Legal Issues Related to Funding for Religious Schools in P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA)

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Summary

The American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) provides funding for various educational programs, including a State Fiscal Stabilization Fund. The State Fiscal Stabilization Fund (SFSF) provides federal funding to states to support elementary, secondary, and postsecondary education. Although federal money provided by the SFSF is available only to public elementary and secondary schools, public and private institutions of higher education are eligible to receive federal money from the SFSF. Because the Establishment Clause of the First Amendment limits the extent to which the government may provide funds to religious organizations, the SFSF also includes a provision that prohibits funds from being used for facilities with religious uses or purposes.

This report will provide a brief overview of the prohibition on the use of funds by institutions of higher education, including proposals considered by the House and Senate before ARRA was enacted. It will also analyze the constitutionality of the distribution of federal money to religious schools in the context of common questions raised by these provisions.

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The American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) provides funding for various education programs.[1] Among these programs, ARRA includes the State Fiscal Stabilization Fund, which provides federal funding to states to support elementary, secondary, and postsecondary education. Funds for modernization are available to public and private institutions of higher education in ARRA and the use of these funds is limited in order to comport with the requirements of the Establishment Clause of the First Amendment. Because the Establishment Clause prohibits the government from providing direct aid to religious activities, these institutions are prohibited from using funds received to modernize facilities that have religious uses or purposes.

This report will provide a brief overview of ARRA's limitations on funding to religious schools, including proposals in the House and Senate versions of the bill. It will also analyze the constitutionality of the distribution of federal money to religious schools in the context of common questions raised by these provisions.

Prohibition on the Use of Funds for Facilities with Religious Uses or Missions

ARRA provided that school modernization was an allowable use of funds under the SFSF, indicating a compromise resulting from the different versions of the bill passed by the House and Senate. Prior to enactment, the House passed its version of H.R. 1 (the House bill) and the Senate passed S.Amdt. 570, an amendment in the nature of a substitute to H.R. 1 (the Senate bill). The House bill, but not the Senate bill, would have specifically created new programs to support school modernization, renovation, and repair at the elementary, secondary, and postsecondary education levels. Both the House bill and the Senate bill would have provided general funds for education to support state fiscal stabilization.

This section will provide an overview of the relevant programs and corresponding prohibitions on the use of funds. Because questions have been raised regarding the previous versions and actions taken by the House and Senate, the proposed provisions of the House and Senate bills follow the enacted provisions in ARRA.

P.L. 111-5, the American Recovery and Reinvestment Act of 2009

As passed by the House and Senate, ARRA includes a prohibition on the use of funds provided under Title XIV, the State Fiscal Stabilization Fund (SFSF). The SFSF allocates federal funds to states to support elementary, secondary, and postsecondary education.[2] The SFSF authorizes state governors to use a portion of the state's allocation "for modernization, renovation, or repair of public school facilities and institutions of higher education facilities."[3] This authorization is

[1] P.L. 111-5. For an overview and discussion of the education programs included in the act, see CRS Report R40151, *Funding for Education in the American Recovery and Reinvestment Act of 2009 (P.L. 111-5)*, by (name redacted), (name redacted), and (name redacted)

[2] P.L. 111-5, Title XIV, § 14002(a).

[3] P.L. 111-5, Title XIV, § 14002(b)(1).

available to only public elementary and secondary schools, but is available to both public and private (including private religious) institutions of higher education.[4]

ARRA limits the use of money received under the SFSF to comport with the Establishment Clause of the First Amendment. In addition to making the funds available only to public elementary and secondary schools, the SFSF provides that money provided by the Fund to institutions of higher education may not be used for:

> modernization, renovation, or repair of facilities –
>
> (A) used for sectarian instruction or religious worship; or
>
> (B) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.[5]

H.R. 1, the House Bill

The House bill proposed a new program to support school modernization, renovation, and repair of facilities at institutions of higher education.[6] The funds provided under this program would have been available to public and private (including private religious) institutions of higher education, but the use of the funds would have been restricted. Specifically, the House bill would have prohibited money provided under the modernization program from being used for:

> modernization, renovation, or repair of facilities –
>
> (i) used for sectarian instruction, religious worship, or a school or department of divinity; or
>
> (ii) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.[7]

S.Amdt. 570, the Senate Bill

The Senate bill did not include the specific modernization program proposed by the House bill, nor did it include modernization funding under the state fiscal stabilization fund.[8]

Before the Senate passed S.Amdt. 570, the Senate debated S.Amdt. 98, an amendment in the nature of a substitute for H.R. 1. S.Amdt. 98 would have created a modernization program for institutions of higher education and included the same prohibition on the use of funds as was provided in the House bill.[9] During debate of S.Amdt. 98, the so-called DeMint amendment was

[4] P.L. 111-5, Title XIV, § 14002(b)(2).

