SUPREME COURT OF NEW JERSEY
Docket No. M-1281/1282
September Term 2016 079277

FREEDOM FROM RELIGION FOUNDATION, et al., *Plaintiffs-Appellants,* v. MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, et al., *Defendants-Respondents.*	Civil Action Bypassing the appeal to the Superior Court of New Jersey, Appellate Division, Docket No. A-002524-16T4 On direct appeal from a final judgment of the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. SOM-C-12089-15 Sat below: Hon. Margaret Goodzeit, P.J. Ch.

BRIEF OF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

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INTRODUCTION

Amici American Civil Liberties Union of New Jersey, American Civil Liberties Union, and Americans United for Separation of Church and State are committed to preserving the separation of church and state as an essential means of defending religious liberty. Amici believe that ensuring that religion is supported solely by private funds is the best way to protect the religious freedom of taxpayers, preserve the independence of houses of worship, and promote harmony among religious groups.

In accordance with these goals, the plain text of the State Constitution's Religious Aid Clause prohibits the funding at issue in this case. Article I, Paragraph 3 could not be clearer: It bars use of tax dollars "for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry."

No valid grounds exist to ignore the Religious Aid Clause's plain language. Funding for historic preservation is not a neutrally available public-safety benefit such as police and fire protection. Indeed, the funding here is not neutrally available at all; instead, the funding criteria favor religious institutions. Moreover, the funding at issue supports religious worship by financing repairs to integral elements of places of worship.

The Churches' arguments that the history of the State Constitution supports reading a historical-preservation exemption into the Religious Aid Clause are not well founded. State constitutional history shows that the Religious Aid Clause was intended to prohibit public funding of religion, and that preventing tax support of buildings used for religious worship was one of its principal aims. History also teaches that the funding at issue here could result in the evils that the Religious Aid Clause was meant to guard against: violation of taxpayers' freedom of conscience; public funding of religion on an extensive scale; weakening of religious institutions through increased dependence on governmental support; governmental interference with churches; and division between religious groups.

Federal constitutional law does not support the grants here. The Religious Aid Clause is interpreted independently of the federal Establishment Clause and restricts public funding of religion more strictly. Even if that were not so, the grants here violate the federal Establishment Clause. And because the grants support religious worship, there is no colorable argument that the federal Free Exercise or Equal Protection Clauses override the Religious Aid Clause here.

This Court should reverse the decision below.

STATEMENT OF INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. For nearly a century, it has been dedicated to preserving religious liberty, including the right to be free from compelled support for religion, and has appeared before the United States Supreme Court and courts around the country towards that end. Its legal arm (the ACLU Foundation) currently serves as counsel in *ACLU-NJ v. Hendricks*, Docket No. 077885 (certification granted Dec. 12, 2016), currently pending before this Court.

The American Civil Liberties Union of New Jersey (ACLU-NJ) is the state affiliate of the ACLU. Founded in 1960, the ACLU-NJ has more than 40,000 members and donors. The ACLU-NJ has served as amicus in numerous cases before this Court, including those involving religious liberty. It is currently a party in *Hendricks*, with its legal arm (the ACLU-NJ Foundation) serving as counsel.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United

has participated as a party, counsel, or amicus curiae in many of the leading church-state cases decided by the U.S. Supreme Court, the federal Courts of Appeals, and state appellate courts. Americans United represents more than 125,000 members and supporters across the country. Americans United has long opposed the coercive extraction of taxpayer dollars for the support of religious worship, training, or instruction. Its attorneys also currently serve as counsel in *Hendricks*.

Amici therefore all have a strong interest in the present case and can assist the Court in the resolution of the significant issues of public importance that it raises.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Statement of Facts and Procedural History Plaintiffs set forth in their Memorandum of Law in Support of Appeal, dated July 7, 2017.

ARGUMENT

I. The Plain Text of the State Constitution Bars the Grants Here.

Article I, Paragraph 3 of the New Jersey Constitution (the "Religious Aid Clause") prohibits the payment of public funds "for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry." The prohibition is clear and unequivocal.

At issue here are grants, pursuant to the Morris County Historic Preservation Trust Fund, to religious organizations to

repair their places of worship. Religious institutions are one of four types of entities that are eligible for the funding; the other three are (1) municipal governments in Morris County, (2) the Morris County government, and (3) not-for-profit charitable conservancies whose purpose includes historic preservation of historic properties. Psca259. Other businesses, individuals, and organizations (including other not-for-profit organizations) are ineligible for grant money from the Fund, regardless of the historic nature of their buildings.

The grants to churches do what the Religious Aid Clause prohibits: They provide taxpayer funding "for building or repairing any church or churches [or] place or places of worship." Morris County permits the churches to use the grant money not just for exterior repairs, but also to repair the structural, mechanical, electrical, and plumbing systems of their houses of worship. Psca1071. One grant was even used to pay for the restoration of a stained-glass window portraying a religious scene. Psca667, 688-90. Providing taxpayer funds for these uses violates the plain language of the Religious Aid Clause.

Yet the Chancery Division concluded that the Religious Aid Clause does not mean what it says. In doing so, the Chancery Division distorted this Court's statement in *Resnick v. East Brunswick Township Board of Education* that the language of the

Religious Aid Clause "is not carried to an extreme," for "'[n]o one suggests that the State must withhold such general services as police or fire protection.'" 77 *N.J.* 88, 103 (1978) (quoting *Clayton v. Kervick*, 56 *N.J.* 523, 529 (1970), *vacated*, 403 *U.S.* 945 (1971) (alteration in original)). The lower court improperly interpreted this statement to "indicate that the only thing that is clear about [the Religious Aid Clause]'s intended meaning is that it is not meant to be read literally." Psca1080. That misinterpretation contravenes long-accepted canons of statutory and constitutional construction.

"In ascertaining the intent of a constitutional provision, a court must first look to the precise language used by the drafters. If the language is clear and unambiguous, the words used must be given their plain meaning." *State v. Trump Hotels & Casino Resorts*, 160 *N.J.* 505, 527 (1999); *accord Martin v. Hunter's Lessee*, 14 *U.S.* 304, 338-39 (1816) ("If the text [of the Constitution] be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible."). At a minimum, the text of the Religious Aid Clause means that the government must not provide public funds "for building or repairing any church or churches, place or places of worship." The phrase is absolute; it is not qualified based on an evaluation of the government's intent in providing the funds.

