Nos. 18-364, 18-365

In The Supreme Court of the United States

MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Respondents.

THE PRESBYTERIAN CHURCH IN MORRISTOWN, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94704
(510) 642-6483
echemerinsky@law.berkeley.edu

ANDREW L. SEIDEL
RYAN D. JAYNE
FREEDOM FROM RELIGION FOUNDATION, INC.
PO Box 750
Madison, Wisconsin 53701
(608) 256-8900

PAUL S. GROSSWALD
13 Irving Place, Ste. 1
Summit, New Jersey 07901
(917) 753-7007

Attorneys for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether it violates free exercise of religion under the First Amendment to the United States Constitution for a state, pursuant to an explicit provision of its state constitution, to deny funds to churches to repair or restore their use for religious worship.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Freedom from Religion Foundation confirms that it does not have parent companies, nor do any publicly held companies own 10% or more of its stock.

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STATEMENT OF THE CASE

Factual background

The facts of this case have been stipulated and are not in dispute. The Morris County Board of Chosen Freeholders awards grants from the Morris County Historic Preservation Trust Fund, which is funded by a county property tax. (Trust Fund Rules, JSSF Ex. A, Psca238.) Morris County requires residents to pay a tax into the Trust Fund. *Id.*

The Freeholders award grants from that fund to four types of entities: 1) municipal governments within Morris County; 2) Morris County itself; 3) charitable conservancies whose purpose includes historic preservation; and 4) religious institutions. (Trust Fund Rules, JSSF Ex. A, Psca259.)

The third category is narrowly defined as charitable conservancies "whose purpose includes historic preservation of historic properties, structures, facilities, sites, areas or objects, or the acquisition of such properties, structures, facilities, sites, areas or objects for historic preservation purposes." (*Id*. at Psca241.)

Put more simply, this dedicated tax is distributed only to the government, charities dedicated to historic preservation, and churches. Individuals, for-profit businesses, and most secular nonprofits are excluded from the County's program even if they own and maintain historic buildings. The grants are not available to all nonprofits owning historical buildings, though they are available for any religious nonprofit owning a

historical building. In other words, key to this case is the undisputed fact that the County's program favors religious institutions over non-religious ones.

Unlike secular nonprofits, religious institutions are eligible for these grants whether or not they have a purpose that includes historic preservation. (Trust Fund Rules, JSSF 7 Ex. A, Psca259.) Secular nonprofits only are eligible if they affirm a purpose of historic preservation, but this requirement is not applied to churches. At least one church that received a grant repudiated "historic preservation" as a purpose, explaining in a letter accompanying the church's 2014 grant application that "the sole purpose of a church is spreading the gospel of Jesus Christ." (JSSF Ex. J2, Psca670.)

Other defendants admitted to their exclusively religious purposes:

- First Presbyterian Church in Boonton said that "the sole purpose of a church is spreading the gospel of Jesus Christ," repudiating "historic preservation" as a purpose. (JSSF Ex. J2, Psca670.) It was awarded $109,840 between 2012 and 2014. (JSSF ¶ 60, Psca232.)

- Community Church of Mountain Lakes declared that "we affirm our journey to live out the teachings of Jesus Christ." (JSSF Ex. M2, Psca814.) It was awarded $16,800 in 2015. (JSSF ¶ 71, Psca233.)

- Stanhope United Methodist Church said that its purpose is "[t]he promotion of the Christian religion

through the preaching of the Word of God, the administration of the sacraments, ordinances, and other means of grace, the maintenance of worship, the edification of believers; the evangelization of the world, and the promotion of the missionary and benevolence causes." (JSSF Ex. H2, Psca531.) It was awarded $139,223 between 2012 and 2015. (JSSF ¶ 58, 68, Psca231-32.)

- Church of the Assumption of the Blessed Virgin Mary described its purpose: "Our long range plan is to provide spiritual support to our more than 2,700 families. This includes preaching the Gospel and administering the Sacraments, celebrating Holy Mass, conducting Assumption School, . . . comforting the sick, consoling the grieving and burying the dead." (JSSF Ex. I2, Psca615.) It was awarded $156,944 between 2012 and 2015. (JSSF ¶ 59, 66, Psca232.)

