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August 31, 2015

By U.S. Mail

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Bill de Blasio, Mayor
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Pasquale T. Deon, Sr., Chairman
SEPTA
1234 Market Street
Philadelphia, PA 19107

Re: Papal Visit

Dear Mayor Nutter, Mayor de Blasio, Mayor Bowser, Director Jarvis, Director Clancy, and Chairman Deon:

We have received numerous inquiries expressing concerns about the elaborate preparations for — and potential cost to taxpayers of — Pope Francis’s visit to the United States, which is scheduled to include Washington, D.C., New York, and Philadelphia. In addition to the Pope’s visit, the City of Philadelphia is also hosting the World Meeting of Families, a self-described “international event of prayer, catechesis, and celebration.” *About the Event*, World Meeting of Families, <http://www.worldmeeting2015.org/about-the-event/faqs/> (last visited Aug. 21, 2015).

In particular, concerns have been expressed to us about several aspects of Philadelphia’s plans: The City intends to impose travel and access restrictions during the Pope’s visit and the World Meeting of Families that are not comparable to anything the City has done before. A significant portion of the City will be turned into a “traffic box” that vehicles will not be permitted to enter once they

leave; a smaller portion of the city, as well as some bridges and certain streets, will be closed entirely. City offices will be closed or providing limited services for several days, trash service will be suspended, and public schools will be closed fully. And it appears that, for its Regional Rail Service on September 26 and 27, the Southeastern Pennsylvania Transportation Authority (“SEPTA”) will honor one-week passes that were only available as part of a registration package for the World Meeting of Families; standard one-week or other long-term passes will not be accepted, and people who did not register for that religious conference will only be able to ride Regional Rail on those days by purchasing one-day passes in person at SEPTA stations.

We write to provide guidance on the constitutional limitations on governmental support of and involvement with the papal visit. Specifically, government bodies must not provide any aid to a Pope’s religious activities that goes beyond the provision of services — such as police, safety, and security — that are regularly given for comparable public events of a similar size.

That is because the Establishment Clause of the First Amendment to the U.S. Constitution prohibits government bodies from taking any action that communicates a message of endorsement of religion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000). Instead, the government must maintain “neutrality . . . between religion and nonreligion.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The Establishment Clause thus prohibits the provision of public aid for religious activity, such as worship or religious instruction. *See Mitchell v. Helms*, 530 U.S. 793, 857, 861 (2000) (O’Connor, J., concurring)¹; *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–55 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Nor may government funds be used to pay for items that are themselves secular, but are used to support religious programming. *See, e.g., Mitchell*, 530 U.S. at 837–39 (O’Connor, J., concurring)

¹ The holdings of *Mitchell* are set forth not in Justice Thomas’s plurality opinion, but in a concurrence authored by Justice O’Connor and joined by Justice Breyer, for those two Justices provided the deciding votes in the case while concurring in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Horn v. Thoratec Corp.*, 376 F.3d 163, 175 (3d Cir. 2004); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418–19 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

(Establishment Clause prohibits use of federal funds for secular materials and equipment, such as computers, to advance a parochial school's religious mission); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 418–19, 424–25 (8th Cir. 2007) (payments to religious program — which were used in part for telephone, mailing, computer, copying, and other administrative costs — ultimately and unconstitutionally supported religious indoctrination).

Accordingly, in *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 927–28 (3d Cir. 1980), the U.S. Court of Appeals for the Third Circuit ruled that Philadelphia violated the Establishment Clause by spending taxpayer funds to build a platform for a papal mass, as well as renting chairs and a sound system for the event, planting shrubbery and flowers for it, and building a smaller platform for the event's choir. The court noted that these were “extraordinary expenditures, all a kind never offered to other organizations, religious or non-religious.” *Id.* at 928. The court explained that the aid “connote[d] the state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent.” *Id.* at 930; *see also Doe v. Vill. of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (concluding that city may not hold Mass during town-sponsored festival because a “religious service under governmental auspices necessarily conveys the message of approval or endorsement”).

On the other hand, in *O'Hair v. Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979), the court upheld the provision of police protection, crowd and traffic control, utilities, and trash services for an outdoor papal mass performed on the National Mall. The court explained that the expenditures incurred by the government were “no different from those regularly incurred with any large public gathering, and a comparable level of services and facilities would be extended by the [government] to any group of similar size which possesses a permit to use [the] land.” *Id.* (footnotes omitted). Unlike in *Gilfillan*, the local Archdiocese itself paid for “any possible incremental sums ascribable to the Mass as a religious worship, including the building of the platform for the altar.” *Id.* at 936.

We urge all governmental officials involved to pay heed to and comply with the constitutional principles and authorities we have described. Contemporaneously with this letter, we are sending public-records requests to the government bodies involved to monitor their plans for the visit. If you have any

questions or would like to discuss this issue further, please do not hesitate to contact us.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alex Luchenitser" followed by a stylized flourish.

Alex Luchenitser, Associate Legal Director
John McGinnis, Legal Fellow*

**Admitted in Maryland only. Supervised by Alex Luchenitser, a member of the D.C. bar.*