Nor is it the case that the grants here support only non-religious activities of religious institutions — not their churches, places of worship, or ministry activities — and are therefore outside the Religious Aid Clause's scope. The grants can pay for a church's "structural, mechanical, electrical, and plumbing systems" (Psca1071) — integral elements of a building that must be maintained for the building to be usable for any purpose. Such grants thus inherently support everything that takes place in a church, including worship and religious instruction. In addition, many of the grants for exterior building improvements have been used to pay for roof repairs (*see* Psca295, 346, 453, 504, 564), which also support everything that occurs in a building, for a leaky roof can make a building unusable and cause serious damage to its interior. Given what the grants pay for, some of the grant applications specifically explained that the grants would enable continued use of church buildings for worship and religious activities. *See* Psca310, 374, 483, 765. And one grant paid for restoration of a stained-glass window with religious imagery. *See* Psca667, 688-90. The grants thus directly pay for the repair and upkeep of facilities that religious organizations use to conduct religious training and worship.

Resnick's reasoning about the availability of police and fire protection to religious organizations does not mean that

the Religious Aid Clause cannot be applied in accordance with its plain text. Police and fire protection are examples of general public-safety services that are not covered under the Religious Aid Clause's prohibitions. The aid here is different from the provision of generalized safety services; it is specifically prohibited by the text of the Religious Aid Clause.

The Chancery Division's equation of historic-preservation grants to police and fire services is especially inapt given the grants' limited availability. Police and fire protection are necessary for public safety and welfare in a way that historic preservation is not. *See, e.g., Rochinsky v. Dep't of Transp.*, 110 *N.J.* 399, 405 (1988) (recognizing public safety need for "police, fire, ambulance and medical services" (quoting *Miehl v. Darpino*, 53 *N.J.* 49, 53 (1968)). Because they are essential services, police and fire protection are provided universally. The grants here are available only to certain classes of owners of historic properties — churches and governmental entities — but not individuals or secular nonprofits, unless their organizational purpose specifically includes historic preservation. Moreover, emergency services must be sufficient for a town's entire need, so that providing them to one resident does not diminish the availability of them to another, while the grants here are competitive and are awarded based on discretionary criteria. *See* Psca1070.

The court below further erred by drawing support for its ruling from *Resnick*'s conclusion that public school districts are not required to charge market rental rates when leasing their property for religious activity. *See* Psca1073; *Resnick*, 77 *N.J.* at 120. *Resnick* prohibited a school district from charging for religious events a rental rate below the rate needed to reimburse all expenses the district incurred in providing its facilities, such as utility, janitorial, and administrative costs. 77 *N.J.* at 103-04, 120-21. Thus this Court concluded that while the Religious Aid Clause bars use of tax funds to subsidize religious activity, merely refraining from charging market rates does not amount to use of tax funds for the support of religious activity. *See Resnick*, 77 *N.J.* at 103-04, 120-21. Here, on the other hand, tax funds are being delivered directly to churches to pay for integral repairs of the buildings that they use for worship. This is a far more direct aid to religion than the failure to require reimbursement of utility, janitorial, and administrative costs that the Court in *Resnick* held to violate the Religious Aid Clause.

Finally, the Chancery Division erroneously accepted the Churches' argument that the grants are permissible because historical preservation benefits the public, and the government thus receives consideration for the grants. *See* Psca1074. The Religious Aid Clause contains no exception for aid to religion

that also provides some benefit to the government or the public. And reading such an exception into the Clause would effectively eviscerate it. Few types of aid to religion do not also provide some broadly conceived benefit to the government or members of the public. If the "consideration received" argument were valid, then the state could provide direct funding for religious education at religious schools, for proselytizing substance-abuse-treatment programs, and for religious childcare services that aim to convert youths to a particular faith — all on the grounds that the funded services provide some benefit to their recipients or reduce the burden on government.

Thus, in *Resnick*, the Court held that the Religious Aid Clause prohibited subsidizing religious worship and instruction through free utility, janitorial, and administrative services even though permitting religious uses of public-school property benefited "[t]he community as a whole" by allowing "nonprofit organizations of interest to its members [to] prosper." *See* 77 *N.J.* at 111. The religious instruction that the Court held in *Resnick* should not be publicly subsidized also could be said to benefit the government by improving children's moral character, but that made no difference in *Resnick* either. Courts from other states construing state constitutional clauses limiting aid to religion have likewise rejected arguments that such aid should be allowed if it produces some benefit to the government or

public. *See Sheldon Jackson Coll. v. State*, 599 *P.2d* 127, 131 (Alaska 1979) (Alaska state aid for private higher education violated state constitution notwithstanding that it could "help retain qualified students in Alaska"); *Op. of Justices*, 258 *N.E.2d* 779, 784 (Mass. 1970) (educational "emergency" did not render aid to private schools constitutional); *Op. of Justices*, 258 *A.2d* 343, 346-47 (N.H. 1969) (tax benefit for private-school education was unconstitutional because it "support[ed] sectarian education" even though it also supported "secular education" at religious schools and thereby served "a public purpose").

II. History Provides No Support for a "Historical Preservation" Exception to the Plain Text of the Constitution's Ban on Tax Funding of Church Repairs.

The Churches argued below that the history of the State Constitution supports reading a "historical preservation" exception into the Religious Aid Clause's clear prohibition. The historical record is to the contrary: It shows that the Religious Aid Clause was intended to strictly prohibit public funding of religion, and that preventing the use of tax dollars to construct and repair buildings used for religious worship was one of its principal aims. History also teaches that the funding at issue here could produce the evils that the Clause was meant to guard against.

A. 1776: The Religious Aid Clause Was Intended to Strictly Prohibit Public Funding of Religion.

The Religious Aid Clause was first adopted in 1776, when it appeared in Article XVIII. It originally read:

> [N]o person shall . . . be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.

N.J. Const. of 1776, http://bit.ly/2okxPwM. The meager records of the 1776 constitutional convention contain no information about the Clause beyond its text. *See Journal of the Votes and Proceedings of the Convention of New Jersey* (1776), http://bit.ly/2oSPEGv. But the historical context demonstrates that the Clause's prohibition against tax funding of construction and repair of houses of worship was intended to be strictly enforced and not subject to exceptions.

New Jersey's Religious Aid Clause was one of several similar state constitutional clauses enacted in the late 18th Century. *See Locke v. Davey*, 540 *U.S.* 712, 723 (2004). Those clauses were intended to avert the harms to religious freedom inflicted by established churches in Europe and in the colonies before the founding of the American Republic. As explained in *Everson v. Board of Education*, 330 *U.S.* 1, 11 (1947) — a case

on which the Churches substantially rely here — "[t]he imposition of taxes to pay ministers' salaries and *to build and maintain churches and church property* aroused the[] . . . indignation" of "the freedom-loving colonials." (Emphasis added.)

The writings of the leading framers of America's constitutional order reveal the purposes of constitutional provisions like New Jersey's Religious Aid Clause. Thomas Jefferson proclaimed, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785), http://bit.ly/1lfgdjl. James Madison explained, "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 conform to any other establishment in all cases whatsoever." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), http://bit.ly/2pPvjz5. Benjamin Franklin observed, "[w]hen a Religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support, so that its Professors are oblig'd to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one." Letter from Benjamin Franklin to Richard Price (Oct.