[5] P.L. 111-5, Title XIV, § 14004(c)(3).

[6] H.R. 1, 111th Cong. § 9302(a) (as passed by House, January 28, 2009).

[7] *Id.* at § 9302(d)(3)(C).

[8] S.Amdt. 570, 111th Cong. (as passed by Senate, February 10, 2009).

[9] *See* S.Amdt. 98, 111th Cong. § 803(d)(2)(C).

proposed and later failed.[10] The DeMint amendment would have invalidated the prohibition on the use of funds included in S.Amdt. 98.

Constitutional Requirements Regarding Public Funding Provided to Religious Schools

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion.... "[11] The U.S. Supreme Court has construed the Establishment Clause, in general, to mean that government is prohibited from sponsoring or financing religious instruction or indoctrination.[12] The Court has interpreted the Establishment Clause in numerous lines of decisions (e.g., government aid to religious organizations, access to public facilities for religious purposes, etc.).[13] The Court has drawn a constitutional distinction between aid that flows directly to sectarian schools and aid that benefits such schools indirectly as a result of a voucher or tax benefit program.[14]

Generally, restrictions on direct aid are greater than restrictions on indirect aid. In direct aid programs, such as the funding provided for modernization in ARRA, a government program provides aid directly to a religious organization or program. The Court requires that direct aid serve a secular purpose and not lead to excessive entanglement with religion.[15] It also requires that the aid be secular in nature, that its distribution be based on religiously neutral criteria, and that it not be used for religious indoctrination.[16]

In a series of cases in the 1970s, the Court limited the use of public funds for the construction and maintenance of religious schools under the Establishment Clause. In 1971, the Court upheld as constitutional a federal program that provided grants to colleges, including religiously affiliated colleges, for the construction of needed facilities, so long as the facilities were not used for religious worship or sectarian instruction.[17] In 1973, the Court upheld a program in which a state issued revenue bonds to finance the construction of facilities at institutions of higher education, including those with a religious affiliation.[18] The program met constitutional requirements because it barred the use of the funds for any facility used for sectarian instruction or religious worship.

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[10] S.Amdt. 189, 111th Cong.

[11] U.S. Const. amend. I.

[12] For a legal analysis of the requirements of the First Amendment relating to public aid for religious schools, *see* CRS Report R40195, *The Law of Church and State: Public Aid to Sectarian Schools*, by Cynthia Brougher.

[13] *See* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher, for further analysis of these cases.

[14] *See* Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000). *Cf.* Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[15] These elements come from the Court's longstanding tripartite *Lemon* test, which requires that government actions (1) serve a secular purpose; (2) have a neutral primary effect; and (3) not foster excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). This test was subsequently interpreted in light of direct aid programs. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini, 521 U.S. 203; Wolman v. Walter, 433 U.S. 229 (1977), overruled by Mitchell, 530 U.S. 793.

[16] Agostini, 521 U.S. 203; Mitchell, 530 U.S. 793.

[17] Tilton v. Richardson, 403 U.S. 672 (1971).

[18] Hunt v. McNair, 413 U.S. 734 (1973).

Also in 1973, although the Court had just upheld aid for construction and repairs to religious institutions of higher education, the Court held that public funds could not subsidize maintenance and repair of sectarian elementary and secondary school facilities, including costs for heating, lighting, renovation, and cleaning.[19] Because Establishment Clause restrictions are heightened in elementary and secondary school settings due to the impressionable nature of those students,[20] the Court imposes greater restrictions on aid provided to elementary and secondary schools.

Common Questions Associated with the Prohibition on the Use of Funds

Has Similar Language Been Used in Previous Legislation Authorizing Federal Programs?

Previous legislation has included provisions that are similar to the prohibition on the use of funds included in the SFSF. The following examples of legislation impose limitations on the use of funds for sectarian instruction or religious worship.

