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Opinion No. 08-105

Constitutionality of Amendment 1 to Senate Bill 4104/House Bill 4089

QUESTION

Whether Amendment 1 to Senate Bill 4104/House Bill 4089, which permits public schools to offer an academic study course on the Bible, is constitutional.

OPINION

Amendment 1 to Senate Bill 4104/House Bill 4089 removes many of the constitutional safeguards contained in the original bill and therefore increases the likelihood that such a course could be subjected to a successful "as applied" challenge.

ANALYSIS

Amendment No. 1 to Senate Bill 4104/House Bill 4089 would provide as follows:

> SECTION 1. Tennessee Code Annotated, Title 49, Chapter 6, Part 10, is amended by adding the following as a new, appropriately designated section: 49-6-10__.
>
> (a) The state board of education is authorized to approve a curriculum for an elective state funded course consisting of an academic study of the Bible.
>
> (b) An LEA that elects to offer a course and utilize an associated textbook approved in accordance with subsection (a) of this section shall implement such course in accordance with the Constitutions of the United States and Tennessee, including the manner in which the course is taught in the classroom and the assignment by the LEA of the individual teaching the course. The individual assigned to teach the course shall meet all certification requirements and all other provisions of this chapter relating to personnel employed by local units of administration. In addition, no person shall be assigned to teach such course based in whole or in part on any religious test, profession of faith or lack of faith, prior or present religious affiliation or lack of affiliation, or criteria involving particular beliefs or lack of beliefs about the Bible or in violation of Title 49, Chapter 6, Part 80 or Section 49-6-2906.

> (c) Nothing in subsection (a) shall be construed as mandating that an LEA use the curriculum developed under subsection (a) for an academic study of the Bible or prohibiting (sic) an LEA from adopting its own curriculum for an academic study of the Bible; provided, that any academic study of the Bible so offered shall be approved as a special course according to the rules of the state board of education.

SECTION 2. This act shall take effect July 1, 2008, the public welfare requiring it.

The United States Constitution provides that the state and federal governments "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Amends. 1, 14. The Free Exercise Clause of the Constitution "forbids governmental restrictions or impediments upon the religious beliefs and, with certain qualifications, upon the religious practices of the individual." *Wiley v. Franklin*, 468 F. Supp. 133, 143 (E.D. Tenn. 1979).[1] The Establishment Clause requires the government to maintain strict neutrality, neither aiding nor opposing religion. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). In the *Abington Township* case, a state required at the opening of the school day the selection and reading of Bible verses, followed by the recitation of the Lord's Prayer by the students in unison. The Court held that this statute violated the Establishment Clause and that to strike down the statute would not conflict with the Free Exercise Clause:

> [W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. 374 U.S. at 225-226 (footnote omitted).

A legislative enactment does not contravene the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster "excessive government entanglement" with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). If a statute fails to meet any one of the three tests — purpose, effect, or entanglement — it will not survive an attack brought under the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (invalidating statute requiring copy of Ten Commandments to be displayed in classrooms).

On the other hand, the Supreme Court has held that there would be no constitutional problem with including study of the Bible or of religion, if presented objectively as part of a secular program of education. *See Abington Township*, 374 U.S. at 225 (Bible may constitutionally be used in an appropriate study of history, civilization, ethics, or comparative religion); *Stone v. Graham*, 449 U.S. at 42 (Ten Commandments cannot be posted on classroom walls but could be used in course on

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[1] *See also* subsequent decisions, *Wiley v. Franklin*, 474 F.Supp. 525 (E.D.Tenn. 1979), and *Wiley v. Franklin*, 497 F.Supp. 390 (E.D.Tenn. 1980).

ethics).

This office has previously opined that Senate Bill 4104/House Bill 4089 is constitutional because "the bill appears to pass all three parts of the tripartite test established by the Supreme Court." Attorney General Opinion 08-74 (April 1, 2008). The opinion noted that the bill had gone "to considerable lengths" to comply with Supreme Court precedent. *Id.* In particular, the bill required that the Bible study be "nonreligious and nonsectarian" and be directed toward the Bible's "impact in literature, art, music, culture, and politics." The bill further mandated that any course authorized by the bill must:

> (1) Be taught in an objective and nondevotional manner with no attempt made to indoctrinate students;
>
> (2) Not include teaching of religious doctrine or sectarian interpretation of the Bible or of texts from other religious or cultural traditions; and
>
> (3) Not disparage or encourage a commitment to a particular set of religious beliefs.

All of the above language would be removed by Amendment 1 to Senate Bill 4104/House Bill 4089. Amendment 1 requires only that the Bible course be an "academic study" and that the curriculum approved by the State Board of Education must do so "in accordance with the Constitutions of the United States and Tennessee." The latter requirement, however, applies only if the LEA uses the curriculum approved by the State Board of Education; if an LEA adopts its own curriculum for an academic study of the Bible, it is not required by the bill to do so in accordance with the Constitution.

The proposed amendment of Senate Bill 4104/House Bill 4089 on its face does not clearly appear to violate the tripartite test established by the Supreme Court in *Lemon v. Kurtzman*,[2] *supra*, and subsequently applied in cases such as *Regan*, *supra*, as discussed above. However, the amended bill provides little guidance to the State Board of Education, and even less to LEAs, as to how to create and implement such a course. The original bill provided useful constitutional guidance and parameters to educators in a sensitive area of first amendment rights.[3] Without these guidelines, the likelihood that a Bible course would be taught in an unconstitutional manner, and therefore be subject to a successful legal challenge, would increase significantly.

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[2] The *Lemon* test has been criticized in some cases. *See, e.g., Orden v. Perry,* 545 U.S. 677 (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.

[3] The legislative history and justification for removing these guidelines and parameters would be relevant to any constitutional challenge to the bill as amended.

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