

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 WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF *AMICUS CURIAE*
NATIONAL TRUST FOR HISTORIC PRESERVATION
IN SUPPORT OF PETITIONERS

THADDEUS HEUER
Counsel of Record
ANDREW LONDON
RACHEL HUTCHINSON
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
theuer@foleyhoag.com

ELIZABETH S. MERRITT
NATIONAL TRUST FOR
HISTORIC PRESERVATION
2600 VIRGINIA AVE., NW
SUITE 1100
WASHINGTON, DC 20037
(202) 297-4133
emerritt@savingplaces.org

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<i>Everson v. Board of Educ.</i> , 330 U.S. 1 (1947)	7
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<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	19

<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	19
--	----

Statutory Authorities

54 U.S.C. §300101	7, 9
54 U.S.C. § 312102(a).....	1, 5, 21
Historic Sites Act of 1935, 49 Stat. 666, §1	7
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Additional Authorities

<i>Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church</i> , 27 OP. O.L.C. 91 (Apr. 30, 2003)	18
Peter Benes, MEETINGHOUSES OF EARLY NEW ENGLAND 13 (2012)	11
Patricia L. Brown, <i>Beacons of Faith Are Dimming on the Prairie</i> , N.Y. TIMES (Jul. 7, 2002)	11
Diane Cohen & A. Robert Jaeger, <i>Sacred Places at Risk</i> (1998), https://sacredplaces.org/uploads/files/ 395429189155295863-spar.pdf (accessed Oct. 15, 2018).....	10, 13, 14, 15
Colorado Historical Foundation, <i>The Economic Benefits of Historic Preservation in Colorado</i> (2002)	12

- Connecticut Trust for Historic Preservation,
Funding Opportunities,
<https://www.cttrust.org/current-funding> (accessed
Oct. 15, 2018)20
- Hunter S. Edwards, *The Guide for Future
Preservation in Historic Districts Using a Creative
Approach: Charleston, South Carolina’s
Contextual Approach to Historic Preservation*,
20 U. FLA. J.L. & PUB. POL’Y 221 (2009)11
- Sara C. Galvan, *Rehabilitating Rehab
Through State Building Codes*,
115 YALE L.J. 1744 (2006)6
- Oscar S. Gray, *The Response of Federal Legislation
to Historic Preservation*, 36 LAW & CONTEMP.
PROBS. 314 (1971)8
- History Colorado, Grants & Financial Incentives,
[https://www.historycolorado.org/grants-financial-
incentives](https://www.historycolorado.org/grants-financial-incentives) (accessed Oct. 18, 2018)9
- Indiana Department of Natural Resources, *Grant To
Preserve Local History Across State*,
[http://www.in.gov/activecalendar_dnr/EventList.as
px?view=EventDetails&eventidn=16251&informat
ion_id=36996](http://www.in.gov/activecalendar_dnr/EventList.aspx?view=EventDetails&eventidn=16251&information_id=36996) (accessed October 18, 2018)16
- Institute of Museum & Library Services, *\$4.8 Million
in Grants Go to “Save America’s Treasures”* (Sept.
21, 2018), [https://www.imls.gov/news-events/news-
releases/48-million-grants-go-save-americas-
treasures](https://www.imls.gov/news-events/news-releases/48-million-grants-go-save-americas-treasures) (accessed Oct. 18, 2018)9, 19

- Massachusetts Historical Commission,
 Massachusetts Preservation Projects Fund,
<https://www.sec.state.ma.us/mhc/mhcmppf/mppfidx.htm> (accessed Oct. 17, 2018)10
- Thompson Mayes, *Introduction: Why Do Old Places Matter?*, 29 FORUM J. 7 (2015)6
- National Main Street Center, Main Street Impact,
<https://www.mainstreet.org/mainstreetimpact>
 (accessed Oct. 15, 2018).....12
- National Trust for Historic Preservation, *America’s Most Endangered Historic Places—Past Listings*,
<https://savingplaces.org/11most-past-listings#.WXNGHYjytW8>
 (accessed Oct. 11, 2018).....15
- Partners for Sacred Places, *The Economic Halo Effect*,
<https://sacredplaces.org/uploads/files/16879092466251061-economic-halo-effect-of-historic-sacred-places.pdf> (accessed Oct. 15, 2018)13
- Partners for Sacred Places, *States Providing Funding to Historic Religious Properties*, 1 SACRED PLACES, no. 3, 2004,
<http://www.sacredplaces.org/uploads/files/935573495915362585-sacred-places-vol-1-no-3.pdf>
 (accessed Oct. 18, 2018).....20
- Michael Paulson, *Historic Trust Lists Catholic Churches*, BOSTON GLOBE (June 5, 2005)16

