No. 18-364

In the Supreme Court of the United States

MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the International Municipal Lawyers Association (IMLA) is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law.

This case is of particular concern to local government attorneys. Each of the nearly 50,000 local governments in this nation contains historic structures. In the last fifty years, historic preservation has become an integral part of the body of laws administered by Federal, State and local governments. Also in the last fifty years, all levels of government have enacted financial aid for historic preservation.

Notwithstanding the prevalence of and need for historic preservation in this country, there exists today no clear rule whether direct financial aid to a religious organization for the preservation of historic structures is constitutional. As set forth in the Petition, courts are intractably divided on this question. The split in authority that has emerged on this issue is due largely to this Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), as

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or any person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel for all parties received notice and consented to the filing of this brief.

courts are unclear as to the scope of the decision. See *Trinity Lutheran*, 137 S. Ct. at 2024, n.3. Given the confusion in the courts, it is not surprising that local government attorneys are struggling for clarity in this area of the law as well.

SUMMARY OF ARGUMENT

It is fair to say that more than any other level of government, it is the cities, towns, and counties of this country which adopt and enforce historic preservation programs. Historic preservation today is largely accomplished by a special form of zoning, called historic zoning. Local governments create historic districts, which generally contain religious structures. Historic districts cover geographic areas and include every structure within that area based on the "tout ensemble" doctrine. Thus, religious structures cannot be excluded from historic districts without impairing the integrity of the entire district. Furthermore, the experience of the last fifty years demonstrates that historic preservation requires financial aid, however, tax credits, which generally help with historic preservation are not available for religious institutions. Religious organizations therefore must pursue historic preservation through other means like the neutral grants at issue in this case.

Thus, the issue is not whether to include religious structures within the reach of historic preservation laws. That reality already exists since historic districts nearly always include religious structures. The question then, is whether local governments can provide financial aid to preserve religious structures, which the local governments must consider in the

context of their existing regulation of religious structures.

For these reasons, it is likely that the issue left unanswered in *Trinity Lutheran* will recur and local governments are caught in the middle. They will be sued if they give aid, as they were in this case, and sued if they do not, as they were in *Trinity Lutheran*. Local governments and their attorneys will be involved in most every conceivable historic preservation challenge. Certiorari should be granted to review the decision below because it squarely presents a conflict over whether providing financial assistance to repair or restore a religious institution as a part of local government's generally available historic preservation fund is consistent with the Free Exercise Clause of the First Amendment. This case provides the Court with an appropriate vehicle to provide a uniform and predictable rule for local governments' historic preservation grant programs involving religious institutions under the First Amendment. Such a standard would allow government lawyers to provide intelligible advice concerning grant funding under widely used historic preservation programs.

ARGUMENT

I. DUE TO THE PERVASIVE REGULATION OF RELIGIOUS STRUCTURES AT THE LOCAL LEVEL, THERE IS A NEED FOR A RULING ON THE CONSTITUTIONALITY OF GRANTS FOR THE PRESERVATION OF HISTORICALLY SIGNIFICANT RELIGIOUS STRUCTURES.

A. Historic Preservation is a Major Program Administered Mainly by Local Governments Through Historic Districts.

Almost 100 years ago, this Court decided *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), which upheld the constitutionality of zoning. Due in large part to that decision, zoning swept the country and today almost every local government exercises planning and zoning powers. See generally Michael A. Wolf, The Zoning of America: Euclid v. Ambler (2008). Today, many local communities throughout the country have adopted historic preservation laws which, like zoning, utilize the police powers to achieve a public purpose. See National Park Service, Working On the Past in Local Historic Districts, https://www.nps.gov/tps/education/workingonthepast/ (last visited Oct. 10, 2018). Zoning is aimed to control land use and often applies to undeveloped areas. Historic preservation laws on the other hand, address the built environment and are not concerned with use at all. Greg Dale and Michael Chandler, Zoning Basics, http://plannersweb.com/2001/04/zoning-basics/ (last visited Oct. 10, 2018).

This Court explained the two primary rationales behind historic preservation laws as follows:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. [Historic] conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107-08 (1978) (internal quotations omitted).

