No.

In the Supreme Court of the United States

THE PRESBYTERIAN CHURCH IN MORRISTOWN, ET AL.,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the categorical exclusion of active houses of worship from a competitive government grant program advancing the secular interest of historic preservation violate the Free Exercise Clause of the Constitution of the United States?

PARTIES AND RULE 29.6 STATEMENT

The parties to this petition, defendants below, are The Presbyterian Church in Morristown, First Presbyterian Church of New Vernon, St. Peter's Episcopal Church, First Reformed Church of Pompton Plains, Church of the Redeemer, Community of St. John the Baptist, Stanhope United Methodist Church, Church of the Assumption of the Blessed Virgin Mary, First Presbyterian Church of Boonton, St. Peter's Episcopal Church in Mountain Lakes, Ledgewood Baptist Church, and Community Church of Mountain Lakes (hereafter, collectively, the "defendant churches"). Other defendants below are the Morris County Board of Chosen Freeholders, the Morris County Preservation Trust Fund Review Board and Joseph A. Kovalcik, Jr., in his official capacity as Morris County Treasurer (collectively, the "County defendants").

Respondent Freedom From Religion Foundation ("FFRF") is a not-for-profit corporation organized under the laws of the State of Wisconsin. Respondent David Steketee is a resident of Morris County, New Jersey, who is a member of FFRF. FFRF and Mr. Steketee were plaintiffs below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New Jersey in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Jersey is reported at 232 N.J. 543, 181 A.3d 992 (2018).[1] (Pet. App. 1a-57a). The statement of decision of the Superior Court of New Jersey, Chancery Division is unreported. (Pet. App. 58-92).

JURISDICTION

The Supreme Court of the State of New Jersey rendered its decision on April 3, 2018 and denied a petition for rehearing by Order dated May 15, 2018. (Pet. App. 93a). This Court has jurisdiction under 28 U.S.C. § 1257(a). This Court granted the petitioners' respective applications to extend time to file a petition for a writ of certiorari until September 18, 2018. *See* U.S. Supreme Court Case Nos. 18A105 (County defendants - granted Jul. 31, 2018) and 18A105 (defendant churches - granted Aug. 6, 2018).

STATUTORY PROVISIONS INVOLVED

This matter arises under the First Amendment to the Constitution of the United States of America, which states:

[1] All references to Petitioners' Appendix ("Pet. App.") are to the Appendix filed by the petitioning County defendants in connection with their Petition for Writ of Certiorari.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are active houses of worship who own historic structures located in Morris County, New Jersey. Between 2012 and 2015, they, among many other applicants, received historic preservation grants awarded by the County's Board of Chosen Freeholders. The grants are funded by a County tax specifically dedicated to historic preservation, and awarded through a competitive program administered by the Morris County Historic Preservation Trust. (Pet. App. 5a-6a).

Requirements of the County Program

The County program's criteria are rigorous – and rigorously secular. The County program operates under a delegation of authority from the New Jersey State Historic Preservation Office. (Pet. App. 269a-277a). Its regulations follow the form of the State program administered by the New Jersey Historic Trust, which in turn draws heavily on National Parks Service procedures. Applicants must submit detailed documentation establishing the historic significance of the structure, including proof of eligibility for inclusion on the National or State Registers of Historic Places. The grant application must also

establish how the specific work for which the grant is sought would enhance the historical value of the structure at issue. The applications are reviewed by a professional consultant meeting standards specified by federal regulations, *see* (Pet. App. 269a-277a), who determines whether the proposed work would comply with the Standards for the Treatment of Historical Properties promulgated by the U.S. Dept. of the Interior, *see* 36 C.F.R. Part 68, which are incorporated by reference in the County program rules. (Pet. App. 94a-130a (Trust Fund Rules, Chapters 1 and 5)).

Compliance with these standards comes at a substantial additional cost compared to routine maintenance. The Secretary of the Interior's Standards for Rehabilitation mandate that deteriorated historic features must be restored rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature must match the old in design, color, texture, and, where possible, materials. 36 C.F.R. § 68.3(6). As New Jersey does not *require* owners of properties on the National or State Registers to preserve the historic elements of these structures, the purpose of the grant program is to *encourage* owners to choose the more expensive option of restoration rather than perform repairs that would merely maintain functionality but not advance the public's interest in historic preservation.

