S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

June 12, 2007

Opinion No. 07-94

Grants to Churches and Youth Clubs with Church Affiliations

QUESTION

Would a grant of state funds to churches and youth groups that appear to be affiliated with churches without specific instructions regarding how the funds may be spent violate state and federal constitutional provisions against the establishment of religion?

OPINION

An unrestricted grant of state funds to several churches and church youth groups would violate the Establishment Clause of the First Amendment to the United States Constitution. Further, any attempt to monitor restrictions on use of the funds would create a significant risk that the state government would become excessively entangled with the day-to-day operations of these organizations in violation of the Establishment Clause, depending upon the facts and circumstances of the monitoring regime.

ANALYSIS

The General Assembly is considering enactment of a "Community Enhancement Grant Program" by which the State would grant money to governmental entities and non-profit associations. We have been provided information stating that the grant categories and purposes authorized for inclusion are public safety, cultural activities, and community development. The opinion request contains a list of five Baptist churches and fifteen "youth clubs," which appear from their names to be affiliated with churches. Your question is whether community enhancement grants to these organizations without specific instructions regarding how the funds may be spent would violate the state and federal constitutional provisions requiring the separation of church and state. This opinion is necessarily general in the absence of specific details of the proposed Community Enhancement Grant Program.

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." The First Amendment is applicable to the states through operation of the Fourteenth Amendment. At a minimum, the First Amendment guarantees that the government may not coerce anyone to support or participate in a religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith or which tends to do so. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467

(1992). Similarly, Article 1, Section 3, of the Tennessee Constitution provides that "no preference shall ever be given, by law, to any religious establishment or mode of worship." In *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Supreme Court stated that the Establishment Clause means that neither a state nor the federal government may "pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U.S. 1 at 15, 67 S.Ct. 504, at 511. No tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. *Id.*

Two lines of analysis used by the United States Supreme Court in determining whether a statute violates the Establishment Clause are relevant to the question here. First, the list appears to single out only churches of the Baptist denomination (four of the five churches listed are identified as Baptist by their names). These grants, therefore, are vulnerable to a challenge on the grounds that the grants would create a denominational preference.[1] When it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 109 S.Ct. 2136, 2146, 104 L.Ed.2d 766 (1989). If no such facial preference exists, courts frequently use a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2125, 29 L. Ed.2d 745 (1971).[2] Under this test, the criteria to be examined in determining whether a statute violates the Establishment Clause are (1) whether the statute has a secular legislative purpose; (2) whether its primary effect is one that neither advances nor inhibits religion; and (3) whether it fosters excessive government entanglement with religion.

We think the courts would conclude that an unrestricted grant of state funds to particular Baptist churches is an unconstitutional establishment of religion under both the Tennessee Constitution and the United States Constitution. First, these grants on their face appear to favor the religion of the Baptists over the religion of others. Second, the grants also appear to fail the second and third prongs of the *Lemon* test. Aid has the primary effect of advancing religion where it flows directly to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 2347, 49 L.Ed.2d 179 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973). A church is such an institution. Moreover, monitoring a grant to a pervasively sectarian organization to ensure that funds are not used for a religious purpose may cause the government to intrude unduly in the day-to-day operations of religiously affiliated grantees. *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562, 2578, 101 L.Ed. 520 (1988). For these reasons, unrestricted grants to the Baptist churches would violate the Establishment Clause. Further, any attempt to monitor any restrictions on the churches' use of the funds could

---

[1] The same constitutional objection would arise if a preference were granted to churches of the Christian faith generally over institutions of other faiths.

[2] The Supreme Court recently declined to abandon the three-part *Lemon* test in *Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005).

create a significant risk that the state government would become excessively entangled with the day-to-day operations of these religious institutions, depending upon the facts and circumstances of the monitoring regime.

The listed youth clubs, if controlled by a church, would also qualify as pervasively sectarian organizations, and, accordingly, the same analysis would render the proposed grants to them constitutionally suspect as well.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Brian Kelsey
State Representative
203 War Memorial Building
Nashville, TN 37243-0183