9, 1780), http://bit.ly/1ynuDiY.

Jefferson and Madison understood language similar to New Jersey's Religious Aid Clause to prohibit public funding of religion, including the physical facilities of places of worship. In Virginia, Patrick Henry had proposed a bill that called for tax funding for "the providing of places of divine worship" and for other aspects of religious ministries. Patrick Henry, *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), http://bit.ly/2ssSCRw. In response, Jefferson drafted — and Madison advocated the successful passage of — the Virginia Statute for Religious Freedom, the key operative language of which was that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 *A.2d* 539, 555 (Vt. 1999).

Jefferson and Madison opposed Henry's proposal even though it provided for equal funding, on a neutral basis, to all sects and for nonreligious instruction: Believers could designate that their tax payment would go to whatever sect they preferred, and objectors' payments would be appropriated by the legislature to education instead of religion. *See* Henry, *A Bill Establishing A Provision;* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 897 (1986). In his preamble to the Virginia Statute for Religious

Freedom, Jefferson noted that "even the forcing [of a taxpayer] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, *A Bill for Establishing Religious Freedom*.

Jefferson and Madison further wrote that permitting any public funding for religion not only violates individuals' freedom of conscience and encourages broader tax support for religion, but also leads to several other evils. It enervates and corrupts religious institutions by "weaken[ing] in those who profess this Religion a pious confidence in its innate excellence" while "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits." Madison, *Memorial and Remonstrance* ¶ 6; *see also* Jefferson, *A Bill for Establishing Religious Freedom* (public funding "tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it"). Public funding further leads to improper governmental interference with religious institutions: "Religion is wholly exempt from [Civil Society's] cognizance," and "if Religion be exempt from the authority of the Society at large, still less can it be subject to that of

the Legislative Body." Madison, *Memorial and Remonstrance* ¶¶ 1-2. In addition, public funding causes discord among religious groups: "[I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects," risking a return to the "[t]orrents of blood" that "have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord." *Id.* ¶ 11.

Moreover, since colonial times, the people of New Jersey have been especially strong proponents of church-state separation — and opponents of public funding for religion. New Jersey "drew many of its initial settlers from European states that had been deeply disrupted by the Protestant Reformation and the religious wars that followed in its wake." Patricia U. Bonomi, *Religious Pluralism in the Middle Colonies* (Jan. 2008), http://bit.ly/1NYcEEO. New Jersey and several nearby colonies therefore "create[d] a uniquely diverse religious society" and "realiz[ed] that no single doctrine of faith could dominate [their] society." *Id.* The colonists of this region "encouraged the separation of church and state" more than the other American colonies did, and "inhibited the legal establishments of religion." Christopher N. Elliott, Note, *Federalism and Religious Liberty: Were Church and State Meant to Be Separate?*, 2 RUTGERS J. L. & RELIGION 5 (2000). "[A] new form of religious

practice" thus "emerged" in these colonies: "the voluntary church — an institution supported not by compulsory taxes and legal scaffolding but by the free choice and personal commitment of its adherents." Bonomi, *Religious Pluralism*.

Indeed, New Jersey was one of only four states that had no religious establishment when the Revolutionary War began. *See* Steven K. Green, *The Separation of Church and State in the United States*, Oxford Research Encyclopedia of American History, 8 (Dec. 2014), http://bit.ly/2uhbVR3. Jefferson and Madison would later identify these states as models for the success of privately supported religion. *See* Bonomi, *Religious Pluralism*; Thomas Jefferson, *Notes on the State of Virginia*, Query 17 (1784), http://bit.ly/2pza7O6. Madison explained: "[E]xperience . . . has shewn that every relaxation of the alliance between Law & religion, from the partial example of Holland, to its consummation in Pennsylvania Delaware N. J., &c, has been found as safe in practice as it is sound in theory." Letter from James Madison to Edward Everett (Mar. 19, 1823), http://bit.ly/2osC6gV.

Allowing the funding sought by the Churches here would contravene the historical purposes of constitutional provisions such as the Religious Aid Clause. It would violate the freedom of conscience of taxpayers who object to supporting religious beliefs to which they do not subscribe. It would lead to other,

broader exemptions from the Religious Aid Clause's plain text. It would weaken religious institutions by making them dependent on governmental support for repairs of their buildings. It would inject government into church affairs, for the preservation grants come with conditions, including restrictions on future alterations to the funded church buildings, review by governmental officials of the use of the grant funds, and governmental easements. *See* Psca1071, 1079. And it would trigger division among religious groups, for long-established denominations are more likely than newer, minority religions to own buildings that are eligible for historical-preservation funding.

B. 1844: New Jersey Strengthened the Strict Prohibitions of the Religious Aid Clause.

At its 1844 constitutional convention, New Jersey strengthened its strict commitment to ensuring that religion is supported solely by private funds. The convention moved the Religious Aid Clause to its current place in Paragraph 3 of Article I and amended it to read:

> [N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform.

N.J. Const. of 1844, http://bit.ly/2pDpyaU. The words "the purpose of" that had appeared before the words "building or repairing" were deleted, removing any room to argue that tax funds could be used to build or repair a church if the program under which the public funding was provided had a nonreligious purpose. Also removed was the word "other" that had preceded the words "church or churches," eliminating any leeway to suggest that the state could levy a neutral tax on all citizens requiring each to pay for repairs to their own church.

As a delegate to the 1844 convention explained, the Religious Aid Clause was understood to mean that no one "should . . . be compelled to pay for the support of any particular religion." *Proceedings of the New Jersey Constitutional Convention of 1844* (1942) 19, http://bit.ly/2ph8QOS.[1] Accordingly, the convention rejected a proposal that might have weakened the Clause. A draft of the 1844 constitution would have changed the 1776 constitution's language barring taxation "for the maintenance of any minister or *ministry*" to "for the maintenance of any minister or *ministers*." *Id.* at 52 (emphasis added). The delegates voted to retain the term "ministry" (*id.*

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[1] The delegate made this statement while unsuccessfully arguing that another provision of Article I, Paragraph 3 — the one prohibiting any person from being "compelled to attend any place of worship" — counseled against having opening prayers at the convention. *Id.* at 18-21.

at 411-12), thereby reaffirming that the Clause prohibits tax support for the propagation of a particular faith by *institutions*, not just by individual ministers.

