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Opinion No. 12-29

Exclusion of Religious or Political Nonprofit Organizations from Certain State Contracts

## QUESTION

Would the exclusion of all religious or political nonprofit organizations, including any affiliated organizations, from entering into partnership or contractual agreements with the Department of Safety and Homeland Security, as set forth in Senate Bill 2237/House Bill 2375 of the 107th General Assembly, be constitutionally suspect?

## OPINION

No. The blanket exclusion of all religious or political nonprofit organizations, including any affiliated organizations, from entering into a partnership or contractual agreement with the Department of Safety and Homeland Security is constitutionally defensible.

## ANALYSIS

This request concerns pending legislation that would authorize the Department of Safety and Homeland Security "to enter into partnership agreements with nonprofit organizations for the purpose of promoting and supporting the goals and objectives of the agency including, but not limited to, law enforcement, safety education, motorist services, disaster preparedness and prevention, and marketing opportunities." Senate Bill 2237/House Bill 2375 of the 107th General Assembly (hereinafter "SB2237").

This legislation imposes numerous restrictions upon the "nonprofit partners." *Id.* Section 1, Subsections (2) – (9). For example, "the nonprofit partners shall have their boards of directors elected by a process approved by the governor or the governor's designee." *Id*. Section 1, Subsection (2). The nonprofit partners must be "properly incorporated under the laws of this state," and be approved as an organization that is exempt from federal income tax under 26 U.S.C. § 501 (c)(3). *Id.* Section 1, Subsection (4). Furthermore

> [t]he nonprofit partners shall annually submit to the governor, the speakers of the senate and the house of representatives, within ninety (90) days after the end of their fiscal year, a complete and detailed report setting forth their operation and accomplishments.

*Id*. Section 1, Subsections (5). (On its face, subsection (5) does not limit the detailed report solely to information regarding any grant or contract issued pursuant to this legislation).

SB2237 provides that the "annual reports and all books of accounts and financial records of all funds received by grant, contract or otherwise from state, local or federal sources shall be subject to audit annually by the comptroller of the treasury" or, with specific approval of the comptroller, by a licensed independent public accountant. *Id.* Section 1, Subsection (6). (On its face, subsection (6) does not limit the audit solely to grants, contracts, or other payments issued pursuant to this legislation). The "full board meetings of a nonprofit organization concerning activities authorized by this section shall be open to the public, except for [certain specified] executive sections." And "the expenditures of a nonprofit organization relating to activities authorized by this section shall be open for public inspection upon specific request to the nonprofit organization." *Id.* Section 1, Subsection (7) & (8). Finally, "[t]he proposed charter and any proposed amendments of a nonprofit organization shall be submitted to the comptroller of the treasury for review and comment prior to the adoption of any such charter or amendments." *Id.* Section 1, Subsection (9). The legislation does not specify sanctions for a nonprofit partner's failure to comply with any of the foregoing requirements.

A proposed amendment to this pending legislation would add to Section 1 an exclusion that no partnership or contractual agreement shall be entered into with any nonprofit entity that is tax exempt under specified sections of the United States Internal Revenue Code as a religious organization, an organization that is affiliated with a religious organization, a political organization, or an organization that is affiliated with a political organization.[1] This request addresses whether this exclusion would be constitutionally suspect.

With regard to the exclusion of religious organizations, the constitutional provisions most probably implicated would be the Religion Clauses – the Establishment and the Free Exercise Clauses – of the First Amendment to the United States Constitution, which provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These clauses apply equally to state legislatures under the due process clause of the Fourteenth Amendment to the United States Constitution. *See Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 743 n.6 (1976); *Cantwell v. Connecticutt*, 310 U.S. 296, 303 (1940). The Establishment Clause prevents the government from promoting any religious doctrine or organization or affiliating itself with one. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 589 (1989). The Establishment Clause "is a specific prohibition on forms of state intervention in religious affairs." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). The United States Supreme Court

[1] The proposed amendment states:

> No partnership or contractual agreement shall be entered into with any nonprofit entity that is tax exempt under United Sates Internal Revenue Code 501(c) (3), codified in 26 U.S.C. [§] 501(c), as a religious organization, an organization that is affiliated with a religious organization as defined in 26 CFR [§] 1.6033-2(h), a nonprofit entity that is tax exempt under United States Internal Revenue Code 527, codified in 26 U.S.C. [§] 527, as a political organization, or an organization that is affiliated with a political organization, as "affiliated" is defined in 11 CFR, Chapter 1.

> has enforced a scrupulous neutrality by the State, as among religions, and also between religious and other activities, but a hermetic separation of the two is an impossibility it has never required.
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> . . .
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> Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity.

*Roemer,* 426 U.S. at 745-46.

Typically the provision of state funds to support a religious activity or entity is challenged as violative of the Establishment Clause. *See id.* at 745-67. In the context of addressing the constitutionality of statutes affording state aid to church-related schools, the Court utilizes a three-part test for the validity under the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. *Board of Education v. Allen,* 392 U.S. 236, 243, 88 S. Ct. 1923, 1926, 20 L. Ed.2d 1060 (1981); finally the statute must not foster „an excessive governmental entanglement with religion.' *Walz,* supra at [397 U.S. 664], at 674, 90 S.Ct. 1414 [1970].

*Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See also Glassman v. Arlington County*, 628 F.3d 140, 146 (4th Cir. 2010). In *Agostini v. Felton*, 521 U.S. 203, 222-24 (1997), the Court modified the *Lemon* test by determining that entanglement also could be considered an aspect of the second prong's "effect" inquiry, and finding that to be valid a governmental program must not create excessive entanglement. The Court has noted that the factors in *Lemon* are "no more than helpful signposts" and has at times looked to other factors, such as a balancing test between the tradition of religion in our nation's history versus our nation's stated desire to maintain a division between church and state. *Van Orden v. Perry,* 545 U.S. 677, 684-85 (2005) (quoting *Hunt v. McNair,* 413 U.S. 734, 741 (1973)). The Court nonetheless has generally continued to recognize and utilize the *Lemon* "helpful signposts" in evaluating claims that government action violates the Establishment Clause. *McCreary County v. Am. Civil Liberties Union,* 545 U.S. 844, 859-60 (2005).

In assessing excessive entanglement, the Court looks to the "character and purposes of the institutions that are benefited [or involved], the nature of [any] aid that the State provides, and *the resulting relationship between the government and the religious authority*." *Lemon*, 403 U.S. at 615 (emphasis added). Excessive entanglement may exist when a program imposes a scheme of "comprehensive, discriminating, and continuing state surveillance" that requires the government to stay enmeshed in the religious entity's affairs on an ongoing basis. *Id.* at 619-20. *See also Agostini*, 521 U.S. at 233 (concluding that unannounced monthly visits by public supervisors to entities receiving government assistance were not constitutionally objectionable); *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (finding that no excessive entanglement existed

where the state reviewed the use of materials and programs conceived by religious grantees of federal aid and monitored recipients' activities through periodic visits).

Preventing excessive entanglement with religion may be characterized as a compelling state interest. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). *But see Hartmann v Stone*, 68 F.3d 973, 979-83 (6th Cir. 1995) (finding no plausible claim of unconstitutional entanglement presented to justify a blanket prohibition by the Army of on-base family child care providers from having any religious practices during day care conducted in provider's homes under contracts with the parents). A state's decision to not fund devotional theology instruction as part of post-secondary student aid was found not to violate the Free Exercise Clause. *Locke v. Davey,* 540 U.S. 712, 718-26 (2004). *See also Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (upholding state statute authorizing direct grants only to nonsectarian schools for reimbursement of tuition for students that had no public education facilities available). Even where a state has chosen to make funding generally available to private colleges, it may exclude "pervasively sectarian" institutions. *See generally Roemer*, 426 U.S. at 755-59; *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999) (finding that a state's compelling interest in enforcing the Establishment Clause allowed it to exclude a "pervasively sectarian" college from receiving publicly funded financial aid).

The application of these principles to the proposed amendment at issue leads this Office to conclude the amendment is constitutionally defensible under the Establishment Clause. The proposed amendment excludes any religious organization or any organization affiliated with a religious organization from being a "nonprofit partner" with the Department of Safety and Homeland Security for the activities authorized by SB2237. All religious and religious-affiliated nonprofit organizations are treated the same and are excluded. On its face, this exclusion does not appear to be based upon any hostility toward religion, but rather can be characterized as an attempt to avoid an excessive entanglement or improper affiliation with religion. As set forth above, the pending legislation mandates numerous requirements applicable to the "nonprofit partners," including requirements for oversight of the appointment process for the board of directors, open board meetings in certain circumstances, review of any charters and charter amendments, annual reports on the entities operations and accomplishments, and annual audits. These on-going requirements could be construed as being an excessive entanglement or improper affiliation between the Department of Safety and Homeland Security and a religious or religious-affiliated organization if allowed to operate as a "nonprofit partner" for the activities authorized by this legislation.

Furthermore, the exclusion of any political or politically affiliated organization from entering into partnership or contractual agreements will be upheld under a Fourteenth Amendment equal protection analysis if there is any conceivable rational basis for the classification, given the classification of political organizations in this proposed amendment free speech impacts neither a fundamental right nor suspect class. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). While it is true that the regulation of political organizations could raise first amendment or assembly concerns, thereby triggering a heightened scrutiny of the regulatory statute, in this case there is no evidence of any such impact. Thus, in light of the restrictions on the "nonprofit partners" in SB2237, there is a rational basis for excluding political and politically

affiliated nonprofit organizations from participating in a program with the oversight and reporting requirements set forth above, which could involve oversight by a competing political party. For example, it could be problematic for the government to specify the procedures for a politically-affiliated nonprofit organization to elect its board of directors, to preview and comment upon any charter enactments or amendments of that organization, and to require the filing of a detailed annual report setting forth the politically affiliated organization's operation and its accomplishments.

This Office perceives of no further constitutional infirmity to this proposed amendment. Thus, as discussed herein, it is the opinion of this Office that the proposed amendment which would add an exclusion providing that no partnership or contractual agreement shall be entered into with any religious or political organizations, or any affiliate organizations, is constitutionally defensible.

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