- Pennsylvania Historical & Museum Commission,
Keystone Historic Preservation Construction
Grants,
[http://www.phmc.pa.gov/preservation/grants-
funding/pages/construction-projects.aspx#6](http://www.phmc.pa.gov/preservation/grants-funding/pages/construction-projects.aspx#6)
(accessed Oct. 18, 2018).....20
- Press Release, *National Park Service Announces
Over \$7.5 Million in Grants To Preserve African
American Civil Rights Movement Sites*, Nat'l Park
Serv. (Jan. 12, 2017)
[https://www.nps.gov/orgs/1207/01-12-2017-civil-
rights-grants.htm](https://www.nps.gov/orgs/1207/01-12-2017-civil-
rights-grants.htm)19
- Holly H. Roberts, *SYNAGOGUES OF MANHATTAN, NEW
YORK* (2013).....11
- Donovan D. Rypkema, *THE ECONOMICS OF HISTORIC
PRESERVATION* (2d ed. 2005).....11, 12
- Save America's Treasures Awards 1999-2010 By
State*, available at
<https://tinyurl.com/SATStateAwards> (accessed
Oct. 18, 2018).....19
- Secretary of the Commonwealth's Office,
*Massachusetts Preservation Project Fund Grant
Recipients*,
[https://www.sec.state.ma.us/mhc/mhcmppf/mppf-
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recipients.htm) (accessed Oct. 18, 2018).....16
- Secretary of the Interior's Standards (2017),
[https://www.nps.gov/tps/standards/treatment-
guidelines-2017.pdf](https://www.nps.gov/tps/standards/treatment-
guidelines-2017.pdf) (accessed Oct. 14, 2018)14

Texas Historical Commission, Texas Preservation
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programs/texas-preservation-trust-fund](http://www.thc.texas.gov/preserve/projects-and-programs/texas-preservation-trust-fund) (accessed
Oct. 15, 2018)10

INTERESTS OF *AMICUS CURIAE*¹

The National Trust for Historic Preservation in the United States (the “National Trust”) is a privately funded nonprofit organization, chartered by Congress in 1949 to further the historic preservation policies of the United States and to “facilitate public participation” in the preservation of our nation’s heritage. 54 U.S.C. § 312102(a). With more than one million members and supporters nationwide, the National Trust works to protect significant historic sites and advocate for historic preservation as a fundamental value in programs and policies at all levels of government. This includes legal advocacy to uphold the integrity of federal, state, and local laws and governmental decisions that help to protect our nation’s historic places. In carrying out its mission, the National Trust has participated as a party or *amicus curiae* in hundreds of cases in federal and state courts since 1970.

During its long history, the National Trust has worked to help preserve numerous historic religious structures across the country. These places include the Old North Church in Boston, Massachusetts; Bok Kai Temple in Marysville, California; Unity Temple

¹ In accordance with Supreme Court Rule 37.2(a), parties’ counsel of record consented to the filing of this *amicus* brief after receiving timely notice of *amicus*’s intent on October 12, 2018. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amicus* or its counsel.

in Oak Park, Illinois; Abyssinian Meeting House in Portland, Maine; Metropolitan AME Church in Washington, D.C.; the Prairie Churches of North Dakota; the Adobe Churches of New Mexico; and St. Bartholomew's Church in New York, New York.

SUMMARY OF THE ARGUMENT

State courts are split over whether awarding generally available public historic preservation grants to historic religious structures—grants for which those structures otherwise qualify on the basis of neutral criteria—nonetheless constitutes a religious use of public funds. Since *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the highest courts of at least three states have assessed the applicability of *Trinity Lutheran* to public historic preservation grants for religious structures. They have reached starkly different legal conclusions.

In *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*, 181 A.3d 992 (N.J. 2018), the New Jersey Supreme Court found that notwithstanding *Trinity Lutheran*, New Jersey was required to prohibit public historic preservation grants from being used to repair and restore the exterior facades of deteriorating historic churches. In Massachusetts, the Supreme Judicial Court held that a public historic preservation grant improperly aided a church in its “essential enterprise as an active house of worship” by allowing the church to reallocate funds that could be used to support its “core religious activities.” *Caplan v. Town of Acton*, 92 N.E.3d 691, 707 (Ma. 2018).

By contrast, the Vermont Supreme Court held that a public grant for painting the exterior of a historic house of worship and inspecting its windowsills for structural damage did *not* constitute a religious use, *Taylor v. Town of Cabot*, 178 A.3d 313 (Vt. 2017), while nearly a decade ago the United States Court of Appeals for the Sixth Circuit held that religious organizations are entitled to receive generally available community development grants to repair and protect historic structures, *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009).

This Court was clear in *Trinity Lutheran*: a religious entity may not be denied a public benefit “solely because of its religious character.” 137 S. Ct. at 2024. Rather than adhere to this holding, however, New Jersey and Massachusetts have instead sought to distinguish *Trinity Lutheran* to the point of disregard in the context of historic preservation. The New Jersey Supreme Court erroneously concluded that using public historic preservation funds to help preserve historic religious structures constituted a “religious use” of those funds, thus rendering *Trinity Lutheran* inapplicable. See *Freedom From Religion Found.*, 181 A.3d at 1008, citing *Trinity Lutheran*, 137 S. Ct. at 2024 n. 3. This conclusion arises from a fundamentally inaccurate premise: that historic preservation is unlike the resurfacing of playgrounds because the preservation of a historic religious structure lacks sufficient secular public benefit.