C. 1947: New Jersey Reaffirmed That Religion Must Not Be Publicly Funded.

New Jersey's 1947 constitutional convention took place shortly after the highest courts of New Jersey and the United States upheld the payment of public funds to reimburse parents for the costs of bus transportation to private schools, including religious schools. *Everson v. Bd. of Educ.*, 133 *N.J.L.* 350 (E. & A. 1945), *aff'd*, 330 *U.S.* 1 (1947). The Churches contended below that the 1947 convention ratified this decision on the ground that aid to religion should be permitted as long as it is neutrally available to both secular and religious groups. But the convention record does not support that contention. Rather, the delegates thought that publicly funded bus transportation was permissible because it was not aid to religion at all, and they continued to read the Religious Aid Clause to broadly prohibit public funding of religion.

In *Everson*, New Jersey's highest court divided 6 to 3. The dissenters argued that tax funding of bus transportation violated the Religious Aid Clause because it was "in aid or support of" "parochial schools." 133 *N.J.L.* at 367 (Case, J., dissenting). The majority did not dispute that the State

Constitution prohibited "aid to sectarian schools," but concluded that publicly funded transportation was aid not to schools but to parents and children. *Id.* at 355. The U.S. Supreme Court then ruled, on similar reasoning, that the tax-funded transportation did not violate the federal Establishment Clause: Although the Establishment Clause prohibited use of public funds "to support any religious activities or institutions," reimbursement of bus fares was aid to students, not schools, and it supported student safety, not religious instruction. 330 *U.S.* at 16-18.

Opponents of the *Everson* decision urged the delegates to the 1947 convention to abrogate the ruling by amending the State Constitution to prohibit not just "direct[]" but "indirect[]" aid to religious education. *See* 3 *State of New Jersey Constitutional Convention of 1947* (1947) 151, http://bit.ly/2oYkFs2; 5 *id.* 792. The supporters of such an amendment did not view it as significantly changing the State Constitution but rather as "cover[ing] the essential elements of what we've had in the Constitution before and mak[ing] clearer what we thought was already in the Constitution regarding the separation of church and state." 3 *id.* 151. A convention committee rejected this proposal on policy grounds. *See* 5 *id.* 794-806. The delegates were concerned about children getting to

school safely, especially during New Jersey's cold winters. *See* 1 *id.* 715-18, 721.

But in their discussion of this issue, the delegates made clear that they understood the State Constitution to unambiguously prohibit direct funding of religion. The most vocal delegate on this issue was John J. Rafferty, a judge on the Court of Errors and Appeals who had joined the majority opinion in *Everson* and who also was Catholic. *See* 5 *id.* 801, 805. Judge Rafferty stated, "I agree with [proponents of the amendment] on the matter of separation of Church and State" and the principle "[r]ender unto Caesar the things that are Caesar's and to God the things that are God's." 5 *id.* 800-02. He explained that it "isn't true" "that the State may provide for the support of Catholic schools" (5 *id.* 797), emphasizing that "transportation of children is [not] an aid to the school" (5 *id.* 804-05). He further stated:

> But the parochial school system . . . has been in existence . . . for many decades, and it has been regarded by many people just as I regard it — that [publicly funded transportation] is not an aid to the schools. The parochial school system developed without any public aid whatsoever and it will continue to develop without any public aid. . . . [I]n my experience the administrators of the affairs of the Catholic Church want no public support, because with public support comes public supervision, comes public inspection, comes public control, and with those things may very well come an embarrassment to the teaching of that which we hold not only to be most dear, but essential — the teaching of religion.

> . . . . [T]ransportation is not a part of the education itself. In other words . . . transportation stops at the school door. The policeman who directs traffic is not contributing to the support of religion. The fireman, as was stated in the United States Supreme Court opinion, who puts out the fire in the parochial school, is not contributing to the support of religion. I mean, that is the logic of it. Don't you see?

5 *id.* 805-06.

Indeed, Judge Rafferty and other supporters of the result in *Everson* were concerned that the decision had been a close call constitutionally and could be overruled by a future state-court decision. *See* 1 *id.* 708, 718. They therefore convinced the convention to approve an amendment expressly making public funding of transportation to private schools constitutional. *See* 1 *id.* 99, 149, 704-22; 2 *id.* 1021, 1236, 1241, 1323. A delegate who supported this amendment stated, "I do not stand here as an advocate of the advancement of any particular religion or religious group through legislative aid or assistance. But this provision . . . does not do any of those things." 1 *id.* 717. Other delegates expressed similar sentiments. *See* 5 *id.* 796 ("Leaving out the support of schools — this is just transportation of children."); 1 *id.* 721-22 ("I am a strong advocate of the theory and philosophy of Thomas Jefferson, as expressed in those words, 'We in America must at all times keep a wall between the church and the state.' . . . [T]he

Legislature now and in the future will not only keep a wall between the church and the state, but will keep that wall impregnable.").

This amendment (now Article VIII, Section IV, Paragraph 3 of the State Constitution) was narrow and confined solely to transportation: "The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from *any* school." 2 *id.* 1308 (emphasis added). The convention did not pass any amendment that would have authorized broader aid to religious institutions.[2]

Finally, the 1947 convention made no changes to the text of the Religious Aid Clause, reauthorizing its strict prohibition against public funding of religion. *See* 2 *id.* 1285-86. By 1947,

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[2] On the contrary, the convention rejected an amendment that would have permitted the state to fund religious and other private institutions "for the aid, care and support of neglected and dependent children and of the needy, sick or aged." *See* 1 *id.* 403-11; 2 *id.* 1093; 3 *id.* 675-82. Judge Rafferty, who proposed that amendment, explained that state officials understood the State Constitution to prohibit such funding. *See* 1 *id.* 404-06, 408; 3 *id.* 677-81. In giving examples of institutions that the amendment would render eligible for public funding, Judge Rafferty referenced only religious institutions, even though the amendment covered nonreligious institutions too. *See* 1 *id.* 404-05, 407; 3 *id.* 678-80. Successfully arguing against it, one delegate stated, "should we adopt this amendment, we are not only setting aside one of the great traditions of New Jersey but we are beginning then to interfere with every private charity and, if I may add, with every church in a way that I do not think we should." 1 *id.* 410.

there were surely many historic churches in New Jersey that needed repairs. If the 1947 delegates had thought that tax dollars should fund such repairs, they would not have left untouched a constitutional clause whose plain language prohibits such funding.

III. Other State Constitutional Provisions Do Not Override the Religious Aid Clause.

A. Constitutional Provisions That Limit Use of Certain State Funds to Particular Purposes, Including Historic Preservation, Do Not Supersede the Religious Aid Clause.

The Churches have argued that constitutional provisions added in the last two decades that dedicate certain state accounts to certain specified purposes, including historic preservation, create an exception to the Religious Aid Clause's prohibition against use of public funds "for building or repairing any church or churches [or] place or places of worship." That argument is contrary to the State Constitution's text, its history, and the canons of constitutional and statutory construction.

