UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE MENDHAM METHODIST CHURCH; and THE ZION LUTHERAN CHURCH LONG VALLEY, Plaintiffs, v. MORRIS COUNTY, NEW JERSEY, et al., Defendants; ATTORNEY GENERAL of NEW JERSEY, Intervenor-Defendant.	Case No. 2:23-cv-02347

***AMICUS CURIAE* BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF INTERVENOR-DEFENDANT AND DENIAL OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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SUMMARY OF ARGUMENT

New Jersey's Religious Aid Clause reflects a historic and substantial interest in not funding the building and maintenance of places of worship. *See* Reply Brief in Support of Motion to Stay and in Opposition to Plaintiffs' Motion for a Preliminary Injunction for Intervenor-Defendant ("AG's Reply Br.") at 13–27. This brief expands upon the Intervenor-Defendant's historical analysis to make two additional points. First, New Jersey's founders adopted the Religious Aid Clause specifically in order to forestall the religious strife that they had come to view as the inevitable result when states funded the building and maintenance of churches or otherwise became entangled in religion. Second, if Plaintiffs are granted their requested relief, the result will be the exact harms that New Jersey's Religious Aid Clause is meant to prevent, for indeed, those were the results under Morris County's prior grant program, which the Plaintiffs seek to revive.

ARGUMENT

In *Marsh v. Chambers*, the Supreme Court upheld the practice of opening legislative sessions with prayer, pointing to an "unambiguous and unbroken history" of such prayers dating back to the First Congress and reasoning that the prayers had, over those 200 years, "become part of the fabric of our society." 463 U.S. 783, 792 (1983); *accord Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) ("*Marsh* stands for the proposition that it is not necessary to define the

precise boundary of the Establishment Clause where history shows that the specific practice is permitted."). Relying on *Marsh* and its progeny, the Court more recently held in *Kennedy v. Bremerton* that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 597 U.S. 507, 535 (2022). Since "the Constitution did not displace but largely co-exists with state constitutions and state laws," "pre-ratification history can be probative of what the Constitution does *not* mean." *U.S. v. Rahimi*, 144 S. Ct. 1889, 1914 (2024) (Kavanaugh, J., concurring).

The "unambiguous and unbroken history" of New Jersey's Religious Aid Clause, which dates to the Founding Era, conclusively demonstrates that prohibiting the use of taxpayer funds to support the building or maintenance of places of worship has "become part of the fabric of our society." *See* AG's Reply Br. at 13–27. In this case, the exact harms that New Jersey sought to prevent through its Religious Aid Clause—religious strife brought on by inequitable distributions of taxpayer money and the government entanglement with religion that follows—will come to pass if the Plaintiffs are granted their requested relief.

I. New Jersey's Religious Aid Clause was meant to forestall the religious strife that historically followed whenever a government financially supported the building or maintenance of places of worship.

New Jersey's Religious Aid Clause reflects a historic and substantial interest in not funding the building and maintenance of places of worship. The Supreme

Court has already recognized that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Locke v. Davey*, 540 U.S. 712, 723 (2004). The Court cited New Jersey's Religious Aid Clause as an example of this unimpeachable historical tradition. *See id*.

New Jersey's founders wrote the Religious Aid Clause in service of safeguarding both majority and minority religious sects from the religious strife they saw as the natural outcome of old world practices. *See Freedom From Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders*, 232 N.J. 543, 555 (2018) (explaining how "'a diverse array of religious traditions' took hold in New Jersey and 'produced a spirit of toleration and liberty by the time independence was declared,'" resulting in New Jersey's Religious Aid Clause) (quoting Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1468 (2004)). "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). "These practices of the old world were transplanted to and began to thrive in the soil of the new America. . . . These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to . . . *build*

and maintain churches and church property aroused their indignation." *Id*. at 9, 11 (emphasis added).

