

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 ON BEHALF OF DEFENDANT-RESPONDENT GRANT RECIPIENTS

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PRELIMINARY STATEMENT

Churches¹ have the right under the State and federal Constitutions not to be excluded from neutral public welfare programs based on religious status - and the public has the right to include churches in such programs in order to advance the public welfare. Reading the State Constitution to exclude churches from Morris County's historic preservation program would undermine that Constitution's protection of the free exercise of religion, create a conflict with the First Amendment as interpreted in Trinity Lutheran Church, Inc. v. Comer, -- U.S. -- (June 26, 2017), and needlessly impair the health, safety and welfare of the people of New Jersey.

Read in context, however, N.J. Const. Art. I, Para. 3 permits inclusion of religious entities in neutral programs that advance secular government interests so long as this does not violate Art. I, Para. 4's prohibition of State establishment of religion. This reading is consistent with the State's prohibition of discrimination based on religious status, and avoids any conflict with Trinity Lutheran. It also pays proper deference to the collective judgment of the people that inclusion of houses of worship in such programs is crucial to advancing the essential governmental function of historic preservation.

¹ "Churches" is used throughout generically to refer to houses of worship.

STATEMENT OF FACTS

Historic Preservation in New Jersey

Historic preservation is "an essential governmental function of the State." N.J.S.A. 13:1B-15.111. The State Constitution specifically authorizes use of public funds for historic preservation and appropriates revenues for this purpose. See N.J. Const. Art. VIII, Sec. II, Para. 6, 7. Since 1966, the Department of Environmental Protection has been charged with establishing comprehensive State-wide policies for historic preservation, N.J.S.A. 13:1B-15.105(a), and in 1967, the New Jersey Historic Trust was created to fund historic preservation projects. N.J.S.A. 13:1B-15.111. The New Jersey Register of Historic Places, created in 1970, provides criteria for identifying historic structures, and these criteria, which provide no basis for excluding a structure because it is a house of worship, set eligibility thresholds for other funding and preservation programs. See N.J.S.A. 13:1B-15.128 et seq. The State Register has, at least since 1972, included active houses of worship² which, since at least 1990, have received New Jersey Historic Trust preservation grants.³

² See New Jersey and National Registers of Historic Places – Essex County, http://www.nj.gov/dep/hpo/identify/nrsr_lists/Essex.pdf (last updated Apr. 26, 2016) (1972 addition to Register of North Reformed Church, St. James A.M.E. Church and St. Mary's/Newark Abbey Church in Newark).

³ http://www.njht.org/dca/njht/funded/sitedetails/solomon_wesley_church.html; <http://www.njht.org/dca/njht/funded/sitedetails/stcolumbasromancatholicchurch.html>.

The Morris County Historic Preservation Trust Fund

To complement the State's efforts, in 1997 the Legislature authorized counties to impose a levy for preservation or acquisition of "historic properties, structures, facilities, sites, areas, or objects." N.J.S.A. 40:12-15.2(a)(1)(e). Morris County did so by referendum in 2002. Its competitive grant program, administered through the County's Historic Preservation Trust, from 2012 to 2015 has made one or more grants to 55 individual recipients, twelve of which were to churches.⁴

The program's requirements are rigorous - and rigorously secular. Eligible properties must be integral elements of historic areas or derive their "primary significance from architectural or artistic distinction or historic importance[.]" N.J.A.C. 7:4-2.3(a)2. Detailed documentation, including proof of National or State Register eligibility and how the work will enhance the structure's historical value, is required. Grants cannot be spent on routine maintenance and recipients must fund 20% of the cost of the approved work, 262sca, which the County monitors to ensure compliance with the Department of the Interior Standards⁵ and State regulations.

⁴ See page 42, *infra*. Funded Sites, Historic Preservation, Morris County, <http://morriscountynj.gov/planning/divisions/prestrust/historic/fundedsites>.

⁵ Standards for the Treatment of Historical Properties (1995) (hereafter Standards). Available at: <https://www.nps.gov/tps/standards/four-treatments/treatment-rehabilitation.htm>.

Each Grant Agreement funding restoration work requires an Easement Agreement granting the County a property interest conferring the right, for 30 years, to compel preservation in accord with the Standards.⁶ Historic features must be restored rather than replaced if possible, and, if not, replacements must match the old in design, color and materials,⁷ adding significant cost and complexity to the work.

Defendant Grant Recipients and Their Communities

1. Morristown

Four defendants maintain structures in The Morristown Historic District, which is recognized by both the National and State Registers⁸ and includes the Morristown National Historical Park.⁹ The centuries-old Morristown Green¹⁰ is framed by the 1870 Norman-style United Methodist Church¹¹ and three buildings maintained by defendant Presbyterian Church in Morristown.¹² These include an 1883 Romanesque Revival Sanctuary designed by

⁶ See 269sca. (Program R. 5.16).

⁷ See 260-61sca. 269sca (Program R. 5.8, 5.16).

⁸ New Jersey Register No. 2192, 2193; *see also* <https://www.nps.gov/nr/publications/bulletins/arch/appen1.htm>.

⁹ The Nation's first National Historical Park. Morristown National Historical Park, National Park Service, <https://www.nps.gov/morr/index.htm>.

¹⁰ One of only two town greens in the State. *See Morristown Green*, Morris County Tourism Bureau, <https://morristourism.org/history/american-revolution/morristown-green>.

¹¹ *See Morristown-Virtual Walking Tour*, Morristown Partnership, http://www.morristown-nj.org/history_cont.html.

¹² The church has maintained a continuous presence on the Morristown Green since 1740. *See Morristown-Virtual Walking Tour*, Morristown Partnership, http://www.morristown-nj.org/history_cont.html.