The two constitutional provisions cited by the Churches — Article VIII, Section II, Paragraphs 6 and 7 — limit the use of specific state accounts to certain purposes, one of which is historic preservation, thus prohibiting diversion of the money to other uses. On their face, these designated-fund clauses are restrictions on spending, not authorizations to override other

constitutional restrictions; and they do not so much as hint at an exemption from the Religious Aid Clause. Hence, the designated-fund clauses are entirely unlike Article VIII, Section IV, Paragraph 3, which — by expressly authorizing public funding of bus transportation "to and from *any* school" (emphasis added) — clearly licenses funding of transportation to religious schools. Instead of using a word such as "any," the designated-fund clauses merely list "for historic preservation" as one of the limited permitted uses of the state accounts to which they apply. The designated-fund clauses therefore must be read to allow use of the money in these accounts for specified purposes as long as the expenditures are not barred by other constitutional provisions, including the Religious Aid Clause.

Nor does the legislative history of the designated-fund clauses demonstrate that the legislators or voters who approved them understood them to create an exception from the Religious Aid Clause. Amici found no discussion of the Religious Aid Clause in the records of the legislative proceedings relating to the constitutional amendments that added the references to historic preservation. And the ballot questions on these amendments mention historic preservation only briefly and contain no references to houses of worship or the Religious Aid Clause. *See Official List, Ballot Questions Tally For November 1998 General Election*, http://bit.ly/2tOQAux; *Official List,*

Ballot Questions Tally For November 2003 General Election, http://bit.ly/2sBzdy3; *Official List, Public Question Results For 11/04/2014 General Election,* http://bit.ly/2sUxuql.[3] Reading

[3] For example, the 1998 ballot statement read:

> **ANNUAL DEDICATION OF UP TO $98 MILLION OF STATE SALES AND USE TAX REVENUE FOR OPEN SPACE, FARMLAND, AND HISTORIC PRESERVATION**
>
> Shall the amendment to Article VIII, Section II, of the Constitution of the State of New Jersey, agreed to by the Legislature, to (1) dedicate $98,000,000 in each fiscal year, for the next 10 years, of State revenue from the State tax imposed under the "Sales and Use Tax Act" for the acquisition and development of lands for recreation and conservation purposes, for the preservation of farmland for agricultural or horticultural use and production, and for historic preservation, and to satisfy any payments relating to bonds, notes, or other obligations issued for those purposes, and (2) dedicate up to $98,000,000 in each fiscal year, for up to 20 years thereafter, of State revenue from the State tax imposed under the "Sales and Use Tax Act" to satisfy any payments relating to bonds, notes, or other obligations issued for those same purposes, be approved?
>
> **Interpretive Statement**
> Approval of this constitutional amendment would dedicate $98 million annually in State sales and use tax revenue for the years 1999 to 2009 to finance open space, farmland, and historic preservation. From 2009 to 2029, this measure would provide for the payment of debt on any bonds issued by an authority to finance these same purposes by dedicating an amount sufficient to pay the debt, up to $98 million annually. This measure also would provide that any bonds issued by an authority relying on the State sales and use tax revenue provided in this dedication must

into these amendments a "historical preservation" exception to the Religious Aid Clause would far exceed what the voters thought they enacted.

What is more, concluding that these amendments implicitly repealed the Religious Aid Clause with respect to repairs of historic churches would be contrary to the canons of constitutional and statutory construction. "[I]mplied repealers are not favored in the law and . . . the requisite intent will not arise by implication unless the subsequent statute is plainly repugnant to the former and is designed to be a complete substitute for the former." *Goff v. Hunt*, 6 *N.J.* 600, 606 (1951); *see also Morton v. Mancari*, 417 *U.S.* 535, 550 (1974) ("[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").[4] The Religious Aid Clause and the designated-

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be issued by 2009. This constitutional amendment does not raise any existing tax or authorize a new tax but would dedicate annually a portion of future revenues from an existing tax.

The 2003 and 2014 ballot statements are similar.

[4] *Accord City of San Francisco v. Cty. of San Mateo*, 896 *P.2d* 181, 186 (Cal. 1995) ("In choosing between alternative interpretations of constitutional provisions we are . . . constrained by our duty to harmonize various constitutional provisions in order to avoid the implied repeal of one provision by another. . . . [W]e will conclude one constitutional

fund clauses relied on by the Churches cover different subjects, serve different purposes, and do not conflict — both can be implemented as long as money for historical preservation does not go to repair houses of worship. The high hurdles for repeal by implication are not met.

B. New Jersey's Equal Protection Clause Does Not Nullify the Religious Aid Clause.

The Churches argued below that Article I, Paragraph 5 of the State Constitution — the State Equal Protection Clause — nullifies the Religious Aid Clause and compels the state to provide funding for religious activities on an equal basis with funding for secular activities. That argument is contrary both to the history of these two clauses and to how this Court has construed them.

The State Equal Protection Clause reads, "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry

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provision impliedly repeals another only when the more recently enacted of two provisions constitutes a revision of the entire subject addressed by the provisions." (citations and internal quotation marks omitted)); *Duggan v. Beermann*, 515 *N.W.2d* 788, 792 (Neb. 1994) ("A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.").

or national origin." While the protections against discrimination based on "race, color, ancestry or national origin" were added in 1947 (*see* 2 *State of New Jersey Constitutional Convention of 1947* 1317), the prohibition against discrimination based on "religious principles" dates back to 1776. Article XIX of the 1776 constitution contained a clause stating, "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles."

The Religious Aid Clause also dates back to the 1776 constitution, and it was intended to strictly prohibit public funding of religion, including funding that was neutrally available to all religions. *See supra* § II(A). The drafters of the 1776 constitution could not have intended the Religious Aid Clause to bar only preferential funding of particular religious beliefs; if they had, the Religious Aid Clause would have been written far differently. Indeed, if the 1776 constitution's framers had desired to bar only preferential funding, they could have omitted the Religious Aid Clause entirely, for another clause in Article XIX of the 1776 document (now Article I, Paragraph 4 — the State Establishment Clause) already provided "[t]hat there shall be no establishment of any one religious sect in this Province, in preference to another."

Nothing in the 1844 changes to the State Constitution or in the records of the 1844 constitutional convention suggests that the delegates desired to permit non-preferential funding of places of worship. The 1844 constitution *strengthened* the strict prohibitions of the Religious Aid Clause. *See supra* § II(B). Meanwhile, the prohibition against discrimination based on "religious principles" was extended to all religions and was moved together with the State Establishment Clause to Article I, Paragraph 4; that paragraph then read, "There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles." As in 1776, if the drafters of the 1844 constitution had intended to prohibit only preferential funding of particular religions, the Religious Aid Clause would have been meaningless surplusage. "[Constitutional] provisions, however, . . . must be construed in concert with other . . . pronouncements on the same subject matter so as to give full effect to each constituent part of an overall [constitutional] scheme." *State v. Hodde*, 181 *N.J.* 375, 379 (2004).