The County program includes safeguards to ensure grants advance the public interest in historic preservation, not subsidize the recipients' regular operations. Grants for routine maintenance, for example, are expressly prohibited. (Pet. App. 110a (Trust Fund Rule 5.10.16)). In addition, recipients are

required to fund 20% of the cost of any approved construction project. Furthermore, applicants must establish the financial ability, without further grants, "to complete the proposed work, maintain the property, administer the grant funds, and develop programs to sustain and interpret the property. (Pet. App. 116a (Trust Fund Rule 5.13.1.a.6); (*see, e.g.*, Pet. App. 146a-147a (application questions establishing applicant's fiscal responsibility)). In this context, "maintain the property" refers to the applicant's compliance with a Grant Agreement and Easement Agreement requiring maintenance of the preserved structural features and prohibiting inappropriate alteration of the property for 30 years. (Pet. App. 127a-128a (Trust Fund Rule 5.16.1)).

In addition to the safeguards preventing *any* applicant, secular *or* religious, from using program funds for any purpose other than historic preservation, the County program contains two additional restrictions on grants to preserve religious properties. First, to be eligible for a grant, religious properties must be integral elements of areas meeting eligibility requirements or derive their "primary significance from architectural or artistic distinction or historic importance[.]" N.J.A.C. 7:4-2.3(a)(2). Second, Trust Fund Rule 5.8.7 specifies that grants to religious entities are limited to work supporting "exterior building elements," (Pet. App. 108a), thereby restricting public funding to preservation of architectural elements that can be enjoyed by members of the general public who never enter the structures for worship services.[2] *See Authority of the*

[2] These restrictions, not challenged here, are routine features of historic preservation programs intended to

Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, Memorandum Opinion for the Solicitor, Department of the Interior, from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (Apr. 30, 2003), *available at*: https://www.justice.gov/sites/default/files/olc/opinions/2003/04/31/op-olc-v027-p0091_0.pdf (finding First Amendment does not bar grants so limited).

The Challenged Grants

While the County has made grants to active houses of worship since its program began making awards in 2005, the grants challenged below were made from 2012 to 2015, during which time the County made 117 grants totaling over $11 million to 55 individual recipients. The County awarded thirty-four of these grants, totaling roughly $4.6 million, to assist the preservation of structures owned by the defendant churches. Depending on the benchmark used, 22% of the grant recipients, 29% of the grant awards and 42% of the grant funds were awarded to assist in the preservation of historic structures owned by active houses of worship.[3]

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address Establishment Clause concerns. While the concurrence below suggests this "separate treatment" facially favors religion, (Pet. App. 56a-57a), the record, unsurprisingly, fails to establish any instance in which churches were favored by these additional restrictions.

[3] *Preservation Trust Fund "Funded Sites*," *available at*:

The historic *bona fides* of the structures in question, and the secular benefit to the community of preserving them, are not open to challenge. For example, seven of the structures receiving challenged grants anchor a compact, two-block area extending from Morristown's historic Green. This neighborhood contains an eclectic mix of secular and religious historic structures that have received preservation funding.[4] Significantly, the neighborhood also contains a large number of small shops and restaurants and the Mayo Performing Arts Center. In addition to the structures' individual historic and architectural merits, this critical mass of preserved

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https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Historic2012Projects.pdf (2012);

https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Historic2013Projects.pdf (2013);

https://planning.morriscountynj.gov/wp-content/uploads/2014/11/Historic2014Projects.pdf (2014);

https://planning.morriscountynj.gov/wp-content/uploads/2014/11/2015-grants.pdf (2015).

[4] Grant recipients in this neighborhood include structures owned by defendant The Presbyterian Church in Morristown (the Green's original owner), the Women's Club of Morristown's Lewis Condict House, structures owned by defendant Church of the Redeemer, the McCulloch Hall museum, defendant St. Peter's Episcopal Church, the Joint Free Public Library of Morristown and Morris Township (built to resemble neighboring St. Peter's), the Mayo Performing Arts Center and structures owed by defendant Church of the Assumption. *See Morris County Historic Preservation Trust Funded Sites*, *available at*:
https://planning.morriscountynj.gov/divisions/prestrust/historic/fundedsites.

sites serves as a catalyst for heritage tourism, a multi-billion-dollar business in New Jersey.[5] Exemplifying this synergistic relationship, each year many of the preserved churches – in conjunction with municipal and county buildings, commercial establishments and the Arts Center – host performances for Morristown's First Night festival.

