



# COMMONWEALTH of VIRGINIA

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December 14, 2006

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The Honorable Gabriel A. Morgan  
Sheriff of the City of Newport News  
P.O. Box 57  
Newport News, Virginia 23607

The Honorable B.J. Roberts  
Sheriff of the City of Hampton  
135 High Court Lane  
Hampton, Virginia 23669

Dear Sheriffs Morgan and Roberts:

I am responding to your requests for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issues Presented

You ask whether the inmates' canteen fund may be used to make direct or indirect payments to faith-based organizations when such organizations provide rehabilitation services, education programs, counseling, and, if requested by an inmate, spiritual guidance.

## Response

It is my opinion that the inmates' canteen fund may be used to make direct or indirect payments to faith-based organizations when such organizations provide rehabilitation services, education programs, counseling, and, if requested by an inmate, spiritual guidance, including providing Bibles and other religious materials.

## Background

Although there is no constitutional right for an inmate to receive rehabilitative services while incarcerated,<sup>1</sup> many sheriffs voluntarily include such programs in the jails. Believing that faith-based

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<sup>1</sup>See *Counts v. Newhart*, 951 F. Supp. 579, 587 (E.D. Va. 1996); *Garrett v. Angelone*, 940 F. Supp. 933, 942 (W.D. Va. 1996); *Harris v. Murray*, 758 F. Supp. 1114, 1120 (E.D. Va. 1990); *Miller v. Landon*, 545 F. Supp. 81, 83 (W.D. Va. 1982); *Hill v. Hutto*, 537 F. Supp. 1185, 1188 (E.D. Va. 1982); *Lunsford v. Reynolds*, 376 F. Supp. 526, 528 (W.D. Va. 1974).

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organizations can play a significant role in the rehabilitation of inmates and the prevention of future crimes after release, sheriffs may utilize these organizations to provide rehabilitation services, educational programs, and counseling to inmates. You relate that such organizations also provide spiritual guidance when requested by an inmate. In conjunction with the spiritual guidance, Bibles and other religious material may be purchased with the funds and provided to the inmates voluntarily utilizing the program.

It is my understanding that none of the programs offered by faith-based organizations<sup>2</sup> are denied to inmates based on their religious or personal beliefs. Should an inmate decline to participate in any part of the programs, he may do so. Further, it is my understanding that none of the programs result in religious indoctrination by the government. Finally, while an inmate may undergo a religious experience, such an event cannot be attributed to an action by the sheriff or his employees.

In exchange for providing rehabilitation services, educational programs, counseling, and spiritual guidance upon request, such faith-based organizations may receive both direct<sup>3</sup> and indirect subsidies<sup>4</sup> from the inmates' canteen fund.<sup>5</sup> Thus, you ask whether such direct and indirect subsidies with public funds<sup>6</sup> violate either the Constitution of Virginia or the Constitution of the United States.

### **Applicable Law and Discussion**

Any constitutional analysis of governmental action must begin with settled legal principles. First, governmental actions are presumed constitutional.<sup>7</sup> The doctrine of constitutional avoidance requires that

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<sup>2</sup>If there is a faith-based program that has features that are different from my understanding, then the constitutional issue could well be decided differently.

<sup>3</sup>A direct subsidy occurs when a sheriff provides money directly to the organization.

<sup>4</sup>An indirect subsidy occurs when the sheriff provides such things as printing, office supplies, or storage space.

<sup>5</sup>The inmates' canteen fund is derived solely from purchases made by inmates. As a practical matter, the items being purchased by the inmates go to the inmates and the proceeds from sales go to the canteen fund. See VA. CODE ANN. § 53.1-127.1 (2005) ("Each sheriff who operates a correctional facility is authorized to provide for the establishment and operation of a store or commissary to deal in such articles as he deems proper. The net profits from the operation of such store shall be used within the facility for educational, recreational or other purposes for the benefit of the inmates as may be prescribed by the sheriff.").

<sup>6</sup>As described herein, the canteen fund is self-funded through inmate purchases. See *supra* note 5. Section 53.1-127.1 provides that canteen funds "shall be considered public funds."

