No. 18-364

In the Supreme Court of the United States

MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, THE MORRIS COUNTY PRESERVATION TRUST FUND REVIEW BOARD, JOSEPH A. KOVALCIK, JR., IN HIS OFFICIAL CAPACITY AS MORRIS COUNTY TREASURER,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION AND DAVID STEKETEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY BRIEF OF PETITIONER

ERIC S. BAXTER
Counsel of Record
DIANA M. VERM
NICHOLAS R. REAVES
CHASE T. HARRINGTON*
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Petitioners

*Admitted only in Colorado; supervised by D.C. bar members.

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INTRODUCTION

Respondents argue as if Morris County's historic preservation program *favored* religious sites and *excluded* the secular. Far from it. Before the New Jersey Supreme Court barred churches with active congregations, all nonprofits could participate. And once Respondents' conjured facts are set aside, they offer no reason to delay a ruling on the actual facts presented.

Morris County's historic preservation program is not "narrowly defined" to limit funding to "charitable conservancies" that are "dedicated" solely or primarily to historic preservation. Opp.1, 12. *Any* nonprofit is eligible if its purposes "include" historic preservation. Supp.App.1a; App.103a. Morris County's preservation program is at least as "generally available" as the program in *Trinity Lutheran*, such that excluding religious organizations because of their religious status triggers strict scrutiny.

Respondents' lengthy recitation of religious grantees' mission statements is also irrelevant. Religious grantees, like all others, must certify that the grants are used for their intended purpose, typically by entering a 30-year easement that mandates "proper maintenance," "limit[s] changes in use or appearance," and "prevent[s] demolition of the property." App.128a. These restrictions ensure that government funding is used as intended, while allowing *all* recipients to continue pursuing their primary missions.

Respondents concede that "[a]t some point" the Court "may need to address whether historic preservation funds must be available for churches when they are similarly available to secular private enti-

ties." Opp.25. This is that case. Leaving the issue to further percolate will only place historic buildings across the country at greater risk. Four courts have now applied the principles of *Trinity Lutheran* to historic preservation, dividing 2-2 on whether aid to churches is inappropriate "religious use." And the court below, over objection from Justice Solomon and in conflict with two other courts, *categorically* excluded historic structures used by active church congregations. This case thus presents a perfect next step for the Court to address, on a discrete and critical issue, when the exclusion of religious groups from generally available programs violates the Free Exercise Clause.

ARGUMENT

I. The decision below deepens the conflicts over *Trinity Lutheran*'s application to historic preservation programs.

Respondents quibble about minor differences in the conflict-defining cases, but cannot deny that the conflicts exist. They claim that *Taylor* v. *Town of Cabot* is "quite different" from this case, because the Supreme Court of Vermont "stressed" that the funds there "were not used to support religious worship." Opp.20. But Respondents miss the point. The funds in *Taylor* were used for "painting three exterior sides" of a church and "examining window sills for structural damage." 178 A.3d 313, 322-23, 320 (Vt. 2017). Likewise, Morris County provides construction funding for a building's exterior and mechanical, electrical, and plumbing systems only. App.108a. This similarity *underscores* the split: *Taylor* held that exterior and structural work *did not* support "wor-

ship," 178 A.3d at 324, while the court below held that exterior and structural work *did* support "religious uses," App.38a.

Respondents further claim that *Taylor* "stressed inadequacy of the record to assess" how the funds were being used. Opp.20. That is incorrect. *Taylor* concluded—on the known facts that grants were used for external and structural repairs—that "plaintiffs' path to success on the merits [was] narrow and challenging." 178 A.3d at 322-23. The court simply noted that the record was "not fully developed" with respect to *other* "anticipated and permitted use[s]." *Id*. at 322; see also *id*. at 324-25.

Respondents also argue that in *Taylor*, the Town of Cabot gave $10,000 to one church while Morris County "awarded $4,634,394 or 41.7%, to 12 churches." Opp.20. But they never explain the constitutional significance of the varying amounts. Nor did the court below make a *de minimis* exception: all churches are excluded regardless of amount.

Respondents next argue that *American Atheists, Inc.* v. *City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009), is "quite different," primarily because it predated *Trinity Lutheran*. Opp.22. But Judge Sutton's prescient opinion tracks *Trinity Lutheran*'s logic, concluding that "the key concern of both Religion Clauses" is "that the government will *not* act neutrally toward religion" and that excluding churches from preservation programs would send a message "of hostility" toward religion.