The challenged grants in the Mountain Lakes Historic District illustrate a different consequence of excluding religious entities from participation in preservation programs. The Mountain Lakes District commemorates Herbert Hapgood's founding of the Borough as an early planned community.[6] It includes a unique concentration of surviving Hapgood and Belhall Craftsman-style homes and public buildings. Defendant St. Peter's Episcopal Church incorporates Craftsman elements and uses a 1916 Hapgood Craftsman home as its Rectory.[7] Defendant

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[5] In 2012 alone, it was estimated that heritage tourism generated $238 million in Morris County, much of which was centered in Morristown. *Tourism Economics: The Economics & Fiscal Impacts of Heritage Tourism in New Jersey*, Tourism Economics: An Oxford Economics Company, *available at*: http://www.njht.org/dca/njht.touring/NJHT%20-%20TE%20Oxford%20report%2007-12-2013.pdf.

[6] *Mountain Lakes Historic District*, New Jersey Register No. 3625; National Register of Historic Places, *available at*: http://focus.nps.gov/pdfhost/docs/nrhp/text/05000963.pdf; *see also National and State Historic District*, Borough of Mountain Lakes, http://mtnlakes.org/committees-and-commissions/historic-preservation-committee/national-and-state-historic-district.

[7] *See* Pet. App. 253a.

Community Church of Mountain Lakes, built on land donated by Hapgood himself, also reflects Craftsman elements.[8] The decision below would create a false history, permitting preservation of only the secular elements of Hapgood's planned community despite churches also being a part of that plan.

Finally, while all the challenged grants preserve structures of secular historic and/or architectural significance, two of the structures preserved by challenged grants to defendant First Reformed Church of Pompton Plains[9] also have significant secular histories. One, the 1876 Carpenter Gothic Grace Chapel, at various times served as the Township's library and school gymnasium.[10] The other, the 1788 Dutch Colonial Giles Mandeville House, now serves as a manse (pastor's residence) but was formerly a stop on the Underground Railroad and the Township's post office.

Giles Mandeville House was historic in its own right long before its acquisition by the First Reformed Church in 1953. Under the decision below, however,

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[8] *See* Pet. App. 266a.

[9] These structures, along with a distinctive Sanctuary that has marked the town center since 1771, frame and buffer a historic cemetery that is the final resting place of 17th century Dutch colonists, Revolutionary War soldiers who encamped in the area, and Civil War veterans. New Jersey Register No. 5026 (Sanctuary), 4125 (Grace Chapel and Cemetery) and 4877 (Giles Mandeville House); National Register No. 12001034. *See* Pet. App. 158a.

[10] Only the Chapel's exterior has been preserved; its interior is open floor space used to host activities as diverse as yoga classes and Boy Scouts meetings.

the only way its owner could secure public funding to preserve this undisputed landmark – or Grace Chapel, which spent most of its history as a government building – would be to cease being a church.

B. The Proceedings Below

In December 2015, plaintiffs FFRF and Mr. Steketee filed suit against the County defendants in the Superior Court of New Jersey, Chancery Division, alleging that the challenged grants violated the Constitution of the State of New Jersey. The County defendants removed the case to the United States District Court for the District of New Jersey, which remanded it to the Superior Court based on plaintiffs' representation that they were not seeking relief under the United States Constitution. Following remand, on April 26, 2016, plaintiffs amended their Complaint to add the defendant churches, alleging the churches had committed fraud by accepting the grants. In response, among other defenses, defendants alleged that exclusion of the defendant churches from the program would violate the Free Exercise Clause of the First Amendment to the Constitution of the United States.

On January 9, 2017, the Hon. Margaret Goodzeit, P. J. Ch., entered summary judgment dismissing the Complaint with prejudice. FFRF appealed to the Appellate Division of the Superior Court of New Jersey. On motion of the County defendants, on June 2, 2017, the Supreme Court of New Jersey agreed to hear the matter on direct appeal. By decision dated April 3, 2018, and reported at 232 N.J. 543, 181 A.3d 992 (2018), that court reversed the decision below, and

on May 15, 2018, denied the defendant churches' motion for reconsideration.