The 1947 convention moved the bar against discrimination based on "religious principles" to a separate clause — Article I, Paragraph 5 — and added prohibitions against discrimination

based on race, color, national origin, ancestry, and (read together with Article X, Paragraph 4) sex to complete this State Equal Protection Clause. The discussions at the 1947 convention about the State Equal Protection Clause focused on protection of these added classes. *See generally* 3 *State of New Jersey Constitutional Convention of 1947* 1-465. A summary of the 1947 constitution provided to the people of New Jersey explained the State Equal Protection Clause as follows: "Under the proposed Constitution, New Jersey will be the first state to give equal constitutional rights to women. The provision forbidding paupers to vote is abolished. Segregation by race or color in the schools and militia is forbidden, and discrimination against any person is barred." 2 *id.* 1317.

In arguing that the 1947 delegates viewed the State Equal Protection Clause as overriding the Religious Aid Clause to permit non-preferential funding of religion, the Churches have relied on a single statement by a single delegate concerning the bus-transportation controversy:

> We have been discussing, widely, tolerance and love of our fellow man and cutting out the religious lines in order to perfect our democracy and improve our society — to get away from the old lines of demarcation which bred bigotry and make it impossible for men to live for the sole purpose of being real Americans, instead of dividing the Americans on a religious question. That's the danger to society that I can see. It is much more serious than letting a little kid [on a bus].

5 *id.* 794. This statement does not even specifically reference the State Equal Protection Clause. And it must be construed in the context of the general understanding of the majority of the convention delegates that bus transportation was not aid to religion and hence was not forbidden by the Religious Aid Clause. *See supra* § II(C).

Nor is there support in New Jersey case law for the Churches' contention that the State Equal Protection Clause overrides the Religious Aid Clause and requires that religious activities be subsidized by public funding on an equal basis with secular activities. Amici have found no case interpreting the term "religious principles" as not only protecting particular religious denominations or beliefs, but as requiring public funding for religious activities. Dicta cited by the Churches below from *Marsa v. Wernik*, 86 *N.J.* 232, 239 n.2 (1981) — stating that "the plain words of the New Jersey constitutional provision invite an equal protection analysis" — is inapposite, for the Court was discussing the State Establishment Clause, not the Religious Aid Clause.

IV. Federal Constitutional Law Is Inapplicable and Does Not Support the Grants.

The Chancery Division and the defendants wrongly relied on federal law. This Court interprets the Religious Aid Clause independently of the federal Establishment Clause. Even if this

Court were to follow federal Establishment Clause law, that body of law prohibits the grants here. And the federal Free Exercise and Equal Protection Clauses do not require the funding in question.

A. This Court Interprets the Religious Aid Clause Independently of the Federal Establishment Clause.

The Chancery Division erred by relying on federal Establishment Clause cases to interpret the Religious Aid Clause. *See* Psca1075-80. The Religious Aid Clause's language — which expressly bars state funding "for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry" — is much more specific than that of the federal Establishment Clause. The more vague wording of the latter — which prohibits any "law respecting an establishment of religion" — has made it susceptible to changing federal-court interpretations, documented in detail in *Zelman v. Simmons-Harris*, 536 *U.S.* 639, 688-95 (2002) (Souter, J., dissenting).

This Court has accordingly interpreted the Religious Aid Clause independently of the federal Establishment Clause.[5] In *Resnick*, this Court analyzed the Religious Aid Clause first,

[5] Of course, the Court may not interpret the Religious Aid Clause in a manner that leads to a result prohibited by the U.S. Constitution. As explained below in Section IV(C), that is not the case here.

without considering federal decisions. *See* 77 *N.J.* at 102-03. The Court then analyzed the federal Establishment Clause separately, in a different section, applying different standards. *See id.* at 105-20. With one exception, the cases cited below by the defendants for the proposition that the Court should follow federal Establishment Clause law only discussed interpretation of the State Establishment Clause — which is the federal Clause's direct counterpart — not the separate Religious Aid Clause. *See S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch.*, 150 *N.J.* 575, 586 (1997); *Ran-Dav's Cty. Kosher, Inc. v. State*, 129 *N.J.* 141, 151 (1992); *see also Right to Choose v. Byrne*, 91 *N.J.* 287, 313 (1982); *Clayton v. Kervick*, 56 *N.J.* 523, 528 (1970), *vacated on other grounds*, 403 *U.S.* 945 (1971). The one case to suggest that Article I, Paragraph 3 should be construed similarly to the Establishment Clause was overruled less than three years after it was decided and did not concern public funding of religion. *See Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 *N.J.* 237, 266 (1977), *overruled by State v. Celmer*, 80 *N.J.* 405, 418 (1979).[6]

[6] In any event, when *Schaad* was decided, the U.S. Supreme Court's interpretation of the federal Establishment Clause limited public funding of religion much more strictly than today, in a manner much closer to what is required by the plain text and historical intent of the Religious Aid Clause. *See Zelman*, 536 *U.S.* at 688-95 (Souter, J., dissenting). Thus, even if it made sense at that time for this Court to look to federal

B. Even If Federal Establishment Clause Jurisprudence Were Controlling, It Does Not Permit the Grants.

Even if this Court were to follow federal Establishment Clause law in interpreting and applying the Religious Aid Clause, the grants here would still be impermissible, for two reasons. First, the grants support religious worship. Second, the grant program favors religious institutions.

1. The grants violate the federal Establishment Clause because they support religious worship.

The U.S. Supreme Court has repeatedly held that public funds must not be used to support religious worship or activity. And the Court has specifically ruled that tax funds must not support construction or maintenance of buildings that are used for religious activity.

A long line of Supreme Court decisions holds that public funds must not be used to support religious activities. *See Mitchell v. Helms*, 530 *U.S.* 793, 840, 857 (2000) (O'Connor, J., controlling concurring opinion[7]); *Bowen v. Kendrick*, 487 *U.S.*

Establishment Clause law for guidance in interpreting the entirely different language of the Religious Aid Clause, it does not make sense to do so today, for that would lead the state clause to be construed in a manner contrary to its language and intent.

[7] Justice O'Connor's concurring opinion in *Mitchell* represents controlling law because she provided the decisive vote to sustain the judgment on narrower grounds than the plurality in the case. *See Marks v. United States*, 430 *U.S.* 188, 193 (1977); *Cmty. House, Inc. v. City of Boise*, 490 *F.3d* 1041, 1058 (9th

589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 *U.S.* 736, 754-55 (1976); *Hunt v. McNair*, 413 *U.S.* 734, 743 (1973); *Everson*, 330 *U.S.* at 16. This principle holds true even when public funding is evenhandedly allocated among religious and secular institutions through neutral selection criteria. *Mitchell*, 530 *U.S.* at 840-42 (O'Connor, J., controlling concurrence).

