September 28, 2021

The Honorable Richard E. Neal
Chairman
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Neal and Chairman Scott:

We write to thank you for your work on the Build Back Better Act.

The legislation invests in childcare, allowing providers—including religious providers—to modernize, renovate, or improve their childcare facilities. At the same time, the legislation honors the longstanding constitutional principle that taxpayer dollars cannot be used to fund spaces primarily used for religious worship or instruction. We appreciate this commitment to uphold constitutional guarantees of religious freedom.

The Constitution Ensures We Each Get to Decide for Ourselves Whether and How our Money Will Support Religion.

In order to protect the independence of faith communities and freedom of conscience for all, the First Amendment prohibits taxpayer dollars from being used for religious uses.[1] More specifically, longstanding Supreme Court precedent firmly establishes that "the State may not erect buildings in which religious activities are to take place" and "may not maintain such buildings or renovate them."[2]

This bedrock constitutional principle remains controlling law and is true even when the funding is allocated evenhandedly among religious and secular institutions.[3] Indeed, the 2017 Supreme Court case *Trinity Lutheran v. Comer*[4] does not require or even allow such funding. *Trinity Lutheran* says that the government cannot deny a religious entity a grant "solely because of its religious character."[5] But the government can—and sometimes must—refuse to fund a religious organization because of what it proposes to do with the funds.[6] Accordingly, the *Trinity Lutheran* Court reiterated its earlier ruling in *Locke v. Davey*, which held that a state rule prohibiting the use of state scholarship funds to pursue theology degrees did not violate the Free Exercise Clause.[7] It explained that in *Locke*, the student "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[8]

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[1] *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (controlling concurring opinion of O'Connor, J.).
[2] *Committee for Public Education v. Nyquist*, 413 U.S. 756, 777(1973); *see also Tilton v. Richardson*, 403 U.S. 672 (1971) (holding unanimously that a government subsidy used to construct buildings at institutions of higher education was constitutional only if the buildings could never be used for religious activities); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding issuance of revenue bonds to finance the construction and renovation of facilities because the law included a condition barring government-financed buildings from being used for religious worship or instruction).
[3] *See, e.g.*, *Mitchell* at 837-42.
[4] 137 S. Ct. 2012 (2017).
[5] *Id.* at 2024; *see also Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2255-56 (2020).
[6] *See Trinity Lutheran* at 2023 (distinguishing *Locke*); *see also Espinoza*, 140 S. Ct. at 2256 (case "turns expressly on religious status and not religious use").
[7] 540 U.S. 712, 719 (2004).
[8] *Trinity Lutheran*, 137 S. Ct. at 2023; *see also Espinoza*, 140 S. Ct. at 2257. In 2019, the Department of Justice Office of Legal Counsel explained this distinction: "Under the framework set forth in *Trinity Lutheran*, the constitutionality of a religious-funding restriction will turn on whether the restriction is based upon an institution's religious status or whether it is based upon how the federal support would be used."

In other words, religious childcare providers are eligible to use Build Back Better funds to modernize, renovate, or improve their childcare facilities. At the same time, the government has a constitutional duty to ensure the funds are not used for religious activities and facilities. Thus, no provider may use funding to renovate or modernize spaces primarily used for religious worship or education.

For nearly five decades, Congress has consistently recognized this constitutional principle. There are many statutory prohibitions on using taxpayer funds to support religious activities such as religious worship or instruction, including to construct, renovate, or improve sanctuaries and buildings used primarily for religious purposes.[9] Moreover, safeguards ensuring taxpayer funds are not put to religious use are common in regulations and polices promulgated by Republican and Democratic administrations.[10]

Limits on How Government Funding Can Be Used Protect Religious Freedom, Including for Houses of Worship.

Houses of worship and spaces used for religious worship and instruction are accorded special protections under the law, such as exemptions, accommodations, and tax deductions. The constitutional limits on government funding for religious uses are also a special protection—these limitations protect the conscience of every taxpayer and provide a level playing field for all religions by ensuring the government does not play favorites among different faiths and denominations. The limits also safeguard the autonomy of religious institutions and leaders. For example, when houses of worship accept government funds, they run the risk of being mired in disruptive inquiries into finances and battles over regulation and accountability.

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On behalf of our organizations, representing individuals, congregations, and religious bodies that believe religious freedom is precious, we thank you for your work on this legislation. Religious freedom is one of our nation's most cherished values, and it is best protected when the institutions of religion and government maintain a healthy separation.

Sincerely,

African American Ministers in Action
Americans United for Separation of Church and State
Baptist Joint Committee for Religious Liberty (BJC)
Bend the Arc: Jewish Action
Interfaith Alliance
National Council of Jewish Women
People For the American Way
Union for Reform Judaism

Mem. Op. for the Acting General Counsel, Dept. of Ed., Religious Restrictions on Capital Financing for Historically Black Colleges and Universities at 6 (Aug. 15, 2019).

[9] *E.g.*, Section 1004 of the American Reinvestment and Recovery Act (ARRA) prohibited the use of funds for the "modernization, renovation, or repair of facilities used for sectarian instruction or religious worship" and Section 18004(c) of the CARES Act restricts the use of funds by institutions of higher education for "facilities related to athletics, sectarian instruction, or religious worship." *See also, e.g.*, 20 U.S.C. § 1011k; 20 U.S.C. § 1062; 20 U.S.C. § 1068e; 20 U.S.C. § 1103e; 25 U.S.C. § 1813; 25 U.S.C. § 3306; 29 U.S.C. § 2938; 29 U.S.C. § 3248; 42 U.S.C. § 9807.

[10] Three recent examples include: Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82037 (2020) (eight agencies' final rules); Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments, 84 Fed. Reg. 31660 (2019); The Attorney General "Memorandum on Federal Law Protections for Religious Liberty" (Oct. 6, 2017).