

# **THE DC HISTORIC PRESERVATION ACT AND THE FREE EXERCISE OF RELIGION**

## **INTRODUCTION**

In June 2008, District of Columbia Council member Marion Barry introduced a sweeping bill that would have the effect of exempting buildings owned by religious institutions from the District's historic preservation laws. Under the bill, a religious institution could prevent such a building from being designated as a historic landmark merely by stating that the designation would substantially burden its exercise of religion. That statement would not be subject to review. Additionally, the bill contains a provision that would make buildings that were landmarked as long ago as 1993 eligible for exemption. This paper examines legal issues raised by the Barry bill.

The bill purports to "conform" the District of Columbia Historic Preservation Act (HPA) to two federal laws that restrict government entities from imposing substantial burdens upon the free exercise of religion through regulatory action. The implication is that the HPA is somehow misaligned with the federal statutes. That is not the case. The HPA comports with both federal statutes, as well the Free Exercise clause of the Constitution.

The two federal laws in question do not prohibit government entities from regulating property owned by religious institutions. Rather, they require only that any such regulation not impose substantial burdens on the free exercise of religion. Nothing in the HPA imposes such burdens or discriminates against religious institutions. Further, the alteration or demolition restrictions that may result from a building's historic designation vastly differ from the type of coercive government actions that are usually associated with what courts have recognized as substantial burdens upon religious exercise.

Aside from being unnecessary and ill-advised, the proposed bill is contrary to the Establishment Clause of the Constitution. The Establishment Clause requires religious neutrality on the part of the government and prohibits government favoritism of religious institutions. The proposed bill defies the Establishment Clause by permitting exemptions based upon unsubstantiated and self-interested statements made by any religious institution, but no other type of institution or entity.

The HPA does not offend religious freedom in any way. The proposed bill needlessly undermines a long-established system for ensuring that historic preservation values are considered in the District's regulation of land use and unwisely entangles the District government in the establishment of religion.

## **BACKGROUND**

### **A. The District of Columbia Historic Preservation Act**

The HPA establishes that “the protection, enhancement, and perpetuation of properties of historical, cultural, and aesthetic merit are in the interests of the health, prosperity, and welfare of the people of the District of Columbia.” D.C. CODE § 6-1101(a). In furtherance of these interests, the HPA confers authority upon the Historic Preservation Review Board (HPRB) to designate landmarks and historic districts in the District. D.C. CODE § 6-1103(c)(3). The HPA also effectuates preservation by spelling out the circumstances under which the Mayor – through a designated Mayor’s Agent – may approve applications for permits to demolish, subdivide, or alter a historic landmark or a building in a historic district or for permits to construct a new structure on the site of a landmark or in a historic district. D.C. CODE §§ 6-1102(8), 6-1104(a), 6-1105(a), 6-1106(a), 6-1107(a).

Specifically, under the HPA the Mayor may not issue such a permit unless the Mayor finds that the permit is necessary in the public interest or that failure to issue the permit will result in unreasonable economic hardship to the property's owner. D.C. CODE §§ 6-1104(e), 6-1105(f), 6-1106(e).<sup>1</sup> To be necessary in the public interest, the subdivision, demolition, or alteration of a historic landmark or building in a historic district must be consistent with the purposes of the HPA or necessary to allow the construction of a project of special merit. D.C. CODE §§ 6-1102(10). To constitute an unreasonable economic hardship, failure to issue the permit must amount to a taking of the owner's property without just compensation.<sup>2</sup> D.C. CODE § 6-1102(14).

### **B. The Barry Bill**

On June 10, 2008, District of Columbia Council member Marion Barry introduced a bill to amend the HPA to include a special exemption for buildings owned by religious institutions. The exemption would be available to any building owned by a religious institution and used for religious free exercise. B17-0788, 17th Council Period, Reg.

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<sup>1</sup> The Mayor may issue a permit for construction of a new structure on the site of a historic landmark or in a historic district only upon a finding that the design of the new structure is compatible with the character of the historic landmark or district. D.C. CODE § 6-1107(f). Notwithstanding a finding of incompatibility, the Mayor may issue such a permit for construction of a project of special merit. *Id.*

<sup>2</sup> In this respect, the HPA adopts the “taking” standard of the Fifth Amendment of the Constitution. D.C. CODE § 6-1102(14).

