ALAN WILSON
ATTORNEY GENERAL

July 31, 2024

The Honorable Kambrell H. Garvin, Member
South Carolina House of Representatives
District No. 77, P.O. Box 292434
Columbia, SC 29229

Dear Representative Garvin:

You seek our opinion regarding "whether religious affiliated institutions must be given the same consideration as non-religious candidates for funding from governmental entities, if religious practices and ceremonies are not included in the proposal." By way of background, you provide the following information as stated in your letter:

> I was recently contacted by my constituent, Bishop Eric Warren Davis, Pastor of Word of God Church and Ministries International and Chairperson of Word of God Community Development Corporation (CDC) located in Columbia.
>
> Bishop Davis provided information regarding the CDC's proposed multimillion-dollar economic development project, I.S.E.E. Silicon South, which would provide workforce development and tourism opportunities along the Broad River Road Corridor by redeveloping the Dutch Square Mall property. From what I have ascertained, the project is proposed to be a public-private partnership, and the CDC intends to seek funding from governmental entities such as the City of Columbia, Richland County, and the State of South Carolina. Bishop Davis has expressed concern regarding whether an organization can be denied public funding based solely on its affiliation with a religious institution.

LAW/ANALYSIS

The "Free Exercise Clause" of the federal Constitution "forbids subtle departures from neutrality." Gillette v. United States, 401 U.S. 437, 452 (1971). In Op. S.C. Att'y Gen., 2015 WL 1382880 (March 13, 2015), we observed that the "Free Exercise Clause protects against government hostility which is masked, as well as overt." As we stated in our 2015 opinion, "the U.S. Supreme Court has found a municipal ordinance invalid under the Free Exercise Clause" because the ordinance "targeted religious conduct, even where the ordinance appeared facially neutral." (referencing Church of the Lucumi Babalu Ave. Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

More recent decisions of the Supreme Court of the United States further reflect and reinforce these fundamental principles. For example, in Trinity Luth. Church of Cola., Inc. v. Comer, 582 U.S. 449 (2017), the Missouri Department of Natural Resources had a strict policy against providing grants to any church or religious applicant for funds from Missouri's Scrap Tire program. Missouri explained to the Trinity Lutheran Church that its application for a grant to install playground surfaces would be denied because the Missouri Constitution forbade providing financial assistance directly to a church.

The United States Supreme Court rejected such an argument and ruled in favor of the church. The Court found that the church could not be discriminated against on the basis of the constitutional protection for Free Exercise of Religion. According to the Supreme Court,

> [t]he Free Exercise Clause "protect[s] religious observers against unequal treatment," and subject to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." Church of Lukumi, Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542, 113 S.Ct. 2217, 553, 542, 113 S.Ct. 2217, 124 L. Ed.2d 472 (1993). . . . Applying this basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." McDaniel v. Paty, 435 U.S. 618, 628, 98 S.Ct. 1322, 55 L. Ed.2d 593 (1978) (plurality opinion) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L. Ed.2d 15 (1972).

582 U.S. at 458. The Court, in Trinity Lutheran, went on to observe that it is "unremarkable in light of our prior decisions" to conclude that the Free Exercise Clause of the First Amendment does not permit Missouri to "expressly discriminate[ ] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." See also Espinoza v. Montana Dept. of Revenue, 140 S.Ct. 2246, 2254 (2020). ["The Free Exercise Clause, which applies to the states under the Fourteenth Amendment, 'protects religious observers against unequal treatment. . . .'" (quoting Trinity Lutheran, 137 S.Ct. at 2021)].

And only recently, in Carson v. Makin, 596 U.S. 767, 780 (2022), the Supreme Court reiterated these same principles, stating as follows:

> [t]he "unremarkable" principles applied in Trinity Lutheran and Espinoza suffice to resolve this case. Maine offers it citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in Trinity Lutheran, a wise range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in Trinity Lutheran, BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character." 582 U.S., at ____, 137 S.Ct., at 2021. By "condition[ing] the availability of benefits" in than manner, Maine's tuition assistance program – like the program in Trinity Lutheran –

"effectively penalizes the free exercise" of religion. Ibid. (quoting McDaniel, 435 U.S. at 626, 98 S.Ct. 1322 (plurality opinion)).

CONCLUSION

Under the authorities presented herein, the Free Exercise Clause of the United States Constitution precludes such discrimination on the basis of religion.

Sincerely,

Robert D. Cook
Solicitor General