<sup>7</sup>Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 472 (1985); Sinking-Fund Cases, 99 U.S. 700, 718 (1879); see also Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The [United States] Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." (footnote omitted)). Indeed, "[e]very law enacted by the General Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." City Council v. Newsome, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984); see also *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003) (noting principle that all acts of General Assembly are presumed constitutional; any reasonable doubt regarding constitutionality is resolved in favor of validity); *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898) (noting that Virginia Constitution is liberally construed to uphold law).

statutes, regulations, and policies be construed to avoid difficult constitutional questions.<sup>8</sup> Under the doctrine of constitutional doubt, when there are two fairly plausible interpretations of a particular statute or regulation, one that finds it constitutional and one that finds it unconstitutional, the finding of constitutionality should be adopted.<sup>9</sup> Thus, courts must resolve all doubts “in favor of the constitutionality” of the practice.<sup>10</sup> “To doubt is to affirm.”<sup>11</sup>

When there is a claim that a particular statute, regulation, or policy violates both the Virginia Constitution and the United States Constitution, the initial inquiry should center on the Virginia Constitution. When an issue can be resolved on state constitutional grounds, there is no reason to address the federal constitutional question.<sup>12</sup> The Supreme Court of the United States has refused to “review judgments of state courts that rest on adequate and independent state grounds.”<sup>13</sup> Because the Supreme Court of Virginia has held that the Virginia Constitution is coextensive with the Religion Clauses in the Federal Constitution,<sup>14</sup> the distinction is of no consequence in this particular opinion.

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<sup>8</sup>Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787 (2000); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* Johnson v. Commonwealth, 40 Va. App. 605, 612, 580 S.E.2d 486, 490 (2003) (“[T]he Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable.” (citation omitted)). The Virginia Supreme Court has observed that “when the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional.... Therefore, ‘a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.’” *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002) (citations and quotation omitted); *see also* Va. Soc’y for Human Life, Inc. v. Caldwell, 256 Va. 151, 156-57, 500 S.E.2d 814, 816 (1998); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940) (noting statutes are construed to avoid constitutional questions where possible).

<sup>9</sup>*See* I.N.S. v. St. Cyr, 533 U.S. 289, 299-00 (2001), *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988).

<sup>10</sup>*Cent. of Georgia Ry. Co v. Murphey*, 196 U.S. 194, 199 (1905); *see also* *Toombs v. Citizens Bank of Waynesboro*, 281 U.S. 643, 647 (1930) (“If the state court has not otherwise construed it and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against the state.”).

<sup>11</sup>*Peery v. Va. Bd. of Funeral Dirs. & Embalmers*, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961) (quoting *Roanoke v. Elliott*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918)).

<sup>12</sup>*See* *New Hampshire v. Ball*, 471 A.2d 347, 350-51 (N.H. 1983).

<sup>13</sup>*See* *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

<sup>14</sup>*See* *Va. Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000) (noting that Virginia courts have “always been informed by the United States Supreme Court Establishment Clause jurisprudence in [construing] Article I, § 16” of Virginia Constitution). Similarly, the Virginia Supreme Court frequently has held that a particular act violates or does not violate both the Virginia Constitution and the United States Constitution. *See, e.g.* *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 612, 553 S.E.2d 511, 515 (2001); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100, 400 S.E.2d 516, 518-19 (1991); *Reid v. Gholson*, 229 Va. 179, 187-88, 327 S.E.2d 107, 112 (1985); *Mandell v. Haddon*, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961).

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The Fourteenth Amendment, which applies both the Establishment and Free Exercise Clauses to the states via the Incorporation Doctrine,<sup>15</sup> substantially restricts the authority of the states to make religious policy.<sup>16</sup>

The United States Constitution “does not say that in every and all aspects there shall be a separation of Church and State.”<sup>17</sup> Rather, the Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.”<sup>18</sup> The Establishment Clause must be viewed “in the light of its history and the evils it was designed forever to suppress”<sup>19</sup> and must not be interpreted “with a literalness that would undermine the ultimate constitutional objective as illuminated by history.”<sup>20</sup> That constitutional objective is clear:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.<sup>[21]</sup>

Thus, the Establishment Clause “does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises ... as to have meaningful and practical impact.”<sup>22</sup> It permits “not only legitimate

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<sup>15</sup>See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947) (noting that First Amendment requires states to be neutral regarding religion).

