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March 18, 2008

Opinion No. 08-58

Grants to Church-Controlled Youth Groups

QUESTION

Would a direct grant of state funds under the Community Enhancement Grant Program to churches and youth groups affiliated with churches violate state and federal constitutional provisions against the establishment of religion, even if the grant includes specific instructions regarding how the funds may be spent?

OPINION

We think a court would conclude that a direct grant of state funds under the Community Enhancement Grant Program to a church or its youth group violates the Establishment Clause of the United States Constitution, regardless of whether the grant includes specific instructions concerning how the funds may be spent, for two reasons. First, a reasonable observer would conclude that a government grant of funds to a church or its youth group constitutes government endorsement of religion in violation of the Establishment Clause. Second, a court would conclude that the State's attempts to monitor a church's use of the funds to ensure that they are not used for religious activity would result in excessive governmental entanglement in religion in violation of the Establishment Clause.

ANALYSIS

This opinion concerns grants of state funds to churches and youth groups that appear to be affiliated with churches. We assume the term "affiliated with churches" refers to groups that have no separate legal standing apart from the church and that are operated by the church. The request refers to Op. Tenn. Att'y Gen. 07-94 (June 12, 2007). In that opinion, our office discussed a grant of state funds to churches and youth groups under a proposed "Community Enhancement Grant Program." That opinion concludes:

> 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 the 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.

We assume your question also concerns a grant under the Community Enhancement Grant Program established by the General Assembly under 2007 Tenn. Pub. Acts, ch. 603, § 68, pp. 128-130.[1] We discussed this program in further detail in Op. Tenn. Att'y Gen. 07-133 (September 5, 2007). We think that, under current law, a court would conclude that any direct grant of funds to a church or a church youth group under this program would violate the Establishment Clause of the United States Constitution. 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, 15-16, 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.*

Courts use the following guidelines to determine whether government aid violates the Establishment Clause. First, 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). As we noted in Op. Tenn. Att'y Gen. 07-94 (June 12, 2007), if grants are made only to churches of a particular denomination, the grants could be found to fail this test. Second, 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). 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. The *Lemon* test has been criticized in some cases. *See, e.g., Orden v. Perry*, 545 U.S. 677, 685-86, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005). In that case, the Court found that the *Lemon* test was "not useful" in determining whether a display of the Ten Commandments on the Texas Capitol grounds violated the Establishment Clause. *Id.* At the same time, the Court did not reject use of the test in other contexts. We think the *Lemon* test still applies in determining whether a direct grant to a religious

[1] Instructions to grant applicants under the Community Enhancement Grant Program state that grants will not be awarded to a church or other institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. For the reasons discussed in this opinion, we think this restriction is constitutionally mandated.

institution violates the Establishment Clause. Under *Lemon* as later refined in what is known as the "endorsement test," courts look to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *Adland v. Russ,* 307 F.3d 471, 479 (6th Cir. 2002), *cert. denied,* 538 U.S. 999, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003) ("endorsement test" is a refinement of the second prong of the *Lemon* test).

Under the Community Enhancement Grant Program, public and private organizations may qualify to receive direct grants of state money for a broad range of activities. Courts have found that government 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); *Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973). Plainly, a church is such an organization. A youth group with no separate legal status from the church and directly controlled by the church is simply an integral part of the church's activities.

Courts have noted that aid that results in a direct payment of money to a pervasively sectarian organization raises "special Establishment Clause dangers." *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 2546, 147 L.Ed.2d 660 (2000) (plurality) (citing *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)); *Mitchell,* 120 S.Ct. 2530, at 2560 (O'Connor, J., concurring);[2] *Steele v. Development Board of Metropolitan Government, Nashville,* 301 F.3d 401 (6th Cir. 2002), *cert. denied,* 515 U.S. 1121, 115 S.Ct. 2275, 132 L.Ed.2d 297 (2003) (issuing tax exempt industrial revenue bonds for the benefit of a religious university is not direct government aid violating the Establishment Clause). In this case, we think a court would conclude that a reasonable observer would believe that a direct money grant under the Community Enhancement Grant Program to a church or its youth group, regardless of instructions on its use, constitutes an endorsement of religion by the government. The grant, therefore, would fail the "endorsement test" applied by the United States Court of Appeals for the Sixth Circuit under the second prong of the *Lemon* test.

Further, the State must monitor grantees under the Community Enhancement Grant Program to ensure the funds are not used to support religious activities. *See, e.g., Mitchell v. Helms, supra,* (O'Connor, J., concurring) (government aid may not be diverted to support religious activities). We think that monitoring a grant to a church or its youth group to ensure that funds are not used for a religious purpose would cause the State to intrude unduly into the day-to-day operations of the church in violation of the third prong of the *Lemon* test. *See, e.g., Committee for Public Ed. and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 2966, 37 L.Ed. 2d 948 (1973)*; Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 2578, 101 L.Ed. 520 (1988). For these reasons, we think

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[2]Justice O'Connor's concurrence has been cited as providing the most recent guidance from the Court on aid to religious institutions under the Establishment Clause. *See, e.g., DiStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 419 (2d Cir. 2001); *but see Steele v. Development Board of Metropolitan Government, Nashville*, 301 F.3d at 408 (concluding that the only binding precedent from *Mitchell* is its holding).

a court would conclude that a direct grant of funds to a church or its youth group under the Community Enhancement Grant Program would violate the Establishment Clause of the United States Constitution, regardless of whether it includes specific instructions concerning how the funds may be spent.

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