- Presbyterian Church of New Vernon declared: "Since 1834 people have gathered here to worship and serve God. . . . Moving into a future of promise the church plans to pursue the following. Worship: Create inspirational and relevant worship services so a diversity of people can praise God, gain faith and hope, be equipped to fulfill Christian responsibilities, and feel part of our fellowship as a community of believers. . . ." (JSSF Ex. C2, Psca348.) It was awarded $746,540 between 2012 and 2015. (JSSF ¶ 53, 64, Psca231-32.)

- Presbyterian Church in Morristown described its goal: "Proclaim faithfully the Good News of the Gospel in fresh and compelling ways; Gather people into a

welcoming caring grace-filled community; [and] Nurture relevant thoughtful, committed disciples." (JSSF Ex. B2, Psca318.) It was awarded $988,016 between 2012 and 2015. (JSSF ¶ 52, 63, Psca231-32.)

- First Reformed Church of Pompton Plains said: "The First Reformed Church of Pompton Plains exists to advance God's Kingdom through acceptance, personal transformation, and service." (JSSF Ex. E2, Psca397.) It was awarded $535,336 between 2012 and 2014. (JSSF ¶ 55, 65, Psca231-32.)

All of the church defendants have active worship congregations, a religious mission, and perform religious activities, including religious worship, in the buildings maintained with the funds provided by the County. (JSSF ¶ 48-50, Psca230-31.) In their grant application materials, many of the churches explained that a grant would further their religious mission. For example, the First Presbyterian Church in Morristown said that a grant would "historically preserve the building allowing its continued use by our congregation for worship services," (JSSF Ex. B2, Psca310.) St. Peter's Episcopal Church sought the grant to "ensure continued safe public access to the church for worship." (JSSF Ex. D2, Psca374.) The Church of the Redeemer stated that "Preserving the Church Building is essential to carry out the worship activities and community life of Church of the Redeemer." (JSSF Ex. F2, Psca483.) Ledgewood Baptist Church told the County that "Preservation of the Ledgewood Baptist Church will enable the congregation to continue to provide

religious and community activities to the county's diverse population." (JSSF Ex. L2, Psca765.)

Taxpayer funds were used to enhance the interior of the churches. For instance, Morris County gave First Presbyterian Church in Boonton a grant in 2014 partly to restore two stained glass windows. The more expensive window shows the "Walk to Emmaus," a religious scene depicting the biblical story in the Book of Luke 24:13-32. The window is situated directly above the church's altar and is only visible from inside the church. (JSSF Ex. J1 Psca667; JSSF Ex. J2, Psca688-90.)

As the New Jersey Supreme Court explained: "According to the parties' joint statement of stipulated facts, all twelve churches 'have active congregations' and all 'have conducted regular worship services in one or more of the structures' for which grant funds have been or will be used. All twelve houses of worship are Christian churches." App. 7a. A very significant portion of the funds under the County's program went to these churches. The New Jersey Supreme Court stated: "From 2012 to 2015, the Freeholder Board approved a total of $11,112,370 in grants from the trust fund. The Board awarded $4,634,394 or 41.7%, to 12 churches." App. 6a-7a.

The Trust Fund Review Board recommends grants to the Freeholders (Trust Fund Rules, JSSF Ex. A, Psca239.) Once the grants are awarded, all work funded by the grant money must be completed within two years, although an extension of up to one year may

be allowed. (*Id.* at 5.16(4), Psca270.) The grant money is disbursed by Joseph A. Kovalick, Jr., who has been named as a defendant in this lawsuit in his official capacity as Treasurer of Morris County. (JSSF ¶ 11, Psca226-27.)

Churches that receive construction grants over $50,000 must sign a 30-year easement agreement with the County, whereby the County will oversee the churches' use of their structures, through "proper maintenance" and "limiting changes in use or appearance and preventing demolition of the property," to "assure long-term preservation" of the property. (*Id*. at 5.16(1), Psca269.) Recipients of non-construction grants, or construction grants of $50,000 or less, are not required to sign an easement. (*Id*.)

Procedural history

The Freedom from Religion Foundation is a national nonprofit organization that strongly objects to the use of taxpayer money to repair or maintain churches, places of worship, or ministries. (JSSF ¶ 1-2, Psca225-26.) David Steketee is a Morris County taxpayer and Freedom From Religion Foundation member. (*Id.* at ¶ 3, 7, Psca226.) They are the Respondents in this Court.

