# **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 124 Place: Washington, D.C. Date: December 8, 2021

# HERITAGE REPORTING CORPORATION

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 DAVID CARSON, AS PARENT AND NEXT ) 3 FRIEND OF O.C., ET AL., ) 4 5 Petitioners, ) ) No. 20-1088 6 v. 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 United States at 10:01 a.m. 16 17 **APPEARANCES:** MICHAEL BINDAS, ESQUIRE, Seattle, Washington; on 18 19 behalf of the Petitioners. 20 CHRISTOPHER C. TAUB, Chief Deputy Attorney General, Augusta, Maine; on behalf of the Respondent. 21 22 MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; for the 23 United States, as amicus curiae, supporting the 24 Respondent. 25

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1 PROCEEDINGS 2 (10:01 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-1088, 4 Carson versus Makin. 5 6 Mr. Bindas. 7 ORAL ARGUMENT OF MICHAEL BINDAS ON BEHALF OF THE PETITIONERS 8 MR. BINDAS: Mr. Chief Justice, and 9 may it please the Court: 10 11 Maine's sectarian exclusion 12 discriminates based on religion. Like all discrimination based on religion, it should be 13 14 subjected to strict scrutiny and held 15 unconstitutional, unless Maine can show that it 16 is necessary to achieve a compelling government 17 interest. 18 Maine cannot make such a showing, and 19 the First Circuit never held that it could. Instead, the First Circuit held that there are 20 21 two kinds of religious discrimination, the bad 2.2 kind and the good kind. 23 The First Circuit recognized that Maine cannot discriminate against students or 24 25 schools because they are religious, but it held

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| 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.                 |

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| 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.                                          |  |

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| <ul> <li>such as Northeastern Florida Chapter of</li> <li>Associated General Contractors, Heckler versus</li> <li>Mathews make clear that when a plaintiff is</li> <li>challenging the a barrier, a discriminatory</li> <li>barrier to a public benefit, the plaintiff need</li> <li>not show, indeed, need not even allege, that</li> <li>they would actually obtain the benefit but for</li> <li>the discriminatory provision.</li> <li>In fact, in Heckler versus Mathews, it</li> <li>was a foregone conclusion that if the plaintiffs</li> <li> plaintiff was successful in challenging the</li> <li>discriminatory provision in the public benefit</li> <li>program, he would not get the benefit because</li> <li>there was a unique severability provision in the</li> <li>program that said if this provision is</li> <li>invalidated the benefit goes away. It doesn't</li> <li>get extended to the excluded class. It goes</li> <li>away.</li> <li>This Court held that, nevertheless,</li> <li>even though it was a foregone conclusion the</li> <li>plaintiff would not get the benefit, he</li> <li>nevertheless had standing</li> <li>JUSTICE KAGAN: So, Mr</li> <li>MR. BINDAS: to challenge.</li> </ul> | 1  | And this Court's decisions in cases              |
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| <ul> <li>9 the discriminatory provision.</li> <li>10 In fact, in Heckler versus Mathews, it</li> <li>11 was a foregone conclusion that if the plaintiffs</li> <li>12 plaintiff was successful in challenging the</li> <li>13 discriminatory provision in the public benefit</li> <li>14 program, he would not get the benefit because</li> <li>15 there was a unique severability provision in the</li> <li>16 program that said if this provision is</li> <li>17 invalidated the benefit goes away. It doesn't</li> <li>18 get extended to the excluded class. It goes</li> <li>19 away.</li> <li>20 This Court held that, nevertheless,</li> <li>21 even though it was a foregone conclusion the</li> <li>22 plaintiff would not get the benefit, he</li> <li>23 nevertheless had standing</li> <li>24 JUSTICE KAGAN: So, Mr</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                | 7  | not show, indeed, need not even allege, that     |
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| 23 nevertheless had standing 24 JUSTICE KAGAN: So, Mr                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 21 | even though it was a foregone conclusion the     |
| 24 JUSTICE KAGAN: So, Mr                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 22 | plaintiff would not get the benefit, he          |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 23 | nevertheless had standing                        |
| 25 MR. BINDAS: to challenge.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 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 state that met the Petitioners' religious 3 requirements, so only two schools that the 4 Petitioners would go to, would use this money 5 for, and both of -- and we knew that both of 6 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 in that case was sufficient for standing 13 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 yes, that even if they're -- even if all the 21 2.2 schools that meet the Petitioners' religious 23 requirements make clear that they're not going to accept this money, we still have a case 24 25 before us?

| 1  | MR. BINDAS: Your Honor, what I would             |  |
|----|--------------------------------------------------|--|
| 2  | want to know in that situation is whether the    |  |
| 3  | plain the plaintiffs had alleged that they       |  |
| 4  | will not go to any other school but these two    |  |
| 5  | schools, whether I mean, you also have to        |  |
| 6  | remember that this sectarian exclusion has been  |  |
| 7  | on the books for four decades. So, to the        |  |
| 8  | extent there's a dearth of religious schools     |  |
| 9  | that are acceptable to the plaintiff in that     |  |
| 10 | situation, that's probably attributable to the   |  |
| 11 | fact that Maine has been discriminating against  |  |
| 12 | schools for four decades. There's a lot I would  |  |
| 13 | want to know there, but                          |  |
| 14 | JUSTICE BARRETT: Well, would the                 |  |
| 15 | Nelsons go to any place besides Temple Academy?  |  |
| 16 | MR. BINDAS: Well, Your Honor, the                |  |
| 17 | the Nelsons alleged and I more importantly,      |  |
| 18 | Maine stipulated that and this is at the         |  |
| 19 | Joint Appendix page 78 that what they want is    |  |
| 20 | an education that aligns with their sincerely    |  |
| 21 | held religious beliefs.                          |  |
| 22 | JUSTICE BARRETT: But I thought they              |  |
| 23 | identified Temple Academy as the place that they |  |
| 24 | wanted to send their child.                      |  |
| 25 | MR. BINDAS: They did. Well, and they             |  |

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1 had been sending their child to Temple Academy, 2 so -- when it came to high school, they could no longer afford the tuition. They were 3 statutorily entitled to the tuition benefit, but 4 they could not use the benefit at that 5 6 particular --7 JUSTICE BARRETT: Okay. MR. BINDAS: -- school. 8 JUSTICE BARRETT: But you're saying 9 that they would be open to sending their child 10 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 2.2 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

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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 the extent Maine is claiming that we lack 4 standing to challenge ongoing religious 5 discrimination based on the fact that some 6 7 schools at some point down the road might mull -- might ultimately decide not to participate 8 here, I -- I -- I think the -- the problem 9 here is that we don't know that, right? Maine's 10 11 argument is essentially that these schools might be excluded at step 2, 3, 4. The problem is 12 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, 2.2 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 this or that at step 2, 3, or 4 that might bear 2 3 on whether these schools ultimately decide to participate or not. But the problem is we can't 4 even get that answer because they're excluded at 5 6 step 1. 7 JUSTICE BARRETT: So this --8 JUSTICE BREYER: Sorry, but on -- on this particular point, I take it the reason is 9 something like that they're -- they're religious 10 11 beliefs in the school's belief. They don't want 12 to have gay students, they can't. They can't 13 have gay teachers. They have to teach that the 14 man is the boss of the women and a bunch of 15 other things like that. 16 Am I right about that? 17 MR. BINDAS: Your Honor, that -- that these schools hold traditional --18 19 JUSTICE BREYER: No. Did I state it 20 roughly right? 21 MR. BINDAS: Your Honor, I -- I -- I 2.2 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 --JUSTICE BREYER: There are -- there 5 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 2.2 have to, what happens? 23 MR. BINDAS: The Maine Human Rights 24 Act says the opposite, Your Honor. There is an 25 absolute religious --

1 JUSTICE BREYER: All right, it says 2 you cannot discriminate on the basis of sexual 3 orientation. Is that what it says? MR. BINDAS: In hiring, there is an 4 absolute protection, Your Honor, for -- that 5 6 allows a --7 JUSTICE BREYER: All right. And suppose the religious belief is the opposite. 8 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. T 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

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1 a standing problem. 2 JUSTICE KAGAN: And -- and --JUSTICE BREYER: But if -- what's 3 worrying me underlying all this is that there 4 are 65 religions or more in this country and 5 they believe a lot of different things. 6 7 And what's worrying me is -- is that if the school -- if the state must give money to 8 9 the schools, they're going to get into all kinds 10 of religious disputes. One state says, no, you 11 -- in this kind of a situation, you've got to 12 hire the gay teacher. The other says yes, you 13 -- yes. The other says no. The other says one 14 thing. The other says the other. 15 And religious beliefs, of course, are -- are very sincere and held very strongly. And 16 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 religious organizations, and -- and that seems 21 2.2 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

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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 participate, it does not fund schools. It funds 4 5 families. 6 And not a penny can go to any school 7 but for the genuine private choice of individuals. As this Court held in Zelman, as 8 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 2.2 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.

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1 Is that discrimination against the 2 religious schools? MR. BINDAS: Is it --3 CHIEF JUSTICE ROBERTS: I mean, it is. 4 But is that okay or not? 5 6 MR. BINDAS: I suspect the government 7 would very well have a compelling interest in that case, Your Honor, because we're talking 8 about direct institutional aid. And when you're 9 dealing with direct institutional aid, the 10 11 government is quite literally funding the thing. 12 But, here, government is simply doing this: It's providing a benefit, a financial 13 benefit to families, and it's saying use it 14 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 in Maine are given the chance to send their 21 22 children to free public secular schools. 23 Correct? 24 MR. BINDAS: To free pub --25 JUSTICE SOTOMAYOR: All parents can do

1 that? 2 MR. BINDAS: To free public secular 3 schools or to the private school of their choice, Your Honor, yes. 4 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 --JUSTICE SOTOMAYOR: Exactly. All 4 5 right. 6 MR. BINDAS: -- a state needn't --7 JUSTICE SOTOMAYOR: In that situation, the parent pays for the religious training of 8 their child. 9 10 MR. BINDAS: If they desire a 11 religious school as opposed to going to the 12 public school, yes. 13 JUSTICE SOTOMAYOR: All right. And 14 the pub -- the district could contract with a 15 school to provide the public education, correct? 16 MR. BINDAS: If the district lacks a 17 public school, then it can contract with a 18 school to send its resident students, yes. 19 JUSTICE SOTOMAYOR: Do you take the 20 position that the school has to -- that the 21 district has to permit or contract with a 2.2 religious school to provide --23 MR. BINDAS: No, Your Honor. At 24 Footnote 9 in our opening brief, we say the 25 opposite, that in that situation where the

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1 government is contracting with a school to educate its resident students, that school would 2 3 have to provide secular instruction. JUSTICE SOTOMAYOR: And the parents 4 have to pay then for the religious training of 5 their children? 6 7 MR. BINDAS: If they don't want to go to the school with which the government has 8 9 contracted and they desire a religious education, yes. 10 11 JUSTICE SOTOMAYOR: So it's only 12 because the school has this -- the district has decided to give you money to find a secular 13 education that you say there's discrimination? 14 15 MR. BINDAS: No, Your Honor. Again, I 16 would return to the statute defining the 17 benefit. I think Maine tries to redefine the 18 benefit as a public education. 19 The benefit is defined in the statute itself, and the benefit is tuition to attend the 20 public or the approved private school of the 21 2.2 parent's choice at which the child is accepted. 23 That is the benefit. 24 JUSTICE SOTOMAYOR: No, no, no, 25 because you leave out what they say is you can

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1 pick any school you want for a secular 2 education. 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 7 themselves as non-sectarian to receive benefits. 8 These parents are put to the same choice that 9 every other parent in Maine is put to: either 10 get a free public secular education or pay for your religious training. They're being treated 11 12 as everybody else is. 13 MR. BINDAS: They are not, Your Honor. 14 In some school districts in Maine, government 15 provides a financial benefit that can be used at 16 the public or private school of the parent's 17 choice. That is --18 JUSTICE SOTOMAYOR: They're getting 19 more than other parents. 20 MR. BINDAS: Just as --JUSTICE SOTOMAYOR: Most other parents 21 2.2 have only one choice: send them to the public 23 school if it exists, send them to the contracted school that exists, or don't. 24 25 MR. BINDAS: And that's always true

with a school choice program, Your Honor. That
 was true in Zelman. That program was specific
 to Cleveland schools --

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

8 You know, this is not a state or a 9 locality basically saying: We just love choice. 10 We think everybody should get as many choices as 11 they want.

12 This is really a default program for a 13 very small number of students living in isolated 14 areas where the state has decided it cannot --15 it does not have the resources to provide public 16 schools.

