

**STATE OF TENNESSEE**

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Opinion No. 10-52

Establishment of New Specialty Earmarked License Plate Asserting that “Jesus is Lord”

**QUESTION**

Would the establishment of a new specialty earmarked license plate, pursuant to Tenn. Code Ann. §§ 55-4-201, *et seq.*, asserting that “Jesus is Lord” and allocating certain proceeds from the sale of these license plates exclusively to further the mission of a non-profit non-religiously affiliated entity 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 asserting that “Jesus is Lord” violates the federal and state constitutional provisions against the establishment of religion.

**ANALYSIS**

This Office has been asked to opine on the constitutional validity of establishing a new specialty earmarked license plate, pursuant to Tenn. Code Ann. §§ 55-4-201, *et seq.*, asserting that “Jesus is Lord.” The funds produced from the sale of the new license plates would be allocated exclusively to further the mission of a non-profit, non-religiously affiliated entity, such as the Children’s Advocacy Center.

Portions of the analysis in prior Attorney General opinions concerning specialty earmarked license plates involving religiously affiliated entities and messages are applicable to the present question. In Op. Tenn. Att’y Gen. 10-34 (March 16, 2010), this Office opined that, under current law, a court would conclude that the establishment of a new specialty earmarked license plate recognizing Catholic Charities would be found by a court to violate the federal and state constitutional provisions prohibiting the establishment of religion. Similarly, in Op. Tenn. Att’y Gen. 09-82 (May 13, 2009), this Office opined that a court would conclude that the establishment of a new specialty earmarked license plate recognizing a specific religious entity would be found by a court to violate the federal and state constitutional provisions prohibiting the establishment of religion. Proceeds from the sale of the proposed specialty earmarked license plate recognizing the Church of God in Christ would have been used exclusively to further the mission of that church’s charities. Likewise, in Op. Tenn. Att’y Gen. 09-110 (June 8, 2009), this

Office opined that the establishment of a new specialty earmarked license plate recognizing a specific religious charity, The Lord's Child, would be found by a court to violate the federal and state constitutional provisions prohibiting the establishment of religion.

In upholding the validity of Tennessee's statutory scheme for specialty license plates in the context of the legislature's authorization of 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 (6<sup>th</sup> 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 plates 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.

While the Free Speech Clause of the First Amendment does not regulate government speech, "government speech must comport with the Establishment Clause." *Pleasant Grove City, Utah v. Sumnum*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1125, 1131-32 (2009). 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 that tends to do so. *Lee v. Weisman*, 505 U.S. 577 (1992). Similarly, Article I, Section 3, of the Tennessee Constitution provides, in part, that "no preference shall ever be given, by law, to any religious establishment or mode of worship."<sup>1</sup> In *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16 (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."

Courts frequently use a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether government actions violate the Establishment Clause. 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 (2005). In that case, although 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, the Court did not reject use of the test in

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<sup>1</sup> Although Article I, Section 3 of the Tennessee Constitution is "practically synonymous" with the First Amendment, Tennessee courts have noted that "the language of [Article I, Section 3 of the Tennessee Constitution], when compared to the guarantee of religious freedom contained in the federal constitution, is a stronger guarantee of religious freedom." *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000), *citing Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718, 721 (1956). *See also State ex rel. Comm'r of Transp. v. Medicine Bird*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001)(recognizing that the "prohibition against government establishment of religion" contained in Article I, Section 3 of the Tennessee Constitution provides broader protection than the First Amendment of the United States Constitution, although applying similar analysis under each provision).

other contexts. *Id.* The Sixth Circuit Court of Appeals and federal district courts within Tennessee still apply the *Lemon* test in analyzing whether government actions violate the Establishment Clause.<sup>2</sup> Under the *Lemon* test, 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); *see also Doe v. Wilson County School System*, 564 F.Supp.2d 766, 792-93 (M.D. Tenn. 2008)(*Lemon* test, as refined by the “endorsement test,” applied to invalidate actions conveying that a particular religious belief is favored or preferred in the public school context).

“Whatever else the Establishment Clause may mean (and [the United States Supreme Court has] held it to mean no official preference even for religion over nonreligion), it certainly means that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).” *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989)(found holiday display of crèche depicting the Christian Nativity scene that was placed on county courthouse main stairway to violate the Establishment Clause). The Court noted “[h]owever history may affect the constitutionality of nonsectarian references to religion by government [such as in the national motto, “In God We Trust”], history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.” *Id.* at 603; *see also Gaylor v. United States*, 74 F.3d 214 (10<sup>th</sup> Cir. 1996)(applied “endorsement test” to find statutes establishing “In God We Trust” as national motto and placing it on United States currency do not violate the Establishment Clause).

The proposed legislation is constitutionally suspect as it differentiates among religious doctrines and only specially recognizes one religious creed. 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 creed. The dissemination of the governmental message on the new specialty earmarked plate, therefore, would likely fail the “endorsement test” applied by the United States Court of Appeals for the Sixth Circuit under the *Lemon* test.<sup>3</sup>

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<sup>2</sup> The *Lemon* test has been used in construing the application of Article I, Section 3 of the Tennessee Constitution. *Martin v. Beer Board for City of Dickson*, 908 S.W.2d 941, 951 (Tenn. Ct. App. 1995), *citing Steele v. Waters*, 527 S.W.2d 72, 74 (Tenn. 1975).

<sup>3</sup> 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 (1976) (plurality); *Hunt v. McNair*, 413 U.S. 734 (1973). In the previously cited Attorney General opinions, this Office opined that a church and the charities chosen to support the mission of that church or religion would likely be viewed as such an institution. Assuming as stated in the Request that none of the proceeds from the sale of the specialty license plates would benefit a religiously affiliated entity or activity, the use of these proceeds likely would not present a constitutional issue regarding advancing religion.

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