Such a presumption lacks any foundation. To the contrary, over the past eighty years, Congress, states,

and numerous municipalities nationwide have formally recognized that preserving historic structures and landmarks—both religious and non-religious—generates myriad public benefits. Historic preservation fosters an appreciation for a shared heritage, drives economic development, promotes community continuity, and preserves significant examples of the craftsmanship of prior eras for the enjoyment of future generations. *See generally Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107-08 (1978). That some of these historic structures are used for a religious purpose does not detract from their historical significance.

Although historic preservation initiatives take many forms, many jurisdictions—including the federal government—offer owners of historic properties opportunities to obtain financial assistance for repairs and restorations. With its decision, the New Jersey Supreme Court eliminated from the historic preservation toolbox a critical tool used by governments to protect historic assets in their communities, including historic religious structures.

Absent this Court's review, similar challenges will continue to be brought across the country, resulting in an unwieldy patchwork of rules governing how the First Amendment applies to public historic preservation programs. As a result, the National Trust believes communities nationwide will increasingly be forced to choose between two equally undesirable options: decline to award preservation grants to qualified historic religious structures out of fear of litigation, or award such grants but devote limited taxpayer dollars to defending those grants in

court, rather than to preserving and revitalizing the community's historic landmarks. This Court must intervene to ensure that *Trinity Lutheran* is applied properly, consistently, and uniformly.

ARGUMENT

The National Trust was chartered by Congress to further historic preservation policies in the United States and to “facilitate public participation” in the preservation of our nation’s history. 54 U.S.C. § 312102(a). This Court was clear in *Trinity Lutheran*: denying a qualified religious entity a generally available public benefit “solely because of [the entity’s] religious character” violates the Free Exercise Clause. 137 S. Ct. at 2024. Yet rather than adhere to this holding, certain states, including New Jersey, have ignored, narrowed, or misinterpreted this holding in the context of historic preservation. These decisions interfere with the ability of the National Trust and state and local historic preservation organizations to protect the diverse historic religious structures that are integral to our national history.

As the leading historic preservation organization in the nation, the National Trust is concerned that, absent review by this Court, communities across the country will be dissuaded from saving historic religious structures, and these iconic buildings and enduring reminders of our diverse pasts will be forever lost to time. This Court should grant the Petition in order to clarify that historic religious structures must have the same access as do secular

structures to public historic preservation grants awarded using neutral criteria.

I. PRESERVING HISTORIC RELIGIOUS STRUCTURES IS AN ISSUE OF NATIONAL IMPORTANCE

A. Protecting Historical and Architectural Heritage—both Secular and Religious—is a Legitimate Government Interest for Cultural, Aesthetic, and Economic Reasons.

Our government at every level has a widely recognized public interest in preserving historic structures and places. The government’s interest in preserving historic places derives from the significant cultural, aesthetic, and economic benefits that historic preservation creates for cities and towns. Old buildings are “physical manifestations of a shared history.”² Whether that history is our national history or our local history, historic places embody our civic, state, and national sense of identity.³ “[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all.” *Penn Cent.* 438 U.S. at 107-08.

Both the federal government and the states have supported historic preservation as a public policy

² Sara C. Galvan, *Rehabilitating Rehab Through State Building Codes*, 115 *YALE L.J.* 1744, 1749 (2006) (arguing that older buildings are a public good).

³ Thompson Mayes, *Introduction: Why Do Old Places Matter?*, 29 *FORUM J.* 7, 8 (2015).

objective for over eighty years. *See* Historic Sites Act of 1935, 49 Stat. 666, § 1 (“It is hereby declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States”); National Historic Preservation Act of 1966, 54 U.S.C. § 300101 *et seq.* (providing that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people”). All fifty states and the federal government have enacted statutes that encourage or require the preservation of buildings and other sites with historic importance. *See Penn Cent.*, 438 U.S. at 107-08.

Furthermore, the “power to legislate for the public welfare . . . is a primary reason for the existence of states,” *Everson v. Board of Educ.*, 330 U.S. 1, 6-7 (1947), and courts have repeatedly affirmed that historic preservation is a legitimate governmental means of furthering the public welfare. *See Penn Cent.*, 438 U.S. at 129 (stating that the Supreme Court has repeatedly recognized that cities may “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city”). The “concept of the public welfare is broad and inclusive” and this Court has recognized a wide array of public investments that advance the well-being of a community. Thus, “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Historic preservation is one means the government may pursue to improve the quality of life in a community. Historic buildings not only “represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.” *Penn. Cent.*, 438 U.S. at 108 (upholding New York City’s landmarks law regulating the development of historic buildings, and rejecting a takings challenge). Historic preservation “enhance[s] the quality of life by preserving the character and desirable aesthetic features of a city.” *Id.* See also *New Orleans v. Dukes*, 427 U.S. 297 (1976) (permitting the City of New Orleans to regulate food cart vendors in its historic French Quarter).