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

And I think, you know, one question here is whether we should view that in the same

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1 way as a kind of Zelman "we love choice" sort of 2 program. 3 MR. BINDAS: A couple points there, Your Honor. Zelman was a program for children 4 in a school district where the public schools 5 6 were failing. It was because of a lack of 7 opportunity in the public school system that the 8 state -- that the state provided the benefit that --9 10 JUSTICE KAGAN: Yes, but it was a 11 districtwide program, these -- this is not 12 working for us, we want to use an entirely 13 different system. That's not Maine's issue 14 here. 15 MR. BINDAS: Oh, well, Your Honor, I 16 -- I -- I think it is. And we -- we should 17 remember that for more than a century, Maine 18 allowed religious schools to participate in this 19 program, which belies the whole notion that this is a substitute for a public education. 20 21 For a century, religious schools could 22 participate. And for a century, that was fine. 23 And there were secular options and there were 24 private options. There were public options. 25 There were private options. There were options

1 in Maine. There were options outside of Maine. 2 In 1980, the state does a reverse 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 6 continue to send you to Miss Porter's or Avon 7 Old Farms, but don't you dare think about going to a Jewish day school or an Islamic school or 8 9 your local Catholic parish's school. For a 10 century, that had been fine. 11 This was not about providing a 12 substitute for a public education. This was about a turn in 1980 based on an erroneous 13 14 interpretation of the Establishment Clause that 15 for some reason, if it wasn't clear after 16 Mueller, if it wasn't clear after Witters, if it 17 wasn't clear after Zobrest, if it wasn't clear 18 after Zelman that that was wrong, it was 19 certainly clear and certainly -- well, it 20 certainly was clear after Zelman. Yet, the 21 state continues to stand by this decision --2.2 JUSTICE KAGAN: Can I take you back to 23 Justice Breyer's point and also the Chief 24 Justice's hypothetical, is you said, well, 25 there's this, you know, strange use-status

1 decision and we all know that doing religious 2 things is just as protected as being religious. 3 And, of course, nobody would argue with that. I mean, you couldn't put somebody in 4 jail for being religious, and you couldn't put 5 6 somebody in jail for doing religious things. 7 So, you know, in -- in that -- no -- nobody 8 argues that. The status-use concept is -- is really 9 10 a concept that applies in subsidy cases, and 11 it's a -- and -- and -- and what is -- it -- it 12 has been intended to say is that the state 13 generally doesn't have to subsidize exercise of 14 a right. You know, we can't put you in jail for 15 saying something. We also can't deprive you of 16 an unrelated benefit for saying something. We 17 can't say you don't get food stamps because we 18 don't like your speech. 19 But that doesn't mean we have to pay 20 for your speech. And we do that all over the place in constitutional law. We do it in the 21 2.2 Free Speech Clause. We do it in other areas as 23 well. 24 And so the question here that the 25 status-use distinction raises is, why is

1 religion different? Why does the state have 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 6 MR. BINDAS: Your Honor, this is not 7 subsidizing the -- the -- the exercise of a right. It is conditioning the availability of 8 9 an otherwise available public benefit on the surrender of a constitutional right. 10 11 As this Court held in Thomas, the 12 government cannot compel a citizen to choose between exercise of a right protected by the 13 14 First Amendment and participation in an 15 otherwise available public program. 16 And there's no question that these --17 JUSTICE KAGAN: The state can define the nature of the program. So just like the 18 19 state defines the nature of the program in a case like Rust v. Sullivan and in countless of 20 21 other of our cases, so here the state is 2.2 defining the nature of the program and saying, 23 for various of the reasons that Justice Breyer gave, that we just -- we don't want to define 24 25 the program so broadly as to raise all these

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1 questions of religious favoritism, religious division, and so forth. 2 3 MR. BINDAS: Your Honor, in a program like Rust or Regan for that matter, which the 4 United States briefs extensively, you're dealing 5 6 with government speech. First of all, this is 7 not a government speech program, and no one can credibly claim it is. 8 9 To the extent it is government speech, however, as this Court made clear in Pleasant 10 11 Grove, the Establishment -- government speech 12 must comport with the Establishment Clause, 13 which requires neutrality toward religion. 14 Moreover, in Rust, the doctors were 15 not forced to choose between receipt of the 16 benefit and the exercise of their right to 17 engage in abortion counseling. They just 18 couldn't use the benefit to do it. 19 Here, you are forced to make a choice. 20 You can get your statutorily entitled benefit to attend the public or private school of your 21 2.2 choice, or you can exercise your free exercise 23 \_ \_ JUSTICE GORSUCH: Well, counsel --24 25 MR. BINDAS: -- your free exercise

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

3 JUSTICE GORSUCH: Counsel, on that, I believe the government's response -- and I think 4 this is what Justice Kagan's getting at -- is in 5 -- in -- in -- in Rust, you know, the question 6 7 is whether you're put to a choice. And -- and, 8 here, the government says there is no choice 9 that you're put to because individuals can still 10 educate their -- their children in religion by sending them to -- I think it's after-school 11 12 programs or Saturday or Sunday programs.

13 What are your thoughts about that? 14 MR. BINDAS: Well -- well, Your Honor, 15 the Court in Espinoza held that parents have a 16 right to direct the religious upbringing of 17 their children and that many parents exercise 18 that right by sending their children to 19 religious schools, which is protected by the 20 Constitution. So there's no question that parents have a constitutional right to send 21 2.2 their children to a religious secondary school. 23 Now, in making that argument that somehow this is all okay, this discrimination is 24 25 okay because you can go to a weekly Bible study,

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1 number one, that's insulting to parents, who are 2 in the position of determining what's an 3 appropriate education, religious education, for 4 the child. But it also ignores the excluded 5 6 activity. In Rust, the excluded activity was 7 abortion counseling. You could still do that. 8 In Regan, it was substantial lobbying activity. 9 You could still do that simply by adopt -adopting the 501(c)(3), (c)(4) designation. 10 In 11 Locke, the excluded activity was a degree in 12 devotional theology, which the Court noted Joshua Davey could still do and still get the 13 14 promised scholarship. 15 Here, the excluded activity is a 16 religious secondary education. You cannot get 17 that if you get the benefit. 18 JUSTICE GORSUCH: Does this affect 19 different religions differently, the 20 government's argument? I mean, some religions might find a -- a -- a Sunday school perfectly 21 appropriate; others, perhaps, may not. 22 23 MR. BINDAS: I -- I -- I think it does affect different religions generally and --24 25 differently, Your Honor. And I think this also

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1 goes to the Establishment Clause problem here. 2 The fact of the matter is some schools that are religious in what the government would 3 call status, perhaps that do some things that 4 look religious, are allowed to participate. But 5 6 there is a regulator in Augusta, Maine, who 7 looks into the curriculum and the activities of -- of the school and sits in judgment on whether 8 9 that school is sufficiently irreligious and therefore a permissible choice for a parent or 10 11 too religious and thus sectarian and excluded as 12 a permissible choice for the parent. Put aside the Free Exercise Clause 13 14 problem. That is a substantial Establishment 15 Clause problem, as Judge McConnell makes very 16 clear in his amicus brief. 17 JUSTICE BREYER: Well, the thing is 18 under -- I don't know if you can think about it 19 at this level or advance my thinking on it, which is what we've seen, of course, is that the 20 21 religious clauses are there to prevent the 2.2 religious wars. You teach your religion. I 23 teach mine. Okay? And to our children. 24 Now, when you get to education, the 25 route you're taking is not unknown. France

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1 takes that route. And you could say, well, the 2 -- the state will pay all the religious 3 education, as well as all the secular, and treat everybody alike. We've never taken that really. 4 The opposite is none. Don't pay the 5 6 priest's salary and don't pay the teaching of 7 devotion and some -- you know, the teaching of actually devotional activity. And then there's 8 the middle, where you say give the money to the 9 10 parents and let them choose. Okay. 11 So what this is, is it's closer to the 12 second -- I mean it's closer to the first, the 13 state's going to pay for it. And the reason I 14 think we've stayed out of that is because we 15 have too many religions, 60, 70, and they're 16 going to get into too many arguments with each 17 other about everything under the sun, you know, 18 and you start getting into arguments about 19 whether the -- it should be like this way in the window or the other way in the window or this is 20 21 the kind of thing to teach or that. 2.2 It's really awful. I mean, I'm not 23 saying the arguments are bad. I understand 24 them. But you get the state in as the 25 arbitrator or the courts, and you're right in

1 the middle of religious activity. So, as I look 2 at these cases in bulk, not the exact words, I see a big push, with our 60 or 70 religions, 3 towards keeping the state out of it. And so 4 that is a -- a theme that probably influences 5 6 the way I -- I -- I approach these problems. 7 I'm not saying I'm right. I'm asking you 8 because I want to know what you have to -- to 9 help me or -- yeah, what do you want to say? 10 MR. BINDAS: Well, Your Honor, going 11 back to your three approaches, I -- I -- I 12 respectfully disagree that this mirrors the 13 first approach. This is the third approach, 14 provide the money to the family and let them 15 decide. And as this Court held in Zelman, as 16 this Court held in Locke, that private choice 17 severs the link between government funds and religious instruction. 18 19 So, to the extent there is any 20 advancement of a religious mission, that's attributable to the choice of a parent. It can 21 2.2 in no way be attributed to the government. 23 And, Your Honor --24 JUSTICE BREYER: The problem is the 25 government's paying for it, right, directly --

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1 MR. BINDAS: But it's paying --2 JUSTICE BREYER: -- and -- and they 3 say -- one -- one -- one church says, my God, you certainly cannot pay for a classroom that's 4 of this size because we're using it to worship 5 6 and it has to be bigger than that. 7 And the others say that's just what you shouldn't do. Worship is private and you 8 9 should have a smaller space for it. And -- and 10 then they're going to have to articulate, you 11 see, and -- and, ultimately -- well, the -- of 12 course, the parents can choose which of those 13 two, it's paid for by the state, and they start 14 suing each other. It's government money here 15 going. 16 MR. BINDAS: Your Honor, as this Court 17 held in Zelman, any constitutional test that would turn on supposed avoidance of -- well, let 18 19 me rephrase that. When you're dealing with a 20 program of individual choice, the possibility, 21 what the Court called the specter of 2.2 divisiveness, religious strife, does not bear on 23 the constitutional analysis because of the fact that it is an individual. 24 25 No one would suggest that a Social

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1 Security beneficiary couldn't tithe to her church because that would somehow be funneling 2 government funds to religion. Her private 3 choice as to where to use those funds is her 4 private choice. 5 6 JUSTICE KAGAN: Zelman --7 JUSTICE BREYER: Which you cannot refer --8 9 JUSTICE KAGAN: -- Mr. --10 JUSTICE BREYER: -- as a number. Ι 11 mean, you cannot insist that the Social Security 12 Administration refer to you by a name rather 13 than a number? Forget it. Forget it. Go on to 14 Justice Kagan. 15 JUSTICE KAGAN: I mean, Zelman was a 16 -- was a case in which the question was could a 17 locality implement such a program. And the 18 question here is different, is does the locality 19 have to implement such a program. And what -- what we have often talked 20 21 about in our First Amendment religion cases is 22 this idea of play in the joints, that not 23 everybody has to follow the same model and that there is some amount of funding which is neither 24 25 prohibited by the First Amendment nor -- nor

1 commanded by the First Amendment. 2 And -- and, essentially, what Maine is 3 saying here is, like, all well and good if a locality or if a state wants to do this, but --4 but we weigh the interests differently, and 5 shouldn't we be allowed to weigh the interests 6 7 differently? MR. BINDAS: Your Honor, the -- the 8 9 quintessential play in the joints is whether or not to have a school choice program. 10 We know 11 the Establishment Clause allows it. 12 Mr. Chief Justice, may I finish? CHIEF JUSTICE ROBERTS: You can finish 13 14 your thought. 15 MR. BINDAS: Okay. 16 We know that the Establishment Clause 17 allows it. Zelman tells us. We also know that 18 the Free Exercise Clause doesn't require it. 19 In Espinoza, the Court held a state 20 need not subsidize private education. 21 Whether to have such a program is the 22 quintessential play in the joints. 23 JUSTICE KAGAN: But the point here, I 24 suppose, is this, is that some states would, you 25 know, have such programs and love them. And

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| 1  | another state says, for the reasons that Justice |  |
|----|--------------------------------------------------|--|
| 2  | Breyer gave, you know, we think that this would  |  |
| 3  | be incredibly divisive in our community, and you |  |
| 4  | can think of a wide variety of reasons why that  |  |
| 5  | would be. It would lead to too great             |  |
| 6  | entanglement. It's not good for the religion     |  |
| 7  | itself. Or other people in our community won't   |  |
| 8  | understand why we're funding this program.       |  |
| 9  | I mean, these schools are overtly                |  |
| 10 | discriminatory. They're proudly discriminatory.  |  |
| 11 | Other people won't understand why in the world   |  |
| 12 | their taxpayer dollars are going to              |  |
| 13 | discriminatory schools.                          |  |
| 14 | For any of a number of reasons, a                |  |
| 15 | state can say we don't want to play in this      |  |
| 16 | game. And the question is, isn't this            |  |
| 17 | play-in-the-joints idea, wasn't it specifically  |  |
| 18 | understood to allow different kinds of solutions |  |
| 19 | in different sorts of areas?                     |  |
| 20 | MR. BINDAS: Mr. Chief Justice, may I             |  |
| 21 | my my time is well                               |  |
| 22 | CHIEF JUSTICE ROBERTS: You can answer            |  |
| 23 | the question.                                    |  |
| 24 | MR. BINDAS: Thank you, Your Honor.               |  |
| 25 | In Espinoza, this Court specifically             |  |

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1 rejected any test that would turn on weighing 2 the benefit and the exclusion against some general state interest in avoiding religious 3 4 conflict. I -- I mean, I -- I -- I think the 5 6 Court has already rejected any such test when 7 you're dealing with a program, at least one that operates and turns exclusively on the private 8 9 choice of parents. It might be a different 10 situation if we were talking institutional aid, 11 but not in a program like this, Your Honor. 12 CHIEF JUSTICE ROBERTS: Thank you. 13 Just one additional question, counsel, 14 or request. Could you articulate for me your --15 your -- your best distinction of -- of Locke 16 before you get to the argument that you think it 17 should be overruled? 18 MR. BINDAS: Yes, Your Honor, 19 absolutely. So, as Espinoza and Trinity Lutheran held, Locke really does need to be 20 21 cabined to its facts, and so let's look at those 2.2 facts. 23 Students could attend religious 24 schools, including what the Court called 25 pervasively religious schools. They could take

1 devotional theology classes, including 2 compulsory classes in such things as 3 spirituality, evangelism, Bible, and religious 4 doctrine. The one thing and the only thing they 5 6 could not do was pursue a major in a degree for 7 entry into the ministry for -- for basically the instruction of future clergy. Even then, 8 9 however, a student was not required to choose 10 between receipt of the benefit and pursuing a 11 devotional theology major. As the Court noted 12 in Footnote 4, they could do both. 13 Now let's look at the facts of this 14 case. Miles apart from Locke. This is not a 15 situation where, as Locke put it, government's 16 going a long way toward accommodating religion. 17 It is a wholesale exclusion of religion. 18 If a school teaches a single class in 19 religion or it doesn't even teach any religion, 20 it just teaches secular subjects, if it happens 21 to teach those secular subjects through what a 2.2 regulator in Augusta determines to be the lens 23 of faith, that school is out. So the exclusion 24 is completely different.