On December 1, 2015, The Freedom From Religion Foundation and Morris County resident Steketee sued the Morris County Board of Chosen Freeholders and related Defendants ("Morris County Defendants") in the Superior Court of Morris County, Chancery

Division under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). (Psca1.)

Plaintiffs sought a declaratory judgment that the Trust Fund Grants violated Article I, Paragraph 3 of the New Jersey Constitution, which states that "No person shall . . . be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship."

Plaintiffs also sought a permanent injunction to rescind the challenged grants and prevent any further grants from being issued to repair churches, places of worship, or ministries. Finally, Plaintiffs sought nominal damages, actual damages, and attorneys' fees and costs.

The court transferred the case, sua sponte, to Somerset County. (Psca54.) Defendants then removed the case to the United States District Court for the District of New Jersey, which remanded to the New Jersey state court. (*See* Morris County Defendants' Notice of Removal, Psca57; *FFRF v. Morris County*, No. 2:16-cv-00185-JMV-MF, Letter Order (D.N.J. Mar. 18, 2016), Psca67.)

At the urging of the trial court, Plaintiffs amended their Complaint on April 26, 2016 to join 12 churches that received Trust Fund Grants as defendants. (Psca82.) On May 16, 2016, Plaintiffs filed a Second Amended Complaint. (Psca138.) The Morris County Defendants answered on June 14, 2016. (Psca192.) The Church Defendants answered on June 20, 2016. (Psca204.)

On August 19, 2016, the parties filed a Joint Statement of Stipulated Facts with the court, containing all of the facts and exhibits to be considered by the court on summary judgment. (Psca225.) Included among the exhibits were the rules for the Morris County Historic Preservation Trust Fund program (JSSF Ex. A, Psca237), and the grant applications and Morris County approvals for each of the church grants at issue. (JSSF Ex. B1-Ex. M2, Psca294-838.)

Plaintiffs and defendants each filed motions for summary judgment and opposed each other's motions for summary judgment. On January 9, 2017, Judge Margaret Goodzeit issued three orders. App. 58a. The first granted the Morris County Defendants' motion for summary judgment. The second granted the Church Defendants' motion for summary judgment. The third denied the Plaintiffs' cross-motion for summary judgment. App. 59a, 86a.

The Plaintiffs filed a timely notice of appeal on February 23, 2017. On April 6, 2017, the Morris County Defendants filed a motion to take a direct appeal to the New Jersey Supreme Court, bypassing the Appellate Division. The New Jersey Supreme Court granted that motion on June 2, 2017.

On April 18, 2018, the New Jersey Supreme Court unanimously reversed the trial court and found that the denial of aid for church repairs was required by the New Jersey Constitution and did not violate free exercise of religion. The New Jersey Supreme Court began its opinion with a detailed review of New Jersey's

prohibition of aid to churches in the state, tracing it to the earliest days of New Jersey history. App. 11a-22a. The court observed: "The above history makes clear that New Jersey's Religious Aid Clause can be traced to the establishment of an independent government in the State in the 1700s. The provision was not inspired by the 'Blaine Amendment'; nor was it a response to anti-immigrant or anti-Catholic bias." App. 22a.

The court concluded that the plain language of the New Jersey Constitution prohibited such aid to churches. The court declared: "We therefore find that the County's grants ran afoul of the State Constitution's Religious Aid Clause." App. 31a.

The court then carefully analyzed this Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), and found that this situation is quite different. *Trinity Lutheran* was about providing aid to schools for playground surfaces. This case is about direct financial aid for churches to use for religious worship. The New Jersey Supreme Court found this much more analogous to *Locke v. Davey*, 540 U.S. 712 (2004), where this Court held that a state could refuse to provide financial aid for a student to attend a seminary for ordination as a minister. The New Jersey Supreme Court observed:

> This case does not involve the expenditure of taxpayer money for non-religious uses, such as the playground resurfacing in *Trinity Lutheran*. The appeal instead relates to grants that sustain the continued use of active houses of worship for religious services and

> finance repairs to religious imagery. In our judgment, those grants constitute an impermissible religious use of public funds. App. 40a.

The New Jersey Supreme Court concluded: "The holding of *Trinity Lutheran* does not encompass the direct use of taxpayer funds to repair churches and thereby sustain religious worship activities. We therefore find that the application of the Religious Aid Clause in this case does not violate the Free Exercise Clause." App. 45a.