Before the 1960s, public historic preservation programs were largely limited to government-owned property, and did little to protect privately-owned property.⁴ That changed with the passage of the National Historic Preservation Act in 1966. See Pub. L. No. 89-665, 80 Stat. 915. The Act declared that “the spirit and direction of the Nation are founded upon and reflected in its historic past,” and that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development.” *Id.* at 915. Thus, Congress deemed it “necessary and appropriate” to “give maximum encouragement to agencies and individuals

⁴ Oscar S. Gray, *The Response of Federal Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROBS. 314, 314-15 (1971).

undertaking preservation by private means, and to assist State and local governments and the National Trust to expand and accelerate their historic preservation programs and activities.” *Id.*⁵

Federal efforts to preserve both publicly and privately owned historic structures include tax credits, listing on the National Register of Historic Places, and direct aid for repairs and restoration. In 1998, Congress established the Save America’s Treasures Program, which provides matching grants to preserve “nationally significant historic properties and museum collections for future generations of Americans.”⁶ In 2018, Save America’s Treasures provided \$4.8 million in grants—and has awarded over \$315 million in grants since its inception.⁷ Many states and municipalities have established similar programs to provide public funds for the historic preservation of publicly and privately owned structures in their communities.⁸

⁵ Recodified in 2014, the Act declares that it is the Federal government’s policy, *inter alia*, to “contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means” and “encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment.” 54 U.S.C. § 300101.

⁶ Institute of Museum & Library Services, *\$4.8 Million in Grants Go to “Save America’s Treasures”* (Sept. 21, 2018), <https://www.imls.gov/news-events/news-releases/48-million-grants-go-save-americas-treasures> (accessed Oct. 18, 2018).

⁷ *Id.*

⁸ See e.g., History Colorado, Grants & Financial Incentives, <https://www.historycolorado.org/grants-financial-incentives>

Historic preservation grants have helped preserve and restore numerous historical landmarks. These historical landmarks are located both in places frequented by tourists and off the beaten path; they include prominent attractions as well as lesser-known locations of local significance. And as discussed below, publicly-funded historic preservation initiatives have long supported historic religious structures as well.

B. Governments Have a Legitimate Interest in Promoting the Historical, Architectural, and Cultural Heritage of Religious Structures.

The government's legitimate interest in preserving a particular historic structure is not diminished merely because that structure operates as an active house of worship. The history of religious structures in the United States is inextricably intertwined with a broader vision of community.⁹ Indeed, the earliest New England churches frequently sat in village centers and served not just as houses of worship but as the community's sole

(accessed Oct. 18, 2018); Massachusetts Historical Commission, Massachusetts Preservation Projects Fund, <https://www.sec.state.ma.us/mhc/mhcemppf/mppfidx.htm> (accessed Oct. 17, 2018); Texas Historical Commission, Texas Preservation Trust Fund, <http://www.thc.texas.gov/preserve/projects-and-programs/texas-preservation-trust-fund> (accessed Oct. 15, 2018).

⁹ Diane Cohen & A. Robert Jaeger, *Sacred Places at Risk*, 7 (1998), <https://sacredplaces.org/uploads/files/395429189155295863-spar.pdf> (accessed Oct. 15, 2018).

municipal building, providing a place for annual town meetings and occasionally serving as courtrooms, hospitals, and art galleries.¹⁰ Similarly, synagogues on the Lower East Side of Manhattan served as the gateway for Jews leaving the shtetls of Europe for a new life in the United States, connecting newly arrived immigrants to housing, jobs, and community.¹¹ And the prairie churches of North Dakota, the first public buildings constructed by homesteaders in the 1880s, still serve as gathering centers for farm families in the Great Plains.¹²

Government also has a legitimate public interest in advancing the *economic* benefits of historic preservation, which often extend far beyond the individual historic property and into the neighboring community.¹³ Investing in historic properties

¹⁰ Peter Benes, MEETINGHOUSES OF EARLY NEW ENGLAND 13, 16 (2012).

¹¹ Holly H. Roberts, SYNAGOGUES OF MANHATTAN, NEW YORK, 11-12 (2013).

¹² Patricia L. Brown, *Beacons of Faith Are Dimming on the Prairie*, N.Y. TIMES (Jul. 7, 2002).

¹³ Numerous studies have demonstrated that “local preservation measures provide[] an economic stimulus through increased property values.” Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina’s Contextual Approach to Historic Preservation*, 20 U. FLA. J.L. & PUB. POL’Y 221, 224 (2009).