Sess. (DC 2008) (unenacted). The bill would prohibit the HPRB from designating such buildings as landmarks – thereby exempting them from any regulation under the HPA – if the religious institution that owns and uses the building merely submits a “substantial religious burden statement.” *Id.* The bill defines a substantial religious burden statement as a statement by a duly authorized official of the religious institution that designation would impose a substantial burden on the institution’s religious exercise. *Id.* The bill does not define “substantial burden.” The bill defines “religious exercise” by adopting the definition of that term provided in the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>3</sup> *Id.*

The bill also contains provisions requiring removal of any prior landmark designation from any building owned by a religious institution and used for free exercise following submission of a substantial religious burden statement to the HPRB. *Id.* These provisions would apply to buildings landmarked any time after November 16, 1993. *Id.*

### **C. RLUIPA and RFRA**

The stated purpose of the proposed bill is to “conform” the HPA to RLUIPA and the Religious Freedom Restoration Act (RFRA). 42 U.S.C. §§ 2000cc, *et seq.*; 42 U.S.C. §§ 2000bb, *et seq.* RFRA prohibits government actions that substantially burden the free exercise of religion unless the government can show that the challenged action is the least restrictive means of furthering a compelling state interest. This legal standard is known as “strict scrutiny.” In 1997, the Supreme Court invalidated RFRA as it applies to state and local governments, but not as it applies to the federal government or the District. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). In response to the *Boerne* decision, Congress enacted RLUIPA, which is similar to RFRA, but narrower. RLUIPA imposes the strict scrutiny standard upon state government actions that involve land use and institutionalized persons.<sup>4</sup>

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<sup>3</sup> RLUIPA defines religious exercise as any exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7) (2008). The definition further states that the use, building or conversion of real property for the purpose of religious exercise also constitutes religious exercise. *Id.*

<sup>4</sup> Whether RLUIPA is applicable to the District is questionable. Whereas RFRA’s definition of “government” expressly includes the District, RLUIPA’s definition of “government” omits any reference to the District, instead defining the term to encompass actions of a “State,” a governmental entity created under the authority of a “State,” or a person acting under the “color of State law.” *Compare* 42 U.S.C. § 2000bb-2(2) *with* 42 U.S.C. § 2000cc-5(4).

## LEGAL ISSUES

1. Does the HPA, on its face, violate the free exercise clause of the First Amendment or substantially burden the exercise of religion in violation of either RFRA or RLUIPA by imposing potential land use restrictions on property owned or used by religious institutions?
2. Would permitting religious institutions to exempt properties owned and used by the institution from the operation of the HPA violate the Establishment Clause of the First Amendment?

## SHORT ANSWERS

1. No. Whether analyzed under the First Amendment, or under RFRA or RLUIPA, the HPA is a neutral law of general applicability that does not discriminate against or impose special burdens on religious institutions and imposes no more than an incidental burden on the free exercise of religion. Further, the HPA allows all property owners relief from its restrictions for projects of special merit or based on a showing of unreasonable economic hardship.
2. Allowing religious institutions to exempt their property from the operation of the HPA would raise serious and substantial questions under the Establishment Clause of the First Amendment.

## DISCUSSION

### **I. THE HPA IS A NEUTRAL LAW OF GENERAL APPLICABILITY THAT DOES NOT VIOLATE THE FREE EXERCISE CLAUSE MERELY BECAUSE IT REGULATES PROPERTY OWNED OR USED BY RELIGIOUS INSTITUTIONS**

#### **A. Constitutional Framework**

The First Amendment of the Constitution bars Congress from making laws that prohibit the free exercise of religion. U.S. CONST. amend I. The First Amendment's constraint against laws prohibiting religious free exercise extends to state and local governments through the Fourteenth Amendment and the District of Columbia through the Fifth Amendment. Notwithstanding any assertions to the contrary, the historic preservation scheme in the District's HPA regulation is consistent with the protections afforded to the exercise of religion under the First Amendment.