25 Moreover, Locke, Joshua Davey was not

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

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1 Justice Alito? 2 Justice Sotomayor? 3 JUSTICE SOTOMAYOR: Yes. I have -- I 4 have one follow-up. I have a great deal of difficulty here. I think, following up Justice 5 6 Gorsuch's point and your own, that you admit 7 that the reason why this school is important to these parents is because they don't teach just 8 9 secular subjects, that they teach all subjects through the lens of their religion. 10 11 Am I correct? 12 MR. BINDAS: They -- they -- religion is a part of -- of their curriculum, yes, Your 13 14 Honor. 15 JUSTICE SOTOMAYOR: I thought, if I 16 understood the materials from the schools that 17 were here, that the very point is that they 18 teach all subjects through the lens of the 19 religion. 20 MR. BINDAS: Well --21 JUSTICE SOTOMAYOR: That -- and I 22 repeat -- even their science courses are limited in their reach because of their belief in 23 certain -- or disbelief in certain -- in certain 24 theories of science. 25

| 1  | MR. BINDAS: I don't know that there's            |
|----|--------------------------------------------------|
| 2  | anything in the record on that, Your Honor. And  |
| 3  | to the extent the state can desires to say,      |
| 4  | hey, if you're going to participate in this      |
| 5  | program or if you even want to be an approved    |
| 6  | private school to operate at all in the in       |
| 7  | the State of Maine, you have to teach certain    |
| 8  | curriculum and you have to teach the theory of   |
| 9  | evolution, I you know, that might well           |
| 10 | JUSTICE SOTOMAYOR: That's okay?                  |
| 11 | MR. BINDAS: That but that's                      |
| 12 | JUSTICE SOTOMAYOR: Is it okay to say             |
| 13 | to to a school you have to take every student    |
| 14 | and not discriminate on the basis of sex, color, |
| 15 | religion, that they don't practice your          |
| 16 | religion, the student I understand that          |
| 17 | there's an exemption in Maine for who they hire  |
| 18 | to teach, but if this program is supposed to     |
| 19 | which I think it is to give students a           |
| 20 | choice, is this program permitted to say, with   |
| 21 | respect to the students, if they meet your       |
| 22 | academic requirements, you can't discriminate?   |
| 23 | MR. BINDAS: Well, Your Honor, that               |
| 24 | that's not this case. But could the state do     |
| 25 | that? I think you're looking analytically at a   |

1 totally different situation there because, at 2 least on its face, that's a religiously neutral 3 requirement.

Now could there be some evidence of a
discriminatory object in the -- in the adoption
of that provision? Perhaps. But at least it's
facially neutral, which means, if it's neutral,
you're not even getting strict scrutiny at that
point.

10 Moreover, I would say, Your Honor, 11 it's important to remember that schools that 12 welcome students of all stripes, that do not consider sexual orientation or gender identity 13 14 in hiring, in admissions, or for any other 15 basis, are just as excluded from this program if 16 they teach that message of inclusiveness and 17 diversity through the lens of faith, and there's 18 record evidence of that in the Kent School. 19 CHIEF JUSTICE ROBERTS: Justice Kagan, 20 anything? 21 Justice Gorsuch? 2.2 JUSTICE GORSUCH: Yeah, I -- I just

23 want to follow up on that. I just want to be 24 clear in my mind that we're not -- we're not 25 being called upon today to interpret Maine's

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anti-discrimination laws, and we don't need to 1 2 do that to decide this case? 3 MR. BINDAS: Not at all, Your Honor. Maine has never said these schools will be 4 excluded. 5 JUSTICE GORSUCH: And -- and -- and 6 7 the Kent School example, that -- that was a -- a 8 -- a religious school that actually applied, as I -- as I remember it -- just correct me if I'm 9 10 wrong -- to participate but was rejected even 11 though it -- it -- it said it was not a 12 sectarian school and said that it was willing to abide by Maine's anti-discrimination laws? 13 14 MR. BINDAS: In the record, I don't 15 know whether it specifically talks about the 16 Maine Human Rights Act at that point because 17 Maine excluded it solely because it was 18 religious. This goes back to the step 1 --19 JUSTICE GORSUCH: Yeah. 20 MR. BINDAS: -- absolute barrier. 21 But, if you get on to the Kent School's website 2.2 and look at its policies regarding employment 23 and -- and admissions, it's plain as day, the 24 school does not discriminate on any of the 25 grounds we're talking about.

1 JUSTICE GORSUCH: So religious schools 2 are forbidden regardless whether or not they're 3 going to participate? MR. BINDAS: Solely because they are 4 religious. 5 6 JUSTICE KAVANAUGH: Two questions 7 about how far your argument goes. With respect to Locke, to follow up on the Chief Justice's 8 9 question, you're saying that that is limited or could be limited to cases involving the training 10 11 of clergy? Is that an accurate description? 12 MR. BINDAS: Well, Your Honor, I think 13 the Court itself limited it in that -- in that 14 way in Locke itself. The Court went so far as 15 to say the only state interest, the Court's 16 words, that we're addressing is the state's 17 interest in not funding the training of clergy. 18 So I think, on its own terms, it's limited to 19 that. 20 JUSTICE KAVANAUGH: Okay. And then, second, just to clarify, you're not arguing, but 21 2.2 correct me if I'm wrong, that the mere funding 23 of public schools would entitle the parents to 24 funding for religious schools? You're saying,

25 but correct me if I'm wrong, that once the state

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1 starts funding private schools, it can't exclude 2 religious private schools and fund secular 3 private schools, is that correct? MR. BINDAS: That is correct, Your 4 Honor. We -- we are not arguing that there is a 5 6 constitutional right to a publicly funded 7 religious education, nor could we. Espinoza said point blank a state need not subsidize 8 9 private education. 10 JUSTICE KAVANAUGH: Okay. Thank you. 11 JUSTICE BARRETT: One follow-up on the 12 same lines as Justice Kavanaugh. I -- I gather, in drawing the 13 14 distinction that Zelman drew between choice and 15 direct funding, that you would concede that if 16 Maine retooled its program so that payments went 17 directly to private schools, like, say, to 18 Miss Porter's, you know, we will pay you X 19 number of dollars to reserve 40 seats in each class for schools -- for students from districts 20 that lack a public school, you're conceding, I 21 2.2 take it, that in the case of that kind of direct 23 subsidy, there would not be a problem with Maine 24 not subsidizing a private religious school as 25 well?

| 1  | MR. BINDAS: Well, Your Honor, in that            |
|----|--------------------------------------------------|
| 2  | situation, what I'd want to know is is           |
| 3  | whether the so we're talking about basically     |
| 4  | a per capita program where payment is to the     |
| 5  | institution but is determined on a per student   |
| б  | basis of how many students the the district      |
| 7  | is sending? Is that                              |
| 8  | JUSTICE BARRETT: Well, I'm just                  |
| 9  | trying to press on how important to your         |
| 10 | argument this severed link is where the money is |
| 11 | going to the parents and then going to the       |
| 12 | school, as opposed to we'll just pay you a flat  |
| 13 | rate. Whether 40 students enroll or not          |
| 14 | MR. BINDAS: Oh.                                  |
| 15 | JUSTICE BARRETT: we want 40 40                   |
| 16 | seats for students that lack a public school in  |
| 17 | their district.                                  |
| 18 | MR. BINDAS: If if if we're                       |
| 19 | bringing choice out of the equation and we're    |
| 20 | talking about a direct institutional aid type    |
| 21 | program, then we're talking about a much, much   |
| 22 | different case, Your Honor.                      |
| 23 | JUSTICE BARRETT: And and you                     |
| 24 | when you say much, much different case, are you  |
| 25 | talking about then a case where there would not  |

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1 be a free exercise claim that could succeed? 2 MR. BINDAS: I think, if the government's paying a flat rate to schools that 3 doesn't turn on whether a student is choosing to 4 attend that school, I -- I -- you know, again, I 5 6 would want to know the particulars, but I think 7 that that would be permissible in that situation 8 for the state to say we're not going to pay a flat rate, we're not going to contract with a 9 10 school that's providing religious instruction. But there are a lot of variables 11 12 there, Your Honor. If the --JUSTICE BARRETT: I understand. 13 14 MR. BINDAS: -- if the payment is 15 based on defraying the cost of tuition for the 16 number of kids that -- but it's --17 JUSTICE BARRETT: No, I understand. 18 I'm just -- I'm just clarifying that you're not 19 defending the notion of that kind of direct 20 subsidy, as opposed to saying that this program 21 functions like choice, like a -- like a school 2.2 choice program, particularly given that kids can 23 go as far as California and to elite boarding 24 schools all over the country with the money? 25 MR. BINDAS: Not a penny flows to any

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1 school under this program but for the private and independent choice of families. 2 3 JUSTICE BARRETT: Thank you. Thank you, 4 CHIEF JUSTICE ROBERTS: 5 counsel. MR. BINDAS: Thank you, Your Honor. 6 7 CHIEF JUSTICE ROBERTS: Mr. Taub. ORAL ARGUMENT OF CHRISTOPHER C. TAUB 8 ON BEHALF OF THE RESPONDENT 9 MR. TAUB: Mr. Chief Justice, and may 10 11 it please the Court: 12 With respect to justiciability, this 13 case is now about one family who wants to send 14 one child to one specific religious school. The 15 record clearly demonstrates, though, that this 16 one school has zero interest in taking Maine's 17 money. Under well-established principles, the 18 Petitioners do not have standing because, even 19 if they were to prevail, they would receive no 20 redress for their alleged injury. 21 As to the merits, Maine law entitles 2.2 every child to a free public education. Maine's 23 highest court has recognized that the tuition 24 program at issue here is intended solely to 25 ensure that those few children who live in

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1 districts that have not made appropriate

2 schooling arrangements are still able to receive3 a free public education.

That is the benefit at issue here, a 4 free public education. That private schools are 5 sometimes enlisted to deliver the benefit is of 6 7 no constitutional significance. States 8 frequently outsource the delivery of public 9 benefit programs, and that does not change the public nature of the program. 10 It should be no 11 different when it comes to education.

12 The reason that schools that promote a 13 particular faith are not eligible to participate 14 is simple. Maine has determined that, as a 15 matter of public policy, public education should 16 be religiously neutral. This is entirely 17 consistent with this Court's holdings that 18 public schools must not inculcate religion and 19 should instead promote tolerance of divergent 20 religious views.

The Petitioners want an entirely different benefit, instruction designed to instill religious beliefs at taxpayer expense. They are not being discriminated against. They simply are not being offered a benefit that no

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1 family in Maine is entitled to. 2 Coming at this from a different 3 perspective, this Court has made clear that the government is entitled to define the scope of a 4 financial benefit in order to advance its own 5 value judgments, even when doing so might 6 7 disadvantage activity protected by the First Amendment. 8 9 If the federal government can provide 10 funding to family planning services on the 11 condition that it not be used to discuss 12 abortion, a state should be allowed to condition paying a child's tuition on the condition that 13 14 the school not promote religious beliefs. 15 JUSTICE THOMAS: Counsel, in Maine, 16 can a parent decide that they simply do not want 17 to send their child to any school at all? 18 MR. TAUB: They -- they could 19 home-school the child --20 JUSTICE THOMAS: No, I -- I mean zero 21 education. 2.2 MR. TAUB: No, no, there is compulsory 23 attendance laws which would satisfy the --24 JUSTICE THOMAS: So you require them 25 to go to school, and you -- in certain areas,

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1 you don't have schools available? 2 MR. TAUB: That's correct. 3 JUSTICE THOMAS: So, if you -- you require them to go and you don't have schools 4 available and you make provisions for them to 5 6 comply with that compulsory law, then how can 7 you say that going to a particular school is a 8 subsidy? 9 MR. TAUB: How can we say that going to a particular school is a subsidy? 10 11 JUSTICE THOMAS: Yes. You say -- you 12 require them to go to schools to do something 13 that you haven't provided for, but then you make 14 a way for them to do that, and you have now --15 now -- you now say it is a benefit or a subsidy. 16 But it is you who require them to do 17 In certain places, you can provide them it. with a public school, and in other places, you 18 19 can't. But they still have to comply with the 20 law. 21 MR. TAUB: Yes, Your Honor. But --2.2 but this Court has made clear that -- that 23 states have a legitimate interest in compulsory education laws. And --24 25 JUSTICE THOMAS: Well, I agree. I

1 understand that. I'm not arguing with that. 2 But you have required them to go. It's one 3 thing if you said, look, you -- we will pay for your -- your attendance at a particular -- at 4 college, at the University of Maine, but we 5 6 won't pay for you to go to a religious college 7 as a substitute for that. 8 You don't have a compulsory 9 requirement that anyone attend college, but you 10 do for primary and secondary school. And I just 11 -- I just want you to explain to me how that is 12 a -- a -- is it -- it's a subsidy if you require them to attend, but you make no provision for 13 14 it. 15 MR. TAUB: Well, Your Honor, in this 16 case, what the benefit that's being offered is a 17 free public education, and so the Maine 18 legislature has decided that it's critical that 19 every student in Maine obtain, if he or she 20 wants it, a -- a free public education. 21 And so the state has made certain 2.2 provisions. It requires school districts to 23 make provisions to ensure that every child gets 24 that benefit. In certain cases, though --25 JUSTICE THOMAS: Well, I don't know

1 how it can be a benefit when you -- you've 2 required it. I -- I'm not saying it can't be a 3 benefit. I think it's a benefit. But you're required. It's a requirement. Anyway, I'm not 4 going to belabor that. 5 The -- the -- but I am interested in 6 7 your -- you explaining to me what your term "rough equivalent" of a public education is. 8 9 What do you mean by "rough equivalent"? 10 MR. TAUB: So, in the state's view, 11 Your Honor, the most significant and defining 12 feature of a public education is that it is a 13 sectarian education that is religiously neutral. 14 JUSTICE THOMAS: And what do you mean 15 by that? 16 MR. TAUB: So what -- what we would 17 consider is an education that doesn't promote 18 one particular set of religious beliefs at the 19 exclusion of others, so -- so a school that --20 that might teach about different religions but 21 doesn't instruct students that they are to 2.2 follow any particular religion, so it's -- it's 23 neutral and silent when it comes to -- to what 24 religion a child should follow.