SUMMARY OF ARGUMENT

This case is about whether a state may choose under its state constitution to refuse to give financial aid directly to churches for their use for facilities for religious worship services. The New Jersey Constitution expressly forbids this. Article I, Paragraph 3 of the New Jersey Constitution, states that "No person shall . . . be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship." The provision of the New Jersey constitution forbidding aid directly to religious institutions traces back to before the adoption of the United States Constitution. *See* App. 11a-22a. Ultimately, this case is about whether a state can enforce its constitutional guarantee that it will not tax its citizens to pay to build or repair the churches for religions to which they do not adhere. The case thus concerns whether the state can ensure that citizens' rights of conscience

will not be violated by employing the coercive taxing power of the government in a manner that funds religious worship. The New Jersey Supreme Court unanimously held that this protection under the New Jersey Constitution did not violate the free exercise rights of churches seeking taxpayer funds to repair their houses of worship.

Petitioners' argument is that the denial of this aid violates the churches' free exercise of religion, but Petitioners fail to identify to whom the religious right at issue belongs: the taxpayers. In other words, Petitioners contend that the government is constitutionally required to provide repair for houses of worship if it provides repairs to any other buildings and even as here where it denies aid to most secular private institutions. But Petitioners ignore the rights of the taxpayers to be free from the violation of free exercise of religion—and the establishment of religion—that results from direct government aid to churches to facilitate religious worship.

The Petitions should be denied because the New Jersey Supreme Court decision does not conflict with decisions of this Court or other courts. Indeed, the New Jersey Supreme Court decision is supported by history tracing back to the earliest days of this country.

First, contrary to Petitioners' assertion, this case is not like *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017). That case involved a challenge to a program that allowed secular private schools to receive funds for resurfacing playgrounds,

but excluded religious schools from receiving such funds. Morris County's program is the reverse. It is a program that provides money to religious entities, but not to private secular entities except those dedicated to historic preservation. In other words, the programs in this case prefer religion, whereas in *Trinity Lutheran* the program disfavored religion.

Also, unlike surfaces for playgrounds, which do not bear on religious worship, this case concerns money given directly to churches for facilities to be used for religious worship. In that way, it is much more like this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), which held that a state, pursuant to its constitution, may refuse to provide funds that are used for core religious purposes.

Second, there is no conflict among the lower courts. Petitioners point to only one case since *Trinity Lutheran* that they assert conflicts with the decision of the New Jersey Supreme Court: *Taylor v. Town of Cabot*, 78 A.3d 313 (Vt. 2017). But that case was quite different from this one. In that case, the aid program was broadly available to secular and religious entities on the same terms. *Id.* at 317. Also, unlike this case, there was no issue as to whether the Free Exercise Clause was violated by the denial of aid. Nor did that case involve the type of on-going entanglement with religion as involved here where any grant over $50,000 creates a 30-year easement that puts the government in the role of overseeing houses of worship.

The issue of whether the government can be constitutionally required to provide aid to churches for their restoration is an enormously difficult one that raises serious concerns under the Establishment Clause. This Court surely would be better off waiting until a split develops among the lower courts and the issue has had a chance to percolate.

Finally, there is a long history in this country of state constitutions prohibiting the taxing of some people to directly support the churches of others. This, of course, was the basis for the famous statements of Thomas Jefferson and James Madison in Virginia. *Everson v. Board of Educ.*, 330 U.S. 1, 13-14 (1947). Since the earliest days of American history states have prevented such aid. The New Jersey Supreme Court's decision is thus consistent with a tradition that is as old as the United States itself.

ARGUMENT

SUPREME COURT REVIEW IS NOT WARRANTED BECAUSE THE DECISION OF THE NEW JERSEY SUPREME COURT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT AND THERE IS NOT A SPLIT AMONG THE LOWER COURTS AS TO WHETHER A STATE MAY REFUSE TO GIVE MONEY DIRECTLY TO CHURCHES TO BE USED FOR RELIGIOUS PURPOSES.

A. The Decision of the New Jersey Supreme Court Is Consistent With the Decisions of this Court.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), this Court concluded that the Missouri Department of Natural Resources infringed free exercise of religion by allowing secular private schools, but not religious schools, to receive grants to purchase rubber playground surfaces made from recycled tires. The Court stressed that this was aid used solely for the completely secular purpose of having safer playgrounds. Quite importantly, the Court made clear that its holding was narrow and declared: "This 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." *Id.* at 2024 n.3.