American Atheists, 567 F.3d at 292, 302 (emphasis in original).[1]

In short, Respondents do nothing to undermine the existence or importance of the split. Instead, they insist this case does not fall within the split because it "arises in the context of a program that favors religious entities over secular ones." Opp.25. Not so.

The argument rests on Respondents' claim that "[m]ost secular private institutions are not eligible" for funding because eligible applicants are limited to governments, "charitable conservancies," and "religious institutions." Opp.18, 1. This fails for at least two reasons. First, a government program need not be "restriction-free" to constitute a "generally available public benefit program." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017). Indeed, the program in *Trinity Lutheran* was itself limited to "public and private schools, nonprofit daycare centers, and other nonprofit entities" that met the qualifying purposes of the grant, with funds ultimately distributed "on a competitive basis" to an even smaller group. *Id.* at 2017.

Second, contrary to Respondents' assertion, the "charitable conservancies" eligible for funding are not "narrowly defined." Opp.1. They include *any* "corpo-

[1] Respondents argue there is a countervailing right "of the taxpayers to be free from the violation of free exercise of religion," Opp.11, but they raised no such claim below, relying exclusively on the New Jersey's constitution's no-aid provision. The same concern could have been raised in *Trinity Lutheran*, but did not preclude this Court's ruling.

ration * * * exempt from federal income taxation" whose stated purposes "include * * * preservation of historic properties." Supp.App.1a; App.103a. Respondents cite no evidence that any nonprofit has ever been denied aid. To the contrary, the superior court concluded that preservation funds are broadly available. App.83a.[2] The requirement that secular nonprofits articulate a purpose of historic preservation is more form than substance.

For all grant recipients, the County has taken numerous measures to ensure that funds are used for their intended purpose. Properties must be listed on, or eligible for, state or national historic registries. Recipients of aid over $50,000 must execute a 30-year easement that provides public access and ensures compliance with preservation standards. See Pet.5-6; App.105a-111a; 128-29a. On top of this, religious in-

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[2] Indeed, many nonprofits with core purposes entirely unrelated to historic preservation have qualified for grants. Homeless Solutions, a nonprofit charity, received funds to preserve the Mount Kemble Home for elderly women. See Morris County Historic Preservation, https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Morristown-Town-Mount-Kemble-Home.pdf. Other grant recipients considered charitable conservancies include the Woman's Club of Morristown and the South Street Theater Company. Morris County Historic Preservation, https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Morristown-Womans-Club-of-Morristown.pdf; Morris County Historic Preservation, https://planning.morriscountynj.gov/wp-content/uploads/2014/11/2016-Morristown-Morristown-Community-Theater.pdf. See also Planning & Preservation, County of Morris, N.J., https://planning.morriscountynj.gov/divisions/prestrust/historic/fundedsites/ (listing all grants).

stitutions can only use funding for a narrowed list of activities. App.108a. Rather than religious favoritism, the program reflects a tailored effort to preserve all of Morris County's historic buildings, taking into account the unique nature of different property owners and users.

Nor should the *government's* purpose in providing aid be conflated with a *church's* religious mission. Opp.2-4. After all, the church in *Trinity Lutheran* "operate[d] * * * for the express purpose of carrying out the commission of * * * Jesus Christ as directed to His church on earth," 137 S. Ct. at 2027 (Sotomayor, J., dissenting), without forfeiting its right to participate in a generally available government program.[3]

This case thus falls squarely within the 2-2 split on "religious use" and the 2-1 split on categorical exclusion. And once Respondents' stray arguments are cleared away, it becomes obvious that this case is an ideal vehicle for resolving both. Despite all of Respondents' hand waving, they fail to identify a single issue that needs further development in the lower

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[3] Respondents are concerned that one grant was used "partly to restore two stained-glass windows," one of which "is only visible from inside the church." Opp.5. But windows are inherently part of a building's structure and historical value. And one purpose of the 30-year easement is to ensure public access to appreciate the building's architecture and artistry. App.129a. These facts simply reinforce that this case is a good vehicle for the Court to clarify whether there are legitimate antiestablishment concerns with secular funding that incidentally benefits religion.

courts. See Opp.25. America's historic sites are already in desperate need of restoration. National Trust Br. at 14-15. Further delay is unwarranted.