James Cleveland Cady, which has an individual Certificate of Eligibility for the National Register.¹³ Adjacent to the Sanctuary is a Gothic Revival Chapel built in 1869, and an 1885 Queen Anne-style manse.¹⁴

Just off the Green is a concentration of sites centered on the 1917 Gothic Revival Joint Free Public Library, built to resemble, in style and materials, the neighboring Sanctuary of defendant St. Peter's Episcopal Church,¹⁵ an English Gothic Revival church and prominent Morristown landmark.¹⁶ Between the Library and the Green on South Street is an 18th century farmhouse,¹⁷ and the 1878 Romanesque Revival South Street Presbyterian Church.¹⁸ Formerly the home of a separate congregation, it is now used by defendant Presbyterian Church in Morristown as a Parish House for administration and meetings.

¹³ See 303sca.

¹⁴ The Chapel was the subject of a 2013 grant of \$264,616 for roof restoration. The Parish House was the subject of a 2015 grant of \$219,168 for roof and wood dormers restoration. The Sanctuary and Chapel were the subject of a \$183,080 roof restoration grant in 2012. See 294sca.

¹⁵ Morristown Library, NJ Historic Trust, <http://www.njht.org/dca/njht/funded/sitedetails/morristownlibrary.html>; Morris County Historic Preservation Grant, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/Morristown-Town-Morristown-Morris-Twp.-Library.pdf>.

¹⁶ See 371sca. St. Peter's, designed by McKim, Mead and White and constructed from 1887-1908, was the subject of a 2012 construction grant of \$428,134 to rebuild the tower parapets, add through-wall flashing and replace the tower and turret roofing, and a 2014 grant of \$115,785 for further moisture control and correction efforts. See 368sca.

¹⁷ Now owned by the library. See Morristown-Virtual Walking Tour, Morristown Partnership, http://www.morristown-nj.org/history_cont.html.

¹⁸ See 303sca. South Street Presbyterian was the subject of a 2015 grant of \$219,168 and 2014 grants of \$297,512 for slate roof replacement and \$23,640 for construction documents. 294sca.

North of South Street Presbyterian, across from the Women's Club of Morristown's 1797 Lewis Condict House, are the grounds of defendant Church of the Redeemer,¹⁹ founded in 1852 by Episcopal abolitionists including telegraph inventor Alfred Vail.²⁰ Church of Redeemer's current Gothic Revival stone church was erected in 1917, followed in 1926 by a matching Parish Hall, used daily for programs serving Morristown's homeless and a 1935 Rectory now used as a home for people living with AIDS.²¹

Illustrating the District's compactness, Church of the Redeemer on South Street backs onto the United Methodist Church property on the Green, and is separated by a row of shops and restaurants from the Mayo Performing Arts Center, a restored 1937 theater, and the 1918 Italian Renaissance Vail Mansion,²² formerly Morristown's town hall, which is located across South Street from the Library and St. Peter's.²³

¹⁹ Individually listed on the New Jersey Register, No. 3390.

²⁰ Our History, Church of the Redeemer, <http://www.redeemermorristown.org/history>.

²¹ See 455sca. These structures received 2012 grants of \$21,160 for construction documents and \$130,246 for exterior restoration of the Parish House, a 2014 grant of \$253,680 for the first phase of an exterior restoration project including roof restoration, and a 2015 grant of \$272,480 to complete a slate roof restoration project. 449sca.

²² Built for AT&T's first President, Theodore Vail - cousin of telegraph inventor Alfred Vail. Glimpse of History: A majestic mansion erected in Morristown in early 1900s, NJ.com, http://www.nj.com/news/local/index.ssf/2011/04/glimpse_of_history_a_majestic.html. (Apr. 24, 2011). It is a contributing structure to the Morristown Historic District. <http://npgallery.nps.gov/pdfhost/docs/NRHP/Text/73001126.pdf>.

²³ The area also includes the 1873 Thomas Nast House, the home of the famous cartoonist and a National Historic Landmark, and the 1810 Federal-style McCulloch Hall, now a museum. See Thomas Nast Home-Villa Fontana, National

Defendant Church of the Assumption is located across Maple Avenue from the rear of St. Peter's, in what was Morristown's "Little Dublin" neighborhood of Irish servants who worked in the area's Robber Baron-era mansions.²⁴ In 1872, its original church was replaced by the present Ruskinian Gothic structure, and a High Victorian Gothic-style Rectory was added in 1890.²⁵

2. Peguannock Township

Defendant First Reformed Church of Pompton Plains maintains three historic buildings.²⁶ Its 1771 Sanctuary, restored after a 1937 fire and featuring a soaring Christopher Wren-styled steeple, is individually listed on the National Register.²⁷ It is flanked by the 1876 Carpenter Gothic Grace Chapel, which at various times also served as the Township's library and school gymnasium,²⁸ and the 1788 Giles Mandeville House,²⁹ now the First

Register of Historic Places, <http://focus.nps.gov/pdfhost/docs/nrhp/text/66000470.pdf>; MacCulloch Hall Historical Museum Home Page, <http://www.maccullochhall.org>. MacCulloch Hall has received five County historic preservation grants totaling \$144,124. Funded Site, Historic Preservation, Morris County, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/2016-Morristown-Macculloch-Hall.pdf>.

²⁴ Morristown-Virtual Walking Tour, Morristown Partnership, http://www.morristown-nj.org/history_cont.html.

²⁵ See 568sca. The Church, restored after a 1985 fire, was the subject of a \$25,000 grant for preservation documents in 2013, and a \$30,520 roof restoration grant in 2014. 562sca. In 2015, the Rectory was the subject of an \$88,000 grant to replace portions of its slate roof. 562sca.