Justice Breyer in his concurring opinion reinforced the very limited nature of the Court's holding. He explained: "Here, the State would cut Trinity

Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. . . . We need not go further." *Id.* at 2027 (Breyer, J., concurring.)

Nothing in the Court's opinion suggested that this should extend to the government being required to provide aid for churches used for religious worship services. In fact, this Court's distinction of *Locke v. Davey*, 540 U.S. 712 (2004), strongly supports the approach of the New Jersey Supreme Court in this case. In *Locke v. Davey*, the Court considered a program in the State of Washington that provided college scholarships to students from that state. Joshua Davey wanted to use his Promise scholarship to attend a seminary to be ordained as a minister, but the State refused to fund this religious education. *Id.* at 715-717. Davey, like Trinity Lutheran, sued claiming this violated his free exercise of religion and denied him equal protection. The Court, in a 7-2 decision authored by Chief Justice Rehnquist, rejected Davey's claim and held that it did not violate the Constitution for the government to insist that its funds be used for secular degrees. *Id.* at 724-725.

In *Trinity Lutheran*, this Court distinguished *Locke v. Davey* and explained: "Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could 'think of few areas in which a State's antiestablishment interests come more into play.'" 137 S.Ct. at 2023 (quoting *Locke v. Davey*, 540 U.S. at 722.) The Court observed that the funding sought in *Locke* was for an

"'essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,' and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses." 137 S.Ct. at 2023 (quoting *Locke v. Davey*, 540 U.S. at 721-722.)

The New Jersey Supreme Court carefully explained why the aid in this case is much more like that in *Locke v. Davey* than in *Trinity Lutheran*: "As in *Locke*, New Jersey's antiestablishment interest in not using public funds to build or repair churches or maintain any ministry 'lay at the historic core of the Religion Clauses.' New Jersey's historic and substantial interest against the establishment of, and compelled support for, religion is indeed 'of the highest order.'" App. 44a (citation omitted.) The New Jersey Supreme Court elaborated:

> New Jersey's Religious Aid Clause and the grants awarded in this matter stand in stark contrast to the setting in *Trinity Lutheran*. As the history of the New Jersey Constitution reveals, the interest the Clause seeks to advance 'is scarcely novel.' The Religious Aid Clause reflects a substantial concern of the State's founders in 1776: to ensure that taxpayer funds would not be used to build or repair houses of worship, or to maintain any ministry. That choice reversed the approval of established religion in the earlier Concessions; it also diverged from the practice of other states that allowed established religion at the time. App. 42a.

Contrary to the assertion of Petitioner Presbyterian Church in Morristown, the funds here were not "an incidental benefit." Petition for a Writ of Certiorari, The Presbyterian Church in Morristown v. Freedom From Religion Foundation at 20. This is about whether a state may refuse to provide funds to repair churches used for religious worship. It involves a program where nearly $5 million in taxpayer funds over four years went to churches, App. 6a-7a, but where most secular private institutions were ineligible for the assistance.

Also, the program here involved a degree of significant entanglement with the government that was not present in *Trinity Lutheran*. Any churches receiving construction grants over $50,000 must sign a 30-year easement agreement with the County, whereby the County will oversee the churches' use of their structures, through "proper maintenance" and "limiting changes in use or appearance and preventing demolition of the property," to "assure long-term preservation" of the property. (*Id*. at 5.16(1), Psca269.) The government thus for a long period of time will be in the constant business of monitoring the use of facilities that exist for religious worship. Nothing like that was present in *Trinity Lutheran*.

The decision of the New Jersey Supreme Court upholding and applying the provision of the New Jersey Constitution is thus completely consistent with this Court's decisions.

B. The Decision of the New Jersey Supreme Court Does Not Conflict With Decisions of Other Jurisdictions.

The grants involved in this case are available only to government entities, private groups dedicated to historical preservation, or to religious institutions. Most secular private institutions are not eligible. For example, if Respondent Freedom From Religion Foundation applied for a grant for a building in Morris County, it would not be eligible to receive funds because it is not an organization dedicated to historical preservation. A church, though, could receive funds from the County even though its purpose is not historic preservation.