<sup>16</sup>See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (noting that free exercise clause would allow parents to refuse to send children to school beyond eighth grade unless state can show state interest of sufficient magnitude to override parents’ rights); *Sch. Dist. v. Schempp*, 374 U.S. 203, 223-25 (1963) (holding that Establishment Clause prohibits practice of daily reading from Bible in public schools even where students are allowed to absent themselves upon parental request). Because there is “play in the joints” between what the Establishment Clause prohibits and the Free Exercise Clause requires, the states retain substantial sovereign authority to make religious policy. See *Locke*, 540 U.S. at 718-19 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)). For example, although the Establishment Clause does not prohibit the indirect funding of religion, the Free Exercise Clause does not require that the states indirectly fund religious education or activity. See *id.* at 719; see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that school choice vouchers may be used at private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (holding that disabled student at private religious school could receive special education services); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 487-89 (1986) (holding that state could provide funds for education of blind student studying for ministry).

<sup>17</sup>*Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

<sup>18</sup>U.S. CONST. amend. I.

<sup>19</sup>*Everson*, 330 U.S. at 14-15.

<sup>20</sup>*Walz*, 397 U.S. at 671.

<sup>21</sup>*Everson*, 330 U.S. at 15-16.

<sup>22</sup>*Schempp*, 374 U.S. at 308 (Goldberg, J., joined by Harlan, J., concurring).

practices two centuries old but also any other practices with no greater potential for an establishment of religion.”<sup>23</sup> Moreover, the history equally is clear that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>24</sup> “The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.”<sup>25</sup>

When interpreting the Establishment Clause, “[t]here is ‘no single mechanical formula that can accurately draw the constitutional line in every case.’”<sup>26</sup> Although the three-part test articulated in *Lemon v. Kurtzman*,<sup>27</sup> “occasionally has governed the analysis of Establishment Clause cases over the past twenty-five years,”<sup>28</sup> the United States Supreme Court frequently refuses to apply the test in Establishment Clause cases.<sup>29</sup> Indeed, “the factors identified in *Lemon* serve as “no more than helpful signposts” in Establishment Clause analysis.<sup>30</sup> Recently, the United States Court of Appeals for the Fourth Circuit, in upholding the constitutionality of Virginia’s statute requiring the daily recitation of the Pledge of Allegiance (which includes the challenged phrase “under God”),<sup>31</sup> did not apply the *Lemon* test.<sup>32</sup>

The United States Supreme Court explicitly has “approved certain government activity that directly or indirectly recognizes the role of religion in our national life.”<sup>33</sup> For example, the Court has approved a voucher program that includes choices of religions schools,<sup>34</sup> permitted religious groups to use public school facilities,<sup>35</sup> allowed public employees to teach some classes at private religious schools,<sup>36</sup>

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<sup>23</sup>County of Allegheny v. A.C.L.U., 492 U.S. 573, 670 (1989) (Kennedy, J., joined by Rehnquist, C.J., White, & Scalia, JJ., concurring in part and dissenting in part).

<sup>24</sup>*Zorach*, 343 U.S. at 313.

<sup>25</sup>*Schempp*, 374 U.S. at 213.

<sup>26</sup>*Myers v. Loudoun Co. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (quoting *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (5-4 decision) (Breyer, J., concurring).

<sup>27</sup>403 U.S. 602, 612-13 (1971).

<sup>28</sup>*A.C.L.U. Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (*en banc*).

<sup>29</sup>*See, e.g., Van Orden*, 125 S. Ct. at 2861; *Zelman*, 536 U.S. at 639; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, (2001); *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>30</sup>*Van Orden*, 125 S. Ct. at 2861 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

<sup>31</sup>VA. CODE ANN. § 22.1-202(C) (2006).

<sup>32</sup>*See Myers*, 418 F.3d at 402-05 (relying on history of Pledge of Allegiance); *id.* at 409 (Duncan, J., concurring) (relying on dicta and authority suggesting that Pledge of Allegiance is not religious); *id.* at 409-10 (Motz, J., concurring) (relying on dicta); *see also Nebraska Foundation*, 419 F.3d at 778 n.8 (declining to apply *Lemon* test).

<sup>33</sup>*Nebraska Foundation*, 419 F.3d at 777.

<sup>34</sup>*Zelman*, 536 U.S. at 662-63.

<sup>35</sup>*Good News Club*, 553 U.S. at 120.

<sup>36</sup>*Agostini v. Felton*, 521 U.S. 203, 208-09 (1997).