Until 1990, strict scrutiny was the legal standard for deciding First Amendment-based challenges against government actions. That changed following the Supreme

Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* established that First Amendment challenges do *not* require analysis under the "strict scrutiny" test, so long as the government action at issue arises under a "neutral law of general applicability." *Id.* at 876-77. Instead, the appropriate constitutional analysis is whether the government can show that the challenged action is a rational means to achieve a legitimate government objective. This analysis is known as the "rational basis" test. The burden of passing constitutional muster under the rational basis test is considerably less than under the strict scrutiny test.

### **B. The HPA Is a Neutral Law of General Applicability**

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court discussed how to define a neutral law of general applicability. A law is neutral, the Court explained, so long as its objective is not to infringe upon or restrict religiously motivated practices. *Id.* at 533. There is nothing in the text of the HPA – or its legislative history – that even remotely suggests that an objective of the HPA is to suppress religious practice. The objective of the HPA is plain: It was enacted to promote the retention and enhancement of landmarks and other properties that contribute to the city's cultural, social, economic, political, and architectural history. D.C. CODE § 6-1101. Further, none of the criteria by which the HPRB selects landmarks for designation are targeted at religious institutions. 10 D.C.M.R. §§ 200, *et seq.* Any effect that the HPA has upon religious exercise is purely incidental, and not by design. As such, applying the *Lukumi Babalu Aye* standard, the HPA is neutral on its face.

Under the *Smith* standard, in addition to being neutral, a law must also be generally applicable in order for the rational basis test to apply. In discussing whether a law is "generally applicable," the Supreme Court in *Lukumi Babalu Aye* emphasized that a law must not selectively impose burdens on religiously motivated conduct. *Id.* at n.1. Applying this principle in the context of land use laws, the Tenth Circuit in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006), held that a land use law is generally applicable if the law is motivated by a secular purpose and if it affects all landowners equally. Similarly, in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004), the Ninth Circuit found that a zoning ordinance is generally applicable if it is applied throughout a city.

As these cases demonstrate, a historic preservation law is a law of general applicability if it applies to all landowners, and not just to religious institutions or persons whose ownership is motivated by religious belief. The HPA applies in that manner and, as discussed above, its purpose is plainly secular in nature. For these reasons, the HPA

qualifies as a neutral law of general applicability.<sup>5</sup>

Accordingly, the HPA passes constitutional muster because there is a “rational basis” for the law; i.e., there is a rational connection between the legitimate governmental purpose of preserving historic landmarks and the HPA’s approach to regulating the demolition and alteration of such buildings.

### **C. There Is No Constitutional Basis to Apply Strict Scrutiny Review**

As the Supreme Court held in *Smith*, where a substantial burden to religious exercise results from a neutral law of general applicability, there are two circumstances in which the strict scrutiny test is used instead of the rational basis test. The first circumstance is where a neutral, generally applicable law includes a system of individualized exemptions under which religious institutions or values are treated unequally. The second circumstance is where the substantial burden involves more than one constitutional right. Neither circumstance is applicable to the HPA.

#### **1. The HPA’s Exemption System Does Not Trigger Strict Scrutiny**

In *Church of the Lukumi Babalu Aye*, 508 U.S. 520, the Supreme Court stated that when the government offers individual exemptions from a general requirement, the government may not refuse to extend the exemption system to requests for relief that are based upon religious grounds. *Id.* at 537-38. In other words, when deciding whether to grant an individual exemption, the government may not discriminate against requests for exemption that are grounded upon religious reasons. In *Church of the Lukumi Babalu Aye* itself, the Supreme Court found that a local ordinance was not neutral because its central objective was suppression of a central element of a church’s religious exercise. *Id.* at 540-542.