For historic preservation, the equivalent of the *Euclid* case was the enactment of the National Historic Preservation Act of 1966, 54 U.S.C. § 300101 *et seq*. (2012). Since that time, the National Register of Historic Places has listed over 93,000 buildings as having historic or architectural merit. See National Park Service, What is the National Register?, https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm (last visited Oct. 12, 2018). The Act is a comprehensive statute, setting up a program for the listing of individual structures and

historic districts on the National Register of Historic Places. 54 U.S.C. §§ 302101 – 302108. It established detailed criteria for listing historic structures and assigned the task of nominating properties to the individual states, after receiving input from local governments and property owners. *Id.*

The Act does not regulate historic structures. See National Park Service, National Register of Historic Places, Frequently Asked Questions, https://www.nps.gov/subjects/nationalregister/frequently-asked-questions.htm (last visited Oct. 10, 2018). Instead, the famous "Section 106" of the Act, 54 U.S.C. § 306108, requires units of the Federal Government to undertake specialized reviews when a federal action, or federally financed action, will have an impact on resources listed on the National Register or those eligible to be listed. *Id.* Although not a land use regulation in the ordinary sense, Section 106 has had a major impact throughout the United States, particularly in dealing with issues such as the location of interstate highways. See Carson Bear, Preservation Basics, National Trust for Historic Preservation, https://savingplaces.org/stories/preservation-basics (last visited Oct. 10, 2018).

Although the Act did much to shape our conception of historic resources through its criteria and the professional program it established, the 1966 legislation fell short of directly protecting historic structures. Unless federal financing or a federal program were present, an owner could freely demolish or alter a historic structure. See National Park Service, National Register of Historic Places, Frequently Asked Questions, https://www.nps.gov/subjects/nationalregister/frequently-asked-questions.htm

(last visited Oct. 10, 2018). To fill in this gap, the states enacted enabling laws authorizing local governments to enact laws to protect historic resources. See*, e.g.,* N.C. Gen. Stat. §§ 160 A-400.1 – 160 A-400.14 (2018); N.M. Stat. §§ 18-8-1 – 18-8-8 (2018); 20 Ill. Comp. Stat. 3420/1 – 3420/6 (2018); See generally National Trust for Historic Preservation, State Preservation Laws, https://forum.savingplaces.org/learn/fundamentals/preservation-law/state-laws (last visited Oct. 12, 2018). Today historic districts created and administered by counties, towns, and municipalities exist throughout the United States, ranging from Nashville to New York City, from Gettysburg to Tulsa, amounting to an estimated 2,300 in number, and each district encompassing many individual structures. See National Park Service, Bringing Preservation Home, Working On the Past in Historic Districts, https://www.nps.gov/tps/education/workingonthepast/ (last visited Oct. 10,2018). The City of New York alone has 141 historic districts; Chicago, 50; Boston, 9; San Francisco, 11; Washington D.C., 53. See *e.g.* Tanay Warerkar, *NYC's enhanced interactive landmarks map is a deep dive into city's historic* districts, Curbed, Dec. 18, 2017, https://ny.curbed.com/2017/12/18/16791546/new-york-city-landmarks-interactive-map-historic-districts; Tom Acitelli, *Boston Historic Districts and You*, Curbed, Mar. 25, 2013, https://boston.curbed.com/2013/3/25/10260634/the-hubs-historic-districts-and-you; City of Chicago, Landmark Districts, https://www.cityofchicago.org/city/en/dataset/landmark_districts.html (last visited Oct. 18, 2018); City and County of San Francisco, Preservation Bulletin No. 10, http://default.sfplanning.org/Preservation/bulletins/HistPres_Bulletin_10.PDF (last visited Oct. 18, 2018); D.C. Office of Planning, DC Historic Districts,

https://planning.dc.gov/page/dc-historic-districts (last visited Oct. 18, 2018). Many historic districts are extensive. The Upper East Side Historic District in Manhattan, for example, stretches from 59th Street to 78th Street. See Friends of the Upper East Side Historic Districts, https//www.friends-ues.org/historic-district-and-landmarks/upper-east-side-historic-di (last visited Oct. 10, 2018). The sheer volume of historic districts in this country underscores a need for a ruling on the issue presented in this case.