²⁶ New Jersey Register No. 5026 (Sanctuary), 4125 (Grace Chapel and Cemetery) and 4877 (Giles Mandeville House; National Register No. 12001034).

²⁷ See 396sca. The Sanctuary was the subject of restoration grants in 2013 (\$84,656) and 2014 (\$135,000). See 389sca.

²⁸ See 396sca. Grace Chapel was the subject of a \$281,600 2013 restoration grant. 389sca. Grace Chapel and the Sanctuary were also the subject of a \$18,600 grant for contract documents in 2012.

Reformed Church's manse, formerly a stop on the Underground Railroad and the Township's post office.³⁰

3. Mountain Lakes

Listed on both the National³¹ and New Jersey Registers, the Mountain Lakes Historic District reflects the Borough's founding by Herbert Hapgood as an early planned community³² and includes a concentration of surviving Hapgood and Belhall Craftsman-style homes and public buildings. Defendant St. Peter's Episcopal Church, built in 1926 in the Gothic Revival style with Craftsman elements, uses a 1916 Hapgood Craftsman home as its Rectory.³³ Defendant Community Church of Mountain Lakes, built on land donated by Hapgood himself, also uses Craftsman elements.³⁴

4. New Vernon

Defendant First Presbyterian Church of New Vernon is the focal point of the New Vernon Historic District, a late 18th Century English vernacular crossroads village listed on the

²⁹ See 396sca. Giles Mandeville House was the subject of a \$15,360 grant for construction documents in 2015. 389sca.

³⁰ See Pequannock Township-Celebrating Its 275th Anniversary, available at: http://hs.pequannock.org/ourpages/auto/2015/4/17/50898103/Pequannock%20Twp_%20275th%20Anniversary.pdf.

³¹ Mountain Lakes Historic District, New Jersey Register No. 3625; National Register of Historic Places, available at: <http://focus.nps.gov/pdfhost/docs/nrhp/text/05000963.pdf>.

³² National and State Historic District, Borough of Mountain Lakes, <http://mtnlakes.org/committees-and-commissions/historic-preservation-committee/national-and-state-historic-district>.

³³ See 733sca. St. Peter's received a \$12,800 2015 grant to complete a Preservation Plan for the church, rectory and Parish House. See 731sca.

³⁴ See 806sca. Community Church was the subject of a \$16,800 2015 grant to complete its Preservation Plan. See 804sca.

National and State Registers.³⁵ The 1833 Church³⁶ melds the basic meeting house form of the pre-Federal era with the Federal detailing prevalent at the time and Gothic elements then just beginning to find favor in church construction.

5. Ledgewood

A contributing structure in the Ledgewood Historic District, the cobblestone-faced, Gothic Revival Ledgewood Baptist Church³⁷ is a very early example of steel-reinforced, poured-concrete construction. Other than the loss of its original slate roof, it is virtually unchanged since 1917.³⁸

6. Netcong

Located adjacent to the Morris Canal, Stanhope United Methodist Church is individually listed on the National and New Jersey Registers³⁹ and an element of the Stanhope Historic District.⁴⁰ The 1920 Late Gothic Revival Church is notable for

³⁵ New Vernon Historic District, National Register of Historic Places, available at: <http://focus.nps.gov/pdfhost/docs/nrhp/text/82003288.pdf>; N.J. Register No. 2126.

³⁶ See 347sca. The church received a \$33,566 Preservation Plan grant and \$125,703 window restoration grant in 2012, and 2013 grants of \$29,736 for contract documents and \$257,535 for roof and foundation restoration. 340sca.

³⁷ New Jersey Register No. 2897; National Register No. 13000202. Available at: <http://focus.nps.gov/pdfhost/docs/nrhp/text/13000202.pdf>.

³⁸ See 758sca. Ledgewood Baptist Church received a \$26,000 2013 grant for preparation of a Preservation Plan, and a 2014 grant of \$9,200 and a 2015 grant of \$12,400 for construction documents for belfry restoration work. See 754sca. There are plans to restore its slate roof.

³⁹ New Jersey Register No. 5209; National Register No. 12001127.

⁴⁰ New Jersey Register No. 335.

its green clay roof tiles, which have had to be individually removed and reinstalled as part of ongoing restoration efforts.⁴¹

7. Mendham

Mendham Township's Community of St. John Baptist is part of a State Register historic district and is an individual National Register site.⁴² It includes a 1913 French Norman Chateau Revival Convent and St. Marguerite's Retreat House, a 1908 Tudor Revival school for girls, now used as an interdenominational retreat.

8. Boonton

The Boonton Historic District⁴³ reflects Boonton's history as an industrial center since the 1700s. Defendant Boonton Presbyterian Church was built in 1859 in a combination of Greek and Gothic Revival styles on land donated by local industry.⁴⁴

The Public Interest at Stake

These churches are snapshots of the architecture of the eras of their construction and contribute to the character of their communities and host historic districts. History and aesthetics do not recognize a secular/sectarian dividing line.

⁴¹ See 530sca. The Church received a 2012 grant of \$117,903 to restore the bell tower roof, and a \$21,300 grant in 2015 for restoration of the main roof. See 527sca.

⁴² New Jersey Register No. 5111, 4278; National Registry No. 07000356. See <http://npgallery.nps.gov/pdfhost/docs/NRHP/Text/07000356.pdf>. See 506sca. The Convent was the subject of a \$366,000 grant in 2012 for restoration of its tile roof. See 503sca.

⁴³ National Register No. 80002509; New Jersey Register No. 2085.

⁴⁴ See 668sca. In 2014, Boonton Presbyterian received a \$109,840 preservation grant. See 666sca.