II. The decision below conflicts with *Trinity Lutheran*.

Respondents argue the decision below is distinguishable from *Trinity Lutheran* because the aid there was "solely for the completely secular purpose" of building safer playgrounds. Opp.14. But it can also be said that the funds here are "solely for the completely secular purpose" of historic preservation. Regardless of how funding is characterized, the underlying reality is the same: under both government programs, religious organizations incidentally benefit from improvements to their property. As *Trinity Lutheran* confirms, that alone cannot justify exclusion.

Moreover, it is unavailing to suggest that preservation grants allow religious organizations to shift their own resources to religious ends. See Opp.6, 12. Grant recipients still pay at least 20% of preservation costs. App.109a. And churches generally lack funds sufficient to pay for historically authentic preservation. Without government aid, they might be forced to prioritize affordability over historicity, or even to abandon their site and relocate. The churches will continue their religious missions either way. The grants merely fill their anticipated, secular purpose of ensuring authentic preservation.

To further distinguish *Trinity Lutheran*, Respondents repeat their claim that Morris County's program explicitly favors religion. That argument has already been refuted. See *supra* Part I. Moreover, the decision below did not somehow level the playing

field and require churches to satisfy the same criteria as other nonprofits.[4] It categorically excluded all religious groups, even if they include a purpose of historic preservation. Moreover, the *reason* churches have been excluded from the program is the same as in *Trinity Lutheran*: their religious character. According to Respondents, churches are now eligible only if the building is "used entirely for secular purposes," Opp.24-25 n.1. Thus, to preserve its historic building, a church would have to "renounce its religious character," stop using its building as a house of worship, and allow it to become a relic. *Trinity Lutheran*, 137 S. Ct. at 2024.

Petitioners do not claim that the government is "constitutionally required" to include churches just because it includes "any other buildings," as that is far from this case. Opp.11. Petitioners simply argue that churches cannot be excluded for the sole reason that they use their sites for religious services. Religious institutions occupy some of the key historic buildings that meet Morris County's preservation

[4] Such "leveling" might actually have the perverse effect of preventing historic churches from applying for grants if their religious beliefs prohibit including any secular ends in their core religious mission. And notably, the most recent version of the program makes an exception for educational institutions to also apply for grants without an expressly stated historic purpose. Morris County regulations 5.5(5), https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Chapter-5-Historic-Preservation.pdf. Viewed through this lens, the program as crafted by the County appropriately accommodates diverse organizations and makes the funding accessible to any deserving nonprofit.

aims. Excluding those churches simply because they are religious violates *Trinity Lutheran*.

This exclusion is also the reason *Locke* does not apply: applicants cannot be required "to 'choose between their religious beliefs and receiving a government benefit.'" *Trinity Lutheran*, 137 S. Ct. at 2023. Yet that is what the court below has done. It has not "merely chosen not to fund a distinct category of instruction," *ibid.,* it has excluded from the historic preservation program any building with an active congregation (whether or not owned by a church) and any building owned by a church (whether or not it hosts religious services). See App.40a (grants impermissible in "church buildings" where "religious worship services can be held"); App.162a, 244a (community centers and rectories among the now-excluded grantees).

Respondents and the court below appeal to New Jersey's "constitutional tradition of not furnishing taxpayer money directly to churches," just as Missouri did in *Trinity Lutheran*. 137 S. Ct. at 2023. But the antiestablishment interest may be invoked "only after determining" that the program does not force applicants to "choose between their religious beliefs and receiving a government benefit." *Ibid.*

Nor is the 30-year easement an excessive entanglement with religion that distinguishes *Trinity Lutheran*. Opp.17. The potential oversight in both cases is the same: an accounting of how funds are spent and buildings maintained. This Court has long rejected that supervision of public aid alone creates an excessive entanglement, even where much more intricate oversight—such as monitoring "to prevent or

to detect inculcation of religion by public employees"—is involved. *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997).

III. No legitimate antiestablishment interest justifies barring churches from historic preservation programs.

Respondents contend that the Founders would have seen a law collecting funds to restore old libraries, courthouses, banks, and cemeteries as raising legitimate establishment concerns because those funds are also available to churches. Opp.26-29. That argument finds no mooring in the text or original meaning of the First Amendment. Respondents' premise that evenhanded government aid programs are the functional equivalent of eighteenth-century taxes to support religious ministers ignores at least two basic distinctions.