The court below adopted a literal reading of Art. I, Para. 3 of the State Constitution, which states:

> No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his or her own conscience; nor under any pretense whatsoever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

N.J. Const. Art. I Para. 3. The court below reasoned that since the concept of "restore" is subsumed within the Oxford English Dictionary definition of "repair," "[t]he terms mean the same thing," and that therefore, Art. I, Para. 3 imposes an absolute categorical ban on funding for anything that could be construed as repair of a church. This made the governmental purpose advanced by the grants irrelevant to the State constitutional analysis. *FFRF*, 232 N.J. at 565-66, 181 A.3d at 1005.

Rejecting defendants' First Amendment defense, the court below found that categorical exclusion of churches from a neutral public welfare program does not violate the federal Free Exercise Clause. In

reaching this result, the court relied on footnote 3 of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), reasoning that "[t]he holding of *Trinity Lutheran* does not encompass the direct use of taxpayer funds to repair churches and thereby sustain religious worship services." *FFRF*, 232 N.J. at 578, 181 A.3d at 1012 (citing *Trinity Lutheran*, 137 S. Ct. at 2024 n.3).[11] In a separate concurrence, one Justice, while finding issues with certain terms of the County program, concluded that the Free Exercise Clause would be offended by categorical exclusion of historic houses of worship from a neutral public welfare grant program. *FFRF*, 232 N.J. at 586, 181 A.3d. at 1017 (Solomon, J. concurring).

REASONS FOR GRANTING THE PETITION

The decision below imposes exactly the same kind of religion-based, categorical exclusion from neutral public welfare programs prohibited by *Trinity Lutheran*. This matter is worthy of the Court's review for two related reasons.

First, the decision below puts the defendant churches to the same choice found to be repugnant to the Constitution in *Trinity Lutheran*: "participate in an otherwise available benefit program or remain a religious institution." Second, the decision below broadens *Trinity Lutheran*'s recognition of a narrow exception from Free Exercise protection for funding of "essentially religious endeavors" to include any grant of government funds to a religious entity that has

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[11] For equitable State law reasons, this ruling is prospective only, and does not affect grants already made. Pet. App. 47a.

even an incidental effect on the entity's religious activities. Defining "religious use" so broadly eviscerates the central premise of *Trinity Lutheran*, that since a church "is a member of the community too," exclusion of a church from a neutral public welfare program impairs the rights of its members under the Free Exercise Clause.

I. The Court Should Grant Review to Make Clear *Locke* is Limited to "Essentially Religious Endeavors" and *Trinity Lutheran* is Not Limited to Playground Resurfacing.

A. The Decision Below Misreads Footnote 3 of *Trinity Lutheran*.

Trinity Lutheran reads *Locke v. Davey,* 540 U.S. 712 (2004), as recognizing a very narrow area of "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. This area is narrow because "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019 (internal quotations omitted) (*citing Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). *Trinity Lutheran* reads *Locke* as recognizing a narrow exception to this general rule, permitting the denial of government funding for an "essentially religious endeavor" when doing so will impose, at most, a minor burden on Free Exercise rights. *Trinity Lutheran*, 137 S. Ct. at 2023-24 (*citing Locke*, 540 U.S. at 725).

Footnote 3 of the Chief Justice's opinion in *Trinity Lutheran* states that "[t]his case involves

express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." In context, the footnote merely reflects that as the religious discrimination challenged in *Trinity Lutheran* did not satisfy the narrow *Locke* exception, there was no cause to reach the position advocated in the concurring opinion of Justice Thomas that there should be no "play in the joints" between the Establishment Clause and Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J, concurring).

Justice Gorsuch, in his concurring opinion, expressed concern that "some might mistakenly read it [footnote 3] to suggest that only 'playground resurfacing' cases … are governed by the legal rules recounted in and faithfully applied by the Court's opinion." For this reason he, and Justice Thomas, declined to join in footnote 3, depriving it of the precedential status of the remainder of the majority opinion. *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J, concurring).