This, too, is completely different from *Trinity Lutheran* where the government was providing aid to secular private schools, but not to religious schools. The government program here discriminates in favor of religious institutions. It also makes this case quite different from the ones that Petitioners and their *amici* point to as creating a conflict among the lower courts.

It is notable that Petitioners point to only three cases that they say create a conflict with the ruling of the New Jersey Supreme Court, and one of these was significantly prior to this Court's decision in *Trinity Lutheran* and another came to exactly the same conclusion as the New Jersey Supreme Court in this case. Petition for a Writ of Certiorari, Morris County Board of Chosen Freeholders v. Freedom From Religion

Foundation at 17-20; Petition for a Writ of Certiorari, The Presbyterian Church in Morristown v. Freedom From Religion Foundation at 14.

On careful examination it is clear that the cases Petitioners cite do not pose a conflict with the New Jersey Supreme Court's decision. Both Petitioners point to a conflict between the New Jersey Supreme Court's ruling and that of the Vermont Supreme Court in *Taylor v. Town of Cabot*, 178 A.3d 313 (Vt. 2017). *Taylor* involved money the city received from the United States Department of Housing and Urban Development that could be used for almost any purpose. The Vermont Supreme Court noted, "funds are possessed and controlled by the Town, and authorizes the Town to use them for a broad array of purposes, with virtually no oversight." *Id.* at 317.

The issue was whether a preliminary injunction should be issued to prevent a small grant to a church for its repair. *Id.* at 314. The Vermont Supreme Court said that the preliminary injunction was inappropriate and stated:

> [T]he record in this case—is not fully developed with respect to the anticipated and permitted use of the grant funds. The grant funds in this case were undisputedly allocated for the purpose of maintenance and repairs to a building that serves as a place of worship, is available for many nonsectarian community events and gatherings, and is an important and historic building in the town. The $10,000

> grant amounts to a small portion of the total funds needed to repair the church. *Id.* at 322.

Taylor v. Town of Cabot is quite different from this case. First, unlike the Morristown policy which favors religious institutions over most private secular institutions, the policy at issue in *Taylor* had no such favoritism. The Vermont Supreme Court explained, "By all appearances, the grant program is available to a broad and diverse collection of potential grantees that is defined without reference to religious affiliation." *Id*. at 324.

Second, the Vermont Supreme Court stressed that unlike this case, the funds were not used to support religious worship. The court observed, "The 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.

Finally, the amount of aid involved in *Taylor* was $10,000 and, as quoted above, the Court stressed inadequacy of the record to assess its use. By contrast, in this case there is no dispute that the funds were used to restore churches for their religious use and "[f]rom 2012 to 2015, the Freeholder Board approved a total of $11,112,370 in grants from the trust fund. The Board awarded $4,634,394 or 41.7%, to 12 churches." App. 6a-7a.

The other case that Petitioner Morris County points to as creating a conflict is *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009). This pre-*Trinity Lutheran* case obviously does not pose a conflict concerning the meaning of this Court's decision in *Trinity Lutheran*, which Petitioners and their *amici* argue is the reason for granting certiorari. Moreover, the facts are quite different from this case.

The City of Detroit, in preparation for hosting a Super Bowl, created a program to refurbish the exteriors of downtown buildings and parking lots in a discrete section of downtown Detroit. *Id.* at 281. The program applied to *all* property within the defined area, and paid up to 50% of the refurbishing costs. The grants were directed to permanent physical improvements to building facades generally visible from a public right-of-way or to enumerated improvements to the street-side edges of parking lots. Three churches within the designated district participated and collectively received 6.4% of the $11.5 million allocated for completed and authorized projects. The question before the court was whether payments to the three churches pursuant to this program violated the Establishment Clause of the First Amendment or the counterpart provision in the Michigan Constitution. *Id.* at 282.

The Sixth Circuit rejected a challenge based on the Establishment Clause. The court stressed that Detroit's "program allocate[d] benefits in an even-handed manner to a broad and diverse spectrum of

beneficiaries." *Id.* at 289. The program assessed a recipient's eligibility for benefits "in spite of, rather than because of, its religious character," and "ma[d]e grants available to a wide spectrum of religious, nonreligious and areligious groups." *Id.* at 290. Nothing in the history or implementation of the program revealed any "overt or masked" purpose to advantage religious groups. *Id.* at 290. Although the funds were used to upgrade some buildings in which religious worship took place, they were available to religious and secular entities alike based on criteria that have nothing to do with religion. *Id.* The Sixth Circuit stressed that the vast majority of the upgrades at issue—renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, trim and gutters—lacked "any content at all, much less a religious content." *Id.* at 292.

