No. 18-365

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

REPLY BRIEF FOR PETITIONERS

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DEFENDANT CHURCH PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

The question presented in this Petition is inevitable and ubiquitous. All states have historic preservation programs and historic active houses of worship. As explained by amicus National Trust for Historic Preservation ("NTHP")[1], the "size, height, iconic architecture and prominent locations of … houses of worship make these buildings landmarks in their communities, contributing to the cultural and historic context of their neighborhoods[.]" NTHP Br. at 13-14. Within a year after *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), was decided, three state supreme courts were called upon to apply that decision to review historic preservation grants to active houses of worship. The discord in these decisions underscores the need for guidance on how to apply *Trinity Lutheran* in this crucial context.

A. Certiorari should be Granted to Resolve Confusion over the Application of *Trinity Lutheran* to Active Houses of Worship.

Caplan v. Town of Acton, 92 N.E.3d 691 (Mass. 2018), highlights the extent of disagreement. *Caplan* reviewed a lower court's denial of a preliminary

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[1] Both the County defendants and the Defendant Churches have filed Petitions for a Writ of Certiorari, Nos. 18-364 and 18-365, respectively. "Pet. App." refers to the Appendix of the County defendants in support of their petition. "FFRF Pet. Opp." refers to the Brief in Opposition to both petitions filed by Respondents Freedom from Religion Foundation and David Steketee.

injunction blocking two grants: one to preserve a church stained-glass window with religious text, and a second to fund a preservation plan for the church and two church-owned historic residences. All six Justices declined to impose a categorical ban on grants to active houses of worship. Beyond this least common denominator, however, the three opinions in *Caplan* share little in common with each other, and even less with the decision below.

A three justice plurality in *Caplan* dismissed *Trinity Lutheran* as merely prohibiting categorical bans,[2] but otherwise found no Free Exercise Clause limitations on excluding active houses of worship from neutral public welfare programs. As a result, it singled out the church grants for a particularly rigorous version of Massachusetts's No Aid clause test. This "careful scrutiny" standard second-guesses the motives of officials approving such grants and subjects them to depositions to probe for any "hidden purpose" to aid religion. *Caplan*, 92 N.E.3d at 706. The inquiry into whether a grant would have the effect of substantially aiding religion presumes that even funding for a secular purpose aids religion by allowing a recipient to divert funds to "support its core religious activities." *Id.* at 707. Finally, by merely

[2] The plurality in *Caplan* was unwilling to exclude all active houses of worship from historic preservation grant programs in order to permit grants "where historical events of great significance occurred in the church[.]" 92 N.E.3d at 710. The test applied in the decision below would deny funding to all orgainzations that hold regular worship services in one or more of the structures covered by grants, (Pet. App. 38a), precluding the *Caplan* plurality's effort to craft an "Old North Church" exception.

raising "the irritating question of religion," *id.* at 710, a grant to an active house of worship is assumed to result in entanglement.

In contrast, three other Justices (two concurring and one in dissent) found that the Free Exercise Clause imposes significant restrictions on the extent state law may exclude active houses of worship from preservation grant programs, noting:

> *Trinity Lutheran* and *Locke* define a very narrow category of exclusions from generally available public benefit programs that can be required by State anti-aid amendments without violating the free exercise clause of the first amendment. To be excluded from a generally available public benefits program, the funding must be sought for an "essentially religious endeavor" raising important state constitutional antiestablishment concerns.

Caplan, 92 N.E.3d at 714 (Kafker, J. and Graziano, J., concurring in result).

These three Justices found the result of the plurality's "careful scrutiny" standard to be inconsistent with *Trinity Lutheran*. *Id.* at 714. *See also Caplan*, 92 N.E.3d at 722 (Cypher, J., dissenting). The concurrence expressly rejected probing decisionmakers' mental processes to search for a "hidden purpose," finding that conservation was the primary purpose of the grants. *Id.* at 715-16. It then found that while "paying for stained glass windows with an express sectarian religious message and mission fits within the very narrow exception afforded

by *Locke*," *id.* at 717-18, a different conclusion was warranted for the other grant. While calling for a limited remand to confirm, *inter alia*, the other grant was limited to the "building envelope," *id.* at 719, the concurrence found the funded activities were not "essentially religious endeavors" and expressly embraced the dissent's observation that "[c]hurches, an undeniable part of the Commonwealth's historic landscape, achieve these same cultural, aesthetic and economic benefits, and likewise warrant preservation." *Id.* at 719 (citing dissent with approval, *id.* at 723-24 (Cypher, J. dissenting)).