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

1 Bangor, Maine, or -- and I'm in a public school. Where is it written in the charter of that 2 particular school that it be non-sectarian? 3 Tt. would seem to me that your interest would be on 4 -- on academic subjects. 5 6 MR. TAUB: Well, I mean, Your Honor, 7 if -- if I understand your question, this -this Court has recognized that public schools 8 must be secular, that they --9 10 JUSTICE THOMAS: No, I'm just -- I 11 think, as far as education, you wouldn't care --12 if you're in a public school, religion doesn't 13 come up. It's a non-issue. 14 MR. TAUB: Well, religion doesn't come 15 up because it can't come up. I mean, that --16 that is the very defining feature of a public 17 school, is that -- is that it doesn't have 18 mandatory prayer. It doesn't have mandatory 19 worship services. 20 I know, but that's JUSTICE THOMAS: 21 not the reason you go. I'm trying to figure 2.2 out, when you say that there are these features 23 of a public school education, I don't think you 24 go -- if you're in a public school in -- in 25 Maine, that your interest isn't, oh, I'm so glad

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1 I'm here because you don't have a lot of 2 Catholicism here. I think you go for other 3 reasons. And I'm trying to figure out, so when you say a "rough equivalent" of that, what are 4 you talking about? 5 6 MR. TAUB: Again, a rough equivalent 7 is an education that is religiously neutral. That is the defining feature of a public 8 education. That is the education that the state 9 10 wants to provide to children. 11 Now, if families and children want a 12 different benefit, if they want an education that inculcates religious beliefs, that's their 13 14 right, but that's not --15 JUSTICE ALITO: Suppose parents want 16 to send their child, using this money, to an 17 elite private school, Exeter, Andover, Miss 18 Porter's. That would be okay, right? 19 MR. TAUB: Yes, those schools would 20 likely be approved. 21 JUSTICE ALITO: And -- and they would 22 provide the equivalent of the -- a rough 23 equivalent of a public education? 24 MR. TAUB: Yes, they would. 25 JUSTICE ALITO: They would?

| 1  | MR. TAUB: Yes. The defining feature             |
|----|-------------------------------------------------|
| 2  | of a public education is that it's religiously  |
| 3  | neutral. Now you could go to Andover            |
| 4  | JUSTICE ALITO: So, when you say a               |
| 5  | public education, all you mean is a secular     |
| 6  | education. That's what you mean?                |
| 7  | MR. TAUB: That is the defining                  |
| 8  | feature. And and what I would say, Your         |
| 9  | Honor                                           |
| 10 | JUSTICE ALITO: So you have to have a            |
| 11 |                                                 |
| 12 | MR. TAUB: is that if you went to                |
| 13 |                                                 |
| 14 | JUSTICE ALITO: that that's you                  |
| 15 | have to have a compelling interest in providing |
| 16 | a purely secular education in the funded in     |
| 17 | the schools to which these students wish to go? |
| 18 | MR. TAUB: Your Honor, if you went               |
| 19 | into any private school, even take Andover      |
| 20 | Academy, I mean, certainly, there are going to  |
| 21 | be trappings there that are going to be much    |
| 22 | different than than trappings in a public       |
| 23 | school.                                         |
| 24 | But, at the end of the day, your                |
| 25 | chemistry class is going to be taught the same  |

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| 1  | as a public school chemistry class. Your         |
|----|--------------------------------------------------|
| 2  | science and religion and math classes are        |
| 3  | going to be taught the same way. And and the     |
| 4  | one thing that's not going to be occurring in    |
| 5  | those schools is that they're not going to be    |
| б  | inculcating children with a particular religion. |
| 7  | So, yes, an Andover or a Phillips                |
| 8  | Exeter may be different from Bangor Public High  |
| 9  | School in many different ways, but what they     |
| 10 | share in common is the most important feature,   |
| 11 | which is that they are not inculcating religion. |
| 12 | JUSTICE GORSUCH: So, counsel                     |
| 13 | CHIEF JUSTICE ROBERTS: Counsel                   |
| 14 | JUSTICE GORSUCH: I'm sorry, Chief.               |
| 15 | After you.                                       |
| 16 | CHIEF JUSTICE ROBERTS: I just                    |
| 17 | let's suppose you have two schools. School A is  |
| 18 | run by Religion A, and and that religion has     |
| 19 | a doctrine that they should provide service to   |
| 20 | their their neighbors. So they're running        |
| 21 | set up and running a school, but there's nothing |
| 22 | in their in their doctrine about propagating     |
| 23 | the faith or whatever, so it does look just like |
| 24 | a public school, but it's owned by religion.     |
| 25 | Religion B also has a school, but its            |

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1
     doctrine requires adherence to educate children
 2
      in the faith, and the -- the school is infused
 3
      in every subject with their view of the faith.
 4
               Now would the first school get the
 5
      funds?
 6
               MR. TAUB: Yes.
 7
               CHIEF JUSTICE ROBERTS: Okay. Would
      the second school?
8
9
               MR. TAUB: No.
10
                CHIEF JUSTICE ROBERTS: And that's
11
     because of the difference between the two
12
     religions, right?
13
               MR. TAUB: That's because they are --
      their -- their program is specifically
14
15
      instilling and promoting --
16
               CHIEF JUSTICE ROBERTS: Right.
17
               MR. TAUB: -- religion in students,
18
      and --
19
               CHIEF JUSTICE ROBERTS: And the other
20
     religion does not?
21
               MR. TAUB: That -- that is correct.
2.2
                CHIEF JUSTICE ROBERTS: So you're
23
     discriminating among religions based on their
     belief, right?
24
25
               MR. TAUB: No, I would not say that.
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1 Religions can have whatever belief they want, 2 but if they want to take part in Maine's tuition program, the education service they have to 3 provide has to be the service that Maine is 4 purchasing. 5 6 CHIEF JUSTICE ROBERTS: Well, and one 7 religion says that's what they do with education, and the other religion says, no, we 8 9 use it to propagate the faith. 10 So it is the beliefs of the two 11 religions that determines whether or not their 12 schools are going to get the funds or not. 13 And -- and we have said that that is the most basic violation of the -- the First 14 15 Amendment religion clauses, for the government 16 to draw distinctions between religions based on 17 their doctrine. 18 MR. TAUB: Again, Your Honor, we're 19 not -- we're not drawing those distinctions 20 based on doctrine. We are drawing those 21 distinctions based on -- on what the school is 22 going to promote. 23 And let me just give you a hypothetical. If -- if -- if there were a 24 25 school that was -- that was -- that was run by

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| 1  | an organization that felt it was critical to     |
|----|--------------------------------------------------|
| 2  | have part of the program be to inculcate         |
| 3  | religious beliefs, if if that school             |
| 4  | otherwise provided a public education, and let's |
| 5  | say it had chapel services and a class that was  |
| б  | intended to instill religion, if if those        |
| 7  | classes were optional, it's likely that that     |
| 8  | state that that school would would be            |
| 9  | eligible for the Maine tuition program.          |
| 10 | What the state is not going to provide           |
| 11 | public funding to is a school that is going to   |
| 12 | require students to take part in programs that   |
| 13 | are intended to instill religion.                |
| 14 | CHIEF JUSTICE ROBERTS: Well, to                  |
| 15 | follow that up, you say likely. I mean, are we   |
| 16 | supposed to put weight on that in deciding the   |
| 17 | case, that that is, in fact, what's going to     |
| 18 | happen?                                          |
| 19 | MR. TAUB: Well, Your Honor, what we              |
| 20 | have in this record, we have a facial challenge  |
| 21 | and we have an as-applied challenge, and the     |
| 22 | as-applied challenge relates to two very         |
| 23 | specific schools. And it's completely clear      |
| 24 | from the record that that those two schools      |
| 25 | are are not of the type of the school that       |

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1 I'm hypothesizing about. 2 And so, if we ever had a school like 3 that, the Department of Education would look carefully at it. But, you know, I think you'll 4 see in the record that -- that one of the 5 6 questions the Department has asked in the past 7 is: I see you have a chapel service. Is that a mandatory chapel service? 8 9 CHIEF JUSTICE ROBERTS: Okay. So let's say the school is -- you know, some 10 11 subjects are more susceptible to religious 12 infusion than others. So half of the classes are religious. You know, when they teach 13 14 literature, it's from a religious perspective. 15 You know, when they teach calculus or chemistry, 16 it's -- it's -- it's not. So they -- what do 17 they do? Do they get the full amount of the 18 credit, or do they get half the amount? 19 MR. TAUB: No, this is -- I mean, what 20 Maine is doing is it's paying the tuition for 21 that student to attend that school. This isn't 2.2 -- this isn't the kind of program where we can 23 segregate out certain funds to go to one part and certain --24

25 CHIEF JUSTICE ROBERTS: Okay. So you

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1 make a judgment of whether the school qualifies 2 and you look at how much -- how -- how serious 3 are they about infusing the subjects with 4 religion? MR. TAUB: Not how serious they are, 5 6 Your Honor, but -- but if --7 CHIEF JUSTICE ROBERTS: Or to what 8 extent they do. MR. TAUB: So -- and -- and -- and 9 what I will say is that -- is that the schools 10 11 self-identify themselves. This is not a 12 situation where you have government officials --13 CHIEF JUSTICE ROBERTS: Okay. A 14 school comes in and says, I identify myself as a 15 50 percent sectarian school and a 50 percent 16 non-sectarian. They get the full credit? 17 MR. TAUB: We would ask them what are 18 you doing as -- as part of the sectarian portion 19 of your program. And -- and if that portion of 20 the program is -- is designed to instill religious beliefs --21 2.2 CHIEF JUSTICE ROBERTS: Right. 23 MR. TAUB: -- and students are 24 required to attend that part of the program, 25 then it's unlikely that that school would --

would -- would be eligible for -- for any 1 2 portion of the tuition program. 3 CHIEF JUSTICE ROBERTS: Well, I don't 4 understand. I think we've gone from likely to -- to -- to unlikely. 5 MR. TAUB: Well --6 7 CHIEF JUSTICE ROBERTS: Are you saying 8 that if they just had one chapel service every 9 -- every day or -- or let's just say that they take a religious perspective on -- on history, 10 11 just that. Are they going to likely be 12 qualified or likely -- unlikely? 13 MR. TAUB: So, you know, these are 14 hypotheticals that the Department of Education 15 would have to look at. But -- but what I can 16 say is that if a school had a mandatory chapel 17 service where this was a religious chapel 18 service --19 CHIEF JUSTICE ROBERTS: All right. 20 Let's skip the chapel service and say it's just 21 mandatory history class, but they have a 22 particular view of the Crusades that not 23 everybody might share. MR. TAUB: You know, Your Honor, as I 24 25 sit here today, I cannot answer that -- that

question. That -- that would be a much tougher
 situation. It's one that's never presented
 itself in Maine.

And what we have here are -- are two 4 schools that are very much different from --5 from those kinds of hypothetical schools. 6 It --7 it -- it might be that there could be an 8 as-applied challenge brought down the line. If 9 -- if you had a school come forward like Your Honor is -- is speculating about and we denied 10 11 funding for that school because we didn't like 12 the fact that religion was taught or that the 13 Crusades were taught from a particular 14 perspective, that school could easily bring a 15 challenge, and -- and then a court would decide 16 whether what -- whether what Maine did is 17 appropriate or not. But -- but what I don't think is 18 19 appropriate is -- is for the Court to decide the 20 case based on hypothetical situations that --21 that have never occurred in the state. JUSTICE ALITO: Well, suppose that a 2.2 23 -- a school is affiliated with a religious group 24 and they say, we do infuse our religious beliefs 25 into all aspects of the community, but our

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1 salient -- our salient religious beliefs are 2 that all people are created equal and that 3 nobody should be treated -- should be subjected to any form of invidious discrimination and that 4 everybody is worthy of respect and should be 5 6 treated with dignity and that everybody has an 7 obligation to make contributions to the community and engage in charitable work, those 8 9 are our religious beliefs and we don't -- we 10 don't really have any dogma, but these are 11 principles that we think our students should 12 keep in mind, consistent with the religious 13 outlook of our community. Would that school be disqualified? 14 15 MR. TAUB: So, I mean, that would be 16 very close to a public school. Public schools 17 often have a set of values that they want to 18 instill: public service, be kind to others, be 19 generous. 20 I think what -- what -- what the 21 defining feature or what -- or -- or what would 2.2 make the difference is -- is whether children 23 are being taught that your religion demands that you do these things, that -- that your religion 24 25 demands --

| 1  | JUSTICE ALITO: Well, then you really             |
|----|--------------------------------------------------|
| 2  | are discriminating on the basis of religious     |
| 3  | belief. What I described is, I think, pretty     |
| 4  | close to Unitarian Universalism, isn't it? And   |
| 5  | that is a that is a religious community.         |
| 6  | So that would be okay. That religious            |
| 7  | community is okay. They can have a school that   |
| 8  | inculcates students with their beliefs because   |
| 9  | those are okay religious beliefs, but other      |
| 10 | religious beliefs, no. Isn't that is that        |
| 11 | what Maine is doing?                             |
| 12 | MR. TAUB: Well, what I'm saying, Your            |
| 13 | Honor, is that and and, again, this is           |
| 14 | what I said in response to the Chief Justice's   |
| 15 | questions is that is that we have two            |
| 16 | schools here at issue. There are other schools   |
| 17 | that could come in the future that are going to  |
| 18 | pose thornier questions, and, again, those might |
| 19 | be challenges that could be brought at that      |
| 20 | point.                                           |
| 21 | So, you know, I can't sit here and               |
| 22 | and tell you whether or not the Department of    |
| 23 | Education would approve a Unitarian school. We   |
| 24 | would just have to know more information about   |
| 25 | what their curriculum is and and how they're     |

1 teaching it. It would be a process where they 2 3 JUSTICE ALITO: Well, unless you can say that you would treat a Unitarian school the 4 same as a Christian school or an Orthodox Jewish 5 school or a Catholic school, then I think you've 6 7 got a problem of discrimination among religious 8 groups --MR. TAUB: So, I mean --9 10 JUSTICE ALITO: -- regardless of the 11 \_ \_ 12 MR. TAUB: -- part of the challenge 13 here --14 JUSTICE ALITO: -- regardless of 15 religious group that is affiliated with the 16 particular school that is at issue in the case 17 before us. 18 MR. TAUB: So -- so part of the challenge here, I think, you know, is -- is in 19 part the definition of religion itself, and --20 21 and that is an issue that this Court has 2.2 struggled with over the years in cases like IRS 23 tax exemptions and conscientious objector 24 status. And so questions always come up about 25 whether -- is this thing a religion or is it

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1 something else? 2 And I think that most people, you 3 know, would believe that Unitarianism is a religion. It --- it might be not be premised on 4 the existence of a supreme being, but I think 5 6 most people would -- would agree that 7 Unitarianism is a kind of religion. I might be wrong about that, but -- but I think that 8 9 Unitarianism is commonly considered a religion. 10 And so, if that is the case, then --11 then a school that is promoting Unitarian 12 beliefs would not be eligible for the program. 13 JUSTICE GORSUCH: Counsel, my -- my 14 understanding of the record is that this theory 15 that Miss Porter's and the -- and the Cate 16 School in California provide a public education 17 or rough equivalent to one in Maine is a -- a 18 relatively recent phenomenon, that -- that 19 before I believe it was 1980, Maine did allow 20 local religious schools to participate in this 21 program and that it changed course only because 2.2 of a perhaps mistaken view about Establishment 23 Clause precedents and that the Maine Supreme Court found that that was the only reason why 24 25 Maine changed course.

