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District of Columbia Historic Preservation Review Board
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Re: Third Church of Christ, Scientist & the Application of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) to its Designation as a Historic Landmark in the District of Columbia

We write to express concerns regarding the potential designation of the church building owned by the Third Church of Christ, Scientist (“Church”), as a historic landmark in the District of Columbia. Although we do not represent the Church or any of its members, we have investigated the relevant issues and write to provide you with our opinion as to how two federal civil rights statutes, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (“RFRA”) and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.*, (“RLUIPA”), may be implicated should the Historic Preservation Review Board decide to designate the Church as a historic landmark.¹

By way of introduction, The Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States and abroad, both as primary counsel and as *amicus curiae*. Our clients come from all different faiths, including Buddhists, Christians, Jews, Hindus, Muslims, Native Americans, Sikhs and Zoroastrians. In particular, we have been intensely involved in litigation under RLUIPA (and corresponding constitutional protections) involving discrimination or the burdening of religious exercise by local land use regulations/officials. We successfully represented the plaintiffs in the first case resolved under RLUIPA, *Haven Shores Community Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich. 2000). Since then, we have brought and won RLUIPA suits in courts across the country, including Alabama, California, Colorado, Florida, Georgia, Hawaii, Illinois,

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¹ Because of its focus on protections against landmarking-related burdens, the following analysis centers on RLUIPA. But RFRA’s significantly broader scope *fully encompasses* RLUIPA’s protections and, unlike the States, clearly applies to instrumentalities of the District of Columbia. *See Potter v. District of Columbia*, No. 01-1189, 2007 WL 2892685 (D.D.C. Sept. 28, 2007). RFRA’s more expansive protections therefore prohibit both what RLUIPA does, and an even broader range of government action than RLUIPA.

Maryland, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, and Texas.

The civil rights principles embodied in RLUIPA enjoy broad, bipartisan support. The legislation sailed through both houses of an otherwise sharply divided Congress, virtually unopposed, and was signed into law by President Clinton on September 22, 2000. RLUIPA's remarkable success in the legislative process can be attributed to strong support from an exceptionally diverse coalition of religious and civil rights groups, ranging from the ACLU and People for the American Way to the National Association of Evangelicals and the Union of Orthodox Jewish Congregations of America.

It is our understanding that the Church has already applied for a demolition permit, but that no action has yet been taken on that application. As explained further below, the designation of the Church's building as a historic landmark could raise serious liability issues under RFRA, RLUIPA and the United States Constitution if it is used to block the construction of a new church designed to fulfill the Church members' unmet religious needs.

As a general matter, RLUIPA encompasses historic preservation and landmarking laws because it defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to the land)." RLUIPA § 8(5). Although RLUIPA has three main provisions, it is our opinion that the "Substantial Burden" provision would be most seriously implicated by the designation of the Church as a historic landmark. It provides in relevant part as follows:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.

This provision reflects the Supreme Court's conclusion, originally outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later reaffirmed in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that government-imposed burdens on religious exercise must be subjected to the strictest form of judicial scrutiny when they are imposed by systems of "individualized assessments." In other words, pursuant to the First Amendment, RFRA and RLUIPA, strict scrutiny applies where burdens are applied on a discretionary, case-by-case basis, as is so often the case in landmark preservation decisions such as the one before the Board. *See, e.g.*, D.C. St. § 6-1104 (e) (noting individualized exemptions in D.C. historic preservation law where Mayor may approve demolition permits – even for historic landmark – when "necessary in the public interest" or where "failure to issue a permit will result in unreasonable economic hardship to the owner"); D.C. St. § 6-1105 (f) (noting same individualized exemptions for alteration permit); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark ordinance "has in place a system of individualized

exemptions”); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”).²

If the Church’s building were designated as a historic landmark and its demolition permit application denied, such actions could “substantially burden” the Church’s religious exercise, even though the burden would not serve a “compelling interest” by the “least restrictive means.”

Generally, the designation of historic landmark status threatens to substantially burden religious freedom first because church property is often, as is the case here, an expression of a church’s theology and religious mission. “The relationship between theological doctrine and architectural design is well recognized.” *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 182 (1992). As one commentator explained:

[E]cclesiastical architecture is religious expression, its semiotic properties reflecting and influencing choices made by religious communities regarding theological principles, liturgical practices, faith renewal, doctrinal developments, missional goals and ecclesial identity.... Houses of worship ... express, among other things, the religious community’s purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of the culture.

Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 449-50 (1991).³ Landmark preservation ordinances place local authorities in the position of evaluating religious communities’ ministry decisions, determining themselves what is appropriate.⁴ Such inquiry would not only substantially burden religious exercise in violation of RLUIPA, it would also threaten to violate other constitutional provisions.⁵

² D.C. landmarking law also appears to lack “narrowly drawn, reasonable and definite standards” governing its regulation of religious expressive activity. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). “The First Amendment prohibits the vesting of such unbridled discretion in a government official.” *Id.*

³ The author continues: “Major religious traditions have been keenly aware of the symbiotic interaction between architecture and theology, of architecture’s connection with doctrinal and liturgical reform, and of the role architectures plays in sustaining and revitalizing faith.” *Id.*

⁴ “By determining which religious beliefs are worthy of architectural expression, the state compels affirmation of particular religious beliefs and ecclesial self-understanding and denies affirmation to others.... The state becomes the reviewer and arbiter of internal design decisions, arrogates to itself the role of religious community, and places itself in a position to direct the long term development of ecclesiastical architecture.” *Id.* at 450.