B. The Venerable "Tout Ensemble Doctrine" Means That Every Structure in the District is Important, Religious or Not.

A historic district is different from an ordinary zoning district. If you look at the zoning map of a particular area, you will see the map assigns various zoning districts to different areas, allowing single family here, multiple family there, commercial uses in other areas, and so on. See *e.g.*, District of Columbia Official Zoning Map, http://maps.dcoz.dc.gov/zr16/#1=11&x=-8576100.80879499&y=4706465.769289769&mms=18!26!21!24!22!4!8!1!2&dcb=0; City of Chicago, Zoning and Land Use Map, https://gisapps.cityofchicago.org/ZoningMapWeb/?liab=1&config=zoning; City and County of San Francisco, Zoning Map, http://sf-planning.org/zoning-map (last visited Oct. 12, 2018). Historic zoning is an overlay zone; it does not alter the underlying conventional zoning. See Greg Dale and Michael Chandler, Zoning Basics, http://plannersweb.com/2001/04/zoning-basics/ (last visited Oct. 10, 2018). Instead, it establishes a district, which controls all structures in the designated area.

The definition of a historic district from the Maryland enabling law is typical: "'District' means a significant concentration, linkage, or continuity of site, structures, or objects united historically or aesthetically by plan or development." Md. Code, Land Use, § 8-101 (2018).

The concept of a historic district is thought to derive from New Orleans, which first authorized an ordinance creating a historic district in 1925. That effort, originally advisory, was given teeth by an amendment in 1936 to the Louisiana Constitution. La. Const. art. XIV, § 22A. The historic district created in New Orleans was for the "Vieux Carre," the French Quarter. The idea of a district emerged from the concept of the "tout ensemble" doctrine, meaning all together. Applied to a historic district, it means that every structure matters, every act affecting the district matters. The Louisiana Supreme Court explained the reasoning behind the doctrine:

> And there is nothing arbitrary or discriminating in forbidding the proprietor of a modern building, as well as the proprietor of one of the ancient landmarks, in the Vieux Carre to display an unusually large sign upon his premises. The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism.

City of New Orleans v. Pergament, 198 La. 852, 859 (1941).

The "tout ensemble" approach, pioneered by New Orleans, forms the intellectual underpinning for historic districts established by local governments throughout the United States. See*, e.g., A-S-P-Associates v. City of Raleigh*, 298 N.C. 207 (1979). When a property is in a historic district, the historic preservation arm of the local government, called a historic commission or landmarks commission, must approve any alteration of its exterior. See *e.g.,* D.C. Code. § 6-1104; Springfield Guide for Historic Properties, https://springfieldohio.gov/wp-content/uploads/2016/02/searchableHistoricPropertyDesignGuidelines6.pdf (last visited Oct. 12, 2018); Fort Worth, Demolition Delay, http://fortworthtexas.gov/planninganddevelopment/historic-preservation/demotion-delay/ (last visited Oct. 12, 2018). The owner must obtain a permit for the alteration, generally called a certificate of appropriateness, and a determination that the alteration is consistent with the historic standards in the district. See*, e.g.,* City and County of San Francisco, Planning Department, Historic Preservation Commission, http://sf-planning.org/historic-preservation-commission (last visited Oct. 10, 2018)

In other words, the very nature of historic district zoning means that religious structures cannot be excluded from historic preservation. The "tout ensemble" doctrine means that every building matters, even religious structures. Often religious structures form important elements of historic districts.[2] In New

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[2] The predominance of religious buildings in American communities has a long history. The colonial meeting houses began as worship sites and eventually evolved into public meeting places. See *generally* Peter Benes, Meetinghouses of Early New England

Orleans, for example, Jackson Square, dominated by St. Louis Cathedral, is said to be the center of the French Quarter. Temple Emanu—El in Manhattan is a landmark on the Upper East Side. Twelve churches exist in Boston's Back Bay Architectural District, established in 1966. See City of Boston, Back Bay State Road/Back Bay West Area Architectural Conservation District, https://www.boston.gov/historic-district/back-bay-architectural-district (last visited Oct. 10, 2018). In even the smallest communities, the religious structure is often a cherished landmark.