Like many historic preservation laws, the District’s HPA permits two types of exemptions: (1) those based upon a showing of economic hardship; and (2) those for projects of special merit. Religious institutions can invoke either exemption and make showings related to their particular circumstances. As courts reviewing similar exemptions in the historic preservation laws of other states have held, neither exemption has the potential for the type of discriminatory use that was the subject of the Supreme

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<sup>5</sup> The Second Circuit has suggested that preservation laws may categorically qualify as neutral laws of general applicability when it characterized a New York preservation law as “a facially neutral regulation of general applicability within the meaning of Supreme Court decisions.” *Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 354 (2d Cir. 1990), *cert. denied* 499 U.S. 905 (1991).

Court's concern in *Church of the Lukumi Babalu Aye*. See *St. Bartholomew's Church*, 914 F.2d at 352, 354 (declining to apply strict scrutiny test in a free exercise challenge to a New York historic preservation law that included an economic hardship exception); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (refusing to apply strict scrutiny on a *per se* basis to any land use regulation merely because the regulation includes a secular exemption); see also *First Assembly of God v. Collier County*, 20 F.3d 419, 423 (11th Cir. 1994); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991); *Mt. Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999); *Civil Liberties for Urban Believers v. City of Chicago*, 157 F. Supp. 2d 903, 914-15 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003).

Further, under the District's HPA's special merit exemption, a religious institution may potentially obtain an exemption based upon religious reasons. This is because the HPA defines special merit as a significant benefit arising from exemplary architecture, specific features of land planning, ***or other social benefits having a high priority for community services***. In at least one case, the Mayor's Agent has found that the social benefits arising from the alteration of a religious building qualified a project as one of special merit. See *Calvary Baptist Church*, H.P.A. Nos. 00-601, 01-44. In *Calvary Baptist Church*, the Mayor's Agent granted a special merit exemption for a partial demolition based in part upon the expected social benefits of community services to be provided as part of the mission of an applicant church.<sup>6</sup>

## 2. The "Hybrid Rights" Exception Is Inapplicable in the Context of Historic Preservation

The second circumstance under which neutral laws of general applicability may be subject to strict scrutiny for purposes of constitutional analysis is where the burden placed on religious exercise implicates more than one constitutional right. This is the so-called "hybrid rights" exception. A religious institution could argue, for example, that regulation of a building implicates both the First Amendment's Free Exercise clause and Free Speech clause. However, courts have consistently upheld the application of historic preservation laws against free speech claims because these laws do not regulate historic properties on the basis of the message conveyed. Rather, burdens on speech have been found to be merely "incidental" and ultimately constitutional because historic preservation laws serve a significant government interest; they are narrowly tailored to serve that interest; and there are sufficient, alternative channels of communication.

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<sup>6</sup> The community services provided by the church included daily counseling, after-school programs, on-site day care and summer camps. These services were a function of the church's religious mission, although they were not necessarily religious in nature.

## **II. THE LANDMARKING OF PROPERTY OWNED BY A RELIGIOUS INSTITUTION DOES NOT SUBSTANTIALLY BURDEN THE EXERCISE OF RELIGION FOR PURPOSES OF RFRA OR RLUIPA, EVEN WHERE THE LANDMARKING OPERATES TO RESTRICT THE INSTITUTION'S ABILITY TO ALTER OR DEMOLISH THE PROPERTY**

### **A. Statutory Framework**

In 1993, in direct response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress passed RFRA, 42 U.S.C. §§ 2000bb, *et seq.*, to require courts to apply the strict scrutiny test to all government action that *substantially burdens* the free exercise of religion. In 2000, in response to the Supreme Court's decision in *City of Boerne*, Congress enacted RLUIPA, 42 U.S.C. §§ 2000cc to 2000cc-5(5). RLUIPA requires the same test as RFRA but applies only to government actions relating to state land use and institutionalized persons. Unlike RFRA, which purported to apply to government entities at all levels (federal, state, and local), RLUIPA applies only to states, state instrumentalities, and persons acting under color of state law.

### **B. Substantial Burden**

The term "substantial burden" is not expressly defined in RLUIPA or RFRA. However, RLUIPA's legislative history indicates that Congress intended the term to be defined by Supreme Court jurisprudence on the Free Exercise clause. 146 Cong. Rec. S7776 (July 27, 2000). A review of Supreme Court decisions in this area reveals that a substantial burden for purposes of either RLUIPA or RFRA requires considerably more than merely showing that a land use regulation restricts a religious institution's property rights.

