8 willing to fund a thing that is important to
9 some other schools but not to me.

10 That -- that's not the kind of equal
11 treatment that the -- either the Free Speech
12 Clause or the Free Exercise Clause would
13 prohibit.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 Thank you, counsel.

18 MR. STEWART: Thank you.

19 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
20 Bindas.

21 REBUTTAL ARGUMENT OF MICHAEL BINDAS
22 ON BEHALF OF THE PETITIONERS

23 MR. BINDAS: Starting with the United
24 States' arguments, this absolutely discriminates
25 against parents. It says you can get an

1 otherwise available public benefit you are
2 statutorily entitled to so long as you don't
3 exercise a right that this Court recognized in
4 Espinoza.

5 You get one or the other. If you're
6 the Carsons, you can afford it, great, you keep
7 your free exercise rights. If you're the
8 Nelsons, you can't afford it, you forego your
9 free exercise rights. That is discrimination no
10 matter how you slice it. And this Court should
11 not allow that to stand.

12 Now, my friend from Maine, you know,
13 throughout the briefing has recast the benefit
14 in this case. Now we're recasting the facts and
15 saying based on how the spirit, I believe I
16 heard correctly, how the spirit of the program
17 works.

18 Well, the spirit of the program
19 doesn't look at whether or not religious
20 instruction or activities are optional. After
21 all, the Kent school was excluded. Chapel was
22 optional. Theology was offered. No one had to
23 take it. Yet they were excluded.

24 My friend from Maine also says that
25 this -- this only triggers, the sectarian

1 exclusion only triggers if the school is
2 actually instilling, inculcating, requiring you
3 to believe.

4 Well, what did the Commissioner
5 testify? That it's triggered if the school
6 promotes the faith or belief system with which
7 it is associated and/or presents the material
8 taught through the lens of this faith.

9 You don't have to -- you don't have to
10 say you must believe this to be excluded. In a
11 philosophy class apparently you can teach
12 Aquinas and Augustine. But if you say Augustine
13 and Aquinas were right, then apparently you are
14 out. Again, based on the decision of a
15 bureaucrat in Augusta about whether the way the
16 material is being presented is through the lens
17 of faith.

18 And the last thing I would say, the
19 benefit here is not a free public education. It
20 is certainly not free. Miss Porter's charges
21 \$66,400 a year. You have to pay much of that,
22 most of that, if you go there with a tuition
23 benefit. This is not a free education.

24 Nor are the participating private
25 schools like a public school or providing a

1 public education in any sense of the word. They
2 need not follow the public school curriculum.
3 They can discriminate on bases that public
4 schools may not.

5 They can, as I just mentioned, charge
6 tuition to the tune of \$66,000 a year. They
7 need not hire certain state-certified teachers,
8 which Maine public schools must do. They can be
9 run by religious organizations and orders.
10 Obviously a public school in Maine may not.

11 It can be unlike a public school in
12 every one of those respects, and participate in
13 this program. But a religious school that is
14 like a public school in every one of those
15 respects is excluded, if it teaches a single
16 religion class or presents material that someone
17 in Augusta determines to be presented through
18 the lens of faith.

19 That is discrimination. This Court
20 should not allow it to stand. It should hold
21 the sectarian exclusion unconstitutional. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:57 a.m., the case
2 was submitted.)
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