The Federal Government also recognizes the importance of historic districts. When the National Register program began, the Federal regulations precluded "…properties owned by religious institutions or used for religious purposes,…" from being included in the Register. 36 C.F.R. 60.4. The program provided for an important exception: "However, such properties will qualify if they are <u>integral parts of districts</u> that do meet the criteria or if they fall within the following categories: (a) A religious property deriving its primary significance from architectural or artistic distinction or historical importance." *Id.* (emphasis added)

Thus, the Federal Government recognizes the special character of a religious structure within a historic district. The concern is not simply with the

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(2012); Pennsylvania Historical & Museum Commission, Meetinghouses 1700 – 1900, http://www.phmc.state.pa.us/portal/communities/architecture/styles/meetinghouses.html (last visited Oct. 12, 2018). The first English settlement at Jamestown included churches. See Curtis et al., Christianity in Jamestown, http.//www.christianity.com/church/church-hstory/timeline/1601-1700/Christianity-in-j (last visited Oct. 10, 2018).

historic character of the structure itself, but with its effect on the district. The integrity of historic district puts an entirely different light on the question of aid to the owner of a religious structure. The vast majority of religious structures regulated by local governments will be in historic districts. Their value lies not only in the value of the individual structure, but its value as a part of a historic district.

C. Effective Historic Preservation Requires Financial Aid.

Experience demonstrates that historic preservation requires financial assistance. It may be cheaper, for example, to demolish a historic building than to restore and re-use it. The findings in the National Historic Preservation Act of 1966, for example, note that historic buildings are being lost with increasing frequency. 54 U.S.C. § 300101. Furthermore, modern floor plans may be more commercially attractive and utility costs may be higher due to the lack of insulation and the nature of the windows. Repairs may require specialized materials and workmanship, which can be difficult and expensive to obtain. See National Trust Insurance Services LLC, The Costs of Historic Reconstruction, https://nationaltrust-insurance.org/customer-resources/blog/5380 (last visited on Oct. 10, 2018). Market forces often pressure owners to demolish historic buildings and rebuild something modern for financial reasons.

In theory, preservation ordinances enacted under the police powers may preserve historic buildings, though there are constitutional limits, which are discussed more fully below. Despite the incomplete reach of the police powers, governments nonetheless

appropriate funds for historic preservation. Perhaps the most successful program in this regard is the federal rehabilitation tax credit for historic preservation, a credit of 20% of rehabilitation cost against the federal income tax for income producing properties. 26 U.S.C. § 47. According to the National Park Service, which administers it, the tax credit has leveraged $84 billion in preservation projects and contributed to the saving of 42,293 historic buildings since its enactment in 1976. See National Park Service, Technical Preservation Services: Tax Incentives for Preserving Historic Properties, https://www.nps.gov/tps/tax-incentives.htm (last visited Oct. 12, 2018). States have adopted similar tax credits as well and often local property tax credits exist. See*, e.g.,* Ohio Historic Preservation Tax Credit Program https.//www.development.ohio.gov/cs/cs.ohptc.htm (last visited Oct. 10, 2018); New York State, Tax Credit Programs, https://parks.ny.gov/shpo/tax-credit-programs/ (last visited Oct. 13, 2018); Michigan State Housing Development Authority, Historic Preservation Tax Credits, https://www.michigan.gov/mshda/0,4641,7-141-54317_19320_62001---,00.html (last visited Oc.t 13, 2018); State of Colorado, The Preservation of Historic Structures Tax Credit, https://choosecolorado.com/doing-business/incentives-financing/the-commercial-historic-preservation-tax-credit/ (last visited Oct. 13, 2018).

Just as with any historic building, financial assistance is often necessary to ensure the preservation of religious structures. However, the Federal tax credit program is not available since religious structures owned by nonprofit entities do not pay taxes. 26 U.S.C. § 501 (c)(3). Nor are the State and local tax credits available for the religious structures for the same

reason. See, *e.g.,* Ala. Const., art. IV, § 91 (stating religious properties exempt from taxation). The need remains for financial assistance in carrying out the burdens of costly historic preservation, particularly for religious structures in a historic district. In fact, if it is determined that aid cannot be given to the owner of a religious structure, it may be that the owner of the religious structure is the only owner in the district not eligible for financial assistance.