Studies also indicate that historic tourism travelers spend more per traveler than other kinds of travelers. Donovan D. Rypkema, THE ECONOMICS OF HISTORIC PRESERVATION 79 (2d ed. 2005) (citing economic research that in Georgia, “[h]eritage tourism

“generally reduces vacancy, enhances the local economy, attracts new businesses and can help to revitalize depressed areas.”¹⁴ Indeed, between the early 1980s and 2017, the National Trust’s own Main Street America program—a national network of more than 1,600 historic downtowns and neighborhood commercial districts—produced \$74 billion in public and private reinvestment, a net gain of 138,303 businesses and 614,716 jobs; and a total of 276,790 buildings rehabilitated.¹⁵ And in 2017, the program calculated its “reinvestment ratio” (the average dollars generated in a community per dollar used to operate the local Main Street program) as \$26.43 for every \$1 spent.”

Crucially, the economic benefits of historic preservation are not limited to commercial or residential properties: historic religious structures—just like their secular historic counterparts—create a *significant* economic benefit for the communities in which they reside. A major study of historic religious places across the United States found that the average historic religious place in an urban environment generates over \$1.7 million in economic

travelers” spend on average over \$200 more per traveler than any other kind of traveler; in Texas, heritage travelers spend on average \$114 per day “compared with \$88 spent daily by other travelers.”).

¹⁴ *Id.*, quoting Colorado Historical Foundation, *The Economic Benefits of Historic Preservation in Colorado* 14 (2002).

¹⁵ National Main Street Center, Main Street Impact, <https://www.mainstreet.org/mainstreetimpact> (accessed Oct. 18, 2018).

impact.¹⁶ These congregations attract visitors and volunteers that spend their money in the surrounding community.¹⁷ Only 11 percent of these visits are related to worship, while 89 percent involve secular activities.¹⁸ In addition, more than four out of every five beneficiaries of community programs and events housed in religious structures are not members of the religious congregation.¹⁹ Like the early churches of New England, America's historic religious structures often serve as *de facto* community centers.²⁰

Further, the architecture of historic religious structures is often distinct from other buildings, and can serve as a powerful physical presence in a community, contributing positively and significantly to the lives of those who live or work nearby.²¹ The size, height, iconic architecture, and prominent locations of many churches, synagogues, and other houses of worship make these buildings landmarks in their communities, contributing to the cultural and historic context of their neighborhoods and

¹⁶ Partners for Sacred Places, *The Economic Halo Effect*, at 4, (“*Economic Halo Effect*”), <https://sacredplaces.org/uploads/files/16879092466251061-economic-halo-effect-of-historic-sacred-places.pdf> (accessed Oct. 15, 2018)

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5

²⁰ *Id.*

²¹ Cohen & Jaeger, *supra*, at 27.

downtowns.²² Religious structures also often showcase the finest work of America’s architects and craftspeople—from the majestic stained glass windows of Louis Tiffany to the ancient petroglyphs of Albuquerque. The secular significance and aesthetic appeal of historic religious structures transcends the bounds of faith and attracts believers and non-believers alike.

Unfortunately, many of America’s historic religious structures face urgent physical repair needs—and many lack the financial resources to maintain the property’s historical character.²³ In 1998, the nonprofit Partners for Sacred Places surveyed over 100 historic religious structures, and reported that “[l]ast-minute repairs alone cost the average congregation \$50,000 a year. One fifth of the 111 buildings surveyed had structural damage. The congregations expect to spend, on average, \$225,000

²² *Id.* at 28.

²³ In addition to deferred maintenance costs, preserving a historic structure often requires utilizing repair techniques that are more time-intensive—and more costly—than those used to repair modern structures. Indeed, compliance with the Secretary of the Interior’s Standards for the Treatment of Historic Properties—detailed minimum standards for the rehabilitation and restoration of historic properties—is mandatory for those receiving federal historic preservation grants. Secretary of the Interior’s Standards (2017), <https://www.nps.gov/tps/standards/treatment-guidelines-2017.pdf> (accessed Oct. 14, 2018). These standards have been widely adopted by states and localities as well.

to repair their buildings.”²⁴ These needs have only increased in the ensuing years.

Indeed, the National Trust has repeatedly listed historic churches as among the most endangered historic sites in the United States—for community, architectural, and historic reasons, not religious ones.²⁵ For example, in 1996, the National Trust named the adobe churches of New Mexico to its annual list of *America’s 11 Most Endangered Historic Places*.²⁶ Built between 100 to 200 years ago, these churches represent a central element of New Mexico’s cultural history, but were literally dissolving due to well-meaning but improper restoration efforts in the 1970s. Similarly, in 2005, the National Trust named all of the historic Roman Catholic churches in Greater Boston to its annual *Most Endangered* list.²⁷ At the time, the Archdiocese of Boston was implementing a plan to close more than 80 parishes. The National Trust partnered with community leaders and private developers in an effort to preserve as many of these historic buildings as possible, with the goal of maintaining these architecturally unique structures

²⁴ Cohen & Jaeger, *supra*, at 2.

²⁵ See National Trust for Historic Preservation, *America’s Most Endangered Historic Places—Past Listings*, <https://savingplaces.org/11most-past-listings#.WXNGHYjytW8> (accessed Oct. 11, 2018).

