AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

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October 20, 2015

Mr. Leif A. Dormsjo
Director
District Department of Transportation
55 M Street, S.E.
Washington, DC 20003

Re: The Proposed Bicycle Lane on 6th Street, N.W. Would Not Violate Religious Liberty

Dear Mr. Dormsjo:

We were recently made aware of the controversy surrounding a proposal to add a bike lane to 6th Street, N.W. We take no position on the designation of such a bike lane. Indeed, there are likely many legitimate arguments on all sides surrounding the proposal. We write simply to explain that the claim that the bike lane would violate religious liberty is not one of them.

On October 18, attorneys for the United House of Prayer wrote to you asserting that the designation of the bike lane on 6th Street, N.W. would violate the religious freedom of the church. In particular, the letter asserts that the bike lane would violate the Free Exercise Clause of the First Amendment to the U.S. Constitution, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

As an organization that has worked to defend the freedom of religion and belief for nearly seven decades, we feel obligated to respond to these claims. Not only are they unsupported in law, but these frivolous claims actually threaten religious freedom. Arguing that designating portions of public roads as bike lanes burdens religion belittles true violations of religious liberty. Furthermore, if DDOT were to acquiesce to the church's claims, it would be handing this church and other houses of worship in the District a trump card over all its decisions.

Freedom of religion is a fundamental American value. It means that we are all free to believe or not as we see fit, but it does not mean that houses of worship have veto power over laws and public policy decisions with which they disagree or that cause them inconvenience. Nor does it grant houses of worship the right to dictate what the District government does with its streets and public land.

The Bike Lane Would Not Violate the Free Exercise Clause

The October 18 letter relies on the 1964 Supreme Court case, *Sherbert v. Verner*,[1] for the assertion that "[t]he First Amendment to the U.S. Constitution prohibits government action that 'substantially burdens' the free exercise of religion. A 'compelling interest' must exist before a governmental body

[1] 374 U.S. 398 (1963).

can import a substantial burden on religious activities." The letter fails to mention, however, that a quarter century ago, the Supreme Court completely changed the landscape of free exercise jurisprudence.[2] *Employment Division v. Smith*[3] held that the compelling interest test still applies to laws that *target* religious practice, but it rejected the standard outright for laws that are neutral and generally applicable.

The bike lane proposal is clearly neutral and generally applicable. The "object or purpose" of the bike lane is not "the suppression of religion or religious conduct."[4] Nor is there a masked hostility that "targets religious conduct for distinctive treatment."[5] The bike lane, which would traverse many blocks and in front of many homes, businesses, and other structures, is designed to increase bicycle use and safety and is not targeted at religious practice. Nor would the bike lane actually result in the inability of the church to engage in religious practice. The First Amendment, therefore, would not bar the bike lane on 6th Street, N.W.

The Installation of A Bike Lane Does Not Create a Substantial Burden Under RFRA

RFRA does prohibit the District from substantially burdening religion without a compelling government interest. But the installation of a bike lane surely would not create a substantial burden on the religious practice of this church.

In *Lyng v. Northwest Indian Cemetery Protective Association*,[6] the Supreme Court held that the federal government's decision to *build a new road* and harvest timber in a national forest did not substantially burden the religious practice of three American Indian tribes that had traditionally used the land for religious rituals. The tribes argued that the "proposed road will 'physically destro[y] the environmental conditions and the privacy without which the [religious] practices cannot be conducted.'"[7] The Supreme Court assumed that the new road "could have devastating effects on traditional Indian religious practices,"[8] yet concluded that that this did not constitute a substantial burden. The Court explained that the tribes would not be "coerced by the Government's action into violating their religious beliefs" nor would the construction "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[9]

If the new road construction on the public property in *Lyng,* which potentially had "devastating effects" on the tribes' religious rituals, did not create a substantial burden on religion, surely designating a portion of existing public streets as a bike lane would not substantially burden the church's religion simply because it eliminates some parking spaces on those public streets. Indeed, the bike lane

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[2] The letter actually cites to *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 545 (D.D.C. 1994), for the proposition that the compelling interest test applies, yet even that case explains that the *Smith "*Court held that the compelling interest test applied only where the challenged regulation directly discriminated against religious conduct. The compelling interest test had been previously applied to facially neutral laws in addition to those explicitly directed at religious conduct."

[3] 494 U.S. 872 (1990).

[4] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

[5] *Id.* at 534.

[6] 476 U.S. 439, 441-42 (1998). In *Priests for Life v. U.S. Dept. of Health & Human Srvs.*, 772 F.3d 229, 248 (D.C. Cir. 2014), a case decided after *Burwell* v. *Hobby Lobby Sto*res*, Inc*, 134 S.Ct. 2752 (2014), the D.C. Circuit relied on *Lyng* to describe what constitutes a substantial burden under RFRA.

[7] *Id.*at 449.

[8] *Id.*at 551.

[9] *Id.*at 449.

would not preclude the church or its members from engaging in any religious practices nor from using the public roads in the same manner as anyone else.

Accordingly, RFRA does not preclude the bike land proposal.

RLUIPA Does Not Apply to District Decisions About District Land

RLUIPA applies to institutionalized persons and land use regulations. In accordance with the statute:

> "land use regulation" means 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 land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.[10]

The District is proposing to designate a portion of its roads as a bike lane. The church lacks any property interest in those roads. Accordingly, RLUIPA does not even apply to the bike lane proposal.

Conclusion

Again, we take no position on whether the District should designate part of 6th Street, N.W. as a bike lane. We write this letter simply to explain that the Free Exercise Clause, RFRA, and RLUIPA do not prohibit the District from designating the bike lane. These religious freedom protections are designed to protect individuals and houses of worship from real violations of religious liberty—losing access to parking spaces on a public road does not amount to religious persecution. We hope that these frivolous claims neither dominate the debate nor dictate its outcome. Such a result would do a disservice to the real issues surrounding the bike lane proposal and real fights for religious liberty.

Sincerely,

Maggie Garrett
Legislative Director

cc: Muriel Bowser, Mayor Council of the District of Columbia
Rashad Young, City Administrator of the District of Columbia
Phil Mendelsohn, Chair, Council of the District of Columbia
Mary M. Cheh, Chair, Committee on Transportation & the Environment, Council of the District of Columbia
Charles Allen, Councilmember, Council of the District of Columbia
Karl Racine, Attorney General of the District of Columbia

[10] 42 U.S.C. § 2000cc-5 (5).