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Opinion No. 09-82

Establishment of New Specialty Earmarked License Plate Recognizing Religious Entity

QUESTION

Would the establishment of a new specialty earmarked license plate, pursuant to Tenn. Code Ann. § 55-4-201, *et seq*., that recognizes a religious entity and allocates certain proceeds from the sale of these new specialty earmarked license plates exclusively to further the mission of that religious entity's charities violate any federal or state constitutional provisions, especially the provisions against the establishment of religion?

OPINION

Yes, we think a court would conclude that the establishment of a new specialty earmarked license plate that recognizes a specific religious entity and allocates certain proceeds from the sale of this new specialty earmarked license plate exclusively to further the mission of that religious entity's charities violates the federal and state constitutional provisions against the establishment of religion.

ANALYSIS

This Office has been asked to assess the constitutional validity of Senate Bill 2145/House Bill 2196, which is currently pending before the legislature. This legislation, as amended, authorizes the issuance of a new specialty earmarked license plate, pursuant to Tenn. Code Ann. § 55-4-201, *et. seq.*, which recognizes the important role that the Church of God in Christ has played, and continues to play, in Memphis, Tennessee. The Church of God in Christ was founded in 1907 in Memphis, where the church has always been headquartered. "The specialty license plate shall contain an appropriate logo or other design representative of the Church of God in Christ." Senate Finance Ways and Means Amendment No. 1 to SB 2145, Section 2, (b). The funds produced from the sale of the new specialty earmarked license plates "shall be allocated to Church of God in Christ Charities in accordance with [Tenn. Code Ann.] § 55-4-215. Such funds shall be used exclusively to further Church of God in Christ Charities' mission in Tennessee." Senate Finance Ways and Means Amendment No. 1 to SB 2145, Section 2 (c). According to the Tennessee Departments of Safety and Revenue, this is the first time a specialty earmarked license plate to recognize a church has been sought.

In upholding the validity of Tennessee's statutory scheme for specialty license plates in the context of the legislature's having authorized such a plate with a "Choose Life" inscription, the Sixth Circuit found that the message on the specialty license plate represents government speech for purposes of the Free Speech Clause of the First Amendment. *ACLU v. Bredesen,* 441 F.3d 370, 375-380 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006). The Sixth Circuit noted that the governmental message is disseminated by the volunteers who display the specialty tags on their private vehicles. *Id.* at 377-380. The court further noted that "there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval." *Id.* at 376. In this case, the Sixth Circuit rejected the ACLU's challenge based upon the legislature's decision not to make a specialty plate available with a "pro-choice" message.

In Op. Tenn. Att'y Gen. 08-58 (March 18, 2009), we opined that, under current law, a court would conclude that any direct grant of funds by the State through the Community Enhancement Grant Program to a church or a church youth group would violate the Establishment Clause of the United States Constitution. Similarly, in Op. Tenn. Att'y Gen. 07-94 (June 12, 2007), we opined that an unrestricted grant of state funds to churches and youth groups affiliated with churches would also violate the Establishment Clause. *See also* Op. Tenn. Att'y Gen. 09-59 (April 16, 2009)(sale or lease of state property to a religious group without advertisement or other means of competitive procurement would be vulnerable to attack under the Establishment Clause); Op. Tenn. Att'y Gen. 08-154 (October 3, 2008)(in light of the Establishment Clause, a utility district in its grant program to distribute voluntary donations collected from customers may exclude churches). The analysis in *ACLU v. Bredesen* and in these prior Attorney General opinions is applicable to the present question.

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, 511, 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." 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 an express recognition of or direct payments to a religious 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 (2003) ("endorsement test" is a refinement of the second prong of the *Lemon* test).

Under the specialty earmarked license plate program, public and private organizations may qualify to receive direct payments of state money collected from the sale of the license plates to be used 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. In addition, charities chosen to support the mission of that church in Tennessee would likely be viewed as 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)); *Steele v. Development Board of Metropolitan Government, Nashville*, 301 F.3d 401 (6th Cir. 2002), *cert. denied*, 515 U.S. 1121 (2003) (issuing tax exempt industrial revenue bonds for the benefit of a religious university is not direct government aid violating the Establishment Clause).

The proposed legislation is constitutionally suspect as it differentiates among religions and only specially recognizes one religious entity. Moreover, under the "endorsement test," we think a court would find that a reasonable observer would believe that the dissemination of this government message on this new specialty earmarked license plate is a governmental endorsement of this particular religious entity. Furthermore, we think a court would conclude that a reasonable observer would believe that the direct payments of money under the specialty earmarked license plate program to the church and its charities constitutes an endorsement of religion by the government. Both the dissemination of the governmental message on the new

specialty earmarked plate and these payments, 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, it is unlikely the program can be structured so that the State could monitor the organizations receiving funds under the specialty earmarked license plate program to ensure the funds are not used to support religious activities. We think that monitoring these direct payments to a church or its charities 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 a court would conclude that the direct payment of funds to a church or its charities under the new specialty earmarked license plate program would violate the Establishment Clause of the United States Constitution.

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