Several decisions, however, including the decision below, treat footnote 3 as a statement of the *holding* in *Trinity Lutheran*. *FFRF*, 232 N.J. at 578, 181 A.3d at 1012. On that basis, the decision below dismisses *Trinity Lutheran* as irrelevant, because "the facts of this case extend well beyond playground resurfacing." *Id.* at 573, 181 A.3d at 1009. Similarly, in excluding active churches from FEMA disaster relief, the court in *Harvest Family Church v. FEMA* also relied on footnote 3 to read *Trinity Lutheran* as being limited to playground resurfacing. 2017 WL 6060107 (S.D. Tex.

2017), *order vacated, appeal dismissed as moot by Harvest Family Church v. Federal Emergency Management Agency* (5th Cir. (Tex.) 2018). In contrast, the concurring opinion in *Caplan v. Town of Acton* reads the footnote in a manner consistent with Justice Gorsuch's *Trinity Lutheran* concurrence. 92 N.E.2d 391, 693-94 (Mass. 2018) (Kafker, J., concurring). *See also Taylor v. Town of Cabot*, 2017 VT 92, 178 A.3d 313 (2017) (applying *Trinity Lutheran* in reversing a preliminary injunction barring a historic preservation grant to an active house of worship).

In less than a year, the highest courts of three states have struggled to apply *Trinity Lutheran* to historic preservation grants to active houses of worship. These cases have produced six separate opinions covering the full spectrum between the wholehearted embrace of *Trinity Lutheran*'s neutralist principles in *Town of Cabot* to the rejection of *Trinity Lutheran*'s relevance in the decision below. As *Harvest Family Church v. FEMA* illustrates, the consequences of this confusion extend far beyond historic preservation. This confusion threatens to undermine *Trinity Lutheran* and eviscerate the Free Exercise right not to be denied participation in neutral public welfare programs on the basis of religion. Certiorari should be granted to resolve this disagreement.

B. The Decision Below Impermissibly Conditions a Government Benefit on Burdening Religious Practice.

A major distinction between *Locke* and *Trinity Lutheran* is that, as *Locke* itself stressed, the scholarship recipient there could still use the scholarship for which he qualified to advance the government purpose it was intended to serve. He thus faced a relatively minor burden on religion, as he was not forced to "choose between [his] religious beliefs and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2023-24 (*citing Locke*, 540 U.S. at 725).

In contrast, in *Trinity Lutheran*, an otherwise eligible recipient was "put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply." *Id.* *Trinity Lutheran* found such conditioning of a benefit violated the Constitution, noting "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions'…[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran*, 137 S. Ct. at 2022 (citations omitted). The defendant churches here face exactly the same prohibited choice.

C. Historic Preservation is Not an Essentially Religious Endeavor.

Furthermore, even where – as is not the case here – the burden on religion is minor, *Locke* is limited to government funding of an "essentially religious

endeavor." *Trinity Lutheran*, 137 S. Ct. at 2023. As *Locke* itself explained, "[t]raining someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling[.]" *Locke*, 540 U.S. at 721. When the State pays to instruct a student to be a minister, it is paying the instructors to proselytize to that student, so the student can, in turn, proselytize to others.[12] Nothing in *Trinity Lutheran* suggests that the Free Exercise Clause tolerates discrimination against religion outside this very narrow context. *Trinity Lutheran*, 137 S. Ct. at 2025.

There is nothing religious, let alone essentially religious, about a slate roof. While only a religious entity would train a minister, any owner seeking to preserve a historic structure faces the same significant added cost of conducting the research, preparing the documentation, and performing the kinds of specialized masonry and carpentry work required to comply with mandated historic preservation standards.

There is a clear distinction between "repair": "[t]o restore (a damaged, worn, or faulty object or structure) *to good or proper condition*," and "restoration": "the process of carrying out alterations

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[12] *Cf. Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986) (government scholarship program can elect to fund a devotional theology degree without violating Establishment Clause if program does not convey impression of State sponsorship of religion). *Locke* and *Witters* collectively illustrate the limited area of "play in the joints."

and repairs *with the idea of restoring a building to something like its original form*." *See Oxford English Dictionary* (3d ed. 2009) (emphasis added). This distinction is written in the DNA of the County program, which prohibits use of grants to subsidize routine repairs or operating expenses. For secular and religious applicants alike, the County program limits grants to defraying a portion of the significantly higher cost of compliance with State historic preservation standards. Underscoring this point, applicants must also demonstrate financial means *independent of the grants* to maintain the preserved structures. Trust Fund Rule 5.10.16; 5.13.1.a.6 (Pet. App. 110a, 116a).