Great expense was incurred to build Morristown's Library to resemble its neighbor, St. Peter's. Letting the church decay would degrade the historical context - and undermine the value of over \$500,000 in County⁴⁵ and State⁴⁶ preservation grants to the Library. Similarly, in Pequannock, the Giles Mandeville House was historic in its own right before it became the manse of the First Reformed Church.⁴⁷ It did not become less historic because it was acquired by a church.

Nor is the public's interest limited to preservation for its own sake. Defendants' properties contribute open space, breaking up blocks of denser development. The presence of a critical mass of historic sites is also a catalyst for heritage tourism. A study commissioned by the New Jersey Historic Trust found that heritage tourism generated \$2.8 billion in economic activity in New Jersey in 2012, including \$238 million in Morris County.⁴⁸ This primarily benefits businesses like the shops and

⁴⁵ See Morris County Historic Preservation Grants, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/2016-Morristown-Morristown-Community-Theater.pdf>.

⁴⁶ See Funded Sites, N.J. Historic Preservation Trust, <http://www.njht.org/dca/njht/funded/sitedetails/morristownlibrary.html>.

⁴⁷ Giles Mandeville House is an example of a church-owned structure whose primary function is not housing worship services. Similarly, Grace Chapel's evolution from church to public school gym to library to meeting space demonstrates that people have faiths while buildings have histories.

⁴⁸ Available at: <http://www.njht.org/dca/njht/touring/NJHT%20-%20TE%20Oxford%20report%2007-12-2013.pdf>.

restaurants interspersed between the historic churches and other historic sites in Morristown.⁴⁹

PROCEDURAL HISTORY

As part of its nationwide mission to promote nontheism, in December 2015 plaintiff Freedom From Religion Foundation ("FFRF")⁵⁰ and a local resident brought suit against the Morris County Board of Chosen Freeholders and other County officials. The matter was removed to federal court. Following remand, defendant grant recipients were added as parties based on allegations they fraudulently conspired to receive illegal funding. On January 9, 2017, the Hon. Margaret Goodzeit, P.J. Ch., entered Orders dismissing plaintiffs' claims. Plaintiffs filed a Notice of Appeal in February 2017 and, thereafter, on April 6, 2017, the County moved for the Court to take this case on direct appeal, a motion granted by Order dated June 2, 2017.

⁴⁹ Exemplifying this synergistic relationship, each year many of the churches - in conjunction with municipal and county buildings, commercial establishments and the Arts Center - host Morristown's First Night festival. First Night Morris 2016 Program, available at: <http://firstnightmorris.com/wp-content/uploads/FNMorris16-PROGRAM.pdf>.

⁵⁰ See Freedom From Religion Foundation Home Page, <http://ffrf.org/>.

ARGUMENT

FFRF's argument that the State Constitution compels the exclusion of churches from neutral public welfare programs advancing secular purposes is untenable under Trinity Lutheran. It also misinterprets the State's Constitution as it was understood at the time of its 1947 adoption and has since been interpreted by our courts and applied and amended by the Legislature.

I. PLAINTIFFS' PROPOSED INTERPRETATION OF ART I, PARA. 3 WOULD VIOLATE THE FIRST AMENDMENT UNDER TRINITY LUTHERAN.

Under Trinity Lutheran, categorical exclusion of religious entities from neutral public welfare programs violates their free exercise rights under the First Amendment. Trinity Lutheran struck down Missouri's exclusion of a church from a competitive grant program in which it would otherwise have been permitted to participate based on neutral selection criteria, relying on neutralist decisions recognizing that a State:

cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation.

Trinity Lutheran, slip op. at 6, citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947).

The Court stressed that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of "the highest order." Trinity Lutheran, slip op. at 6, citing McDaniel v. Paty, 435 U.S. 618 (1978) (state cannot condition a public position on recipient surrendering his religious status). It further found that where there is a secular basis for government action, any interest in greater church/State separation beyond that provided by the Establishment Clause is limited by the free exercise right not to be discriminated against on the basis of religion. See Trinity Lutheran slip op. at 14. The court noted that Missouri "had pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far." Id.

FFRF's claim also goes too far. Its contention that exclusion of churches from the program does not impact their free exercise rights, Pb 50, is untenable after Trinity Lutheran. Like the playground resurfacing program in Trinity Lutheran, preserving the facades of historic houses of worship advances a secular government interest. As in Trinity Lutheran, defendant grant recipients qualify for inclusion based on application of neutral criteria. Just like the playground

well as children of non-member residents.” Trinity Lutheran, (Sotomayor, J., dissenting), slip op. at 2.

FFRF also argues that competitive grants are not “generally available” because they are not given to all comers. As Trinity Lutheran involved a competitive grant, this argument cannot be reconciled with its holding, or reasoning that the denial of the opportunity to compete itself violated the First Amendment. Trinity Lutheran, slip op. at 11. Even Justice Breyer, author of the narrowest concurrence, found the effort to distinguish competitive grants untenable. Trinity Lutheran, (Breyer, J. concurring), slip op. at 2.

FFRF’s position is that since money is fungible, anything that defrays a religious entity’s costs benefits religion.⁵³ This position is untenable under Trinity Lutheran, which approved direct payment of funds to a church. The Court of Errors and Appeals also rejected this argument in Everson v. Bd. of Educ. of Ewing, 133 N.J.L. 350, 366-67 (E & A. 1945), where, over a dissent by Justice Chase relying on this point, it reversed lower court decisions that public funding of busing to parochial schools violated the State Constitution because the schools could divert the cost savings to religious purposes.

