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ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 13, 1983

Harvey E. DeVane
Commissioner of Business Regulation
Department of Business Regulation
State House Station 35
Augusta, ME 04333

Dear Commissioner DeVane:

You have requested the opinion of the Department of the Attorney General concerning the constitutionality of a provision of the Maine Charitable Solicitations Act, 9 M.R.S.A. § 5001 et seq., differentiating among religious organizations based on the scope of their solicitation activities. A recent decision of the United States Supreme Court compels this office to conclude that this statutory distinction is violative of the United States Constitution and the Maine Constitution.

The Maine Charitable Solicitations Act (hereinafter "the Maine Act") was enacted in 1977 to effectuate the legislative intent that charitable organizations which solicit contributions within this State should register and report certain financial information to state government.1/ See 9 M.R.S.A. § 5002. Under the Maine Act a "charitable organization" is defined as any organization which is or holds itself out to be operated for any charitable purpose.

1/ In 1981 the Legislature transferred the responsibility for administering the Maine Act from the Secretary of State to the Commissioner of Business Regulation. See P.L. 1981, c. 456, Part A, §§ 23-38.

9 M.R.S.A. § 5003(1). The term "charitable purpose" is defined by the Maine Act to include a religious purpose. 9 M.R.S.A. § 5003(2). Unless exempted, every charitable organization which intends to solicit contributions within this State must file a registration statement with the Commissioner of Business Regulation at least 30 days prior to solicitation in each year in which the organization is engaged in solicitation activities. 9 M.R.S.A. § 5004(1). Moreover, a charitable organization which receives more than $30,000 in "gross contributions" during the organization's fiscal year must file a financial report with the Commissioner of Business Regulation within six months after the close of that fiscal year. 9 M.R.S.A. § 5005(1).

The Maine Act exempts certain charitable organizations from the need to file registration statements, although organizations which claim to be exempt from registration must file with the Commissioner a statement setting forth the reason for the claim of exemption. 9 M.R.S.A. § 5006(2).[2/] Among those organizations exempted from registration are the following:

> "B. A religious corporation, trust, society or organization incorporated or established for religious purposes, except to the extent that the organization engages in the solicitation of funds or sales of goods or services to the general public by means of advertisements, personal contacts, mailings or telephone contacts. The term advertisement shall not be construed to include public service announcements;"
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> 9 M.R.S.A. § 5006(1)(B).

Therefore, the Maine Act draws a distinction based on the organization's level of public solicitation. Religious organizations which do not engage in public solicitation are exempt from registration under the Maine Act. Religious

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2/ By its terms, the statutory exemption is limited to the registration requirement. It does not apply to the filing of financial reports required of certain organizations pursuant to 9 M.R.S.A. § 5005, nor does it exempt organizations from any other obligation imposed by the Maine Act.

organizations which do not meet the conditions of § 5006(1)(B) are subject to registration.3/

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The Establishment Clause of the First Amendment applies to the actions of the States through "the fundamental concept of liberty embodied" in the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Article I, Section 3 of the Maine Constitution states that "... no subordination nor preference of any one sect or denomination to another shall ever be established by law . . . ." In the words of the Maine Supreme Judicial Court, "[t]his clause obviously provides for the equality of all sects, and forbids the preference of one over another." Donahoe v. Richards, 38 Me. 379, 403 (1854).4/

In Larson v. Valente, __ U.S. __, 102 S. Ct. 1673 (1982), the United States Supreme Court held that a provision in the Minnesota Charitable Solicitation Act (hereinafter "the Minnesota Act") similar to the Maine Act violates the

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3/ Two other bases for exemption contained in 9 M.R.S.A. § 5006(1) might be thought to apply to religious organizations. Section 5006(1)(A) exempts "organizations which solicit primarily within the membership of the organization and where solicitation activities are conducted by the members." Section 5006(1)(D), in effect, exempts organizations which receive less than $10,000 in contributions during a calendar year or have fewer than ten contributors, if all fund-raising activities are conducted by persons not remunerated for their services. The legislative history of the Maine Act, and amendments thereto, is not clear as to whether the Legislature intended that religious organizations be able to utilize the foregoing grounds for exemption. This Opinion does not address whether the applicability (or inapplicability) of these exemptions to religious organizations would violate either the Establishment Clause or the Free Exercise Clause of the First Amendment.

4/ But note the Law Court's statement that "the provisions of the Maine Constitution relating to . . . the separation of church and state, carry no more stringent prohibitions than the First and Fourteenth Amendments to the Federal Constitution." Squires v. Inhabitants of the City of Augusta, 155 Me. 151, 164, 153 A.2d 80, 88 (1959). Therefore, this Opinion does not contain a discrete analysis of the validity of the Maine Act under the Maine Constitution.

Establishment Clause. The Minnesota Act provided that only those religious organizations receiving more than one half of their contributions from members and affiliated organizations would be exempt from the Act's registration and reporting requirements. See Minn. Stat. § 309.515; Larson v. Valente, supra, 102 S. Ct. at 1677. As noted infra, the Maine Act exempts from registration those religious organizations which abstain from solicitation of the general public by means of advertisements, personal contacts, mailings or telephone contacts. 9 M.R.S.A. § 5006(1)(B).