Thus, in *Tilton v. Richardson*, 403 *U.S.* 672 (1971), the U.S. Supreme Court partially invalidated a statute that provided grants to colleges and universities, including religiously affiliated institutions, for the construction of educational facilities. The statute prohibited the funding of "any facility used or to be used for sectarian instruction or as a place for religious worship," but this restriction expired twenty years after a facility's construction. *Id.* at 675, 683. The Court concluded that the statute and the grants issued under it were unconstitutional to the extent that the restriction on religious use of the publicly funded buildings expired after twenty years. *Id.* at 683-84, 689. The Court reasoned that if, after twenty years, a building were used for religious purposes, "the original federal grant will in part have the effect of advancing religion." *Id.* at 683. The Court explained that "[i]t cannot be

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Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 *F.3d* 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Grp.*, 247 *F.3d* 397, 418 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 *F.3d* 501, 510 n.2 (6th Cir. 2001).

assumed that a substantial structure has no value after that [twenty-year] period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." *Id.*[8]

In keeping with this principle, the U.S. Supreme Court and lower federal courts have repeatedly struck down the provision of public funding or property to religious institutions for the construction, maintenance, or improvement of buildings that are or can be used for religious instruction or activity. In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 *U.S.* 756, 774-80 (1973), the Supreme Court invalidated a New York statute that provided private schools, including parochial schools, with grants for the maintenance and repair of their facilities. The grants were not accompanied by any restriction limiting them "to the upkeep of facilities used exclusively for secular purposes." *Id.* at 774. Relying on *Tilton*, the Court reasoned:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair

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[8] Though this opinion was by a four-Justice plurality, a fifth Justice agreed with this analysis. *See Lemon v. Kurtzman*, 403 *U.S.* 602, 665 n.1 (1971) (White, J., concurring opinion concerning *Tilton* and *Lemon*).

> of facilities without any limitations on their use.

Id. at 776-77. The Court further stated, "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777. And rejecting an argument similar to the Churches' contention that the grants here are legal because they serve a secular interest in historic preservation, the Court held that a state's "concern for an already overburdened public school system" and the state's "interest in preserving a healthy and safe educational environment for all of its schoolchildren" could not justify state-funded maintenance or repair of buildings used for religious instruction. *Id.* at 773-74.

More recently, in *Community House, Inc. v. City of Boise*, 490 *F.3d* 1041, 1059-60 (9th Cir. 2007), the Ninth Circuit enjoined a city from leasing a homeless shelter to a religious organization for one dollar per year so long as the lessee continued to hold daily chapel services for its residents. *See also Foremaster v. City of St. George*, 882 *F.2d* 1485, 1489 (10th Cir. 1989) (striking down governmental electricity subsidy to church); *Wirtz v. City of S. Bend*, 813 *F. Supp. 2d* 1051, 1055, 1069 (N.D. Ind. 2011) (striking down city gift of property for construction of football field to parochial school that required

all school athletic events and practices to be preceded or followed by prayer), *appeal dismissed as moot*, 669 *F.3d* 860 (7th Gir. 2012); *Annunziato v. New Haven Bd. of Aldermen*, 555 *F. Supp.* 427, 433 (D. Conn. 1982) (striking down city transfer of property for one dollar to religious organization that intended to run religious school on property).

The grants here plainly violate the Establishment Clause rule that public funds must not pay for the construction or repair of buildings that are used for religious worship or activity. The grants support religious worship by paying for integral elements of church buildings, including structural, mechanical, electrical, plumbing, and roof repairs. *See supra* § I.

2. The grant program violates the federal Establishment Clause because the selection criteria favor religious organizations.

The Establishment Clause requires that governmental aid be "'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion'" and must be "'made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" *Mitchell*, 530 *U.S.* at 846 (O'Connor, J., controlling concurrence) (quoting *Agostini v. Felton*, 521 *U.S.* 203, 231 (1997)). "[T]he government may not favor . . . religion over irreligion." *McCreary Cty. v. ACLU*, 545 *U.S.* 844, 875 (2005). Thus recipients of governmental aid must not be

"define[d] . . . by reference to religion." *Mitchell*, 530 *U.S.* at 845 (O'Connor, J., controlling concurrence); *Agostini*, 521 *U.S.* at 234.

Yet here, instead of allocating funding neutrally among religious and secular institutions, the grant program defines funding recipients "by reference to religion." Religious institutions are automatically eligible for funding, while secular nonprofits are eligible only if their purpose includes historic preservation. *See* Psca259. For example, if amicus ACLU of New Jersey were to purchase an old church as office space and seek to restore it, the organization would not be eligible for a grant because historic preservation is not one of its purposes.

The defendants argued below that secular nonprofits can become eligible for program grants if they change their purposes to include historic preservation. The Chancery Division did not permit evidence supporting this assertion to be added to the record. Psca913. But even if it were to be considered, this contention is no answer. The requirement that a non-profit organization designate historic preservation as one of its purposes is a burden that may not be easy to surmount, and historic preservation may not be relevant to or consistent with the organization's mission or core activities. Most importantly, it is a burden that the grant program imposes on secular non-profit organizations alone; religious groups do not need to

demonstrate that one of their purposes is historic preservation to be eligible for funding.

3. No federal court has upheld grants such as those here.

The Chancery Division erred by substantially relying on *American Atheists v. Detroit Downtown Development Authority*, 567 *F.3d* 278 (6th Cir. 2009). *See* Psca1076-80. The grant program there funded refurbishment of building exteriors and was available to all property owners in a discrete section of downtown Detroit. *See* 567 *F.3d* at 281-83. In upholding the program, the Sixth Circuit emphasized that it was neutral with respect to religion, "mak[ing] grants available to a wide spectrum of religious, nonreligious and areligious groups alike and employ[ing] neutral, secular criteria to determine an applicant's eligibility." *Id.* at 289-90. The program here, on the other hand, is not generally available to all buildings in Morris County. Instead, the grants are competitive, allocated through discretionary criteria. *See* Psca1070. And those criteria favor religious institutions over secular nonprofits.

Moreover, the aid in *American Atheists* was limited to building exteriors, did not pay for religious imagery, and was not "diver[ted]" "to further" any church's "religious mission." *See* 567 *F.3d* at 281-82, 292-93. Here, the grants fund repairs in

church interiors, have been used for religious imagery, and support religious worship.

The Churches have also relied on a 2003 U.S. Department of Justice memorandum approving historical-preservation funding for the Old North Church in Boston. *See* Authority of Department of Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91 (2003). But the funding there went to a nonreligious nonprofit organization — separate from the church's congregation — that managed the building's historical programs and preservation, and the building principally served as a living historical museum for the public because of its pivotal "one if by land, and two if by sea" role in the Revolutionary War. Here, the grants would go directly to churches, not to secular nonprofit organizations, and the churches do not principally serve as museums.