This is quite different from this case. First, the Sixth Circuit emphasized that there was no favoritism for religious entities over non-religious ones. By contrast, the Morristown program expressly favors religion by allowing religious entities to receive funds, but denying them to private entities unless they exist for an express historic preservation purpose. (Trust Fund Rules, JSSF Ex. A, Psca259.) Second, there was no issue in *American Atheists* and the court therefore did not rule on whether a state could choose under its constitution to not use money to build and restore churches. No free exercise of religion issue was presented or discussed. But that is the question presented in this case. The Sixth Circuit opinion focused on whether providing funds under this program would

violate the Establishment Clause, an issue not presented in this case because the New Jersey Supreme Court expressly found it unnecessary to address that question. App. 46a.

The only other case that Petitioners point to as creating a conflict is *Caplan v. Town of Acton*, 92 N.E.3d 691 (Mass. 2018). *Caplan* is quite similar to this case in that it involved whether a local government violated the Massachusetts Constitution by giving funds directly to churches for their preservation. The Massachusetts Supreme Judicial Court, like the New Jersey Supreme Court, carefully reviewed the history of the state constitutional provision limiting aid to religious entities.

The Massachusetts Supreme Court found that the aid to the churches violated its state constitution. Its analysis was almost identical to the New Jersey Supreme Court in this case. The court explained:

> [T]he proposed grants are 'neither minimal nor insignificant' in amount. The total cost of the comprehensive assessment contemplated under the Master Plan will be $55,000, to which the Master Plan grant will contribute $49,500, while the total cost of restoring the stained glass windows will be $56,930, to which the stained glass grant will contribute $51,237. . . . More worrisome is the extent to which these grants will assist the church in its 'essential enterprise' as an active house of worship. *Id*. at 707 (citation omitted.)

The court noted "these grants risk infringing on taxpayers' liberty of conscience—a risk that was specifically contemplated by the framers of the anti-aid amendment. . . . Second, these grants also present a risk of government entanglement with religion." *Id.* at 708-709.

This case thus creates no conflict at all with the New Jersey Supreme Court decision. It came to exactly the same conclusion. Petitioner Morristown Board of Freeholders argues that there is a conflict in that the Massachusetts Court rejected a "categorical exclusion of active houses of worship from historic preservation programs." Petition for Writ of Certiorari, Morristown Board of Freeholders, at 22. But the Massachusetts Supreme Court Judicial Court said only that it would not read the Massachusetts Constitution "as an absolute ban on grants to churches, . . . because [it] . . . by its own terms calls for a case-by-case analysis." 92 N.E.3d at 702-703. The court observed that "[a] categorical prohibition also invites the risk of infringing on the free exercise of religion." *Id.* Quite importantly, nothing in the New Jersey Supreme Court decision imposes a categorical prohibition on all aid to religious institutions in all circumstances.[1] The New Jersey Supreme

[1] New Jersey Supreme Court does not take a "categorical approach" prohibiting all aid to churches, but rather just prevents assistance that facilitates religious worship. For example, religious institutions may receive aid under the historic preservation program for buildings that are used entirely for secular purposes. After the New Jersey Supreme Court handed down its unanimous opinion, the New Jersey Historic Trust, the statewide historic trust body, approved $1,037,621 in grant recommendations from

Court found that the specific Morris County program violated the state constitution, just as the Massachusetts Supreme Judicial Court found that the program before it violated the Massachusetts Constitution.

There is no conflict among the lower courts. At some point, as *amici* argue, this Court may need to address whether historic preservation funds must be available for churches when they are similarly available to secular private entities. But this case does not pose this issue and arises in the context of a program that favors religious entities over secular ones. And given the significance of this issue—and its difficulty because of the tensions with the Establishment Clause—this Court surely would benefit from waiting until there is a split among the lower courts and the issue has had a chance to percolate and be addressed by them.