⁵ For example, “to inquire into the significance of words and practices to different religious faiths, ... would tend inevitably to entangle the State with religion in a manner forbidden by [Supreme Court] cases.” *Widmar v. Vincent*, 454 U.S. 263, 270 n.6 (1981).

Secondly, the designation of historic landmark status threatens to substantially burden the Church's religious exercise because church facilities are an integral part of the church's activities and facilitate its religious mission. Even aside from the religious aspects inherent in church design itself, it is not difficult to imagine how the detailed regulation of a historic designation could substantially burden religious exercise. As RLUIPA explains, "religious exercise" includes "the use, building, or conversion of real property for the purpose of religious exercise." RLUIPA § 8(7)(A). Historic preservation regulations have the potential to be inhibit religious expression and to result in financial hardship.

For example, the application of these regulations could limit the freedom of a church to reduce the size of its meeting facilities and thereby utilize its resources in other aspects of its ministry. It could also place such financial burdens on a church as to effectively prevent it from pursuing its ministries. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *First United Methodist Church of Seattle v. Landmarks Preservation Bd.*, 916 P.2d 374, 380-81 (Wash. 1996) (holding that landmark preservation ordinance "severely burdens free exercise of religion because it impedes [the church] from selling its property [for commercial redevelopment] and using the proceeds to advance its religious mission"); *Sts. Constantine and Helen v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (city's denial of church's rezoning request imposed substantial burden due to "delay, uncertainty, and expense" of the process and the denial).

It is our understanding that the historic preservation standards at issue here could create severe financial burdens on the Church because of the age of the building and astronomically high cost of maintaining it. It is also our understanding that the Church wishes to downsize its meeting facilities within the planned building (due to a smaller urban congregation in recent years) and use the proceeds from the remaining commercial rental space to further its religious mission. It is the Church's religious belief that it should be spending money on its spiritual mission rather than on maintenance. If the historic landmark designation were applied to the Church, either of these scenarios could evolve into a substantial burden on the religious exercise of the Church and its members.

Furthermore, we are not aware of any interests that the District of Columbia might have sufficient to impose such a burden on the Church congregation. RFRA, RLUIPA and the First Amendment provide that the government may only substantially burden religious exercise when the imposition of such burden is the least restrictive means of furthering a compelling government interest. Courts have repeatedly held that "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Indeed, under RFRA, RLUIPA and the First Amendment "compelling governmental interests" are "interests of the highest order," *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 546 (1993), interests that prevent a clear and present, grave and immediate danger to public health, peace, and welfare.

The District of Columbia's historical, aesthetic, or cultural interests are inadequate under the applicable "strict scrutiny" standard. The case decided by the Washington Supreme Court

mentioned above is particularly instructive. In *First Covenant Church of Seattle v. City of Seattle*, the court considered whether applying Seattle's Landmarks Preservation Ordinance to First Covenant violated the church's right to freedom of religion. *See id.*, 840 P.2d 174 (1992). Although that court considered the question under the state and federal constitutions rather than RFRA or RLUIPA, it applied the same test that RFRA and RLUIPA establish, determining whether the burden placed on religion was justified by a compelling state interest. *Id.* at 183. The court concluded that the regulations burdened free exercise both "'administratively' because they require that First Covenant seek the approval of a government body before it alter the exterior of its house of worship, whether or not the alteration is for a religious reason" and "financially, because they reduce the value of the Church's property by almost half." *Id.* Then, in considering the government's interest, the court held:

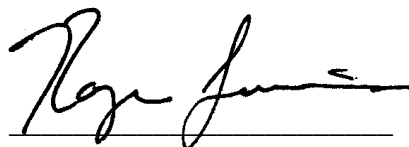
[T]he City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.

Id. at 185.⁶ Therefore, the court concluded that the ordinance unjustifiably violated the church's religious freedom. For these reasons, we believe that the designation of the Church's building as a historic landmark could violate not only RFRA and RLUIPA, but also the Free Exercise Clause of the federal Constitution.

We recognize, of course, that RLUIPA is a relatively recent civil rights statute (enacted September 22, 2000), and thus the Board may not have been fully aware of the Act's scope and application. We contact you now so that the Board may consider the historic landmark decision with the benefit of more complete knowledge of how the obligations of RFRA, RLUIPA and the Constitution may apply in this situation. Should you so desire, we can also provide you with more detailed information about RFRA, RLUIPA and their requirements upon request. We also invite you to visit our website dedicated to RLUIPA, www.rluipa.com. We welcome any inquiries.

Sincerely,

The Becket Fund for Religious Liberty



Roger Severino, Esq.

⁶ See also *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571, 574 (Mass. 1990) (holding landmark designation as violative of state free exercise provision, noting that "[t]he government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance")

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