1 So isn't this whole discussion of 2 rough equivalent of public schools something of 3 a post hoc justification? MR. TAUB: It's not, Your Honor. 4 It is true that -- that -- that there was a time 5 6 period when religious schools were eligible for 7 the program. The Attorney General authored an opinion which I think most scholars and courts 8 at the time would have concluded was accurate 9 that included --10 JUSTICE GORSUCH: Well, I don't doubt 11 12 it was in good faith, but you'd agree that that 13 was the reason why Maine changed course? 14 MR. TAUB: That -- that was the 15 reason, but I think what's significant is then 16 after -- after Zelman came out, the Maine 17 legislature understood that maybe that they 18 could include religious schools in the program, 19 and so there was debate about whether to remove 20 the religious exemption. 21 And if you look at -- at -- at -- at 2.2 the statements made during the debate, it's --23 it's clear that the -- that -- that the 24 legislators who were opposed to -- to -- to -to removing the exclusion had interests 25

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1 different than Establishment Clause concerns. 2 They had concerns about making sure that a 3 public education is religiously neutral, that 4 it's -- it's -- it's inclusive, that it's not discriminatory. 5 6 So I think -- and -- and the fact that 7 JUSTICE GORSUCH: There were debates 8 9 after the Attorney General changed position, but 10 the -- the change was due to the Attorney 11 General's opinion? Is that right? 12 MR. TAUB: That -- that -- that was 13 the change that was made in 1981. 14 JUSTICE GORSUCH: Okay. All right. 15 And then I -- I do want to understand this 16 theory. So a -- a -- a private entity can 17 provide a -- a public education in Maine? 18 MR. TAUB: Yes. 19 JUSTICE GORSUCH: A private entity in 20 California can? 21 MR. TAUB: A private -- yes. 2.2 JUSTICE GORSUCH: It just can't have 23 too much religious entanglement? MR. TAUB: It's not that it has too 24 25 much religious entanglement. It's that --

1 JUSTICE GORSUCH: Well, some might be 2 okay, but some --3 MR. TAUB: It's --JUSTICE GORSUCH: -- some might not 4 5 be --MR. TAUB: Well --6 7 JUSTICE GORSUCH: -- I believe was your answer to the Chief Justice. 8 MR. TAUB: -- the ones that would not 9 be okay are the ones that are instilling 10 11 religious beliefs in children. 12 JUSTICE GORSUCH: Okay. How does that not discriminate against minority religious 13 14 viewpoints or ones that are unorthodox because 15 some -- and favor religions that are more 16 watered down, some might say, or more -- more majoritarian, more comfortable with what a --17 18 what a -- a bureaucrat in Bangor might say? 19 MR. TAUB: I don't see that that's -that's an issue at all. This isn't an issue 20 about how watered down the religion is. This is 21 22 an issue just about -- about whether religious 23 beliefs are -- are being instilled. 24 Whether those are watered-down 25 religious beliefs or more vigorous --

1 JUSTICE GORSUCH: Oh, but -- but I 2 thought some were okay, but there comes a line 3 that it's too much. MR. TAUB: No, there -- there's --4 there's -- there's no -- there -- there -- there 5 is not a school that instills religious beliefs 6 7 that would be eligible for -- for our program. 8 JUSTICE GORSUCH: Thank you. 9 CHIEF JUSTICE ROBERTS: Justice 10 Thomas? 11 Justice Breyer? 12 JUSTICE BREYER: I would like to ask 13 you, because Mr. Bindas said, which is --14 leaving my views out of it, which have been in 15 dissents and so forth, that this really is the 16 same as Zelman. I mean, in Zelman, the -- the 17 state provides -- provided tuition money so that 18 the children's parents could choose what 19 religious school to go to. 20 That's pretty much, I think, my 21 recollection is. And so what's the difference 2.2 here? 23 MR. TAUB: So --24 JUSTICE BREYER: This parent chooses a 25 school and the state supplies some money.

1 MR. TAUB: So the first important 2 point is that Zelman was about what a state is 3 permitted to do, not what about a state is required to do. 4 So -- so, in Zelman, this Court said 5 6 that it was permissible for the state to allow 7 the school vouchers to be used at religious schools. But -- but the other significant 8 9 aspect is that in Zelman, the state was 10 providing a program for -- for parents who 11 wanted to opt out of the public school system, 12 for -- for parents who wanted to send their kids to private schools because of a failing public 13 14 school system. 15 In Maine, our -- our tuition program 16 is part and parcel to our public schools. It's 17 -- it's available for that very tiny percentage 18 of kids who live in districts who otherwise 19 wouldn't be able to receive a public education. 20 It is only those children who are allowed to participate in this tuition program. And so --21 2.2 JUSTICE BREYER: So you're -- for you 23 to basically win, it seems to me, you would have to fall within the -- what Justice Kagan said is 24 25 this -- this area where the state has a degree

1 of leeway, is that right? MR. TAUB: Yes. I think -- I think 2 3 there's two ways that we win. I think the one -- the first way we win is if the Court agrees 4 that this is part of Maine's public education 5 6 program. 7 And then I think the other way that we can win is if the Court agrees that when -- that 8 9 when it comes to spending programs, just like 10 with free speech, the state is allowed to use 11 its pocketbook to promote the values that it has 12 decided it wants to promote. And so this is a spending program, and what Maine wants to --13 wants to advance is religious neutrality. We 14 15 want schools to be neither --16 JUSTICE BREYER: I --17 MR. TAUB: -- for nor against any 18 particular religion. 19 JUSTICE BREYER: -- I got it. Okay. 20 CHIEF JUSTICE ROBERTS: Justice Alito? 21 JUSTICE ALITO: Well, on that point, 22 suppose a school inculcates a purely materialistic view of life. 23 24 Would that be -- would that be okay? 25 MR. TAUB: So, I mean, this is

| 1  | something that we that we've thought about,      |
|----|--------------------------------------------------|
| 2  | and I think there there are other aspects of     |
| 3  | of of what a school could do that would be       |
| 4  | inconsistent with a public education.            |
| 5  | Now what the Maine legislature had in            |
| б  | front of it was it had a set of of sectarian     |
| 7  | schools and it had a set of secular schools, and |
| 8  | and the one thing that the legislature knew      |
| 9  | is that it did not want to have schools that     |
| 10 | inculcate religion as part of the public         |
| 11 | education program.                               |
| 12 | Now it's possible that, you know, down           |
| 13 | the road some school might pop up that is        |
| 14 | teaching something else, not religion but        |
| 15 | something else, say, Marxism or Leninism or, you |
| 16 | know, white supremacy. Clearly, those kinds of   |
| 17 | schools would be doing something completely      |
| 18 | inconsistent with a public education.            |
| 19 | JUSTICE ALITO: But, as of now, that              |
| 20 | would not prohibit a parent from getting funding |
| 21 | to send a child to one of those schools?         |
| 22 | MR. TAUB: So, be be because                      |
| 23 | those are hypothetical situations that the       |
| 24 | legislature has never had to confront, it hasn't |
| 25 | addressed that in the legislation.               |

1 But there's no doubt, Your Honor, that 2 if a white supremacy school tried to participate in Maine's program, the legislature would 3 swiftly act to say, no, you know, beyond being 4 religiously neutral, you also can't teach 5 principles of -- of -- of hatred. 6 7 JUSTICE ALITO: I understand that. But, as of now, the only thing that you want to 8 9 make sure that the schools that are covered by 10 this cannot do is that they can't inculcate 11 religion --12 MR. TAUB: Yeah, I mean -- I mean --JUSTICE ALITO: -- even if it's -- you 13 14 know, even if it's a religion that promotes 15 tolerance of all religious beliefs, if it's 16 religiously based, no? 17 MR. TAUB: Again, I mean, I don't want 18 to quibble with -- with words, but it's not just 19 that it's religiously based. It's that it's 20 instilling religion in the children who attend 21 that. And -- and that is because that is the defining characteristic and I think this Court 2.2 23 has recognized that that's a defining characteristic of a public education. 24 25 And so -- so that is the thing that

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1 the legislature has controlled for because 2 that's what actually exists on the ground. We 3 actually have schools that instill religious 4 beliefs. We -- we don't have schools that are instilling Leninism or white supremacy. 5 6 CHIEF JUSTICE ROBERTS: Justice 7 Sotomayor? JUSTICE KAGAN: But just to follow up 8 9 on that point, you're confident that that would -- that kind of school would not be funded 10 11 because -- a white supremacist school, because 12 it's outside the bounds of your program, is that 13 right? 14 MR. TAUB: I mean, yes, Your Honor. I 15 -- I think it's -- it's unfair for --16 for the -- for a legislature to be expected to 17 legislate against every hypothetical outlandish 18 situation that could come forward. So it's 19 incredibly unlikely that we would ever have a 20 white supremacy school applying to become part 21 of our public school program. 2.2 But knowing what I know about Maine 23 and our legislature, that school would -- there 24 -- a way would be found to ensure that that school is not allowed to participate. 25

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1 JUSTICE ALITO: Well --2 JUSTICE KAGAN: Do you --3 JUSTICE ALITO: -- could I follow up? 4 I'm sorry. 5 JUSTICE KAGAN: No, please. 6 JUSTICE ALITO: No, go ahead. 7 JUSTICE KAGAN: Go ahead. 8 JUSTICE ALITO: Would you say the same 9 thing about a school that teaches critical race 10 theory? 11 MR. TAUB: Whether that school would 12 be eligible? 13 JUSTICE ALITO: Yeah. MR. TAUB: So I think that that is 14 15 something that the legislature would have to 16 look at. I mean, that one's closer because, 17 frankly, I don't -- I don't really know exactly 18 what it means to teach critical race theory. So 19 I think -- I think the Maine legislature would 20 have to look at what that actually means. 21 But -- but I -- I will say this, that -- that if -- that -- that if teaching critical 2.2 23 race theory is -- is -- is antithetical to a public education, then the legislature would 24 25 likely address that.

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1 CHIEF JUSTICE ROBERTS: Justice Kagan? 2 JUSTICE KAGAN: You've been asked 3 quite a number of questions on your time up there about, you know, hard cases, also sort of 4 odd cases. 5 I just want to know what's the hardest 6 7 case you have actually -- the Department of Education has actually ever been confronted with 8 in this area? 9 10 MR. TAUB: So we've never really had a 11 hard case. In 20 years worth of records, we've 12 identified three schools where there was any issue raised about whether they were eligible. 13 14 The first school was a seminary 15 school, and so that was clearly ineligible. We 16 told them that, and we never heard back. 17 There was another school that, even 18 though it indicated it was -- it was 19 non-sectarian, it -- it disclosed or -- or a 20 Department of Education official learned that --21 that "its" -- "its student life centers around 2.2 our chapel." And it also had a religious 23 affiliation. And so the state responded that it 24 doesn't look like you're eligible, but, if you 25 want to provide us with more information, we'll

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1 consider it, and we never heard anything more 2 from that school. And then the third -- the third 3 school, the Cardigan Mountain School, was a -- a 4 school that we identified as having a chapel, 5 6 and so we -- we wrote to the school and said, is 7 this a mandatory chapel service? And they said, 8 well, it is, but the chapel is just the biggest 9 building that we have on campus, and so, when we 10 have our student assemblies, that's where we 11 hold them, but there's nothing religious that 12 goes on there. And so we said, okay, that's 13 fine. 14 Those are the only -- in 20 years, 15 those are the only situations that we have had 16 where we've had to make those kinds of 17 decisions. 18 JUSTICE KAGAN: I mean, I would think 19 all the religious schools I know of -- and, you know, it could be Catholic schools or it could 20 be evangelical Christian schools or it could be 21 2.2 Muslim schools or Jewish schools of any 23 persuasion, not just Orthodox but any Jewish 24 schools, I mean, if somebody said to them, are 25 you a religious school, they would have no