⁵³A categorical ban of providing direct funding to churches would also, among other undesired consequences, bar the State’s practice of making disaster recovery grants to churches. See Sandy Disaster Relief Grants for Historic Properties, available at: <http://www.nj.gov/dep/docs/grant-awards.pdf>.

Furthermore, the County grants do not defray operating costs. They cannot be used for routine maintenance, but are limited to discrete work found, on the basis of rigorous criteria, to advance the public interest in historic preservation. This work involves costs above those incurred in the ordinary course of operations. Stone work and slate are not necessary for prayer; congregations can and will keep meeting under asphalt shingles and behind vinyl siding. This, however, would not advance the public interest in preservation. Also, as the grants reimburse only 80% of funds already spent on approved work, there is no risk of diversion of funds to religious uses.

B. A Categorical Ban Cannot be Justified

Trinity Lutheran found that any state interest in achieving a level of church-State separation beyond the considerable buffer provided by the Establishment Clause is limited by the free exercise rights of religious entities. Slip. op. at 14. In Trinity Lutheran, it was conceded the grant there passed Establishment Clause scrutiny. Here, as FFRF acknowledges, Pb24, it has disclaimed any Establishment Clause claim, a disclaimer it relied upon to prevent removal. Nevertheless, FFRF has raised a number of Establishment Clause issues, albeit in Free Exercise clothing. These issues are without merit and in any event would not support the categorical ban sought by FFRF.

1. The Program Does Not Favor Religious Institutions

FFRF repeatedly argues that the County program is not neutral because "most secular nonprofits are excluded from the County's program even if they own and maintain historic buildings" due to a requirement that secular non-profits, but not churches, must be "dedicated" to historic preservation Pb6. Everything about this allegation - conspicuously absent from the Complaint - is wrong. It was first raised by FFRF in briefing after the parties had filed an extensive Joint Statement of Stipulated Facts (JSSF) intended to support their briefs. FFRF then objected to the County's rebuttal certification - on the grounds it referred to issues outside the JSSF! To moot the objection, which threatened to become a time-consuming sideshow, the County withdrew the rebuttal certification after the trial court, pointing to materials in the JSSF on grants to non-profits, and stated "I don't think we need the certification." 10/13/2016 Tr. 29. The trial court then rejected FFRF's selection criteria argument on the merits. 1079sca.

On the merits, just because Trust Fund Rule 5.5 lists "Religious entities" as a separate applicant category, 259sca, does not mean this is a favored category. In fact, the distinction subjects religious institutions to additional restrictions. Trust Fund Rule 5.8.7 specifies that religious entities - and only religious entities - are limited to work

supporting "exterior building elements" and cannot seek grants for interior work. 261sca.

The "dedicated" requirement is also a made-up fact. All "[c]haritable conservancies whose purpose includes historic preservation" are eligible for grants. Trust Fund Rule 5.5.3 (259sca) (emphasis added). The Rules do not require any specific form of documentation that an entity's purposes include historic preservation.⁵⁴ In practice, the requirement is self-executing. Historic preservation becomes a purpose of any non-profit entity which assumes the long-term obligations imposed by the Grant and Easement Agreements. This is shown by the statement below, which, by only citing the fragment reprinted in bold, Pb7, FFRF characterized as a disclaimer of preservation as a purpose:

As was noted in 2010, the Church bylaws included with the application cannot directly name historic preservation as a purpose of the Church, since the **sole purpose of a church is spreading the gospel of Jesus Christ. . . .** That said, we are firmly committed to maintaining the historic integrity of the building, since the property is part of the Boonton Historic District and is listed on the national and state historic registries, and the Morris County Heritage Commission. This is further evidenced by our commitment to historic preservation and the investment and the completion of the Historic Preservation Plan in 2011 and the ongoing approvals for additional work by the First Presbyterian Church of Boonton Session on March 10, 2014.

670sca.

⁵⁴ This is in stark contrast to the very specific requirements it imposes for documenting issues such as tax-exempt status and Register eligibility.

Tellingly, this applicant completed Attachment A of the grant application to qualify as a "charitable conservancy." 707sca. In fact, many of the statements FFRF cites as "proof" the grants are sustaining churches, Pb7, Pb17, are taken from Attachment A, which requires applicants to "State the mission of your organization" and "describe why it is important to preserve this resource and how the resource fits into your organization's mission." See, e.g., 318sca, 531sca, 707sca, 814sca. Given the questions, the answers are unremarkable. As the trial court observed "[i]t is only reasonable that a church's congregation is interested in worshipping in their church." 1078sca.

There is also no evidence that any non-profit entity has been denied a grant due to the "includes" requirement. As the trial court was aware through briefing and materials in the JSSF, 10/13/2016 Tr. 22-23, the Mayo Performing Arts Center, an active theater, has received County preservation grants,⁵⁵ as has the Growing Stage children's theater in Netcong.⁵⁶ The Women's Club of Morristown's charitable and community activities go far beyond preserving its historic headquarters.⁵⁷ Tellingly, while

⁵⁵ The Arts Center/Community Theater has been the subject of four County historic preservation grants totaling \$100,065. Morris County Historic Preservation Grants, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/2016-Morristown-Morristown-Community-Theater.pdf>.

⁵⁶ The County has awarded \$656,458 to The Growing Stage. Morris County Historic Preservation Grants, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/Netcong-Borough-Growing-Stage.pdf>.

⁵⁷ Lewis Condict House has received nine County historic preservation grants totaling \$653,880. Morris County Historic Preservation Grants,

FFRF baldy asserts that the Red Cross, if housed in a historic structure, would be ineligible for a County grant, Pb44, the record is to the contrary. Homeless Solutions, Inc. is no more dedicated to historical preservation than the Red Cross. Among the properties it uses to shelter the homeless is the Mt. Kemble Home, built in 1880 as a non-sectarian home for widows. In a win-win, Homeless Solutions has been able to use the existing structure to house elderly homeless while using preservation grants⁵⁸ to preserve the Home's historic elements.