Generally, a substantial burden exists only where the government coerces a person to engage in an action that violates a fundamental tenet of his or her genuinely held religious beliefs, or where the government forces an individual to choose between following a basic tenet of his or her faith and forfeiting a government benefit or facing a criminal penalty. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (finding that compulsory education beyond the eighth grade violated a sincere religious belief of the Amish community); *Sherbert v. Verner*, 374 U.S. 398 (1963) (finding a substantial burden where an individual was required to either work on the Sabbath Day of her faith or forfeit government benefits). There is no substantial burden where a government action interferes with, but does not coerce, an individual's action, or where a government action makes it more expensive to practice a religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (no substantial burden where Forest Service road-building in an area traditionally used for religious purposes interfered with, but did not coerce, Native Americans' religious exercise); *Braunfield v. Brown*, 366 U.S. 599 (1961) (law prohibiting certain retail sales on Sunday did not impose a substantial burden even though the law increased expenses for individuals whose religious beliefs prevented them

from working on Saturdays).

Several D.C. Circuit cases have applied the above-described Supreme Court framework to substantial burden issues arising in the District. *See Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (loss of tax exemption is not a substantial burden on a church's free exercise of religion); *see also Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001) (law preventing sales of religious tee-shirts on the National Mall is not a substantial burden because the prohibition did not significantly inhibit or constrain a central tenet of religious beliefs and alternatives were available).

Various circuits have considered the issue of substantial burden in the context of land use regulations. For instance, in deciding an appeal based upon a RLUIPA claim, the Seventh Circuit held that a land use regulation imposes a substantial burden when the regulation "necessarily bears direct, primary, and fundamental responsibility" for rendering religious exercise "effectively impractical." *Civil Liberties for Urban Believers*, 342 F.3d at 761 (local zoning ordinance requiring special use approval for religious institutions to operate in commercial and business areas did not create a substantial burden under RLUIPA). In another RLUIPA case, the Eleventh Circuit defined a substantial burden as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior," noting that the pressure may be to forego religious principles or to adhere to religious conduct. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (zoning ordinance excluding religious institutions from a business district where private clubs and lodges were permitted did not violate the substantial burden provision of RLUIPA).

Along the same lines, the Ninth Circuit determined that a land use regulation imposes a substantial burden if it is oppressive to a "significantly great extent." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (no substantial burden where ordinance may have prevented college from providing education and worship at the property in question but did not preclude the college from using other sites within the city); *see also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006) (affirming the definition of substantial burden presented in *San Jose Christian Coll.*). These cases demonstrate that federal courts of appeals, in keeping with the Supreme Court standard, have generally held that substantial burdens occur only where there is some type of direct coercion upon or oppression of religious exercise.

It is hard to conceive how the HPA could cause a burden similar in degree of severity to those described in the case law. It is true that application of the HPA may result in some financial burden or aesthetic constraints. However, such incidental burdens simply do not amount to the type of coercion or oppression of religious practice contemplated in the case law that defines "substantial burden." The Second Circuit reached this precise holding when it determined that a municipal landmark law did not pose a substantial burden on the free exercise of religion by restricting a church's ability

to redevelop a landmarked building, even though the law impaired the church's ability to generate increased income for ministerial and charitable activities. *St. Bartholomew's Church*, 914 F.2d 348. Following the church's appeal of the decision, the Supreme Court denied review. *See also Branch Ministries*, 211 F.3d 137 (holding that the loss of tax exemption is not a substantial burden on a church's free exercise, even though the loss of the tax exemption would decrease the amount of money available to the Church for its religious practice); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961 (N.D.Ill. 2003) (finding that the "monetary and logistical burdens" of a zoning ordinance on a church's religious exercise do not rise to the level of substantial burden).