C. The Federal Free Exercise and Equal Protection Clauses Do Not Compel Funding of Historic-Preservation Grants That Support Religious Worship.

The defendants have argued that enjoining the grants at issue here would violate the federal Free Exercise and Equal Protection Clauses. But the U.S. Supreme Court and other courts have repeatedly rejected arguments that the U.S. Constitution requires tax funding available for secular uses to also be made available for religious uses. The Court's recent decision in

Trinity Lutheran Church of Columbia v. Comer, 137 *S. Ct.* 2012 (2017), did not change that rule, because it involved funding that did not serve religious uses.

In *Locke v. Davey*, 540 *U.S.* 712 (2004), the U.S. Supreme Court held that a state regulation prohibiting use of state scholarship funds to pursue a degree in theology did not violate the federal Free Exercise or Equal Protection Clauses (or the Free Speech or Establishment Clauses). The Court explained that although allowing the scholarship funds to be so used would not violate the Establishment Clause,[9] "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 *U.S.* at 719.

The Court noted that the scholarship applicant was not denied a benefit based on his religious beliefs or status; instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 720-21. The Court emphasized that the funding restriction was supported by an important and historic state interest in not funding the training of ministers or religious instruction. *Id.* at 721-23. Because the state interest was "substantial" and any burden on religion was

[9] *Zelman*, 536 *U.S.* at 649, had held two years earlier that scholarships delivered directly to parents or students who are free to use them at religious or secular institutions are not subject to the strict Establishment Clause limitations applicable to direct funding of religious institutions.

"minor," the scholarship applicant's Free Exercise claim failed. *Id.* at 725. And because that claim failed, the Equal Protection claim triggered only rational-basis scrutiny and failed as well. *Id.* at 721 n.4.

Following *Locke*, numerous federal and state appellate courts have rejected arguments that the Free Exercise or Equal Protection Clauses require governmental bodies to provide funding for religious uses on the same terms as for secular uses. *See Bowman v. United States*, 564 *F.3d* 765, 772, 774 (6th Cir. 2008) (religious ministry to youth); *Teen Ranch, Inc. v. Udow*, 479 *F.3d* 403, 409-10 (6th Cir. 2007) (religious programming in childcare services); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 *F.3d* 344, 353-57 (1st Cir. 2004) (religious education); *Bush v. Holmes*, 886 *So.2d* 340, 343-44, 357-66 (Fla. App. 2004) (religious education), *aff'd on other grounds*, 919 *So.2d* 392 (Fla. 2006); *Anderson v. Town of Durham*, 895 *A.2d* 944, 958-61 (Me. 2006) (religious education); *see also Chittenden*, 738 *A.2d* at 563 (religious education).

The Supreme Court's recent decision in *Trinity Lutheran*, 137 *S. Ct.* 2012, involved and was limited to far different circumstances. In *Trinity Lutheran*, the Court held that a state violated the federal Free Exercise Clause by denying a church-operated preschool — solely because of its religious status — a grant to purchase a rubber surface for its playground. *Id.* at

2017-18, 2024-25. The Court did not analyze whether the grant violated the federal Establishment Clause but instead simply accepted the parties' agreement that it did not. *Id.* at 2019.

The record in *Trinity Lutheran* contained no evidence that the playground was used for religious activity. *Id.* at 2017-18, 2024 n.3. The Court thus strictly limited the scope of its holding: "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 (emphasis added).[10]

Indeed, *Trinity Lutheran* reaffirmed *Locke*'s holding that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id.* at 2019 (quoting *Locke*, 540 *U.S.* at 718). The *Trinity Lutheran* Court emphasized that, on the specific facts of the case before it, the state had "expressly den[ied] a qualified religious entity a public benefit *solely* because of its religious character." *Id.* at 2024 (emphasis added). *Locke* was different,

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[10] Though this footnote was joined only by Justices Roberts, Kennedy, Alito, and Kagan, it is controlling under *Marks*, 430 *U.S.* at 193. These four Justices set forth narrower grounds for the judgment than Justices Thomas and Gorsuch, who joined all of the majority opinion except for the footnote. *See Trinity Lutheran*, 137 *S. Ct.* at 2025-26 (concurring opinions of Thomas, J., and Gorsuch, J.). In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See id.* at 2026-27.

explained the Court, because the scholarship applicant there "was not denied a scholarship because of who he *was;* he was denied a scholarship because of what he proposed *to do* — use the funds to prepare for the ministry." *Id.* at 2023.

Moreover, the denial of funding in *Locke* was based on a state "antiestablishment interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses." *Id.* "Nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Id.*

Unlike *Trinity Lutheran*, this case involves "religious uses of funding." *Cf. id.* at 2024 n.3. The grants provide funding not for playgrounds, but for repair of integral elements of church buildings, within which active congregations conduct worship and religious instruction. In fact, some of the grant applications explained that the grants would enable continued use of houses of worship for those religious activities. *See* Psca310, 374, 483, 765. And one grant even paid for restoration of a stained-glass window with religious imagery. *See* Psca667, 688-90.

Therefore, unlike in *Trinity Lutheran* (and for that matter, *Locke* itself), the funding here is affirmatively prohibited by the federal Establishment Clause. *See supra* § IV(B). Even if it were not, as with training of ministers and religious instruction, there is a historic and substantial state interest

in not funding construction or maintenance of places of worship. *See supra* § II(A); *see also* 5 Annals of Cong. 92 (1834), http://bit.ly/2uLkHDH (Congressman, during debate on language of federal Establishment Clause, noted that Clause would restrict compelled funding of "building of places of worship" to same extent that it would restrict compelled "support of ministers").

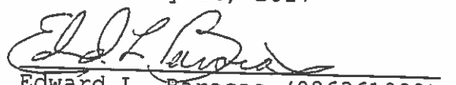
Furthermore, unlike the funding prohibition in *Trinity Lutheran*, New Jersey's Religious Aid Clause does not bar funding based on an institution's status as religious, but instead restricts funding based on how the money will be used. It disallows public funding "for *building or repairing* any church or churches, place or places of worship, or for the *maintenance* of any minister or ministry." (Emphasis added.) The Clause does not speak to whether religious institutions may receive public funds if the funds are not used to build or repair places of worship or to maintain a ministry.

In sum, *Trinity Lutheran* is inapplicable for several reasons: the grants here support religious worship; the grants violate the Establishment Clause; states have a substantial historic interest in not financing the maintenance of places of worship; and New Jersey's Religious Aid Clause bars religious uses of state funds instead of disqualifying religious institutions based on their status from all state funding.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Dated: July 14, 2017



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