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Opinion No. 08-154

Utility District Grant to a Church

QUESTION

Under Tenn. Code Ann. ' 7-82-304(b), a utility district is authorized to make donations to charitable organizations. Subsection (b)(3) prohibits Adiscrimination by a utility district in the distribution of voluntary contributions for bona fide charitable purposes to organizations whose mission is to assist persons regardless of their race, color, creed, religion, national origin, gender, disability or age.@ Does this statute prohibit a utility district from denying a grant to an organization solely because it is a church?

OPINION

No. The statute prohibits discrimination in the distribution of grants on the basis of religion, among other factors. Like all statutes, it must be construed in light of controlling constitutional requirements. Because a utility district is considered a governmental entity, any payment of money by the utility district to a church would likely be found to be governmental endorsement of religion in violation of the Establishment Clause of the United States Constitution, even though the grant is made from funds that customers have voluntarily contributed to the district. For this reason, Tenn. Code Ann. ' 7-82-304(b) should not be construed to authorize a utility district to grant funds to a church. In contrast, utility district grants to faith-based organizations that are not churches may not fall within the Establishment Clause. The determination whether grants to such organizations would violate the Establishment Clause would depend upon the facts and circumstances of each case.

ANALYSIS

This opinion concerns utility district grants under Tenn. Code Ann. ' 7-82-304(b). That statute provides:

> (1) In addition to the authority granted under otherwise applicable law, a utility district created under the provisions of this chapter, or any private act of the general assembly, upon the adoption of a resolution by its board of

> commissioners, has the power to accept and distribute voluntary contributions for bona fide charitable purposes pursuant to programs approved by the board of commissioners, which programs may include, but shall not be limited to, programs in which utility bills are rounded up to the next dollar when such contribution is shown as a separate line on the utility bill.
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> (2) Contributions accepted by a utility district pursuant to programs authorized by subdivision (b)(1) shall not be considered revenue to the utility district, and such contributions shall be used only for charitable purposes.
>
> (3) For purposes of this subsection (b), a Acharitable purpose@ is one that provides relief to the poor or underprivileged, advances education or science, addresses community deterioration, provides community assistance, assists in economic development, provides for the erection of public buildings, monuments or works, assists in historic preservation, or promotes social welfare through nonprofit or governmental organizations designed to accomplish any of the purposes set forth in this subdivision (b)(3). This section prohibits discrimination by a utility district in the distribution of voluntary contributions for bona fide charitable purposes to organizations whose mission is to assist persons regardless of their race, color, creed, religion, national origin, gender, disability or age.

The question is whether this statute, which prohibits discrimination on the basis of religion, prohibits a utility district from denying a grant request from an organization solely because it is a church. Statutes should be construed so as to render them constitutional if possible. *Bailey v. County of Shelby,* 188 S.W.3d 539, 547 (Tenn. 2006). Thus, where one construction would make a statute unconstitutional and another interpretation would render it valid, every reasonable doubt must be resolved in favor of the constitutional interpretation. *Id.*; *Mitchell v. Mitchell*, 594 S.W.2d 699, 702 (Tenn. 1980); *Blankenship v. Old Republic Insurance Co*., 539 S.W.2d 23 (Tenn. 1976), *appeal after remand*, 567 S.W.2d 156 (Tenn. 1978). For this reason, we think the statute should not be interpreted to authorize any grant that would violate the Tennessee Constitution or United States Constitution.

The Establishment Clause of the First Amendment to the United States Constitution provides that ACongress 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 Ano 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 Apass 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). 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., Van 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 Anot 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 institution violates the Establishment Clause. Under *Lemon* as later refined in what is known as the Aendorsement 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) (Aendorsement test@ is a refinement of the second prong of the *Lemon* test).

Our Office has recently concluded that a grant of state funds to a church would constitute an endorsement of religion by the government and, therefore, is prohibited by the First Amendment to the Constitution. Op. Tenn. Att=y Gen. 08-58 (March 18, 2008); Op. Tenn. Att=y Gen. 07-94 (June 12, 2007). Of course, unlike the state government, utility districts have no taxing authority. Tenn. Code Ann. ' 7-82-301(a)(1). Further, the utility district grants are made from voluntary contributions by district customers to the program. The statute explicitly provides that these contributions are not to be considered district revenue. Tenn. Code Ann. ' 7-82-304(b)(2). But a utility district is a Amunicipality@ or public corporation in perpetuity, and a Abody politic and corporate with power of perpetual succession.@ Tenn. Code Ann. ' 7-82-301(a)(1). A utility district is established through a petition submitted to the county and the Utility Management Review Board. Tenn. Code Ann. ' 7-82-201. A utility district is the sole public corporation empowered to furnish authorized services in its district. *Id.* Utility district commissioners are chosen as provided by state law. Tenn. Code Ann. ' 7-82-307. The grant program, therefore, is created by state law and is administered by a governmental entity. For these reasons, we think a reasonable observer would conclude that a utility district grant to a church is an endorsement of religion in violation of the Establishment Clause, even though the grant is made from funds that customers have voluntarily contributed.

In light of the principles of statutory interpretation discussed above, Tenn. Code Ann. ' 7-82-304(b), which prohibits utility districts from discrimination on the basis of religion in the

distribution of grant funds, should not be construed to authorize grants of utility district funds to churches. Your opinion request states that the legislative intent of the statute in question was to avoid discrimination against "faith-based organizations." We note that many faith-based organizations are not organized as churches and, depending on the facts, could receive governmental grants consistent with the Establishment Clause.

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