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the Preserve New Jersey Historic Preservation Fund for 33 preservation planning projects including grant recommendations of $43,186 to the Moravian Church in Gloucester County and $5,000 to the Middle Valley Chapel in Morris County. *See* Press Release "33 Historic Preservation Planning Projects Recommended for Grant Awards" September 19, 2018, https://www.njht.org/dca/njht/news/#2. Both buildings are historic churches, but neither have active congregations or are used for religious worship. The Moravian Church is now county-owned and the chapel has been repurposed as a community center.

C. The Constitution Should Not Be Interpreted to Require that the Government Provide Funds to Churches for their Worship Facilities.

Since early in American history, states have rejected taxing citizens to provide financial aid directly to religious institutions. Virginia's episode with funding of churches has assumed epic dimensions in the history of the Establishment Clause, mainly because of the involvement of Thomas Jefferson and James Madison. Virginia's Constitution of 1776 provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ." While not immediately resulting in disestablishment of the Anglican Church, Virginia promptly eliminated tithes to that church for dissenters, and shortly thereafter suspended them for all of its citizens. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1436 (1990).

After the Revolutionary War ended, an attempt was made to resurrect compulsory taxes for the support of churches of a taxpayer's choice. *Everson v. Board of Education*, 330 U.S. 1, 13-14 (1947). This initiative resulted in the successful efforts of Madison and Jefferson in 1785 to completely end such aid in Virginia, via Jefferson's Virginia Statute for Religious Freedom. *Id.* In the famous *Memorial and Remonstrance* that Madison wrote as part of these efforts, he opined that even such a liberal assessment would violate the rights of free exercise protected by the State

Constitution. According to Madison, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one religious establishment, may force him to pay more, or to conform to any other establishment in all cases whatsoever." *Id.* at 57. Thomas Jefferson put the point in even stronger terms in the preamble to the Statute for Religious Freedom: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . ." *Id.* at 13.

With the exception of Maryland and Georgia, by the mid-1780s all of the middle and southern states had explicitly recognized an individual right not to be coerced into financially supporting churches or other places of worship against one's will as part of a broader free exercise right. McConnell, *supra*, at 1436-1437. And even Maryland and Georgia did so as a matter of practice, formalizing this understanding just a few years later. Moreover, most of the states had also buttressed the right of free exercise—either explicitly or in practice—with a ban on the establishment of one particular religious denomination by the state government. The only states in the original thirteen that had not adopted this understanding of free exercise by this time were the New England Congregationalist States of Connecticut, New Hampshire and Massachusetts. *Id.* at 1437.

It was not long, however, before even these long-entrenched establishments yielded to arguments that compelled support of religious congregations violated free exercise rights. Connecticut eliminated such

support requirements in 1818, New Hampshire in 1819 and Massachusetts in 1833. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1458. While Connecticut continued to operate under its English charter until adopting a constitution in 1818, both the original Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 contained explicit protections for the free exercise of religion. *Id.* at 1510, 1542.

In sum, by the time the First Congress met in 1789 to consider a federal bill of rights, there appears to have been a widely shared understanding in all of the states—except three in New England—that protection against having to pay compulsory taxes to support religious faiths a person did not believe in was a key component of a broader right to the free exercise of religion. Even those New England States recognized a qualified form of the right against compelled taxation, limiting the use of such taxes to an individual's own congregation.

New Jersey's long-standing choice in its constitution to not provide funding of churches thus should be upheld based on history and based on the recognition since the earliest days of the nation that it is wrong to tax people to support the churches of others. Providing aid of the sort involved in this case raises serious issues under the Establishment Clause. These would need to be addressed by this Court, but were not ruled on by the New Jersey Supreme Court. App. 46a. It is hard to imagine a clearer instance of tension between

the Free Exercise Clause and the Establishment Clause than posed in this case. To avoid the establishment of religion and to protect its citizens from being taxed to support religions, New Jersey's Constitution says that "No person shall . . . be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship." This is a choice that a state should be able to make.

CONCLUSION

For these reasons the Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94704
(510) 642-6483
echemerinsky@law.berkeley.edu

ANDREW L. SEIDEL
RYAN D. JAYNE
FREEDOM FROM RELIGION FOUNDATION, INC.
PO Box 750
Madison, Wisconsin 53701
(608) 256-8900

PAUL S. GROSSWALD
13 Irving Place, Ste. 1
Summit, New Jersey 07901
(917) 753-7007

Attorneys for Respondents