STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

March 16, 2010

Opinion No. 10-34

Establishment of New Specialty Earmarked License Plate Recognizing Catholic Charities

QUESTION

Would the establishment of a new specialty earmarked license plate, pursuant to Tenn. Code Ann. § 55-4-201, et seq., recognizing Catholic Charities and allocating certain proceeds from the sale of the new plate exclusively to further the mission of Catholic Charities of East Tennessee violate any federal or state constitutional provisions?

OPINION

Yes, we think a court would conclude that the establishment of a new specialty earmarked license plate recognizing Catholic Charities and allocating certain proceeds from the sale of the new plate exclusively to further the mission of Catholic Charities of East Tennessee 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 3780/House Bill 3361 currently pending before the legislature. This proposed legislation would authorize the issuance of a new specialty earmarked license plate, pursuant to Tenn. Code Ann. § 55-4-201, et. seq., which recognizes Catholic Charities. "The new specialty license plate . . . shall contain an appropriate logo or other design representative of Catholic Charities and its mission."[1] Senate Bill 3780/House Bill 3361, Section 2(b). The funds produced from the sale of the new specialty earmarked license plates "shall be allocated to Catholic Charities of East Tennessee in accordance with [Tenn. Code Ann.] § 55-4-215." Id., Section 2(c).

The analysis in prior Attorney General opinions concerning similar specialty earmarked license plates is applicable here. In Op. Tenn. Att'y Gen. 09-82 (May 13, 2009), this Office opined that, under current law, 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

[1] The emblem for Catholic Charities of East Tennessee, Inc., includes a cross as the "t" in Charities, with arms of the cross wrapped around each adjacent "i." http://www.ccetn.org.

have been used exclusively to further the mission of that church's charities.[2] Likewise, In Op. Tenn. Att'y Gen. 09-110 (June 8, 2009), this Office opined that a court would conclude 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 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.

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 (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 (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 (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 (1971). Under this test, the criteria to be examined in determining

[2] In Op. Tenn. Att'y Gen. 08-58 (March 18, 2008), this Office 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), this Office 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).

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, 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).

The proposed legislation is constitutionally suspect under the "endorsement test." Catholic Charities of East Tennessee states in its 2008/2009 Annual Report that it "operates as the social service arm of the Catholic Diocese of Knoxville."[3] *See* http://www.ccetn.org. The website for Catholic Charities USA, which is the national network of charitable organizations in each state, states that the Catholic Charities across the nation are "[a]n integral part of the Catholic Church."[4] Catholic Charities of East Tennessee receives a grant from the Diocese of Knoxville. The current Executive Director is a priest and pastor in the Catholic Church. As part of the advocacy for the poor and others in need, this organization participates with affiliated organizations that are "in line with our mission statement [and] Catholic Social Thought."[5] These affiliated organizations include Catholic Charities USA and the Catholic Public Policy Commission of Tennessee, described as "a statewide commission of people chosen by the bishops of our state"[6] who "provide the public policy voice of the Catholic Church in Tennessee."[7]

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 religiously affiliated 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 this religiously affiliated charity constitutes an endorsement of religion by the government. Both the dissemination of the governmental message on the new specialty earmarked plate and the payments, therefore, could fail the "endorsement test" applied by the United States Court of Appeals for the Sixth Circuit under the second prong of the *Lemon* test.

---

[3] The organization's Mission Statement is "[e]mpowered by the grace of Jesus Christ, Catholic Charities of East Tennessee addresses the unmet needs of the most vulnerable of our region by providing shelter, nourishment, counseling and education, in order to foster human dignity."

[4] The Catholic Charities USA website further explains that the charitable work of Catholic Charities is ministry rooted in the scriptures and that Catholic Charities are authorized to exercise their ministry by the diocesan bishop. "Ten Ways Catholic Charities are Catholic." http://www.catholiccharitiesusa.org/NetCommunity/ Page.aspx?pid=296.

[5] http://www.ccetn.org/Catholic_Charities_of_East_Tenn/Advocacy.html.

[6] *Id.*

[7] http://www. tncppc.org.

Further, it is unlikely the program can be structured so that the State could monitor the religious charity receiving funds under the specialty earmarked license plate program to ensure the funds are not used to support religious activities. We think that monitoring direct payments to this religiously affiliated charity 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 religion 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 (1973); *Bowen v. Kendrick,* 487 U.S. 589 (1988). For these reasons, we think a court would conclude that the direct payment of funds to Catholic Charities under the new specialty earmarked license plate program would violate the Establishment Clause of the United States Constitution.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Vince Dean
State Representative
107 War memorial Building
Nashville, Tennessee 37243