First, unlike Morris County's program, founding-era church finance laws were plainly enacted to advance religion. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 49 (1997). Massachusetts' 1780 ministerial tax, for example, sought the "preservation of civil government" by promoting "piety, religion, and morality." Mass. Declaration of Rights of 1780, art. III, in 2 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1328, 1338 (B. Poore 2d ed. 1878); see also *Town of Greece, N.Y.* v. *Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring) ("[T]axes were levied to generate church revenue."). Morris County's program, in contrast, seeks preservation of community history (a conceded secular purpose) by providing funds to

groups that manage historic buildings, irrespective of their beliefs.

Second, Morris County's program is consistent with the founding-era practice of including churches in generally available public benefits. The Virginia Legislature since at least 1777 has authorized tax exemptions for property belonging to the "commonwealth, or to any county, town, college, houses for divine worship, or seminary of learning." Act of Jan. 23, 1800, ch. 2, § 1, 1800 Va. Acts. And Thomas Jefferson (an ardent separationist) advocated for public funding of a department of theology in conjunction with other professional schools in his home state of Virginia. See S. Padover, *The Complete Jefferson* 1067 (1943). In sum, mere *inclusion* of churches does not turn otherwise neutral public funding programs into an unconstitutional establishment of religion.

None of Respondents' examples involve a law designed to advance a secular purpose. The most "liberal assessment" they identify, Opp.26, is a Virginia property tax titled: "A Bill establishing a provision for teachers of the Christian Religion." *Everson* v. *Board of Ed. of Ewing*, 330 U.S. 1, 72-73 (1947) (appendix to dissent of Rutledge, J.). The bill allowed taxpayers to "direct the money" raised "be paid" to any "society of Christians," but not to other religions or to private secular entities. *Id.* at 73. The bill would have forced Muslim and Jewish Virginians to financially support Christianity. See T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 145 (1986) (discussing *The Religious Petitions*, Chesterfield County (1785)). In his *Memorial and Remonstrance*, Madison opposed the bill because it "signal[ed] * * * persecution" (¶ 9)

and "violate[d] that equality which ought to be the basis of every law" (¶ 4). 2 *Writings of James Madison* 186-88 (Gaillard Hunt ed. 1901).

Madison's *Memorial* is thus best read as opposing taxation to subsidize a particular faith; it does not support Respondents' position that the First Amendment forbade all payments to religious entities through generally available government programs. See *American Atheists*, 567 F.3d at 297 ("Reliance on the *Memorial* [to exclude churches from revitalization initiative] gives historical analogy a bad name."). Indeed, far from embracing Respondents' view that all "compulsory taxes to support religious faiths" violated taxpayers' free exercise rights, Opp.28, both Houses of the First Congress selected chaplains and furnished each with a $500 salary. *Marsh* v. *Chambers*, 463 U.S. 783, 787 (1983).

In short, the tax debated by the Founders and rejected by Madison and Jefferson was intended exclusively for religious ministers and congregations to advance religious belief—not even remotely similar to the historic preservation funding here. Nothing in the Constitution's text or original meaning requires states to discriminate against religious entities in accessing funds through generally available programs.

* * *

No antiestablishment interest mandates barring churches from historic preservation programs. As this Court warned, "we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their

religious belief." *Everson*, 330 U.S. at 16. Granting this petition would allow the Court to reaffirm that principle.

CONCLUSION

The petition should be granted or, in the alternative, the judgment below should be summarily reversed in light of *Trinity Lutheran*.

Respectfully submitted.

ERIC S. BAXTER
Counsel of Record
DIANA M. VERM
NICHOLAS R. REAVES
CHASE T. HARRINGTON*
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Petitioners

*Admitted only in Colorado; supervised by D.C. bar members.

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SUPPLEMENTAL APPENDIX

The Morris County Open Space, Farmland, Floodplain Protection and Historic Preservation Trust Fund

2. Definitions

The following words and terms shall have the following meanings unless the context clearly indicates otherwise:

* * * *

Charitable Conservancy – a corporation or trust exempt from federal income taxation under paragraph (3) of subsection (c) of section 501 of the federal Internal Revenue Code of 1986 (26 U.S.C.§501 (c)(3)), whose purpose include (1) acquisition and preservation of lands in a natural, scenic, or open condition, or (2) historic preservation of historic properties, structures, facilities, sites, areas, or objects, or the acquisition of such properties, structures, facilities, sites, areas, or objects for historic preservation purposes.

* * * *