The County awarded the challenged grants through a neutral public welfare program applying well-defined secular criteria under professional guidance to a wide variety of applicants. Forty-three of the fifty-five recipients of grants awarded during the period in question are secular entities. Of the remainder, four are Episcopal, three are Presbyterian, one is Methodist, one is Baptist, one is United Church of Christ, one is First Reformed and one is Catholic. All of the grants advance the same secular interests.

The premise of the decision below, that "[t]his case does not involve the expenditure of taxpayer money for non-religious uses," *FFRF*, 232 N.J. at 574, 181 A.3d at 1110, turns a blind eye to the significant governmental interests actually served by the grants. As the concurrence below recognized, however, even if governmental purpose is irrelevant under the New Jersey Constitution, it is very relevant to the defendant churches' Free Exercise right not to be

excluded on religious grounds from neutral programs advancing secular purposes. *Id.* at 586, 181 A.3d at 1017 (Solomon, J, concurring).

Historic preservation safeguards the nation's heritage, facilitates education, enhances civic pride, improves community aesthetics and promotes tourism-related business. This is why New Jersey expressly recognizes historic preservation as "an essential governmental function of the State." N.J.S.A. 13:1B-15.111. These important government interests are advanced by including structures serving as active houses of worship in historic preservation programs. *See, e.g.*, *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009) (discussing secular benefits of including churches in preservation programs); National Historic Preservation Act, 16 U.S.C. § 470a(e)(3) (permitting grants "for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant.").

New Jersey's Constitution specifically dedicates funds to advance historic preservation. *N.J. Const.* Art. VIII, Sec. II, Para. 6, 7. Its local instrumentalities are encouraged to do the same. These funds are available, on a competitive basis through application of neutral, secular criteria, to a wide range of entities. The decision below simply declares these funds off limits to otherwise qualified churches, a form of discrimination prohibited by *Trinity Lutheran*.

II. The Court Should Grant Review to Make Clear that Historic Preservation of an Active House of Worship is Not "Religious Use" of Public Funds

A. Free Exercise Rights do not Turn on a Status/Use Distinction.

At one point, *Trinity Lutheran* describes the result in *Locke* as being that "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Trinity Lutheran*, 137 S. Ct. 2023. Justice Gorsuch's concurrence in *Trinity Lutheran* expressed concern that this observation might be mistaken as establishing a status/action distinction, albeit one that would apply only to what *Locke* and *Trinity Lutheran* identified as "essentially religious endeavors" akin to using funds to prepare for the ministry. *Id.* at 2026 (Gorsuch, J, concurring).

The decision below, however, not only applies a status/action distinction, but does so far outside the context of "essentially religious endeavors." It rationalizes its result on the grounds that "the Churches are not being denied grant funds because they are religious institutions; they are being denied public funds because of what they plan to do—and in many cases have done: use public funds to repair church buildings[.]" *FFRF*, 232 N.J. at 575, 181 A.3d at 1110. Similarly, the plurality opinion in *Caplan v. Town of Acton* found *Trinity Lutheran* irrelevant to the question of the constitutionality of historic preservation grants to churches because "[w]e do not interpret the Massachusetts anti-aid amendment to

impose a categorical ban on the grant of public funds to a church 'solely because it is a church.'" 92 N.E.3d at 704. Although the case was dismissed as moot when FEMA altered its policy, the District Court in *Harvest Family Church v. FEMA*, 2017 WL 6060107, also relied on the status/use distinction to declare *Trinity Lutheran* irrelevant to whether FEMA could deny disaster recovery funds to rebuild churches.

The Free Exercise Clause is vulnerable to death by a thousand cuts if it can be circumvented by the semantic exercise of recasting a status-based exclusion as a use-based exclusion. As Justice Gorsuch observed, it should not matter "whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J, concurring). Certiorari should be granted to return the Free Exercise analysis to its proper focus on whether access to funds in a neutral program is being conditioned on the recipient refraining from acts of religious practice.