The six opinions in the three state supreme court cases addressing this issue are in pointed disagreement over whether the *Locke* exception recognized in *Trinity Lutheran* only applies to categorical bans, or to everything except playground resurfacing,[3] or to any "religious use," or only to "essentially religious endeavors." Under the decision below, any incidental benefit to a recipient's religious activities, without regard to the substantial secular interests intended and advanced, taints a grant as "religious use" (Pet. App. 38a). This *de minimis* threshold drives the decision below's conclusion that

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[3] The decision below, like *Harvest Family Church v. FEMA*, 2017 WL 6060107 (S.D. Tex. 2017), *order vacated, appeal dismissed as moot* (5th Cir. (Tex.) 2018) reads footnote 3 of *Trinity Lutheran* as limiting that decision to playground resurfacing. The plurality in *Caplan,* noting that footnote 3 did not command a majority of the Court, instead defended its "careful scrutiny" standard as not being a *de jure* categorical ban. *Caplan*, 92 N.E.3d at 703 and n. 17.

"[t]his case does not involve the expenditure of taxpayer funding for non-religious purposes[.]" (Pet. App. 40a). *Accord Caplan*, 92 N.E.3d at 707.[4]

In contrast, the three Justices concurring or dissenting in *Caplan* all made clear that, putting aside the special case of sectarian stained-glass windows, historic preservation of active houses of worship does not rise to the level of the "essentially religious endeavor" required to justify exclusion from generally available public benefit programs. Justice Solomon, in his concurrence in the decision below, reached the same conclusion, writing separately to stress that under *Trinity Lutheran*, state law "cannot categorically bar churches with active congregations from receiving funds that promote a substantial public purpose, such as historic preservation," noting bluntly that "such a blanket exclusion violates the Free Exercise Clause of the United States Constitution[.]" (Pet. App. 49a).

The Supreme Court of Vermont in *Taylor v. Town of Cabot*, 2017 VT 92, 178 A.3d 313 (2017), also concluded that a categorical bar of grants to preserve active houses of worship could not pass muster under *Trinity Lutheran.* The Sixth Circuit, prior to *Trinity Lutheran*, reached the same conclusion in *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009).

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[4] Similarly, Respondents seek to define "incidental" in terms of the size of the grant, not whether any benefit to the recipient's religious activities is merely ancillary to the governmental purpose advanced by the grant. (FFRF Pet. Opp. at 17).

These differing views are also reflected in how the opinions characterize historic preservation costs. The majority opinion below and the plurality in *Caplan* view restoration as indistinguishable from general repairs, in part on the discredited theory that any direct government grant to a religious institution aids religion by permitting the recipients to defray other costs. Under this view, even roofing is inherently religious. (Pet. App. 41a); *Caplan*, 92 N.E.3d at 707.

In contrast, *Taylor, American Athiests*, the concurrences and dissent in *Caplan*, and the concurrence in the decision below all view the cost of conducting preservation work as qualitatively and quantitatively different than work needed merely to keep the church doors open. (*See* NTHP Br. at 14, n. 23 (discussing significant added cost of compliance with the U.S. Dept. of the Interior's Standards for the Treatment of Historical Properties)). The Trust Fund Rules themselves prohibit secular *and* religious grant recipients alike from using grants to subsidize routine repairs or operating expenses.[5] Trust Fund Rules 5.10.16; 5.13.1.a.6 (Pet. App. 110a, 116a).

The opinions also differ with respect to concerns that conservation easements required for some grants

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[5] FRFF's "proof" that grants enabled continuation of worship services are quotes, offered out of context, taken from a form requiring applicants to describe the impact of the funded work on the existing use of the site. (*See* Petition at 21, n. 13; County Petition at 26; Pet. App. 146a). Statements that religious services that already occur would continue after the funded work does not mean that the funds were needed, sought or awarded to enable religious services.

might entangle governments in ongoing decisions on church property. While the majority decision below and the *Caplan* plurality view this as a grave concern, the Sixth Circuit dismissed it as "simply another way of advocating an absolute no-aid rule," *American Atheists*, 567 F.3d at 300. As noted in *Caplan*, in ten years Massachusetts has made thirty-eight grants to active houses of worship without encountering this concern. *Caplan*, 92 N.E.3d at 721 n. 5 (Cypher, J. dissenting). The same is true in New Jersey, where State and local governments have made historic preservation grants to active houses of worship for almost *thirty* years without incident.