The Supreme Court began its analysis of the constitutionality of the Minnesota Act with the statement that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 102 S. Ct. at 1683. The Court then asserted that:

> "The fifty per cent rule of [the Minnesota Act] clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents. Consequently, that rule must be invalidated unless it is justified by a compelling governmental interest . . . and unless it is closely fitted to further that interest ...." [citations omitted] 102 S. Ct. at 1684-1685.

The Court rejected the argument that the "fifty per cent rule" was merely a religiously neutral classification based on secular criteria.

> "On the contrary, [the Minnesota Act] makes explicit and deliberate distinctions between different religious organizations. We agree with the Court of Appeals' observation that the provision effectively distinguishes between 'well-established churches' that have achieved 'strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of public policy, may favor public solicitation over general reliance on financial support from members,' on the other hand. 637 F.2d, at 566." 102 S. Ct. at 1684, n. 23.

The Supreme Court acknowledged that "the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization." 102 S. Ct. at 1685. However, the Court concluded that the statutory distinction was not "closely fitted to further the interest that it assertedly serves." 102 S. Ct. at 1685. In summary, the Court found that a statutory scheme which exempted religious organizations on the basis of the percentage of contributions received from members was not "closely fitted" to further the State's interest in protecting its citizens from abusive solicitation practices because there is no necessary relationship between the percentage of nonmember contributions and the need for regulation.5/

It should be noted that, prior to the U.S. Supreme Court's decision in Larson v. Valente, supra, the North Carolina Supreme Court declared unconstitutional a portion of the North Carolina Charitable Solicitation Act which exempted from regulation those religious organizations whose support is derived primarily from contributions by members. In the words of the North Carolina Court:

> "The inescapable impact of the statute is to accord benign neglect to the more orthodox, denominational, and congregational religions while subjecting to regulation those religions which spread their beliefs in more evangelical, less traditional ways. This the state may not do." Heritage Village Church and Missionary Fellowship v. State, 2989 N.C. 399, 411, 263 S.E. 2d 726, 733 (1980)."

The differences among the Maine Charitable Solicitation Act and the Minnesota and North Carolina Acts do not appear sufficient to justify distinctive analysis. In short, the Maine Act subjects some religious organizations to registration, while exempting others. Although the exemption provisions in the Maine Act, 9 M.R.S.A. § 5006, are limited to exemption from the filing of registration statements, the burden of compliance with the registration provisions of the Maine Act cannot be said to be de minimis in nature. See

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5/ The Court proceeded to rule, although "not necessary to the disposition of the case . . .," that the "fifty per cent rule" violated the Establishment Clause for the additional reason that it resulted in excessive governmental entanglement with religion. 102 S. Ct. at 1687. See Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

Larson v. Valente, supra, 102 S. Ct. 1673, 1687-1688; 9 M.R.S.A. § 5004. Good arguments can be made that a statute, such as the Maine Act, which regulates religious organizations on the basis of the secular activity of charitable solicitation should be permissible even though the effect of the statute is to regulate the activities of different religious organizations differently. See, for example, the dissenting opinion of Justice White in Larson v. Valente, supra, 102 S. Ct. at 1690-1693; and the dissenting opinion of Justice Huskins in Heritage Village Church and Missionary Fellowship v. State, supra, 299 N.C. at 416-432, 263 S.E. 2d at 736-745. However, it is the obligation of those who enforce the law to follow the interpretation of the First Amendment set forth by the U.S. Supreme Court. cf. Squires v. Inhabitants of the City of Augusta, supra, 155 Me. at 164, 153 A.2d at 87-88. Therefore, it is the opinion of this office that 9 M.R.S.A. § 5006(1)(B), which establishes a limited exemption from registration under the Maine Act, cannot be applied constitutionally to bona fide religious organizations.[6/]

In order to cure this constitutional infirmity, the Maine Act should be amended to provide either that all religious organizations shall be subject to registration under the Act, or that all religious organizations shall be exempt from registration under the Act. It should be understood that the former approach would be subject to challenge on the grounds that the registration and reporting requirements of the Act may represent excessive governmental entanglement with religion and/or interference with the free exercise of religion. See notes 3 and 5, supra. The decision in Larson v. Valente, supra, did not resolve the question of the constitutionality of charitable solicitation regulation which is applicable to all religious organizations.

6/ An Opinion of this Department, dated June 28, 1977, and signed by Deputy Attorney General Donald G. Alexander, concluded that L.D. 1736 (1977), which as amended became the Maine Act, was constitutionally valid as applied to religious organizations. While we regard that Opinion as well reasoned, it must be deemed superseded by Larson v. Valente, supra.

This office would be pleased to assist you in the preparation of legislation to remedy the problem discussed in this Opinion. Do not hesitate to inquire if you have further questions concerning this matter.

Sincerely yours,

James E. Tierney

JAMES E. TIERNEY
Attorney General