²⁶ *Id.*

²⁷ *Id.*

as community and cultural landmarks—even if a religious use was no longer viable.²⁸

**C. Federal, State, and Local Governments
Regularly Fund the Preservation of Historic
Religious Structures to Advance Secular
Public Benefits.**

Faced with the risk of historic structures disappearing due to insufficient financial resources for their upkeep, government at all levels has regularly supported the stabilization, preservation, and restoration of historic structures, religious and non-religious alike. Examples of publicly supported projects range from the Irvington United Methodist Church in Indianapolis to the Temple Ohabei Shalom Cemetery Chapel in Boston.²⁹ These projects have received historic preservation grants based on their historical merit and cultural importance—not the applicant’s sectarian identity.

While many grants to historic religious structures are made at the state and local levels, since 2003 the

²⁸ See Michael Paulson, *Historic Trust Lists Catholic Churches*, BOSTON GLOBE (June 5, 2005) at B1.

²⁹ Indiana Department of Natural Resources, *Grant To Preserve Local History Across State*, http://www.in.gov/activecalendar_dnr/EventList.aspx?view=EventDetails&eventidn=16251&information_id=36996 (accessed October 18, 2018); Secretary of the Commonwealth’s Office, *Massachusetts Preservation Project Fund Grant Recipients*, <https://www.sec.state.ma.us/mhc/mhcmppf/mppf-recipients.htm> (accessed Oct. 18, 2018).

Department of Justice has affirmatively permitted federal agencies to make preservation grants to historic religious structures as well. Federal agencies are authorized to do so provided that the grants extend to a broad class of beneficiaries defined without reference to religion, and so long as there is no basis to conclude that those who administer the program will do so in a manner that favors religious entities.

The Department of Justice's 2003 opinion resulted from a controversy involving one of the most iconic historic landmarks in the country: Old North Church in Boston, Massachusetts. As every schoolchild knows, the steeple of Old North Church is where, on Paul Revere's orders, two lanterns were displayed on the evening of April 18, 1775, warning the citizens of surrounding towns that the British regulars were intending to raid rebel arms stores in Concord by departing Boston by sea, rather than by land.

Yet when Old North Church applied to the federal Save America's Treasures Program for funds to restore its steeple and historic windows, the federal government initially concluded that the Department of the Interior was prohibited from awarding such a grant because Old North Church remains an active ministry of the Episcopal Diocese of Boston.

The National Trust was heavily involved in working with the Department of Justice to reevaluate that conclusion, so as to authorize the use of federal preservation funds for historic religious structures like Old North Church. In 2003, after extensive advocacy by the National Trust, the Department of

Justice issued a formal opinion that the National Park Service was *not* barred from funding historic restoration projects at Old North Church because:

- (1) “The federal government has an obvious and powerful interest in preserving all sites of historic significance . . . without regard to their religious or secular character,”
- (2) Eligibility for the program extended to “a broad class of beneficiaries, defined without reference to religion,” and
- (3) There was no basis to conclude that the criteria for the grants were not neutrally applied.³⁰

The Department of Justice concluded that barring Old North Church from receiving historic preservation grants would provide a powerful incentive for a religious organization to “bend their practices in a secular direction,” and the Supreme Court had repeatedly explained that “governmental assistance must not be structured in a way that creates a financial incentive for people to change their religious (or nonreligious) behavior.”³¹

³⁰ *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church*, 27 Op. O.L.C. 91, 102 (Apr. 30, 2003).

³¹ *Id.* at 111, citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002).

Nor does permitting communities to evenhandedly provide public historic preservation grants to religious structures

Today, federal preservation grants have supported over fifty restoration projects at historic religious structures, including churches, chapels, synagogues, meeting houses, a cathedral, and several Shaker villages.³² Indeed, of the nine Save America's Treasures awards made in 2018 for historic structures, three were for historic religious structures.³³ And just last year, the National Park Service announced plans to fund projects at the Sixteenth Street Baptist Church in Alabama and the West Hunter Street Baptist Church in Georgia as part of a larger grant for the preservation of 39 sites associated with the Civil Rights Movement.³⁴

conflict with the government's anti-establishment interest. There is no Establishment Clause violation even when a state itself displays historical monuments that have some religious aspect, so long as there is a secular purpose in doing so as part of a "broader moral and historical message reflective of a cultural heritage." *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring). See also *American Atheists, Inc. v. City of Detroit Dev. Auth.*, 567 F.3d 278 289 (6th Cir. 2009) ("[P]rograms that evenhandedly allocate benefits to a broad class of groups, without regard to their religious beliefs, generally will withstand scrutiny").

³² *Save America's Treasures Awards 1999-2010 By State*, available at <https://tinyurl.com/SATStateAwards> (accessed Oct. 18, 2018).

³³ Institute of Museum and Library Services, *supra*.

³⁴ See Press Release, *National Park Service Announces Over \$7.5 Million in Grants To Preserve African American Civil Rights Movement Sites*, Nat'l Park Serv. (Jan. 12, 2017), <https://www.nps.gov/orgs/1207/01-12-2017-civil-rights-grants.htm>.

