Bond Case Briefs

Municipal Finance Law Since 1971

U.S. Supreme Court Decision in Carson v. Makin Reconfirms Availability of Municipal Bond Financing for Religious Organizations: Orrick

Historically, the ability of a governmental conduit issuer to issue bonds to facilitate a financing for a religious organization or a religiously affiliated school, university, senior housing facility or other nonprofit institution, raised concerns that such a financing might run afoul of the required compliance with the Establishment of Religion Clause (the "Establishment Clause") of the First Amendment (the "First Amendment") of the United States Constitution, which generally prohibits the government from advancing religion or becoming entangled with religious activity. Certain financings also raised concerns about whether relevant state's laws, regulations and policies ("State Religious Aid Restrictions") were violated, some of which are more restrictive than the requirements of the Establishment Clause relating to governmental aid toward religious organizations. The concern was elevated when a borrower was "pervasively sectarian" – meaning an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission – given certain Supreme Court case law on this matter.

More recently, the United States Supreme Court (the "Court") has been finding that the disqualification of religious organizations from governmental aid programs (that was believed to be necessary to satisfy the Establishment Clause) violates the Free Exercise of Religion Clause (the "Free Exercise Clause") of the First Amendment, which generally protects against indirect coercion or penalties on the free exercise of religion. On June 21, 2022, the Court rendered its decision in Carson v. Makin ("*Carson*"): the latest case involving the tensions between the Establishment Clause and the Free Exercise Clause. This client alert expands on and updates our previous alerts, titled " U.S. Supreme Court Decision in Espinoza v. Montana Department of Revenue Confirms Availability of Municipal Bond Financing for Religious Organizations" ("*Espinoza*") and " Public Finance Implications of the Trinity Lutheran Case" ("*Trinity Lutheran*") published July 2020 and August 2017, respectively. *Carson*, together with *Espinoza* (involving a scholarship program) and *Trinity Lutheran* (involving playground resurfacing grants), reaffirm that the Free Exercise Clause prevents the application of State Religious Aid Restrictions to a generally available public benefit program based on an organization's religious status (and as *Carson* made clear, religious use), absent meeting strict scrutiny by advancing a compelling state interest and by narrow tailoring of such restrictions.

The facts of *Carson* are simple. Maine enacted a tuition assistance program for parents who live in school districts that neither operate a secondary school of their own nor contract with a particular school in another district. Under that program, parents designate the secondary school they would like their child to attend, and the school district transmits payments to that school to help defray the costs of tuition. Sectarian institutions were excluded from the program based on an opinion by the Maine attorney general that public funding of private religious schools violated the Establishment Clause. Petitioners sued the commissioner of the Maine Department of Education alleging that the "nonsectarian" requirement violated the Free Exercise Clause, the Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. The Court held that if a State chooses to

subsidize private education, it cannot disqualify some private schools solely because they are religious. Hence, Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause.

Additionally, *Carson* expands on *Espinoza* through the elimination of any distinction between religious use-based discrimination (how the money will be used) and religious status-based discrimination (recipient's affiliation with or control by a religious organization). The Court in *Carson* explained that *Trinity Lutheran* and *Espinoza* held that the Free Exercise Clause forbids discrimination based on religious status, but those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. Because the schools being excluded from this program were inherently sectarian, the Court acknowledges that the education provided by these schools involved indoctrination of students in their faith. The Court concludes that the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

The Court in *Carson* also confirmed its holding in Locke v. Davey ("*Locke*"), a case also discussed in *Espinoza*, which highlights a restriction on a governmental aid program that satisfied strict scrutiny. *Locke* involved a Washington scholarship fund to assist academically gifted students with postsecondary education expenses that could be used for theology degrees but excluded vocational religious degrees (the "essentially religious endeavor" of pursuing a degree that trains a minister to lead a congregation). The Court confirmed the holding in *Locke* that there was a "historic and substantial state interest" against using "taxpayer funds to support church leaders" and that the program was narrowly focused to exclude vocational religious degrees. The Court in *Carson* concluded that *Locke* cannot be read to generally authorize the State to exclude religious persons from the enjoyment of public benefits, for "it is clear that there is no 'historic and substantial' tradition against aiding [private religious] schools." The discussion in *Carson* may provide support for narrowly tailored exclusions in conduit financing programs such as prohibitions on bond financing vocational religious schools or facilities based on *Locke*.

In our view, *Carson* makes clear that a generally available conduit financing program cannot exclude religious borrowers no matter how pervasively sectarian and no matter how closely tied to church, synagogue or mosque.

by Marc Bauer, Jenna Magan & Stephen Spitz

July 7, 2022

Orrick, Herrington & Sutcliffe LLP