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upheld the disbursement of money to student religious organizations,<sup>37</sup> accepted a Christmas display that includes a creche,<sup>38</sup> approved the practice of hiring a chaplain to conduct legislative prayers,<sup>39</sup> permitted tax deductions for certain religious educational expenses,<sup>40</sup> allowed religious property to be exempt from taxation,<sup>41</sup> and, most recently, upheld the presence of a monument containing the Ten Commandments on public property.<sup>42</sup> Indeed, as Justice Scalia has observed, “there is nothing unconstitutional in a State’s favoring religion generally,<sup>43</sup> honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”<sup>44</sup> Given the Court’s approval of the constitutionality of these activities, it appears a logical extension of such reasoning to conclude that government may contract with private faith-based groups to provide rehabilitation services, education programs, counseling, and, when requested by an inmate, spiritual guidance.

While the United States Supreme Court has refused to apply the *Lemon* test in certain circumstances and individual Justices have criticized its application,<sup>45</sup> the Court has not repudiated *Lemon* or provided a clear alternative.<sup>46</sup> “[W]e remain in Establishment Clause purgatory.”<sup>47</sup> Therefore, I will apply the *Lemon* test, with caution, to this situation.<sup>48</sup>

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<sup>37</sup> *Rosenberger*, 515 U.S. at 844-46.

<sup>38</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>39</sup> *Marsh*, 463 U.S. at 792.

<sup>40</sup> *Mueller v. Allen*, 463 U.S. 388, 401-02, (1983).

<sup>41</sup> *Walz*, 397 U.S. at 680.

<sup>42</sup> *Van Orden*, 125 S. Ct. at 2864.

<sup>43</sup> The United States Supreme Court clearly has stated that “total separation” of church and state is not absolutely possible. *Lynch*, 465 U.S. at 672. “Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Id.* at 673 (noting that Congress opens its sessions with paid chaplains).

<sup>44</sup> *Id.* at 2864 (Scalia, J., concurring).

<sup>45</sup> Individual justices have criticized the *Lemon* test. See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400, (1993) (Scalia, J., joined by Thomas, J., concurring); *Allegheny*, 492 U.S. at 655-57 (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, J.J., concurring in part and dissenting in part); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 346-48 (1987) (O’Connor, J., concurring).

<sup>46</sup> As the United States Court of Appeals for the Sixth Circuit recently explained:

“*McCreary County* and *Van Orden* did not settle the issue. On the one hand, the Supreme Court declined an invitation to abandon *Lemon* in *McCreary County*. The majority in that case certainly implies *Lemon*’s continued vitality by conducting purpose analysis. The majority never explicitly reaffirms *Lemon*, though, because the inquiry ended when the Court held the displays unconstitutional as having an impermissible purpose.”

“On the other hand, a plurality of the Court in *Van Orden* disregarded the *Lemon* test, noting that *Lemon* is “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.” The plurality instead employed an analysis “driven both by the nature of the monument and by our Nation’s history.” Justice Breyer’s concurrence arguably provided a fifth vote as to *Lemon*’s inapplicability. However, “the views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.””

*A.C.L.U. v. Mercer County*, 432 F.3d 624, 635-36 (6th Cir. 2005) (citations and footnote omitted), *reh’g denied*, 446 F.3d 651 (6th Cir. 2006).

<sup>47</sup> *Id.* at 636.

<sup>48</sup> See *id.* (applying *Lemon* test “[b]ecause *McCreary County* and *Van Orden* do not instruct otherwise”).

Under the *Lemon* test, as clarified, a faith-based rehabilitation program is constitutional when: (1) it has a predominately secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion.<sup>49</sup>

First, the faith-based rehabilitation programs, as you relate them, have a predominately secular purpose, which is to teach certain life skills to help the inmate be a responsible member of society upon release and not recidivate.<sup>50</sup> Such a program has the clear secular benefit of reducing crime and victimization, thus saving citizens future costs of prosecution and incarceration. A program “that is motivated in part by a religious purpose” may still satisfy the first part of the *Lemon* test.<sup>51</sup> “The eyes that look to purpose belong to an “objective observer,” one who takes account of the traditional external signs that show up in the “text, legislative history, and implementation of the statute,” or comparable official act.”<sup>52</sup> Applying these standards, I find that there is a predominately secular purpose—the rehabilitation of inmates and, ultimately, the improvement of public safety for the community. This purpose is accomplished by conforming inmate behavior to the societal norms and increasing inmate self-confidence and self-image with the ultimate goal of reducing inmate recidivism. In short, the overall noble secular purpose is to transform persons who have violated our criminal laws and may be a future threat to our society into law-abiding citizens.