2. The Program is Limited to Preserving Church Exteriors

FFRF also argues the restrictions on interior work have been violated - another issue not raised in the Complaint. The questioned work in fact complies with Trust Fund Rule 5.8.7 permitting work on structural mechanical, electrical and plumbing systems of religious properties. This provision reflects an established National Parks Service Guidance that internal supports are needed to preserve historic façades from collapse, and heating, ventilation, and moisture control prevent decay due to moisture, which plagues historic structures.⁵⁹

<http://morriscountynj.gov/planning/wp-content/uploads/2014/11/Morristown-Town-Womans-Club-of-Morristown.pdf>.

⁵⁸ The grants to the Home have totaled \$86,084. Morris County Historic Preservation Grants, <http://morriscountynj.gov/planning/wp-content/uploads/2014/11/Morristown-Town-Mount-Kemble-Home.pdf>

⁵⁹ Sharon C. Park, AIA, Heating, Ventilating, and Cooling Historic Buildings - Problems and Recommended Approaches, <https://www.nps.gov/tps/how-to-preserve/briefs/24-heat-vent-cool.htm>; Historic Preservation - Morris County Homepage, <http://morriscountynj.gov/planning/divisions/prestrust/historic>.

FFRF also objects to work on a stained-glass window allegedly "only visible from inside" First Presbyterian Church of Boonton. Pb9. The work in question fully complies with Trust Fund Rule 5.8.7. It is being done to ensure only light, not water, passes through the window. The grant application specifies that the window "will be re-leaded, broken glass replaced and soldered, panels waterproofed two sides, Lexan panel installed, and new steel bars attached." 701sca, 689sca.



This is a non-issue. FFRF did not allege any violation of program rules, the grants do not violate the program rules, rules violations would not be grounds to challenge the program and, given the less restrictive option of correcting the grant terms, imposing a categorical exclusion of churches as a means of preventing violations would not satisfy Trinity Lutheran's strict scrutiny standard.

II. THE STATE CONSTITUTION PERMITS RELIGIOUS INSTITUTIONS TO PARTICIPATE IN PROGRAMS GOVERNED BY NEUTRAL CRITERIA.

While the federal issue is dispositive, the State Constitution also permits churches to participate in the County program, and therefore does not run afoul of Trinity Lutheran. See Skilling v. United States, 561 U.S. 358 (2010) (if a law can be reasonably construed to preserve constitutionality, it should be so construed).

The County program enjoys a presumption of validity, a point ignored by FFRF. Elected representatives decided that including churches in historic preservation programs advances the public welfare. Such a determination is presumed valid "unless its repugnancy to the Constitution is clear beyond a reasonable doubt." State v. Muhammad, 145 N.J. 23, 41 (1996). Where reasonable minds can differ on constitutionality, the courts should respectfully defer. Roe v. Kervick, 42 N.J. 191, 229 (1964).

A. The Religion Provisions of the State Constitution.

As the trial court noted, 1069sca, the State Constitution contains three religion clauses, Art. I, Para. 3, 4 and 5:

3. No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor 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.

4. There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.

5. 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 or national origin.

FFRF wants one part of Art. I Para. 3 read as an island unto itself. Constitutions are not read this way.⁶⁰ See Resnick v. E. Brunswick Twp. Bd. of Educ., 77 N.J. 88, 118-19 (1978) (criticizing literal approaches as advanced "in total disregard of historical reality[.]"). Our Constitution is not read this way. See Vreeland v. Byrne, 72 N.J. 292, 328 (1977) (State Constitution is "a living charter - designed to serve the ages."). As Resnick's admonition against taking Art. I, Para. 3 to extremes shows, the religion clauses are not read this way.

This Court has made clear that the religion clauses must be "taken together." Schaad v. Ocean Grove Camp Meeting Ass'n of United Methodist Church, 72 N.J. 237, 266-67 and n. 9 (1977)

⁶⁰ Gallenthin Realty Develop. Inc. v. Borough of Paulsboro, 191 N.J. 344, 359-60 (2007), cited by FFRF as mandating a "plain language" reading, in fact turns on other approaches. Similarly, Kervick v. Bontempo, 29 N.J. 469, 480 (1959), in finding a bond authorization amendment was not subject to the general provision that the Assembly initiate revenue measures, noted that "[t]he Constitution was made to serve and protect the people of the State and all of its language must be sensibly construed with that uppermost in mind."

(emphasis added), *overruled in part on other grounds*, State v. Celmer, 80 N.J. 405 (1979). This is because, as the Court also explained in South Jersey Catholic Teachers Org. v. St. Theresa Elem. Sch., 150 N.J. 575, 586-87 (1996), an issue framed as an Art. I, Para. 3 Free Exercise claim might in fact call for an Art. I, Para. 4 Establishment Clause-type analysis. While Art. I, Para. 3 is called New Jersey's "Free Exercise" clause and Art. I, Para. 4 its "Establishment Clause," the analogy is imperfect, as language concerning funding religious entities - traditionally an Establishment Clause issue - happens to fall in Art. I, Para. 3. Similarly, the right not to be excluded from public programs, arguably an Art. I, Para. 5 discrimination issue, also implicates Free Exercise concerns. The relevant frame of analysis is defined by the substance of the dispute, not the paragraph enumeration of the Constitution, particularly since that enumeration has changed over time.⁶¹