Finally, numerous states provide historic preservation grants to historic religious structures, particularly in instances where the needed repairs involve exterior elements. Pennsylvania permits religious structures to apply for historic preservation funds so long as the historic place is open to the public at least 100 times a year, a requirement that also applies to non-religious structures.³⁵ Connecticut provides matching-funds to religious organizations for projects including window restoration, steeple repair, sill replacement, masonry repair, exterior painting and roofing.³⁶ In total, at least 23 states have provided public preservation support for projects involving historic religious structures.³⁷

In short, the evidence is clear: the secular public benefits of preserving and maintaining historic religious structures are both manifest and indistinguishable from those gained by preserving and maintaining non-religious historic structures.

³⁵ Pennsylvania Historical & Museum Commission, Keystone Historic Preservation Construction Grants, <http://www.phmc.pa.gov/preservation/grants-funding/pages/construction-projects.aspx#6> (accessed Oct. 18, 2018).

³⁶ Connecticut Trust for Historic Preservation, Funding Opportunities, <https://www.cttrust.org/current-funding> (accessed Oct. 15, 2018).

³⁷ Partners for Sacred Places, *States Providing Funding to Historic Religious Properties*, 1 SACRED PLACES, no. 3, 2004 at 11, <http://www.sacredplaces.org/uploads/files/935573495915362585-sacred-places-vol-1-no-3.pdf> (accessed Oct. 18, 2018).

II. STATE COURTS ARE SPLIT ON WHETHER HISTORIC PRESERVATION GRANTS ARE A PUBLIC BENEFIT WITHIN THE SCOPE OF *TRINITY LUTHERAN*.

Congress established the National Trust as a steward of our nation’s history and an independent advocate for historic preservation policies across the United States. 54 U.S.C. §312102(a). Today, the National Trust is the leading organization devoted to saving historic places across the United States. The National Trust is concerned that, absent clear and unequivocal guidance from this Court as to the scope of *Trinity Lutheran*, communities across the country will be dissuaded from saving historic religious structures out of fear of litigation, and that these enduring reminders of our diverse pasts will be forever lost to time.

This Court was clear in *Trinity Lutheran*: a religious entity may not be denied “a public benefit solely because of its religious character,” *see generally* 137 S. Ct. 2012 (2017). Yet rather than adhere to this holding, several states have instead sought to distinguish it to the point of disregard, particularly in the context of historic preservation. These conflicting authorities leave state historic preservation offices and local governments with differing rules—and significant legal uncertainty—about how the Free Exercise Clause affects their historic preservation efforts.

In *Trinity Lutheran*, this Court held that the State of Missouri could not exclude Trinity Lutheran

Church from a statewide grant program designed to fund the resurfacing of playgrounds. *Id.* The Court observed that Missouri had effectively given Trinity Lutheran a choice: “participate in an otherwise available benefit program or remain a religious institution.” *Id.* at 2021-22. The Court concluded that such a policy “imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Id.* at 2021.

While this Court was clear that a religious entity may not be denied a generally available public benefit on the basis of its religious character, New Jersey and Massachusetts have instead focused on footnote three of *Trinity Lutheran* to conclude that the scope of the Court’s holding was exceptionally limited. That footnote, which four members of the Court joined, notes that the case “involves express discrimination based on religious identity with respect to playground resurfacing” but that the opinion does “not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n. 3. Justice Breyer wrote a separate concurrence to indicate that he would “leave the application of the *Free Exercise Clause* to other kinds of public benefits for another day.” *Id.* at 2027 (Breyer J., concurring) (emphasis in original). Justice Gorsuch, joined by Justice Thomas, also wrote separately and expressed doubt that any useful distinction could be made “between laws that discriminate on the basis of religious *status* and religious *use*.” *Id.* at 2025 (Gorsuch, J., concurring) (emphasis in original).

New Jersey and Massachusetts interpret footnote three as essentially rendering the balance of the

Court's opinion as non-precedential. For example, the New Jersey Supreme Court contends that footnote three limits *Trinity Lutheran's* reach to instances indistinguishable from the legally-permissible resurfacing of playgrounds at a church-maintained preschool. *Freedom from Religion Found.*, 181 A.3d. at 1011. Historic preservation funding has widely-recognized secular economic, cultural, and aesthetic public benefits. Yet the New Jersey Supreme Court declared that historic preservation funding for historic religious structures is a "religious use" outside of *Trinity Lutheran's* scope, because the repairs allowed active congregations to hold "religious worship services" in the historic structures. *Id.* In essence, the New Jersey Supreme Court determined that the State's disestablishment interest superseded free exercise protections where there is an incidental benefit to religion, even if the purposes of the benefit—avoiding the deterioration and loss of historic structures—are avowedly secular.