Second, the faith-based rehabilitation programs do not have the primary effect of advancing religion. Evaluation of the primary effect prong turns on (1) whether government defines recipients by reference to religion, and (2) whether the government’s action results in indoctrination.<sup>53</sup> As noted, it is my understanding that none of the faith-based organizations declines services to individuals because of their religious or personal beliefs, and no inmate is required to participate. Additionally, you state that the programs do not directly result in religious indoctrination by the government. Moreover, while an inmate may have a religious experience or a reaffirmation of faith, such religious activity is incidental to the

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<sup>49</sup> *Mellen v. Bunting*, 327 F.3d 355, 367 (4th Cir. 2003), *reh’g denied*, 341 F.3d 312 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004); *see also* *McCreary County v. A.C.L.U.*, 125 S. Ct. 2722, 2735-36 (2005) (discussing secular purpose prong of *Lemon* test). Faith-based rehabilitation programs easily pass this standard.

<sup>50</sup> In *McCreary County*, the Court altered the *Lemon* test so that the secular purpose had to be predominant. *Mercer County*, 432 F.3d at 630 n.5; *see also* *McCreary County*, 125 S. Ct. at 2757 (Scalia, J., dissenting) (“[T]he [*McCreary County* majority] replaces *Lemon*’s requirement that the government have ‘a secular ... purpose’ with the heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion.” (second alteration in original) (citations omitted)).

<sup>51</sup> *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *see also* *McCreary County*, 125 S. Ct. at 2736 (noting that when assessing purely objective purpose of government’s funding or involvement in religion, courts traditionally defer to state legislative decisions); *Lemon*, 403 U.S. at 613 (recognizing legitimate state concern to maintain minimum school standards and considering effort by respective legislatures to include precautionary provisions in program given their understanding that such programs could “intrude upon[] the forbidden areas under the Religion Clauses”).

<sup>52</sup> *McCreary County*, 125 S. Ct. at 2734 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring))).

<sup>53</sup> *Agostini*, 521 U.S. at 234.

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primarily secular purpose of rehabilitation and is not the result of religious indoctrination by a governmental employee. Assuming these facts are correct, it is my opinion that the programs do not have the primary effect of advancing religion.<sup>54</sup>

Third, the faith-based rehabilitation programs do not foster excessive government entanglement with religion.<sup>55</sup> Government officials have no pervasive involvement. They also do not control the programs provided by the faith-based organizations. The government does not choose the persons who run the programs, does not create the content of the programs, and has little or no input into (other than for purposes of protecting safety) which persons actually come to the correctional facility. Moreover, while the introduction of any private sector program into the correctional setting will require some interaction between the government and those who run the program, the level of coordination between the government and the faith-based program is minimal. Thus, it is my opinion that there is no excessive entanglement.<sup>56</sup>

Therefore, it is my opinion that the faith-based rehabilitation programs that you describe are constitutional in light of the United States Supreme Court's precedents. The programs meet all three prongs of the *Lemon* test, as clarified by the Supreme Court. Moreover, the mere fact that such faith-based programs have a religious component does not justify their exclusion while similar programs without religious components are allowed. A rehabilitation program based on the philosophy of Christ or Muhammad or Buddha should be treated the same as a rehabilitation program based on the philosophy of Marx or Rand or Nietzsche. The mere fact that the programs being implemented have a religious component does not render them unconstitutional on their face.

### Conclusion

Accordingly, it is my opinion that the inmates' canteen fund may be used to make direct or indirect payments to faith-based organizations when such organizations provide rehabilitation services, education programs, counseling, and, if requested by an inmate, spiritual guidance, including providing Bibles and other religious materials.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:395; 1:1055/06-052

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<sup>54</sup> See *Good News Club*, 533 U.S. at 109-12 (noting that program is not pervasively sectarian if its secular values can be separated from religious message).

<sup>55</sup> Often the excessive entanglement inquiry is coextensive with the primary effect inquiry. See *Zelman*, 536 U.S. at 668 (O'Connor, J., concurring).

<sup>56</sup> *Agostini*, 521 U.S. at 233-34 (noting that administrative cooperation, by itself, is insufficient to create excessive entanglement).