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1 trouble saying, yes, we are, right? 2 MR. TAUB: They're not trying to hide 3 this, Your Honor. They're proud of it, and they 4 should be. I mean, these schools have an important place in our community. And so 5 6 they're not trying to hide or -- or pull a fast 7 one over us. They're proud of -- of being a school that instills religion, and they will 8 tell us that. 9 10 JUSTICE KAGAN: Thank you. 11 CHIEF JUSTICE ROBERTS: Justice 12 Gorsuch? 13 JUSTICE GORSUCH: Yeah, just to follow 14 up on that. So the Cardigan school had a chapel 15 in the middle of campus, and it was allowed to 16 participate. 17 MR. TAUB: Yes. 18 JUSTICE GORSUCH: But the Kent school, 19 which was the second one you mentioned, though 20 you didn't identify it by name, an Episcopal 21 school, said it's not owned or affiliated with 2.2 the church, but it was not allowed to 23 participate, right? 24 MR. TAUB: Well, what we told the 25 school is that, based on our review, because you

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1 say that your life centers around your chapel 2 and be -- because --3 JUSTICE GORSUCH: Right. It was not 4 allowed to participate, right? MR. TAUB: Well, they were invited to 5 6 provide more information. 7 JUSTICE GORSUCH: More information, but they were denied at that time? 8 9 MR. TAUB: Yes. 10 JUSTICE GORSUCH: Okay. So somebody 11 in Maine, in Bangor, has to sit down and decide 12 Cardigan good/Kent bad, right? 13 MR. TAUB: Yes, Your Honor, but these 14 were easy calls to make. 15 CHIEF JUSTICE ROBERTS: Justice 16 Kavanauqh? 17 JUSTICE KAVANAUGH: If -- if the state 18 said that you can use the funds for a secular 19 private school or a Protestant private school 20 but not a Catholic or Jewish or Muslim private school or any other religious private school, I 21 22 assume you would agree that would be 23 problematic? 24 MR. TAUB: Of course, Your Honor. 25 JUSTICE KAVANAUGH: Okay. So, when it

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1 says that you can use it for a secular private 2 school but not a Protestant, Catholic, Jewish, or Muslim or any other religious private school, 3 you say that's -- that's okay, though? 4 MR. TAUB: Well, I mean, I think that 5 6 this Court has recognized, for example, in the 7 school prayer cases that -- that the -- the absence of religion isn't -- isn't animosity 8 9 towards religion. 10 So what we are trying to achieve are 11 schools that are religiously neutral. And --12 and -- and just to be clear --13 JUSTICE KAVANAUGH: But if you -- keep 14 qoing. 15 MR. TAUB: -- if -- if -- if 16 there were a school that -- that teached sort of 17 antireligion, that -- that -- that taught kids 18 that there is no God, that you should reject all 19 religion, that school wouldn't be eligible 20 either. What we want is religious neutrality. 21 JUSTICE KAVANAUGH: But the -- the 22 problem, I think, and the tension with what you 23 just said as to those two questions is that our 24 case law suggests that discriminating against 25 all religions, as compared to secular,

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1 comparable secular, is discriminatory, just as 2 it is discriminatory to say exclude the Catholic 3 and the Jewish and include the Protestant. And so it's not exclusion of religious 4 people and religious institutions from public 5 benefits solely because they're religious is 6 7 itself discriminatory. So how do -- I mean, we said that 8 9 Trinity Lutheran said odious to our 10 Constitution. How do you deal with -- with 11 that? 12 MR. TAUB: So I think there's a nuance 13 going on here that I just want to make sure I 14 can clarify, that -- that I think that there --15 there is a difference between sort of state 16 regulations, in other words, like state 17 prohibitions, and -- and state programs that are 18 providing funding. 19 And so I think, when it comes -- when 20 it comes to prohibitions, a state can't 21 discriminate based on status or use. So you 2.2 can't -- you -- you can't say a person can't be 23 Catholic and you also can't say that a person can't take Communion. 24 25 I also think, when it comes to subsidy

1 programs, there, you can't discriminate based on 2 status. So you can't say that we have a 3 playground program, but you can't -- you're not eligible if you're religious. 4 But I think that there's a fourth 5 6 category, and -- and the fourth category is a 7 subsidy program that -- where -- where the subsidy is being used for a specific purpose, 8 9 and it excludes purposes that are -- that are 10 contrary to what the government is trying to 11 establish and are going to be used to directly 12 advance religion. I think that is the one very 13 narrow category where there is a real 14 distinction between status and use. 15 JUSTICE KAVANAUGH: One last question, 16 which is to pick up on Justice Breyer's 17 questions earlier, which I think identified a 18 real issue here, which is strife that is 19 created. 20 But what do you say to -- to those who 21 would say, by excluding someone who's religious 2.2 from a state program and creating this feeling 23 of exclusion for people who are told your school 24 isn't good enough solely because it's religious, 25 go to Exeter or Andover, but you can't go to the

1 Bangor Christian or the DeMatha or whatever the 2 religious school is, doesn't that also create a 3 possibility of -- of strife? MR. TAUB: So a few points there, Your 4 Honor. I -- I think what the real strife would 5 be, first of all, I think there would be strife 6 7 among parents who live in districts that have public schools or contract with schools, because 8 I think the strife there would be, how come I 9 can't send my kids to religious schools at 10 11 public expense but these other kids can? 12 So I think that -- that -- that's one source of strife. I think another source of 13 14 strife would be trying to explain to taxpayers 15 in Maine why your money is being used to go to a 16 school that teaches that boys are better than 17 girls, that actively discriminates against 18 certain protected classes. So I think that's --19 that that's a second element of strife. But I think the other point I want to 20 make is -- is we are not telling people that you 21 2.2 can't qo to a school because you're religious. 23 There are plenty of people in Maine who want to send their kids to religious schools for reasons 24 25 wholly unrelated to the religious aspects of the

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| 1  | school. It might be because they have a better   |
|----|--------------------------------------------------|
| 2  | hockey team or they have better academics or     |
| 3  | they just have more discipline.                  |
| 4  | And and we tell the same thing to                |
| 5  | those parents. It's not that you're religious    |
| б  | that you can't go to that school. It's just      |
| 7  | those schools aren't eligible for our program.   |
| 8  | JUSTICE KAVANAUGH: Appreciate your               |
| 9  | answers. Thank you.                              |
| 10 | CHIEF JUSTICE ROBERTS: Justice                   |
| 11 | Barrett?                                         |
| 12 | JUSTICE BARRETT: I have one I have               |
| 13 | a question, but I have one quick follow-up to an |
| 14 | answer you gave Justice Kavanaugh.               |
| 15 | You said that if a private secular               |
| 16 | school taught that all religions were bad,       |
| 17 | religions were bigoted, that they would not be   |
| 18 | eligible for participation in Maine's program.   |
| 19 | Why? That's not sectarian, is it?                |
| 20 | MR. TAUB: Well, the the goal of                  |
| 21 | the program is religious neutrality. And so,     |
| 22 | you know, we've we've never heard of a school    |
| 23 | that's sort of antireligious, a school that      |
| 24 | teaches that all religion is bad. But but        |
| 25 | it's clear that such a school would not be       |

1 religiously neutral. And so, because the whole 2 purpose of the program is to --3 JUSTICE BARRETT: But the statute says non-sectarian. It doesn't say religiously 4 neutral, right? 5 MR. TAUB: Well, that's true. 6 But --7 but I think that -- that -- that the spirit and purpose of the program -- and -- and -- and 8 we've talked about this with the commissioner of 9 10 the Department of Education, and -- and -- and 11 her position is -- is the same as ours, that --12 that a school that is -- that is antireligious is not religiously neutral, and so it would not 13 14 qualify for this program. 15 JUSTICE BARRETT: Thank you. And my 16 question is as follows. It kind of goes back to 17 Justice Thomas's questions about rough 18 equivalent of a public school. 19 So all schools, in making choices about curriculum and the formation of children, 20 21 have to come from some belief system. And in 2.2 public schools, the public school -- the school 23 boards, the districts are making that choice, those choice of classes to be taught and the 24 25 kind of values that they want to inculcate in

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1 the students. 2 Is there any kind -- I mean, how would 3 you even know if a -- if a school taught all religions are bigoted and biased or, you know, 4 Catholics are bigoted or, you know -- or we take 5 a position on the Jewish-Palestinian conflict 6 7 because of our position on, you know, Jews, 8 right? 9 How would they even know? Because 10 it's my understanding that in choosing whether a 11 non-sectarian school can be funded or not, 12 you're not engaging in that kind of oversight 13 about what the belief systems are of the school. 14 So long as they're not sectarian, it's a 15 thumbs-up? 16 MR. TAUB: So I will answer that --17 that question, Your Honor. Obviously, I will 18 answer your -- your question, but -- but I -- I 19 just -- I just want to make this point first 20 because this might be lost in -- in the record. 21 Over 99.8 percent of children in Maine 2.2 go either to a public school or one of what we 23 call the Big 11, which are schools that enroll 24 at least 60 percent publicly funded students but 25 -- but, in reality, enroll more like 95 percent

publicly funded students. So it's -- it's
 only .2 percent of students that are going to
 other private schools.

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

10 But -- but, to answer Your Honor's 11 question, there is a process that schools have 12 to go through to become part of our program, and through that process, if a Department of 13 14 Education official says -- sees information that 15 -- that -- that the school seems to be teaching 16 antireligious views, that would raise a red 17 flag, and -- and that would result in the kind 18 of inkling --

JUSTICE BARRETT: But it was my understanding that that wasn't part of -- just based on the record, and I may not understand it, but as it was laid out in the briefs, it was my understanding that if the school is accredited, that there weren't particular curricula requirements the school had to satisfy

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1 to be eligible for participation in the program. 2 You know, a school, for example, could be single 3 sex. It didn't have to be co-ed. And I assume all the public schools in Maine are co-ed. 4 I mean, it didn't have to match up 5 6 along all of those metrics and that there was no 7 formal examination into what kinds of values that the school was seeking to inculcate in 8 9 students. 10 That is true, but -- but MR. TAUB: 11 what the Department of Education does when it 12 gets a new school apply is it does a little 13 homework, and so it'll go to the school's 14 website and say, okay, I've never heard of this 15 school before, I want to learn a little about 16 it. Or maybe it takes a look at the student 17 handbook. 18 And, you know, if the first sentence 19 in the handbook says that our school is designed 20 to promote white supremacy interests or our 21 school is designed to promote antireligion, that 2.2 is going to be a flag that's going to get 23 tripped, and that's going to result in the kind 24 of inquiry.

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So you're absolutely right, Your

1 Honor, that -- that -- that the schools are not 2 submitting their curriculum to us as part of 3 this process. 4 JUSTICE BARRETT: And there's no visit to the school? There's no talking to the 5 6 teachers? There's no -- it's just kind of what 7 you can find on the website? And that's not -that's not pertinent to the statute because the 8 9 statutory requirement is simply 10 sectarian/non-sectarian? 11 MR. TAUB: Yeah. I mean, in just the 12 run-of-the-mill cases, these schools are 13 well-known to us. They check off a box saying 14 they're either sectarian or non-sectarian. 15 JUSTICE BARRETT: Okay. I -- I 16 understand the Big 11. 17 MR. TAUB: Yeah. 18 JUSTICE BARRETT: But I think you 19 answered my question for these. 20 MR. TAUB: No, but -- but that's true for -- for all schools. 21 2.2 JUSTICE BARRETT: Okay. Thank you. 23 CHIEF JUSTICE ROBERTS: Thank you, 24 counsel. 25 Mr. Stewart.

1 ORAL ARGUMENT OF MALCOLM L. STEWART 2 FOR THE UNITED STATES, AS AMICUS CURIAE, 3 SUPPORTING THE RESPONDENT MR. STEWART: Thank you, Mr. Chief 4 Justice, and may it please the Court: 5 6 The judgment of the court of appeals 7 upholding Maine's sectarian school exclusion should be affirmed. That is so for three basic 8 9 reasons. 10 First, the government has far greater 11 latitude when it simply declines to fund 12 particular speech or religious exercise than when it imposes affirmative barriers to that 13 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 fund those schools. 20 21 Third, the religious instruction these schools provide is, by the schools' own account, 2.2 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 where does it come from? 3 MR. STEWART: The frame -- the framers 4 adopted the anti- -- the Establishment Clause 5 out of concern that excessive closeness between 6 7 government and religion could harm both government and religion and cause public 8 discord. And when we refer to an 9 10 anti-establishment interest, what we mean is 11 state, local, and the federal government should 12 have significant latitude, the play in the joints to which Justice Kagan referred, to 13 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 sessions with a brief prayer. But I think it 20 21 would be extravagant to suggest that any 2.2 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

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1 good, it has caused discord, people believe that 2 we are preferring particular religions even though that was not our intent, it could 3 discontinue the practice. 4 It would be going beyond what the 5 6 federal Establishment Clause requires, but it 7 would still be pursuing legitimate anti-establishment interests in the sense of 8 9 attempting to prevent the general harms at which the Establishment Clause is directed. 10 11 And I'd say it's entirely clear that's 12 the way it works on the Free Exercise Clause -on the free exercise side. That is, it's 13 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 2.2 and RLUIPA, where the federal -- the Congress 23 says, in a wide variety of context, you have to 24 make certain accommodations to religious 25 practice, even though the Free Exercise Clause

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1 itself would not require that. It's natural in that circumstance to 2 speak of the government vindicating free 3 exercise values or pursuing free exercise 4 interests, even though the Free Exercise Clause 5 doesn't compel that sort of action. 6 7 And as Justice Kagan also suggested, different states and localities could decide to 8 do it differently. One state could decide we 9 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. So -- so there -- there -- as the 20 Court has often emphasized, the Establishment 21 2.2 Clause and the Free Exercise Clause, they may in 23 some sense be in tension, but they don't compel a single course of action, that there is room 24 25 for play in the joints, room for the -- the