The Massachusetts Supreme Judicial Court reached a similar decision in *Caplan v. Town of Acton*, 92 N.E.3d 691 (Ma. 2018), a lawsuit challenging a municipal historic preservation grant to repair the 1846 Acton Congregational Church, located in the Acton Centre Historic District. That court purported to narrow *Trinity Lutheran's* applicability to only those instances where there is a "categorical ban on the grant of public funds to a church 'solely because it is a church.'" *Id.* at 703-04. In remanding the case for further proceedings, the court indicated that any incidental benefits to a religious organization must be weighed against the grants' permissibility under the Massachusetts Anti-Aid Amendment. The court

expressed concerns that grants for the repair and restoration of the exterior of the church structure “would help defray planning and restoration costs that the church would otherwise have to shoulder on its own, allowing the money saved to be used to support its core religious activities.” *Id.* at 707. Similarly, the court concluded that grants to repair stained-glass windows were impermissible regardless of the secular purposes for those repairs—such as ensuring that the historic structure remained watertight—because they “substantially aid the church in its essential function.” *Id.* at 711.

One justice of the Massachusetts Supreme Judicial Court recognized the inherent conflict between *Caplan* and this Court’s holding in *Trinity Lutheran*. Justice Cypher correctly noted that while the public benefits of restoring a historic religious structure and restoring a historic secular structure are identical, the court impermissibly considered the religious identity of the grant recipient in evaluating the permissibility of the grant. *See Id.* at 720 (“Historic churches and meeting houses are, like secular historic buildings, an indispensable part of our historic landscape and warrant the same degree of preservation.”) *Id.* at 720 (Cypher, J., dissenting). As such, Justice Cypher recognized that a historic religious structure with an active congregation was placed at a distinct disadvantage in applying for a historic preservation grant, when compared to a structure whose congregation was no longer active. *Id.* at 723. Put differently, the dissent observed that under the majority opinion in *Caplan*, two identical historic restoration projects could be treated differently by the government based solely on the

religious affiliation of the owner. This is precisely what *Trinity Lutheran* prohibits.

Moreover, the decisions in New Jersey and Massachusetts conflict with the decision of the Vermont Supreme Court, which recognized that the clear secular purposes of the historic preservation grants put them squarely within *Trinity Lutheran's* scope. *Taylor v. Town of Cabot*, 178 A.3d 313 (Vt. 2017). The Vermont Supreme Court stated, “[t]he fact that the ultimate recipient of these funds is a church does not itself establish a violation of the Compelled Support Clause; the critical question is whether the funds will support worship.” *Id.* at 323. Unlike the courts in Massachusetts and New Jersey, the Vermont Supreme Court found that the record did not support a conclusion that painting the structure and inspecting its window sills for damage supported worship. *Id.*

Even prior to *Trinity Lutheran*, the United States Court of Appeals for the Sixth Circuit reached the same conclusion when reviewing whether historic religious structures could participate in a public community revitalization grant program. See *generally American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009). In *American Atheists*, the City of Detroit offered generally available grants for repairs of buildings in Detroit’s downtown area in advance of that city hosting the Super Bowl. Three churches—each listed on the National Register of Historic Places—were among the numerous organizations to be awarded grants based on neutral criteria. In reviewing a challenge under the Establishment Clause, the Sixth

Circuit identified the Free Exercise implications of excluding religious organizations from generally available public benefits. Judge Sutton, writing for the Court, noted that “[e]xcluding the churches from taking part in the program . . . would send . . . a message not of endorsement but of disapproval.” *Id.* at 292. As this Court subsequently noted in *Trinity Lutheran*, the Free Exercise Clause demands neutrality. *Trinity Lutheran*, 137 S. Ct. at 2020 (“[W]hen this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion”).

In all of four of these cases, the public grants served an important secular benefit: the preservation of historic structures central to the communities’ aesthetic and architectural appeal and cultural heritage. The grants were awarded based on neutral criteria and offered to broad class of organizations without regard to the applicants’ political or religious beliefs. Like nearly all public benefits, the grants in question permitted the grantees to focus other resources elsewhere. Yet while Vermont and the Sixth Circuit correctly recognized that any benefit to religion was incidental to the secular purpose of the grants, New Jersey and Massachusetts determined that they were obligated to consider the identity of the grant applicant to assess how the grants would change the applicant’s spending of private funds. By this standard, communities across the country with grants to give will be forced to watch their historic structures fall into disrepair solely because of the identity of the structures’ occupants. The Free Exercise Clause demands a different result.

CONCLUSION

Continued legal uncertainty regarding the ability of government to assist in funding the preservation and repair of historic religious structures will limit the ability of government to protect historic structures, as communities will be unwilling to risk their already-stretched financial resources in light of likely litigation. For the foregoing reasons, *amicus* urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

THADDEUS HEUER
Counsel of Record
ANDREW LONDON
RACHEL HUTCHINSON
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
theuer@foleyhoag.com

ELIZABETH S. MERRITT
NATIONAL TRUST FOR
HISTORIC PRESERVATION
2600 VIRGINIA AVE., NW
SUITE 1100
Washington, DC 20037
(202) 297-4133