

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb1286/1dn

RAC:cjs:ch

June 21, 2001

This amendment authorizes the state to incur public debt in an amount not to exceed \$1,500,000 for the purpose of aiding in the construction of a youth and family center for the Holy Redeemer Institutional Church of God in Christ in the city of Milwaukee. Because this amendment authorizes the state to spend public money to construct a facility that is owned and operated by a religious organization, there is an issue as to whether this amendment violates the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. (This provision applies to the states through the operation of the 14th Amendment.)

The test that the courts have used to examine whether a provision violates the Establishment Clause of the First Amendment is taken from *Lemon v. Kurtzman*, 403 U.S. 602, at 612–613 (1971). The test provides that a statute does not violate the Establishment Clause if:

1. The statute has a secular legislative purpose;
2. The statute's principal or primary effect neither enhances nor inhibits religion; and
3. The statute does not create excessive entanglement between government and religion.

While courts, using the *Lemon* test, have permitted revenue bonding for religious institutions for secular purposes (see *Hunt v. McNair*, 413 U.S. 734 (1973)), I have been unable to identify a case in which courts have permitted general obligation bonding for a religious institution for the construction of a facility in which religious instruction and religious worship could occur. As I read the materials that you submitted with the drafting request, the youth and family center to be constructed at Holy Redeemer will contain classrooms in which religious instruction may occur and will also be used as a retreat center in which religious worship may occur. For this reason, I cannot ensure that this amendment will be found not to violate the Establishment Clause of the First Amendment.

For a very recent discussion of the Establishment Clause and the use of revenue bonding for a religious institution, see *Johnson v. Economic Development Corp. of Oakland County*, No. 99–1884 (6th Cir. February 27, 2001). (A copy of this decision can be found on the Web at <http://pub.bna.com/lw/991884.htm>). In *Johnson*, the court

upheld a government corporation's issuing tax-exempt revenue bonds for a religious institution as part of a community economic development program. Significantly, however, the religious institution was required to pay all issuance costs of the bonds and was required to pay all principal and interest payments. Obviously, this fact situation differs considerably from the fact situation involving the Holy Redeemer Institutional Church of God in Christ, because in this amendment general obligation bonds are being issued, the issuance and principal and interest costs of which are to be paid by the state and not by HR Academy, Inc.

If I may be of further assistance, please do not hesitate to contact me.

Rick A. Champagne
Senior Legislative Attorney
Phone: (608) 266-9930
E-mail: rick.champagne@legis.state.wi.us