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1 government to exercise discretion as to what 2 balance it wants to strike. 3 The -- the next thing I'd want to say is this is a case about what the government has 4 to subsidize, what it has to fund. It's not a 5 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 send their children for religious instruction 13 after school or on weekends. It was not our 14 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 beliefs, right? 21 2.2 It would be -- it -- we MR. STEWART: are not trying to tell the parents what they 23 should do with their children. 24 25 JUSTICE GORSUCH: Well --

| 1  | MR. STEWART: Our our primary                     |
|----|--------------------------------------------------|
| 2  | JUSTICE GORSUCH: and and and                     |
| 3  | you'd agree that, you know, in Thomas, for       |
| 4  | example, this Court's made clear that that       |
| 5  | you you don't have to choose between             |
| б  | receiving a public benefit and your faith,       |
| 7  | right?                                           |
| 8  | MR. STEWART: That that's correct.                |
| 9  | But the question is the question is not          |
| 10 | whether you can be denied the unrelated benefit  |
| 11 | based on your faith or based on your religious   |
| 12 | practice. It's whether the government has to     |
| 13 | subsidize the religious practice itself, and     |
| 14 | JUSTICE GORSUCH: Fair fair enough.               |
| 15 | But, once it creates the program, here, we have  |
| 16 | a program that's been created, and I think that  |
| 17 | goes back to the Chief Justice's point that, you |
| 18 | know, maybe they didn't have to create a         |
| 19 | program.                                         |
| 20 | But, once once they do, to suggest               |
| 21 | that you don't have to choose between            |
| 22 | participation in the program and your faith      |
| 23 | because you can send your children to Sunday     |
| 24 | School or to a Bible Study program at night      |
| 25 | seems to suggest favoritism toward religions     |

1 just react to this -- seems to favor religions 2 for whom that is an adequate substitute and 3 discriminate against religions for whom that is not an adequate substitute. 4 MR. STEWART: I -- I think the state 5 6 is behaving neutrally in the sense that it says 7 we will fund secular education. We will not fund religious instruction or an inculcation. 8 9 And it may be that to members of some religions 10 that will be a greater practical burden than to 11 others, but that doesn't --12 JUSTICE GORSUCH: So, to the Orthodox 13 Jewish family, it is a burden, and to the 14 Protestant family, it may not be? 15 MR. STEWART: I -- I guess I would 16 speak -- I -- I -- I --17 JUSTICE GORSUCH: You agree that's the 18 practical reality of the program? 19 MR. STEWART: I mean, obviously, 20 parents who would like to send their children to 21 religious schools full time during the day are 2.2 burdened by this rule in a way that parents who 23 have no interest in doing so would not be. But -- but, to speak to a -- a 24 25 hypothetical that the Chief Justice raised, if

1 -- if, for instance, the state decided we will 2 provide aid for refurbishing athletic facilities and it will be available to secular and to 3 religious schools alike, and -- some religious 4 schools have robust athletic programs and they 5 6 would benefit significantly from the assistance. 7 Another religious school might say: Participation in athletics is contrary to our 8 9 religious values. This money is useless to us. If it's confined to -- to that parameter --10 11 within those parameters, we would like the money 12 to use it for something that is as important to us as athletics is to some other schools. 13 14 Clearly, they'd have no valid free 15 exercise claim. The state has chosen to 16 subsidize certain activities and not others. 17 It's done so on a religiously neutral basis. Ιt may be that that aid will be, practically 18 19 speaking, more valuable to members of some 20 religions than to others, but that doesn't create a constitutional violation. 21 2.2 JUSTICE KAVANAUGH: But, at its core, 23 Mr. Stewart, you're suggesting that with, say, 24 two neighbors in -- in Maine, in a neighborhood, 25 and they both -- there's not a public school

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1 available, and the first neighbor says: We're 2 going to send our child, children, to secular 3 private school, they get the benefit. The next-door neighbor says: Well, we 4 want to send our children to a religious private 5 6 school, and they're not going to get the 7 benefit. And I don't see how your suggestion 8 that the subsidy changes the analysis. That's 9 just discrimination on the basis of religion right there at -- at the neighborhood level. 10 11 MR. STEWART: Well, first, as Mr. Taub 12 said, it's not discrimination based on the --13 the religion of the parents. Some parents 14 obviously send their children to religious 15 schools because they share the religious values. 16 Other parents may send the -- the children to 17 religious schools for a combination of other 18 reasons. 19 And -- and so there is a disparity in 20 treatment. It's not necessarily a disparity based on the religion of the parents. But the 21 2.2 \_ \_ 23 JUSTICE KAVANAUGH: Well, that's 24 slicing it pretty thin in the real world, I 25 think. It's discrimination against the

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| 1  | different schools because of the religion and   |
|----|-------------------------------------------------|
| 2  | people who prefer those schools, prefer         |
| 3  | religious schools over secular schools.         |
| 4  | MR. STEWART: But but I think the                |
| 5  | still, the the response is the state is         |
| 6  | behaving neutrally in the sense that it will    |
| 7  | fund secular education and not religious        |
| 8  | education. And that that seems especially       |
| 9  | appropriate in a program like this one that, as |
| 10 | Justice Kagan was was saying earlier, it's      |
| 11 | not intended to provide the broadest range of   |
| 12 | possible choices. It's intended to provide a    |
| 13 | substitute for public education in Maine.       |
| 14 | JUSTICE KAVANAUGH: Why isn't it                 |
| 15 | treating people neutrally to tell them you're   |
| 16 | all equal citizens without respect to your      |
| 17 | religion, and so too all the schools that are   |
| 18 | accredited are equal without respect to their   |
| 19 | religion, whether you're secular, Catholic,     |
| 20 | Jewish, what have you, you're all going to be   |
| 21 | treated equally?                                |
| 22 | Isn't that the the neutral                      |
| 23 | position, is to suggest your religion does not  |
| 24 | affect your qualification for a particular      |
| 25 | public benefit, your religion or lack of        |

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1 religion doesn't affect your -- your 2 qualifications in our society? 3 MR. STEWART: I -- I mean, first, the state, as your question pointed out earlier, 4 certain -- certainly couldn't distinguish among 5 religions. It couldn't provide the funds to the 6 7 Catholic school but --8 JUSTICE KAVANAUGH: Okay. And to stop 9 you there, I think the lesson of some of the cases is discriminating against all religions 10 11 versus secular is itself a kind of 12 discrimination that the Court has said is odious to the Constitution at least in certain 13 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. JUSTICE BREYER: Well, what is it --20 21 MR. STEWART: And I think that -- that 2.2 there -- there is a sort of secular analog to 23 this where, in cases like Regan and in Cammarano versus United States, if -- if a federal or 24 state tax code says a business can take a 25

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1 business expense deduction for the money it 2 spends advertising its product, but it can't take a deduction for lobbying expenses or for 3 expenses on electoral advocacy, that -- that --4 a distinction like that doesn't rest on any idea 5 6 that electoral advocacy and lobbying are 7 disfavored speech or that they are less important. To -- to the contrary, they're the 8 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 electoral advocacy are so important and because 13 14 there is such a diversity of views on those 15 subjects, the government is going to stay clear 16 of anything that looks like funding or 17 subsidizing that speech. 18 And -- and, historically, the 19 government has had the same latitude with 20 respect to religious inculcation. It can't penalize people in some unrelated sphere because 21 2.2 they have engaged in religious instruction of their children, but it can decline to fund the 23 religious instruction itself. 24 25 JUSTICE ALITO: If a state -- if a law

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| 1  | like this drew a distinction between schools     |
|----|--------------------------------------------------|
| 2  | that teach that all religion is bad and schools  |
| 3  | that teach that religion is good, would that be  |
| 4  | permissible in the view of the government?       |
| 5  | MR. STEWART: No, it would not be, I              |
| 6  | think essentially for the same reason that a law |
| 7  | that provided the money to Catholic schools but  |
| 8  | not to Jewish schools would would be no good,    |
| 9  | it would be a denominational preference.         |
| 10 | We don't think, though, that                     |
| 11 | JUSTICE ALITO: Well, do you see                  |
| 12 | anything in the Maine statute that would rule    |
| 13 | out a subsidy for a parent who sends a child to  |
| 14 | a school that teaches all religions are bad?     |
| 15 | MR. STEWART: I don't see anything in             |
| 16 | the Maine statute as currently written that      |
| 17 | would naturally be construed in that way. The    |
| 18 | the either the Department of Education or        |
| 19 | a court in Maine could adopt a limiting          |
| 20 | construction, or I think more likely, as Mr.     |
| 21 | Taub said, if it if that became a prevalent      |
| 22 | practice, the legislature could step in.         |
| 23 | So, while we don't think it would be             |
| 24 | constitutional for Maine to distinguish on that  |
| 25 | basis, we don't think that the absence of an     |

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1 express provision in the statute to that effect 2 is a basis for striking the statute. JUSTICE ALITO: Don't we have to judge 3 the constitutionality of the statute as it now 4 stands? 5 MR. STEWART: Well, I think what they 6 7 are -- I think we should be asking, is the statute constitutional as applied to these 8 particular Petitioners? And if these 9 10 Petitioners could point to an example in which a 11 school was approved for funding even though it 12 provided atheistic or antireligious instruction, then that might be a valid basis for an 13 14 as-applied claim. 15 But the -- the theoretical possibility 16 that could happen is -- is not a ground for 17 invalidating the statute. And, obviously, the 18 -- the Court has dealt with a lot of funding 19 programs and a lot of issues under both the Establishment Clause and the Free Exercise 20 21 Clause, deciding certain practices are 2.2 constitutional or not. 23 I don't know of any case in which the Court has said the absence from this statute of 24 25 some express exclusion for atheist schools is

1 itself a basis for striking the law down. 2 If -- if I may, I'd like to say just 3 one -- if I may, I'd like to say just --JUSTICE GORSUCH: Mr. Stewart, I do --4 I do have one question. I -- I -- I just want 5 6 to confirm my understanding. I -- I didn't see 7 in the government's brief any strict reliance or suggestion that the Court should rely on a 8 status-use distinction. Rather, I saw this 9 10 analogy to government speech. Is that right? 11 MR. STEWART: Well, I think we are 12 advocating the status-use distinction, but I 13 think -- not -- not the analogy to government 14 speech so much because I don't think it's 15 necessary to treat this as government speech. 16 We are relying on the principle in the 17 Free Speech Clause cases that the government has substantially more latitude when it declines --18 19 JUSTICE GORSUCH: I -- I'm sorry. 20 That's what I meant to say, as opposed to a strict reliance on a status-use distinction. 21 2.2 MR. STEWART: I -- I think our view is 23 the status-use distinction is just different 24 words for the same concept. That is, the --25 JUSTICE GORSUCH: Well, the government

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1 -- the government wouldn't -- I mean, maybe it 2 would. Does the government see a basis for distinguishing between a tax on persons who wear 3 yarmulkes as opposed to a tax on Jewish persons, 4 to borrow from one of our cases? 5 MR. STEWART: No, but we don't view 6 7 the status-use distinction as being based, as --8 as Justice Kagan was saying earlier, on a distinction between religious belief and 9 religious conduct. We -- we think the 10 11 status-use distinction means, on the one hand, 12 the state can decline to fund your religious exercise, but it cannot define -- decline to 13 give you an unrelated benefit based on the fact 14 15 that you have engaged in religious exercise 16 outside the program. 17 CHIEF JUSTICE ROBERTS: Thank you, 18 Mr. Stewart. What is your answer to the 19 questions I -- I posed to your friend from Maine about the two churches, one that doesn't have a 20 21 religious interest in infusing the school with 2.2 its -- with its religion but -- or -- or it 23 does? Its -- its religious value is service to 24 others, and they're doing that by providing a 25 perfectly secular school, and the other that has

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1 the religious teaching that it should infuse its 2 children with the values of the faith and they have a school like that? 3 As I understood it, we have -- the 4 former school can participate in this program, 5 6 but the latter cannot. 7 MR. STEWART: I -- I -- that is correct. And I think, even though it might 8 9 appear in -- in one sense to be discriminatory, it actually avoids a more insidious form of 10 discrimination. That is, there are a lot of 11 12 circumstances in which the government decides to fund or subsidize activities that it believes to 13 14 be in the public interest. 15 And the general rule is, as long as 16 you are prepared to do those things, you're 17 entitled to the funding whether you're religious or not. And if we said that the person who did 18 19 those things with a religious reason in mind is 20 going to be treated differently from the person 21 who did them with purely secular motivations, 2.2 that would be problematic. 23 And to -- to take your hypothetical 24 and -- and compare it to a situation in the 25 public schools, as Mr. Taub was pointing out,

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1 public schools attempt to teach virtues like 2 honesty, trustworthiness, kindness, 3 consideration for those less fortunate, and, certainly, those are essentially secular values. 4 They certainly correspond to values that many 5 people hold as a matter of religious conviction. 6 7 But there's no question those values could be taught in the public schools. And if a 8 9 particular public school teacher was especially 10 committed to those values because of her 11 religion, that wouldn't be a problem. But, if 12 the teacher at the public school said you should 13 behave in this way because that was the way that Jesus Christ behaved and he was the son of God, 14 15 that would be problematic. 16 We would look at the content of the 17 instruction the public school teacher was providing, not her internal motivation for 18 19 speaking as she did. 20 CHIEF JUSTICE ROBERTS: Thank you. 21 Justice Thomas? 2.2 JUSTICE THOMAS: No questions, Chief. Justice 23 CHIEF JUSTICE ROBERTS: 24 Breyer? 25 JUSTICE BREYER: I -- I might ask this

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1 because it's related to what Justice Kavanaugh 2 said and -- and what you're saying. 3 I mean, it is discriminatory against religion, but I think the Establishment Clause 4 problem or interest underlying it forever has 5 6 been beware if the government gets too involved. 7 One, people will think the government favors some things as opposed to others and that that 8 will cause strife. 9 10 Two, the Vietnamese boat people will 11 have no problem in Los Angeles, but they sure 12 will in Maine because there aren't enough of And there are a lot of religious people 13 them. 14 who will say, why are you preferring the 15 Catholics or the Jews to the Vietnamese boat 16 people? See? And you say I have an answer to 17 the discrimination, there aren't enough of you. 18 Oh, oh, I see. Minority, okay. 19 But there's a third one which you haven't mentioned, which I learned out of a case 20 in the First Circuit, which was really tough, 21 2.2 religious reason for teaching about Honduras in 23 the geography class in way X. School board says 24 way X, you can't do it; you're disqualified as a 25 teacher. They say but that's how we're supposed

1 to do it, okay? And I have never seen emotions 2 rise so high in a courtroom. 3 And, suddenly, you get into teaching that involves worship and religious principle. 4 You don't know what kinds of inter-religion or 5 why are you doing it for the religious people 6 7 but not me, I'm not religious, dah, dah, dah, dah, dah. The strife that can be involved. 8 9 All right. Now I thought that was a 10 good reason why Zelman was wrong, but my colleagues did not. Now we have, in fact, a 11 12 different issue: Can a state have a different 13 judgment than Ohio? Can Maine differ from Ohio? 14 That's the issue. 15 All right? Hey, we have a principle, 16 we have 50 states and a huge country, and so why 17 not, I say, let some decide one way, let some 18 decide the other. They have different kinds of 19 populations. Now you see what I have? I have a 20 21 great theory. Is there any law supporting that? 2.2 MR. STEWART: Oh, I think there's the 23 law that I referred to and that Justice Kagan referred to, the idea of the play in the joints, 24 25 the idea that there is a fairly significant

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sphere of activity in which the state can
 legitimately choose either to fund or not to
 fund religious institutions.