B. The Significance of a Secular Government Purpose

FFRF contends that reading the religion clauses together renders Art. I, Para. 3 meaningless. This is not so. The core guarantees of freedom of belief and from compelled worship remain sacrosanct. Similarly, absent a factor like historic

⁶¹ In 1776, the Free Exercise and Establishment Clauses were combined in Art. 19, with the discrimination provisions in Art. 18. In the 1844 Constitution, some Free Exercise language was put in Art. I, Para. 3, while the Establishment Clause and antidiscrimination provisions were combined in Art. I, Para. 4. The 1947 Constitution uses a three-paragraph format.

preservation creating a separate secular interest, government funding "for building or repairing any church or churches" would be prohibited, as such funding could only be for the benefit of religion, and therefore beyond the power of the State. Here, however, providing funding for the protection of its historic districts is within the State's power. This shifts the focus of inquiry to whether the State must sacrifice the health, safety and welfare of its people, and impair the free exercise rights of potential grant recipients, in order to deny any incidental benefit to a religious group.

As the court below observed, 1073sca, Resnick suggests a spectrum of church-State interactions in which some are permitted, some are prohibited, and others permitted subject to conditions tailored to the circumstances. Establishing "The Church of New Jersey" and public school Bible distribution both fall on the prohibited side. Tudor v. Board of Ed. of Boro of Rutherford, 14 N.J. 31 (1953). The provision of general services such as police and fire protection fall on the permitted side. Resnick, 77 N.J. at 103. While tax exemptions aid the construction and maintenance of churches, this also falls on the permitted side, Resnick, 77 N.J. at 103, as does funding busing to parochial schools, Everson, 133 N.J.L. at 356, even though, by facilitating attendance at those schools and freeing up funds that might otherwise be consumed by busing

costs, it violates a literal reading of Art. I, Para. 3. A form of analysis more nuanced than categorical exclusion is needed to make these distinctions.

As Trinity Lutheran suggests, an Establishment Clause analysis is well-suited to reconciling the relevant interests when government actions serve a secular purpose. It looks to whether the government action has the effect of advancing (or inhibiting) religion, which turns on whether the aid results in indoctrination, conditions eligibility on religion, conveys a message of endorsement or creates excessive entanglement between church and State. See, e.g., McKelvey v. Pierce, 173 N.J. 26, 41 (2002), citing Agostini v. Felton, 521 U.S. 203 (1997).

The County grants do not present these concerns. This is borne out by the scrutiny federal funding for historic preservation of churches has received. The National Historic Preservation Act, for example, permits grants to preserve historic active houses of worship:

Grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant.

16 U.S.C. § 470a(e)(3). In opining that such grants are constitutional, the Office of Legal Counsel rejected the premise

that historic preservation of churches was a religious use. Memorandum Op. for the Solicitor Dep't of the Interior, Apr. 30, 2003. See also Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, 26 Op. O.L.C. 114 (2002) (permitting grants to churches damaged in natural disasters); State Amicus brief at 5 (discussing similar State grants to churches).

In a comprehensive decision, American Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009), the Sixth Circuit upheld grants made to active churches as part of a program to revitalize areas of Detroit prior to the 2006 Super Bowl. The grants were challenged not only under the First Amendment, but also under Mich. Const. Art. I, § 4, which states that "[n]o person shall be compelled ... to contribute to the erection or support of any place of religious worship[.]" In upholding the program, the Sixth Circuit noted it makes grants:

available to a wide spectrum of religious, nonreligious and areligious groups alike and employs neutral, secular criteria to determine an applicant's eligibility, what projects may be reimbursed and how much each grantee receives. That the program includes, rather than excludes, several churches among its many other recipients, helps ensure neutrality, not threaten it.

Id. 290. It further reasoned that "[i]f a city may save the exterior of a church from a fire, it is hard to understand why it cannot help that same church with peeling paint or tuck

pointing – at least when it provides the same benefit to all downtown buildings on the same terms.” Id. at 291-92, *citing Everson*, 330 U.S. at 17-18.

No reasonable observer familiar with the County program would view it as endorsing religion. In 2012-15, it awarded grants to 55 recipients, running the gamut from schools to fire engines, locomotives and mansions. It is in no way analogous to the hypothetical discussed in American Atheists, 567 F.3d at 290, of a program limited to buildings with steeples, or the program struck down in Comm. for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 768 (1973), which used gerrymandered criteria to limit eligibility to Catholic schools. The dozen church grant recipients are also a small percentage of the County’s over 140⁶² houses of worship, meaning that most grant recipients are not houses of worship and most houses of worship do not receive grants. This is not a context reasonably viewed as endorsing religion.

⁶² Nickolas Low-Beer, Houses of Worship in Morris County NJ (last updated Mar. 8, 2013), available at: <http://morris.njaes.rutgers.edu/nj-snap-ed/Morris%20County%20Houses%20of%20Worship.03.08.13.pdf>.

C. Other Provisions of the Constitution Support the Grant Program.

The religion clauses also do not stand alone. The principle of harmonization requires that elements of the State Constitution be read as part of a cohesive whole. See Muhammad, 145 N.J. at 44, citing Nat. Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582, 618 n.11 (1949) (Rutledge, J. concurring) (a "Constitution's provisions are to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as part of a harmonious framework."). In Muhammad, 145 N.J. at 43, for example, the Court considered the interplay of contemporaneous statutory and constitutional enactments concerning victim statements in capital cases. Despite prior case law suggesting that such statements were cruel and unusual punishment and violated due process under the State Constitution, the Court found that the statute was probative of the type of legislation intended to be authorized by the recently adopted amendment.