James Madison and Thomas Jefferson were among the American Founders who adamantly voiced their opposition to levying taxes in support of churches, as the Supreme Court documented in *Everson*. *See id*. at 11–14; *see also Locke*, 540 U.S. at 722 n.6 ("Perhaps the most famous example of public backlash is the defeat of 'A Bill Establishing A Provision for Teachers of the Christian Religion' in the Virginia legislature" which "sought to assess a tax for Christian teachers…."). In his famous *Memorial and Remonstrance Against Religious Assessments*, James Madison equated a law that "can force a citizen to contribute three pence only of his property for the support of any one establishment" with all the evils of old world establishments. He warned that Virginia's proposed tax to support churches "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects" and reminded readers that "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted* in *Everson*, 330 U.S. at 69–70. Madison saw no end to the potential religious strife that would result, should the States consider codifying religious assessments. *See id*. ("What mischiefs may not be dreaded

should this enemy to the public quiet be armed with the force of the law?"). New Jersey, and the majority of other states, heeded Madison's words at the outset. And ultimately, after the American Revolution, these antipathies were channeled into the Federal Constitution's First Amendment. *See* U.S. CONST. amend. I, cl. 1–2.

The religious strife and division that New Jersey sought to avoid was not hypothetical; it was being realized contemporaneously in Massachusetts, whose founders initially chose to maintain established churches. *See* John Witte, Jr. & Justin Latterell, *The Last American Establishment: Massachusetts, 1780-1833* (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529592. The language in Massachusetts' 1780 Constitution which exacted "religious taxes" to support state-recognized churches was hotly contested in the state's Convention and ratification debates. *Id*. at 7–14. After ratification, "[p]ublic support for the establishment eroded" as non-established sects grew in number, membership, and influence, and established sects split apart. *Id*. at 15; *see also id*. at 17 (describing examples of controversial litigation and attempted constitutional reforms arising in the 1820s and 1830s when Congregationalists split into Trinitarian and Unitarian factions). Widely circulated petitions in 1832 described the religious tax as "anachronistic, un-American, and even tyrannical—quite in contrast with other New England States that had recently rejected religious taxes and other supports for religion." *Id*. By 1833, the religious strife brought on by the Massachusetts

establishment had come to a head and the people elected to make church funding "entirely voluntary" under their constitution's Eleventh Amendment. *Id*. at 18–19.

"The States thus disestablished individually, in response to their own experiences, well before the religion clauses of the First Amendment were applied to the States." *FFRF v. Morris Cnty.*, 232 N.J. at 558. "That process reflected the views of some 'religious sects [that] opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities.'" *Id*. at 557–58 (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438 (1990)).

If, as Justice Holmes once stated, "a page of history is worth a volume of logic," *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921), then surely a volume of history—the numerous state constitutions adopting religious aid clauses, the Founders' advocacy against religious assessments, and New Jersey's own unique constitutional history—evinces that New Jersey's prohibition against funding the building and maintenance of places of worship is rooted in a well-established interest in avoiding the religious strife that has historically accompanied government religious establishments.

II. Granting the relief Plaintiffs seek would produce the exact harms New Jersey's Religious Aid Clause was designed to prevent.

New Jersey has an unambiguous and unimpeachable interest in ensuring that no taxpayer money is used to fund the building or maintenance of places of

worship. *See* Sec. I., *supra*. New Jersey—and countless other states during the Founding Era—sought to prevent the religious strife that inevitably follows the distribution of government resources in aid of religion. *See* Sec. I., *supra*. If this Court grants Plaintiffs' motion and the relief they seek, the result will be to bring about the religious strife New Jersey's Religious Aid Clause was meant to forestall.

If Morris County is permitted to resume its prior funding practices, the inevitable result will be inequities in the financial distributions enjoyed by different religious factions. The County—and its taxpayers—will facilitate religious worship for older, established Christian sects while similar financial aid will remain unavailable to more recently established congregations. The inequitable distribution of aid under the County's prior program already bears this out. The records obtained by FFRF in its prior lawsuit challenging Morris County's grant program demonstrate that the *only* religious groups who benefited from the County's program from 2003 to 2015 were Christian sects. *See* App. A (listing all program beneficiaries from 2003 to 2015, when FFRF's lawsuit was filed).