And in making that decision, state and 4 local legislators can -- cannot just decide what 5 would be the best solution for the whole 6 7 country. Legislators in a particular part of the country can decide, where we live, excluding 8 9 the religious schools would be more likely to be perceived as a form of religious discrimination 10 and to cause turmoil, and, therefore, we won't 11 12 do it. In another part of the country, the legislators might say including the religious 13 14 institutions is more likely to cause strife.

15 Obviously, there are limits. Espinoza 16 and Trinity Lutheran made clear that you can't 17 exclude the institution all -- altogether with 18 respect to secular activities, but there is 19 significant room for regional variation.

20 CHIEF JUSTICE ROBERTS: Justice Alito? 21 JUSTICE ALITO: If the program allowed 22 parents to send their children to any accredited 23 school anywhere in the country, which is what 24 this program seems to allow, with the exception 25 of so-called sectarian schools, would -- how

1 would that cause strife? And add into that the 2 fact we're told that Maine didn't rule out these schools until -- for many, many years, the 3 parents were permitted to send their -- their 4 children to those schools. 5 Was there -- are you aware of a 6 7 history of strife? Explain -- you know, it's one thing to say strife. Could you explain in 8 9 more concrete terms how you see a potential for religious strife arising out of the acceptance 10 11 of the Petitioners' argument here? 12 MR. STEWART: I think, first, to speak to the history briefly, until 19 -- it was in 13 14 1980 that the Maine attorney general first 15 analyzed the question, and the attorney general 16 said, I think it would be unconstitutional under 17 then extant Supreme Court precedent to fund sectarian schools, and he explained that he 18 19 meant schools whose dominant purpose is the 20 promotion of religious beliefs. 21 And -- but, after Zelman was decided 2.2 in 2003, the Maine legislature reexamined the 23 question, decided to maintain the bar in effect 24 on the books based on independent reasons. 25 But, to -- to speak to the strife

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1 point in particular, I think it is likely, 2 contrary to what was said earlier, that allowing the subsidy for religious schools will tend to 3 favor -- favor majoritarian religions because, 4 in order to have a religious school, you don't 5 6 have -- you have to have more than a single 7 adherent to a particular belief system. You have to have a critical mass of people within 8 9 the community who are willing to support the school. 10 11 And so those are going to tend to be 12 religions of majoritarian schools. And there is 13 at least the spectacle as -- the specter, as Mr. 14 Taub said, of people in the community saying: 15 You are funding religions other than our own, 16 and you are funding religious schools that 17 promulgate beliefs that are antithetical to 18 ours. 19 CHIEF JUSTICE ROBERTS: Justice 20 Sotomayor? JUSTICE SOTOMAYOR: You know, I look 21 2.2 at the history in this area and what I see is 23 that at the founding there weren't public

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

24

schools.

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They were self-taught, but most of the

history of some states, not all, subsidizing some religious schools. And then we have later a movement -- much later -- a movement towards public schools. But what I don't see after the creation of public schools is a tradition of history -- or history of continued support of religious schools.

Am I reading the history right? 8 I mean, I don't -- I 9 MR. STEWART: 10 don't want to speak too categorically. I think 11 you're right, there was a movement in the 12 direction of public education. It, of course, wasn't until the 1960s that this Court issued 13 14 the school prayer decision, so -- so it wasn't 15 even until fairly recently that the Court said 16 you can't have an overt religious component in 17 the public schools.

18 So I -- I think what we would draw 19 from the history is different governmental units 20 have done it different ways at different points 21 in time, and that may weigh in favor of an 2.2 argument that particular practices should be 23 permissible under the Establishment Clause, but 24 it shouldn't preclude particular states from 25 deciding we don't want to do this here.

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1 JUSTICE SOTOMAYOR: Thank you. 2 CHIEF JUSTICE ROBERTS: Justice Kagan? JUSTICE KAGAN: Mr. -- Mr. Stewart, 3 how should we analyze the standing question 4 here? I mean, the Petitioners here say, look, 5 your -- what this legislation does is to prevent 6 7 us from even seeking a school that would accept the money, and so the fact that we haven't come 8 9 up with a particular school that would accept 10 the money and that meets our religious criteria 11 is irrelevant. Why isn't that right? 12 MR. STEWART: I mean, the cases they 13 were relying on were the Northeastern Florida 14 General Contractors case and Heckler versus 15 Mathews, which I believe was a sex-based 16 disparity in public benefits. And -- and in 17 both of those cases, the plaintiff himself was saying, I have suffered direct overt 18 19 discrimination in the sense that the law I am 20 challenging subjects me to unfavorable treatment 21 based upon my own characteristics. 2.2 And -- and we don't have that here. 23 Maine law doesn't distinguish between religious 24 and non-religious parents. The Petitioners are not challenging any aspect of the Maine statute 25

that defines the class of parents who can seek

1

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2 the tuition subsidy. 3 The provision it challenges is the provision that says what characteristics does 4 the school have to have in order for the school 5 6 to be -- get approved school status and 7 potentially be eligible for the funds. And I think it's entirely clear that if the schools 8 9 were the plaintiffs and all they were willing to 10 say is, if this is struck down, we would think 11 about accepting the money, that wouldn't be good 12 enough under a case -- a more recent case like 13 Carney versus Adams. 14 And so, if the plaintiffs' claim is 15 essentially derivative of an alleged 16 constitutional wrong done to the schools, it 17 would be anomalous to say that the plaintiffs have standing even though the schools do not. 18 19 CHIEF JUSTICE ROBERTS: Justice 20 Gorsuch? 21 JUSTICE GORSUCH: Would the government -- I -- I can't believe it would, but --22 23 but would the government permit an argument of 24 -- for discrimination against persons based on an unsupported hypothetical possibility of 25

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| 1  | strife if the discrimination were based on race  |
|----|--------------------------------------------------|
| 2  | or sex or some other basis like that?            |
| 3  | MR. STEWART: It it depends on what               |
| 4  | you mean by discrimination. Ordinarily, you      |
| 5  | could not impose affirmative disadvantages, but  |
| 6  | government can make funding decisions all the    |
| 7  | time, can decide what activities to subsidize    |
| 8  | and what activities not to subsidize based on    |
| 9  | fairly speculative inferences about what results |
| 10 | might occur.                                     |
| 11 | That that's that's the whole                     |
| 12 | point of the government's of the Court's free    |
| 13 | speech cases that say the government has a lot   |
| 14 | more latitude when it's making funding           |
| 15 | decisions.                                       |
| 16 | JUSTICE GORSUCH: Including on the                |
| 17 | basis of sex and race and other personal         |
| 18 | characteristics like that?                       |
| 19 | MR. STEWART: No. And I if if                     |
| 20 | the statute here said that religious parents     |
| 21 | generally or parents of a particular religion    |
| 22 | can't apply for the school subsidy, that would   |
| 23 | clearly be no good. Here here, what the          |
| 24 | state is saying is we don't want to subsidize    |
| 25 | JUSTICE GORSUCH: So, if we viewed the            |

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1 statute as you just described it, it would be no 2 good in your terms? 3 MR. STEWART: If -- if you read the statute to say that religious parents can't seek 4 the subsidy even for a secular school, but --5 JUSTICE GORSUCH: Then the statute 6 7 would be no good. MR. STEWART: Then the statute would 8 be unconstitutional. 9 10 JUSTICE GORSUCH: Okay. Thank you. 11 MR. STEWART: But nobody is reading 12 that way. Petitioners are not arguing that 13 that's what the statute says. 14 CHIEF JUSTICE ROBERTS: Justice 15 Kavanaugh? 16 JUSTICE KAVANAUGH: I just want to 17 follow up on that question from Justice Gorsuch. I think it's important on this public discord or 18 19 -- or strife issue to emphasize that, as I 20 understand it, they are seeking equal treatment, 21 not special treatment. 2.2 They're -- they're saying don't treat 23 me worse because I want to send my children to a 24 religious school rather than a secular school. 25 Treat me the same as the secular parent next

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1 door. I think that's what they're asking for, 2 is equal treatment. 3 Special treatment cases are where you're asking for an exemption from generally 4 applicable law. That's the Smith kind of cases. 5 6 Those are -- those are hard cases. But, here, I 7 think all they're asking for is equal treatment. 8 And the question then becomes public 9 discord from equal treatment -- to follow up on Justice Gorsuch's question -- how should we 10 11 think about that? 12 MR. STEWART: I mean, I -- they are 13 certainly characterizing what they are asking 14 for as equal treatment. But Maine's view and 15 our view is they are seeking a benefit different 16 from the one that Maine is willing to provide. 17 Maine is willing to provide a secular 18 education, an education that is the rough analog 19 to what the public school would give you at 20 state expense. It's not willing to pay for religious inculcation. 21 2.2 And so it's -- it's like a case where the school that doesn't believe in athletics 23 24 says, I'm being treated unequally because you 25 are willing to fund a thing that is important to

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1 some other schools but not to me. 2 That -- that's not the kind of equal 3 treatment that either the Free Speech Clause or the Free Exercise Clause would prohibit. 4 JUSTICE KAVANAUGH: Thank you. 5 6 CHIEF JUSTICE ROBERTS: Justice 7 Barrett? Thank you, counsel. 8 9 MR. STEWART: Thank you. 10 CHIEF JUSTICE ROBERTS: Rebuttal, Mr. 11 Bindas. 12 REBUTTAL ARGUMENT OF MICHAEL BINDAS ON BEHALF OF THE PETITIONERS 13 14 MR. BINDAS: Starting with the United 15 States' arguments, this absolutely discriminates 16 against parents. It says you can get an 17 otherwise available public benefit you are statutorily entitled to so long as you don't 18 19 exercise a right that this Court recognized in 20 Espinoza. 21 You get one or the other. If you're 22 the Carsons, you can afford it, great, you keep 23 your free exercise rights. If you're the 24 Nelsons, you can't afford it, you forego your 25 free exercise rights. That is discrimination no

1 matter how you slice it, and this Court should 2 not allow that to stand. 3 Now my friend from Maine, you know, throughout the briefing has recast the benefit 4 in this case. Now we're recasting the facts and 5 6 saying based on how the spirit, I believe I 7 heard correctly, how the spirit of the program works. 8 9 Well, the spirit of the program 10 doesn't look at whether or not religious 11 instruction or activities are optional. After 12 all, the Kent school was excluded. Chapel was 13 optional. Theology was offered. No one had to 14 take it. Yet they were excluded. 15 My friend from Maine also says that 16 this -- this only triggers -- the sectarian 17 exclusion only triggers if the school is 18 actually instilling, inculcating, requiring you 19 to believe. 20 Well, what did the Commissioner 21 testify? That it's triggered if the school 2.2 promotes the faith or belief system with which 23 it is associated and/or presents the material 24 taught through the lens of this faith. 25 You don't have to -- you don't have to

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1 say you must believe this to be excluded. In a 2 philosophy class, apparently, you can teach Aquinas and Augustine. But, if you say 3 Augustine and Aquinas were right, then, 4 apparently, you're out, again, based on the 5 6 decision of a bureaucrat in Augusta about 7 whether the way the material is being presented is through the lens of faith. 8 And the last thing I would say, the 9 benefit here is not a free public education. 10 It's certainly not free. Miss Porter's charges 11 12 \$66,400 a year. You have to pay much of that, most of that, if you go there with a tuition 13 benefit. This is not a free education. 14 15 Nor are the participating private 16 schools like a public school or providing a 17 public education in any sense of the word. They 18 need not follow the public school curriculum. 19 They can discriminate on bases that public schools may not. 20 21 They can, as I just mentioned, charge 2.2 tuition to the tune of \$66,000 a year. They 23 need not hire cert -- state-certified teachers, which Maine public schools must do. They can be 24 25 run by religious organizations and orders.

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| 1  | Obviously, a public school in Maine may not.     |
|----|--------------------------------------------------|
| 2  | It can be unlike a public school in              |
| 3  | every one of those respects and participate in   |
| 4  | this program. But a religious school that is     |
| 5  | like a public school in every one of those       |
| 6  | respects is excluded if it teaches a single      |
| 7  | religion class or presents material that someone |
| 8  | in Augusta determines to be presented through    |
| 9  | the lens of faith.                               |
| 10 | That is discrimination. This Court               |
| 11 | should not allow it to stand. It should hold     |
| 12 | the sectarian exclusion unconstitutional.        |
| 13 | Thank you.                                       |
| 14 | CHIEF JUSTICE ROBERTS: Thank you,                |
| 15 | counsel. The case is submitted.                  |
| 16 | (Whereupon, at 11:57 a.m., the case              |
| 17 | was submitted.)                                  |
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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| \$                                                                                                                                                                          | Absolutely [6] 5:14 9:24                                                                                                                                                                                                                        | <b>80</b> :21                                                                                                                                                                                                                                                                | anti-discrimination [2]                                                                                                                                                                                                                        | atheist [1] 105:25                                                                                                                                                                                                                    |
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