B. An Incidental Benefit to a Religious Entity does not Transform Neutral Grants into "Religious Use."

The decision below sets an extremely low threshold for "religious use." Regardless of the government's purpose in awarding funding, if the religious activities of a recipient are incidentally advanced, the funding is condemned as religious use. *See FFRF*, 232 N.J. at 575, 181 A.3d at 1010 ("This case does not involve the expenditure of taxpayer money for non-religious uses" because any "use of taxpayer funds to repair churches" "sustains religious worship activities.").

The decision below imposes a categorical ban. *See, e.g.*, *FFRF*, 232 N.J. at 573, 181 A.3d at 1009. While at times it describes the grants as being used to "sustain the continued use of active houses of worship for religious services and finance repairs to religious imagery," *id.* at 575, 181 A.3d at 1010, the decision below does not turn on the specific use of the grants.[13] The defendant churches lost merely because they "all have active congregations, and all have conducted regular worship services in one or more structures repaired with grant funds." *FFRF*, 232 N.J. at 548, 550, 573, 181 A.3d at 994, 995, 1009. So long as worship services would occur in the preserved structures, as a matter of law the preservation grants became religious use of funds deemed to have been

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[13] Exactly *one* of the thirty-four challenged grants funded structural work on a stained-glass window containing religious imagery. *FFRF*, 232 N.J. at 551, 181 A.3d at 996. One other grant funded drafting a preservation plan for a building whose problems *include* deteriorated stained-glass windows. Pet. App. 257a. Similarly, while the decision below recites that "[s]everal successful applicants specifically stated that the funds were needed to allow the church to offer religious services[,]" *id.* at 575, 181 A.3d at 1010, this assertion inaccurately paraphrases responses of just four defendant churches to general application questions such as "describe any impact of proposed project on existing use of site." Unsurprisingly, the churches responded that their existing activities, including worship, would continue. This does not mean that the grants were *needed* to permit worship to continue, or were *awarded* to enable this result, which would violate Program's Rules prohibiting grants for routine repairs or operating expenses.

awarded in order to sustain worship services. *Id.* at 575, 181 A.3d at 1009.

This approach is an unabashed embrace of the pervasively sectarian doctrine. The decision below cites with approval pervasively sectarian decisions such as *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774, (1973) and *Tilton v. Richardson*, 403 U.S. 672, 683-84, 689 (1971). In fact, it relies on these decisions to reject defendants' assertion that "there is nothing inherently religious about roofing." *FFRF*, 232 N.J. at 576, 181 A.3d at 1011. The decision below also repeatedly looks to the dissent in *Trinity Lutheran*, *see, e.g., FFRF*, 232 N.J. at 558-559, 572-73, 181 A.3d at 1000-01, 1009, which in turn cites approvingly pervasively sectarian decisions such as *Nyquist* and *Tilton*. *Trinity Lutheran*, 137 S. Ct. at 2029-30 (Sotomayor, J. dissenting). *See also Caplan v. Town of Acton,* 92 N.E.3d at 693–94 (plurality opinion) (relying on argument that grants will free up funds to sustain worship to support broad reading of religious use and narrow view of protection provided by *Trinity Lutheran*).

In *Mitchell v. Helms,* 530 U.S. 793 (2000), a plurality of the Court declared that the period of the pervasively sectarian doctrine's ascendancy "is one the Court should regret, and is thankfully long past[,]" *id.* at 826, explaining "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Id.* at 827. Even prior to *Mitchell,* the Court had reversed some foundational pervasively sectarian decisions, *see, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 222–223 (1997)

(*overruling Aguilar v. Felton*, 473 U.S. 402 (1985)). After *Mitchell, Nyquist* itself was read as being limited to its facts, which concerned a program that was *not* neutral, but had been gerrymandered to benefit only religious entities. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) ("*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.").

The pervasively sectarian doctrine was used to ban direct grants to religious entities on the belief religious entities must be kept separate from secular society. *Trinity Lutheran* permits such grants because religious entities are "member[s] of the community too." *Trinity Lutheran,* 137 S. Ct. at 2022. The Court's guidance is needed to make clear that pervasively sectarian principles should not be used to hamstring the Free Exercise rights recognized by *Trinity Lutheran.*

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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