Given the widespread adoption of historic districts throughout the United States and the lack of availability of a tax credit for religious institutions, local government attorneys need clarity as to the question of financial assistance for the preservation of religious structures. Because of the pervasive nature of historic zoning, which already regulates religious structures, the issue is bound to occur with increasing frequency in the years to come.

II. LOCAL GOVERNMENTS NEED A CLEAR AND ADMINISTRABLE RULE ON FINANCIAL AID FOR RELIGIOUS STRUCTURES AS THEY ADMINISTER HISTORIC DISTRICTS OR ELSE THEY WILL FACE LAWSUITS REGARDLESS OF THEIR COURSE OF ACTION.

The ramifications of the decision below presents a great concern to *Amicus*. Given the doctrine of the "tout ensemble," that every structure matters, there is a threat to historic districts throughout the United States if religious structures are excluded from full participation in the preservation programs applicable to a district. The preceding discussion of historic preservation laws and their evolution demonstrates the

pressing need for a ruling on this question: may a unit of government provide financial aid to a religious institution to assist historic preservation?

This question was left unaddressed in *Trinity Lutheran* and there are compelling arguments on either side of this question, which has resulted in a split of authority. The highest courts in both Massachusetts and New Jersey have analogized historic preservation grants, which provide funds to religious structures, to grants for religious instruction, which were found to violate the Establishment Clause in *Locke v. Davey*, 540 U.S. 712 (2004). *Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, 181 A.3d 992, 1012 (N.J., 2018); *Caplan v. Town of Acton*, 479 Mass. 69, 103-04 (Mass. 2018) (Kafker, J. concurring).

On the other side of the split, the Sixth Circuit upheld a grant for the exterior of a church against an Establishment Clause challenge. *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.,* 567 F.3d 278, 282 (6th Cir. 2009). At issue in *American Atheists,* was Detroit's facially neutral grant program to revitalize the downtown area. *Id.* at 282-84. The Sixth Circuit concluded that, "[b]y endorsing all qualifying applicants, the program has endorsed none of them, and accordingly it has not run afoul of the Establishment Clause." *Id.* at 282. Similarly, the Supreme Court of Vermont concluded that plaintiffs were unlikely to succeed in demonstrating that providing grant funds to repair and paint the exterior of a church was not akin to providing funding for playground resurfacing as in *Trinity Lutheran*. *Taylor v. Town of Cabot*, 178 A.3d 313, 323-25 (Vt. 2017). The

Court in *Taylor* warned that, "[i]n fact, denying the [church] secular benefits available to other like organizations might raise concerns under the Free Exercise Clause of the United States Constitution." *Id.* at 323. As set forth in the Petition, courts are divided on this important and recurring issue, and local government attorneys need this Court's guidance to properly advise their clients.

In addition to the split of authority outlined in the Petition, and to further complicate matters for local government attorneys, the inclusion of religious structures in historic districts creates its own set of constitutional and legal challenges. Although the regulation of historic districts is a valid exercise of local government police power, there are limits to that power under the Takings Clause of the Fifth Amendment. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (analyzing whether New York City's Landmark Law constituted a Taking under the Fifth Amendment). Additionally, in the case of regulation of religious structures in historic districts, local governments face the added possibility of a claim under the Free Exercise Clause or parallel state constitutional provisions.

For example, in *First Covenant Church v. City of Seattle*, the Supreme Court of Washington held that applying Seattle's Landmark Preservation Ordinance to the church, which would have required it to get approval before it sought to make changes to its exterior violated the Free Exercise Clause of the Constitution. 840 P.2d 174, 185 (1992). In so concluding, the court noted that the "possible loss of significant architectural elements is a price we must

accept to guarantee the paramount right of religious freedom."[3] *Id.* Similarly, in *Society of Jesus of New England v. Boston Landmarks Commission*, the court concluded that the designation of the interior of a church as a landmark was invalid under Article 2 of the Declaration of Rights of the Massachusetts Constitution, which is analogous to the Free Exercise Clause. 564 N.E.2d 571, 574 (Mass. 1990). The court in *Boston Landmarks Comm'n* noted 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." *Id*. Likewise, in *Keeler v. Mayor of Cumberland,* a church successfully sued the city under the Free Exercise Clause based on the city's refusal to permit the church to demolish its monastery and chapel, which had been designated historic landmarks. 940 F. Supp. 879, 886-87 (D. Md. 1996).