Furthermore, unlike attempts to enforce restrictions imposed by law on unwilling churches, *see, e.g., Roman Catholic Bishop v. City of Springfield,* 724 F.3d 78 (1st Cir. 2013), the conservation easements are entered into *by consent* as contractual obligations. As explained in *Kirby v. Lexington Theological Seminary,* 426 S.W.3d 597, 615-16 (Ky. 2014): "like any other organization, a church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court . . . . Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights."

Equally troubling is FFRF's argument that grant awards to *former* houses of worship address any Free Exercise concerns because churches can make historic structures eligible for grants by divesting them. (FFRF Pet. Opp. at 24 n. 1). As the Court recognized in *Trinity Lutheran*, even the scholarship recipient in *Locke* could still use the scholarship for which he

qualified, and therefore was not forced to "choose between [his] religious beliefs and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2023-24 (*citing Locke v. Davey*, 540 U.S. 712, 725 (2004)). Here, owners of historic structures found worthy of preservation under neutral competitive criteria qualified for grants they can never use. This is no different than being "put to the choice between being a church and receiving a government benefit." *Id.* at 2022.

B. FFRF's Allegations of Favoritism Are Unsupported and Not Grounds to Decline Certiorari.

FFRF concedes the need for guidance "to address whether historic preservation funds must be available for churches when they are similarly situated," but suggests that this is not the case to do so because the County program "favors religious entities over secular ones." (FFRF Pet. Opp. at 25).[6] This claim lacks any record support. The Trust Fund Rules list "charitable conservancies whose purpose includes historic preservation" and "religious institutions" as separate categories. (Pet. App. 103a). By reading "express" into the actual text of the Rule, FFRF mistakenly claims the County program excludes secular private entities "unless they exist for an *express* historic preservation purpose." (FFRF Pet. Opp. at 22 (emphasis added)). From this false premise springs the unsupported claim that due to inability to meet the non-existent express purpose requirement, "most

[6] The favoritism argument is also the primary ground offered for distinguishing *Taylor* and *American Atheists*.

secular nonprofits are excluded from the County's program even if they own and maintain historic buildings." (FFRF Pet. Opp. at 2, 18).

The trial court expressly considered whether the program was skewed in favor of churches and found that it was not. (Pet. App. 79-80a). The Trust Fund Rules do not require that a charitable conservancy's by-laws recite "historic preservation" as an express purpose. There is also *no* evidence *any* nonprofit undertaking to preserve a building has *ever* been excluded from the County program on the grounds it was not dedicated to historic preservation. On the contrary, numerous nonprofit entities organized for purposes other than historic preservation have received grants through the County program.[7] Finally, religious institutions are a separate category in order to *restrict* grants to them to work supporting preservation of external features, *see* Trust Fund Rule 5.8.7 (Pet. App. 108a), while other nonprofits can receive grants to preserve interior spaces.

The bias claim is a fiction. Even the letter FFRF cites as proof a church received grants despite having

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[7] *Inter alia*, the Mayo Performing Arts Center / Community Theater received $100,065 in County historic preservation grants, the Growing Stage children's theater received $656,458 in grants, the Women's Club of Morristown received $653,880 in grants to preserve its headquarters in the 1797 Lewis Condict House, and Homeless Solutions, Inc. received $86,084 in grants to preserve an 1880 structure it uses as one of its homeless shelters. *See County of Morris, Planning & Preservation, Funded Sites*, https://planning.morriscountynj.gov/divisions/prestrust/hihistor/fundedsites.

"repudiated" historic preservation as a purpose in fact explains the absence of "preservation" in its ecclesiastic by-laws and affirms that the church is:

> firmly committed to maintaining the historic integrity of the building, since the property is part of the Boonton Historic District and is listed on the national and state historic registries, and the Morris County Heritage Commission. This is further evidenced by our commitment to historic preservation and the investment and the completion of the Historic Preservation Plan in 2011[.]

(Pet. App. 248-49a).

CONCLUSION

For the reasons set forth above, the Court should grant this petition.

Respectfully submitted,

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