- No Child Left Behind Act of 2002, P.L. 107-110
- Workforce Investment Act of 1998, P.L. 105-220
- Higher Education Amendments of 1992, P.L. 102-325
- National and Community Service Act of 1990, P.L. 101-610
- Higher Education Amendments of 1986, P.L. 99-498
- Nurse Education Amendments of 1985, P.L. 99-92
- Job Training Partnership Act of 1982, P.L. 97-300
- Omnibus Budget Reconciliation Act of 1981, P.L. 97-35
- Education Amendments of 1980, P.L. 96-374
- Comprehensive Older Americans Act Amendments of 1978, P.L. 95-478
- Comprehensive Employment and Training Act of 1973, P.L. 93-203

These examples are not an exhaustive list, but rather, represent a sample of legislation that has restricted the use of funds based on religion.

Other legislation has also included slightly different restrictions on the use of funds based on religion. For example, the Higher Education Amendments of 1998 also included a prohibition on the use of funds for religion.[21] The provision stated that no project using public funds "shall ever

[19] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[20] *See* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

[21] P.L. 89-329, Title I, Part B, § 122, as added by P.L. 105-244, Title I, § 101(a), 112 Stat. 1601, codified at 20 U.S.C. § 1011k(c).

be used for religious worship or a sectarian activity or for a school or department of divinity."[22] In comparison, the Higher Education Amendments of 1986[23] stated that "no grant may be made under this Act for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity."[24]

Although the language in these two provisions appears similar, there is a difference in the limitations imposed on sectarian activity versus sectarian instruction. Instruction may be seen as a specific type of activity. Thus, the provision from the 1998 amendments may be read more broadly than the provision included in the 1986 amendments. A prohibition on the use of funds for projects that involve "sectarian activity," like the 1998 amendments, may be interpreted to include any religious activity, whether that activity be an individual private activity such as prayer, an official group activity such as a faith-sharing group meeting, or religious instruction. A prohibition like in the 1986 amendments that relates only to programs, activities, or services involving religious instruction or worship would provide a more specific restriction on the types of activities included under the provision and appears to eliminate an interpretation that would limit individuals' independent religious activities.

How Does ARRA's Prohibition on the Use of Funds Related to Facility Modernization Apply to Religious Schools?

Religious institutions of higher education are eligible to receive funds provided under the SFSF. ARRA specifically provides that the receipt of public funds authorized as part of SFSF is not dependent on "the type or mission of [the] institution of higher education."[25] No institution of higher education, regardless of religious affiliation, may use the funds for facilities that either: (a) are used for sectarian instruction or religious worship, or (b) are substantially subsumed in a religious mission. A school is not prohibited from receiving funds if it holds religious ceremonies on campus or if other buildings are used for religious purposes. Rather, the school is prohibited from using funds it receives for the particular facilities in which these activities occur.

For example, this prohibition would forbid a college from using funds received from the SFSF to repair a chapel or synagogue. The prohibition would also forbid a university from using funds to modernize a faith-based student center (e.g., the Baptist Student Center or the Muslim Student Association House), because even if such a facility may not be used for instruction or worship, a substantial portion of activities of such a facility would likely be considered to have a religious mission. On the other hand, a general student center, not dedicated to the use of a particular group, but generally available to many activities and groups, would not fit within this prohibition, even if it was occasionally used by religious groups for religious purposes.

[22] *Id.*

[23] P.L. 89-329, Title III, Part B, § 323, as added by P.L. 99-498, Title III, § 301(a), 100 Stat. 1295, codified at 20 U.S.C. § 1062(c).

[24] *Id.*

[25] P.L. 111-5, Title XIV, § 14002(b)(2).

How Broad Is ARRA's Prohibition on the Use of Funds Related to Modernization of Facilities of Higher Education?

Some have argued that the first element of the prohibition on the use of funds under the SFSF broadens the general prohibition traditionally used to limit public funding to religious organizations. According to this argument, the prohibition of the use of funds for facilities "*used for* sectarian instruction or religious worship" (emphasis added) might be construed to prohibit colleges and universities from using SFSF money for student dormitories because some students may use their dorm rooms for religious prayer or small faith group sessions which may include instruction or worship. This argument suggests that the standard by which funds will be limited is unclear under the statutory language.

ARRA imposes no specific standard regarding the degree to which a facility must be used for religious purposes. Rather, it provides a broad prohibition that appears to restrict the provision of funds if the facility that would benefit from the funds is ever used for religious purpose. Therefore, a literal reading of the provision may prohibit the use of funds under the SFSF from being used for a building in which a religious student group convenes for private worship or a dormitory in which students exercise religious prayer. However, Supreme Court decisions and the typical administration of such a program through the agency regulation process would indicate such a broad reading is inappropriate and unlikely to be applied by courts.