The examples of *First Covenant Church, Boston Landmarks Commission,* and *Keeler* in light of the conflict that has emerged after *Trinity Lutheran* are illustrative of the competing constitutional principles local government attorneys must navigate in this area.

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[3] In *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York,* a church sued the city for a violation of the Free Exercise Clause based on the city's designation of the church as a historic landmark, which prevented the church from replacing a church owned building with an office tower. 914 F.2d 348, 350-51 (2d Cir. 1990). While the Second Circuit ultimately concluded that the New York City law was a "a valid, neutral regulation of general applicability" and that it therefore did not violate the Free Exercise Clause, the City was nonetheless tied up in litigation for years over the issue, which is far from settled. *St. Bartholomew's Church,* 914 F.2d at 355-56.

If a local government regulates a religious structure in a way that prevents it from demolishing its building due to its historic significance, the local government can be sued under the Free Exercise Clause by religious entities seeking to modernize their buildings. See *First Covenant Church,* 840 P.2d at 185; *Boston Landmarks Commission,* 408 Mass. at 43; *Keeler,* 940 F. Supp. at 886-87. To prevent the deterioration of the historic district then, the local government may seek to provide funding to religious structures and non-religious structures alike through a neutral grant program like the one at issue in this case to help incentivize building owners to preserve the integrity of their historical structures. However, if it does, the local government can be sued for an Establishment Clause violation for providing financial aid to a religious institution, as was the case below. See *Morris Cty. Bd. of Chosen Freeholders*, 181 A.3d at 1012; see also *Caplan*, 479 Mass. at 95.

If on the other hand, the local government determines the Establishment Clause mandates that they exclude religious structures from their historical grant preservation program, the local governments may still face challenges for religious discrimination under *Trinity Lutheran*. See *Taylor* 178 A.3d at 323. By virtue of being in the district, the owner of a religious structure would argue that it should qualify for every consideration for that grant in the same manner as every other owner in the district. If the owner is deemed not eligible for a grant, the owner will claim it can only be because of its religious status under *Trinity Lutheran.* Even before *Trinity Lutheran*, Judge Sutton explained the problem facing local governments under the Establishment Clause. “The

Establishment Clause requires neutrality toward religion, not hostility. [W]e must be careful, in protecting the citizens of [Detroit] against state established churches to be sure that we do not inadvertently prohibit [Detroit] from extending its general state law benefits to all its citizens without regard to their religious belief." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297-93 citing *Everson v. Bd. of Educ. of Ewing,* 330 U.S. 1, 16 (1946).

Local government attorneys face the challenging task of reconciling historic preservation practice, as it has evolved over the last fifty years, with the sometimes-competing Free Exercise and Establishment Clause issues outlined above. Financial aid to religious structures, particularly those with active congregations, heightens this difficulty. For local governments, the issue is not just the validity of the grant for the individual religious structure, but the effect on the district as a whole. Without this Court's intervention, local governments will continue to be sued regardless of what they do, with no good options as they seek to preserve the integrity of their historic districts.

CONCLUSION

As the foregoing demonstrates, historic preservation is pervasive throughout the United States. Religious structures are an integral element of this effort. The experience of the last fifty years demonstrates that financial assistance is necessary for successful historic preservation and that historic preservation at the local level is conducted mainly through historic districts, which include all structures, religious or not. The issue

of aid to religious structures will be on the front burner in the cities, towns, and counties throughout the country. Without this Court's intervention, local governments will be embroiled in litigation no matter what course of action they choose and IMLA therefore urges the Court to grant the Petition to provide clarity for local governments on the issue of financial aid for historic preservation of religious structures.

Respectfully submitted,

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