### **C. The HPA Already Provides Two Outlets for Relief to Religious Institutions**

Under the HPA, once a building is landmarked, the property is subject to the HPA's regulatory scheme. However, the regulatory scheme includes exemptions for unreasonable economic burdens and for projects of special merit. These exemptions balance the interests of property owners with historic preservation interests and offer any landowner – including any religious institution – the availability of relief from the HPA's land use constraints. The exemptions also serve to mitigate any substantial burden associated with historic preservation, particularly where the burden – as often is the case – is tied to economic considerations.

#### **1. The Public Interest Exemption**

The first exemption allows demolition, alteration, or subdivision permits to be issued where the permit is "necessary in the public interest," which the HPA defines to include "the construction of a project of special merit." D.C. CODE § 6-1101(b). To qualify as a project of "special merit," a plan or building must have "significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." D.C. CODE § 6-1102(11). The Mayor's Agent has found projects to be of special merit on wide-ranging bases, including, as discussed above, the furtherance of a church's ability to provide community outreach. *See In re Calvary Baptist Church*, H.P.A. 00-601, 01-044 (Mayor's Agent 2000).

#### **2. The Unreasonable Economic Hardship Exemption**

The HPA defines "unreasonable economic hardship" as the taking of an owner's property without just compensation or an excessive financial burden upon low income property owners. D.C. CODE § 6-1102(a)(14). In interpreting the statute, the D.C. Circuit has followed the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and held that an unreasonable economic burden occurs if a property owner shows that no reasonable economic uses for the

building are available. *See, e.g., Embassy Real Estate Holdings LLC v. District of Columbia*, 944 A.2d 1036 (D.C. Ct. App. 2008); *900 G St. Assocs. v. Dep't. of Hous. & Cmty. Dev.*, 430 A.2d 1387, 1390-92 (D.C. Cir. 1981). If a reasonable economic use is available, denial of the permit does not qualify as an unreasonable burden, notwithstanding the existence of a *more* economically beneficial use of the property. *Embassy Real Estate Holding LLC*, 944 A.2d at 26.

3. The HPA's Exemptions Already Protect Against the Imagined Harms that the Proposed Bill Purports to Remediate

The HPA's special merit and unreasonable economic burden exemptions function to alleviate serious hardships that may result from a landmark designation. The possibility that the HPA would cause the type of coercive or oppressive constraints upon religious exercise that could qualify as substantial burdens is minimal even without these exemptions.<sup>7</sup> But with the two exemptions in place, the possibility is totally remote. In sum, the HPA already includes two exemptions that protect religious institutions and other property owners from substantial burdens. As such, the HPA is already harmonious with RLUIPA and RFRA, and the proposed amendment is superfluous.

### **III. THE BARRY BILL RAISES SERIOUS FIRST AMENDMENT QUESTIONS UNDER THE ESTABLISHMENT CLAUSE**

Under the proposed bill, a religious institution could block a building from being landmarked merely by stating that the designation would substantially burden its exercise of religion. No evidentiary showing or other support would be required. The statement would not be subject to any review, such as examination by government officials or interested parties. Accordingly, the proposed bill is contrary to the Establishment Clause because it allows exemptions based upon unsubstantiated and self-interested statements made by any religious institution, but no other type of institution or entity.

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<sup>7</sup> The law certainly would not require religious organizations to choose between pursuing religious beliefs or forbearing government benefits or incurring criminal penalties, nor would it prevent religious organizations from engaging in religious worship or other religious activities. *See Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp.2d 691 (E.D. Mich. 2004) (denial of a demolition permit did not constitute a substantial burden because it did not force the choice between exercising religious beliefs and forgoing significant government benefits or incurring criminal penalties and it did not coerce the abandonment or violation of religious beliefs).

## A. Constitutional Framework

The Establishment Clause requires religious neutrality on the part of the government and prohibits the entanglement of church and state. U.S. CONST., amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established the test for determining whether a law violates the Establishment Clause. Under *Lemon*, a law (1) must not impermissibly entangle church and state; (2) must not have the primary effect of advancing religion; and (3) must have a secular purpose. As discussed below, the proposed bill fails on all three counts.