The religious beneficiaries under Morris County's prior program were exclusively Christian sects, despite the existence of many non-Christian religious organizations with a presence in the area. In 2015, at the time the County's program was first challenged, roughly twenty-three percent of New Jersey's population was non-Christian, including believers in Judaism, Islam, Buddhism,

and Hinduism and non-believers. *See Religious Landscape Study*, PEW RESEARCH CENTER (May 12, 2015), https://www.pewresearch.org/religious-landscape-study/database/state/new-jersey/. None of the County's minority religious groups had projects funded under the County's prior program, despite much of the funding being earmarked for the type of routine property repair (like fixing windows, roofs, or HVAC) that burdens all property owners. And were the County permitted to resume funding places of worship under its grant program, newly established congregations, such as the mosque currently being built in the County, will continue to be ineligible. *See, e.g.*, Nicole Flanagan, *Madison Mosque Finally Under Construction, 3 Years After Contentious Hearings*, DAILY RECORD (July 9, 2024) https://www.dailyrecord.com/story/news/local/morris-county/2024/07/09/madison-nj-mosque-being-built/74126306007/. Newly established congregations will always be disadvantaged, due to the prohibitive requirement that grant recipients operate out of properties listed on the New Jersey and National Registers of Historic Places. *See* N.J. DEP'T ENV'T PROT., https://www.nj.gov/dep/hpo/1identify/nrsr_lists/MORRIS.pdf (last updated 3/25/2024).

"We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist." *Carson v. Makin*, 596 U.S. 767, 793 (2022) (Breyer, J., dissenting). There is little doubt that each and every congregation operating within Morris County would appreciate having equal

access to the historic preservation funding previously enjoyed solely by the County's Christian sects. But since the Plaintiffs' requested relief makes no attempt to level the playing field that previously benefited Christians alone, religious strife will surely follow, should the Plaintiffs prevail.

New Jersey's Religious Aid Clause was also designed to forestall a second form of religious strife, brought about by government entanglement with religious practice. Such entanglements were evident during the operation of the County's prior grant program and will again come to pass if this Court grants the Plaintiffs' requested relief. As the Supreme Court of New Jersey previously recognized, receipt of funds under the County's prior grant program necessitated significant government entanglement with religion:

> Morris County's preservation grants are not one-time awards . . . . [R]ecipients of grants that totaled more than $50,000 embarked on a thirty-year relationship with the County marked by an easement agreement between each church and local authorities. Grantees were required to negotiate with the County as to when their property would be open to the public. They also had to register their buildings on the National and New Jersey historic registers.

232 N.J. at 579. The same requirements remain in place today. *See* Morris County Preservation Trust Fund - Rules & Regulations § 5.16 (April 10, 2024), https://drive.google.com/file/d/1-b_tvFp7OMQnbwEcoLfYulTntc1r1v_I/view.

In order to assess churches' grant applications, the County was often put in the position of determining whether a proposed project would further a religious

organization's religious mission. In fact, many applicants emphasized that a grant would do just that. 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* . . . ." App. B at 2. St. Peter's Episcopal Church sought the grant to "ensure continued safe public access to the church *for worship*." App. C at 2. 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." App. D at 2. And 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." App. E at 3 (emphasis added to each). There is simply no way for the County to evaluate many of the project proposals that have come before it without becoming entangled in religious affairs.

CONCLUSION

Plaintiffs' requested relief would undermine New Jersey's unimpeachable interest in forestalling the religious strife that historically followed from old world religious establishments. For the foregoing reasons, this Court should deny the Plaintiffs' motion for preliminary injunction and grant the Attorney General's motion to stay.

Dated: July 19, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 19, 2024, I electronically filed the foregoing brief and accompanying papers with the Clerk of the U.S. District Court for the District of New Jersey. Counsel for all parties will be served via CM/ECF.

Dated: July 19, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief's type-style and typeface comply with Local Civil Rule 7.2 because it was prepared in 14-point Times New Roman, a proportional font. I further certify that this amicus brief complies with the page-length requirement set forth in this Court's June 20, 2024 Order.

Dated: July 19, 2024

Respectfully Submitted,

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