Current Supreme Court precedent prohibits the government from directly funding religious activities, which may include religious instruction or worship, but under a line of decisions separate from the direct funding cases, the Supreme Court has held that the Establishment Clause does not forbid religious groups from using or having access to public facilities. The Court has held that it is unconstitutional to deny religious groups access to public facilities, including public schools, if the same facilities are made available to nonreligious groups.[26] Restrictions that forbid religious groups from using public facilities while allowing nonreligious groups to have access treat religious groups differently in a manner that suggests disapproval of religion, in violation of the Establishment Clause. The Court interpreted the First Amendment's requirement of equal access to include access to benefits offered by public institutions when it required a public university to provide student activity funds to student groups regardless of the religious content of the group's activities.[27] These decisions indicate a requirement of neutrality in the treatment of religious groups and activities and nonreligious groups and activities when dealing with public resources.

If an institution of higher education applies the prohibition on the use of funds literally (i.e., prohibiting student religious groups from meeting in any facility modernized, renovated, or repaired by SFSF funds), that institution's action likely would be considered a violation of the First Amendment only if it allows nonreligious groups to meet in the same facility. The Court's rulings indicate that facilities funded by public money are required to comply with restrictions imposed on public buildings.[28] These restrictions prohibit discrimination against groups allowed access or use of the facility based on the group's religious affiliation if the facility is used by

[26] *See* Widmar v. Vincent, 454 U.S. 263 (1981); Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Good News Club v. Milford Central School, 533 U.S. 98 (2001).

[27] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

[28] *See Mergens*, 496 U.S. 226; *Tilton*, 403 U.S. 672; *Hunt*, 413 U.S. 734.

others for similar, but nonreligious, purposes. For instance, if an institution of higher education uses public funds under the SFSF to renovate a student center and makes it available to student groups for meetings, the First Amendment mandates that religious student groups also be allowed to hold meetings in the facility, despite public funds being used in its renovation. On the other hand, if a university uses the SFSF funds for an academic building that it allows to be used only for classroom instruction and does not allow any group meetings, it may also prohibit religious groups from meeting in the facility. Furthermore, because the government is not responsible for private individual choices to exercise religion in public facilities, the prohibition on the use of funds for facilities used for religious activity could not be read to prohibit individual religious exercise in a dormitory, as such actions are also protected by the Free Exercise Clause of the First Amendment.[29]

It is significant to note that programs that distribute public funds are typically administered by government agencies. These agencies, having specialized knowledge and experience in the program's field, often address the limitations of the funding more specifically through program regulations. Therefore, although the proposed statutory language may be written broadly, Supreme Court precedent and agency regulations implementing similar provisions indicate that the program likely would not be administered under such a broad interpretation.

Does the Prohibition on the Use of Funds Comport with Current U.S. Supreme Court Precedent?

In each of the Court's previous construction and repair cases, the Court refused to allow public aid for religious schools if that aid would be used for facilities used for sectarian instruction or religious worship. Although the Court's interpretation of the Establishment Clause's requirements for direct funding cases has evolved since the 1970s cases in which the Court addressed this issue specifically, the later decisions that revisited the requirements of direct aid programs likely would not alter the outcome of the school construction and maintenance cases that might arise under this legislation.

The use of SFSF funds for educational facilities' modernization and repair serves a secular purpose of supporting education and public safety. Because ARRA requires funds to be used for certain purposes, which generally address building safety and efficiency issues, courts are unlikely to conclude there is excessive entanglement with religion as a result of government-funded repairs on facilities. Furthermore, the aid provided would be secular in nature and would be distributed on a religiously neutral basis. That is, colleges would be eligible to receive the aid, regardless of their public status or religious affiliation. Finally, the prohibition on the use of funds for certain religiously related purposes limits the aid from being used for religious purposes. The prohibition, therefore, is likely constitutionally required under current Supreme Court precedent. If the prohibition had not been included explicitly in the statutory language, the restrictions would still apply as a matter of constitutional law. Including the provision in the law would explicitly clarify that the restrictions required by the First Amendment apply to this aid program.

[29] *See* Locke v. Davey, 540 U.S. 712 (2004) (noting that allowing a recipient of public funds to use the funds for a devotional theology degree would not violate the federal Establishment Clause because the individual made an independent choice about how to spend those funds); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding government aid constitutional when the recipient uses funds received from a federal agency to pay for some sectarian service if the distribution reflects the individual's choice).

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