### 1. Impermissible Entanglement of Church and State

A law may not “substitute[] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.” *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). The “substantial religious burden statement,” which is the operative feature of the proposed bill, flagrantly violates this principle. Under the proposed bill, religious institutions themselves – as opposed to a government decisionmaker – determine whether a substantial burden exists. Further, the bill contemplates no exemption application process, and it does not provide for any governmental or judicial review of a religious institution’s determination of hardship.<sup>8</sup>

For these reasons, the bill bestows upon religious institutions a blanket grant of power to exempt themselves from a law. The Supreme Court has held on numerous occasions that this type of fusion of government and religious functions is impermissible. *See, e.g., Bd. of Educ. v. Grumet*, 512 U.S. 687, 698, 702 (1994) (holding unconstitutional a state’s delegation of school district powers to a religious group); *Larkin*, 459 U.S. at 127 (holding unconstitutional a state’s delegation to churches of veto power over issuance of liquor licenses). By allowing exemptions based upon an unsubstantiated “substantial burden statement,” the bill not only abdicates the exercise of a government function, but it also delegates the function of determining the applicability of a land use law to a group selected based solely upon a religious criterion. For these reasons, the bill contravenes *Lemon* and the Establishment Clause.

### 2. Government Favoritism of Religious Over Secular Entities

By exempting religious entities – but not others – from the constraints of landmark designation, the bill advances religious interests over secular interests. Specifically, the

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<sup>8</sup> The bill does not call for the promulgation of regulations that would establish an application or review process.

exemption would allow religious institutions to profit from the commercial development of their historic properties, and then apply the profit to advance their religious missions. In the absence of a like exemption, secular institutions, such as secular educational or charitable entities, are denied the potential to realize such profits. *Lemon* prohibits the government from preferring religious over secular interests in this manner.

A related problem with the bill is that it does nothing to ensure that religious use or ownership of a building continues after its exemption from landmark designation. Accordingly, a religious institution would be free to declare its building exempt, and sell it to a developer who could tear down and construct a new building for commercial use in its place. The government neutrality toward religion that *Lemon* mandates requires an evenhandedness in conferring benefits to religious and secular entities alike. In this regard, the proposed bill fails because it provides a subsidy exclusively to religious institutions, while leaving secular institutions and other property owners saddled with any incidental costs of landmark designation.

3. Accommodation Laws Pass the Secular Purpose Test Only When They Remediate a Significant Government Interference with Religious Exercise

While *Lemon* dictates that a law must have a secular purpose, a government may enact a law that accommodates religious entities. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). However, the accommodation must be for the purpose of alleviating significant government interference with a religious institution's ability to carry out its mission. *Id.*; *see also Texas Monthly v. Bullock*, 489 U.S. 15, n.8 (1989) (plur. opn. of Brennan, J.) (overturning a sales tax exemption for religious publications because there was neither a "significant state-imposed deterrent to the free exercise of religion," nor a "demonstrated and possibly grave imposition on religious activity").

Supreme Court jurisprudence demonstrates that economic burdens such as those attendant to landmark designations do not qualify as the type of government interference that justifies an accommodation law.<sup>9</sup> *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990) (economic cost of a sales tax that was applicable to religious publications did not burden an evangelical organization in a constitutionally significant manner); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (disallowance of tax deduction for purchase of religious training and counseling from church would unlikely impose a substantial burden); *Bob Jones Univ. v. United States*,

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<sup>9</sup> In the District of Columbia, the availability of an exemption under the HPA's unreasonable economic burden further insulates against any need for an accommodation law.

461 U.S. 574, 603-04 (1983) (“Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets”). In the absence of substantial interference by the government, an accommodation law such as the proposed bill is improper.

## **CONCLUSION**

The proposed bill is unnecessary because any alteration or demolition restrictions that a religious property owner may experience as a result of a historic designation under the HPA does not amount to a substantial burden under the Supreme Court’s Free Exercise jurisprudence, especially in view of the relief mechanisms that are built into the District’s historic preservation scheme. The proposed bill is unwise because it improperly grants government decision-making power to religious entities without any checks or balances; it favors religious entities by conferring exclusive economic benefits; and it offers religious entities an accommodation even though no significant government interference is present.