Here, there is a similar overlap of contemporaneous statutory and constitutional actions. When Art. VIII, Sec. II, Para. 7 was adopted to dedicate tax proceeds for State historic preservation efforts,⁶³ it was already well-established that this

⁶³ <http://www.njleg.state.nj.us/bills/BillView.asp>.

included grants to churches. In 1997, the year before adoption, the Legislature specifically approved historic preservation grants to four active houses of worship.⁶⁴ In 1998, the year the historic preservation amendment was placed on the ballot, the Legislature approved similar grants to nine more houses of worship.⁶⁵ In 2001, after adoption of the amendment, the Legislature used the expanded funding to provide grants to eight more houses of worship.⁶⁶ The Constitution has since been amended twice, most recently in 2014, to increase funding for historic preservation⁶⁷ while the State has continued to fund historic preservation of churches.

The Legislature and the electorate are presumed to know what one hand was doing in funding preservation of historic

⁶⁴ The recipients included defendant Church of the Redeemer and Montclair Jewish Center. See P.L. 1997, C. 106, 107, approved 6/2/1997. Appropriation to New Jersey Historic Trust, Assembly No. 362 (Dec. 9, 1996), available at: ftp://www.njleg.state.nj.us/19961997/A0500/362_I1.htm; Appropriation to New Jersey Historic Trust, Assembly No. 385 (Dec. 9, 1996), available at: ftp://www.njleg.state.nj.us/19961997/A0500/385_I1.htm.

⁶⁵ The recipients were South Presbyterian Church in Bergenfield, Old Bergen Church in Jersey City, Our Lady of Grace Church in Hoboken, The Presbyterian Church of Lawrenceville, St. Mary's Roman Catholic Church in Wharton, Plainfield Friends' Meeting House, Bethel A.M.E. Church in Greenwich Township, Christ Episcopal Church in Shrewsbury, and St. Peter's Episcopal Church in Freehold, Monmouth. L. 1998, c. 64, 65. Available at: http://www.njleg.state.nj.us/9899/Bills/PL98/65_.PDF.

⁶⁶ The recipients were Princeton University Chapel, The First Presbyterian Church of Salem, St. Columbia's Roman Catholic Church in Newark, Old Dutch Bergen Reformed Church in Bayonne, St. Peter and Paul Orthodox Church in Jersey City, St. Peter's Episcopal Church in Perth Amboy, St. Peter's Episcopal Church in Freehold, and Grace Episcopal Church in Plainfield. L. 2001, c. 55, 56.

⁶⁷ In 2003, Art. VIII, Sec. II, Para. 7 was amended to increase funding dedicated from the Sales and Use Tax. In 2014, language was added to Art. VIII, Sec. II Para. 6 to allocate funding from the Corporation Business Tax.

churches when the other amended the State Constitution to provide more funding to do so.⁶⁸ The people did not repeatedly amend their Constitution in order to continue violating it.

The State Constitution also authorizes counties to acquire easements and other interests in property for the benefit of county residents. Art. IV, Sec. VI. Nothing suggests this power is void when the property is owned by a church, as the power of eminent domain is subject only to the constraints that the government pay just compensation, extend due process and only take private property for public use. Gallenthin, 191 N.J. at 455. Indeed, in Resnick, even the lower courts that objected to a church leasing space from a school did not object to a school leasing space from a church. See Resnick, 77 N.J. at 97-98.

These disparate lines of authority all support the County program. In contrast, there is no reason to exclude churches from neutral programs that do not associate the State with endorsement, indoctrination or entanglement with religion.

D. Resnick and the State Constitution

1. The Program is Valid Under Resnick

The parties have very different views of Resnick. The Resnick court would not recognize FFRF's reading of their opinion, which cautioned *against* placing undue emphasis on "wall

⁶⁸ Garden State Historic Preservation Trust Fund: Funding History, NJ Historic Trust, <http://www.njht.org/dca/njht/programs/gshptf/>.

of separation" rhetoric, and held that the State and federal Constitutions permitted weekend services to be held in public schools subject to certain conditions. Resnick, 77 N.J. at 103. It set a low threshold for State interaction with religious entities, at one point characterizing the entanglement concerns raised there as "rather silly." Resnick, 77 N.J. at 120.

While Resnick contains language concerning religious groups' ineligibility for "certain benefits which are partly subsidized by tax-generated funds," Resnick, 77 N.J. at 103-04, it is important not to bury the lead: the Court held that under the specified conditions even regular use of a school to host services was not "use of tax revenues for the maintenance or support of a religious group." The key language in Resnick is that Art. I. Para. 3's prohibitory language "is not carried to an extreme." Id. at 103. So long as minimal safeguards were followed, the Court concluded "there is no reason why these organizations should not be accorded the same treatment by government as other nonprofit groups." Id. at 120-21.

This is an easier case than Resnick, which involved use of a public school as a house of worship. In that most problematic context, the Court reconciled the relevant constitutional concerns by ensuring churches paid nothing less than the out-of-pocket costs of use. In the reverse context of the public using part of a church, the equivalent concern is ensuring the grants

cover nothing more than the cost of work found to advance historic preservation. The County program does this.

Furthermore, Resnick, 77 N.J. at 103, like Everson and Trinity Lutheran, recognized the analogy between preservation and public safety programs. Preserving the integrity of host historic districts by protecting the historic elements of defendants' structures from the ravages of time is no different in purpose or effect than protecting them from the ravages of crime, fire or flood. See Amer. Atheists, 567 F.3d at 291-92 (equating preservation grants with grants to churches to remedy flood damage). While FFRF rejects this analogy, the people of New Jersey have decided "[h]istoric preservation is an essential governmental function of the State[,]" N.J.S.A. 13:1B-15.111, a judgment not subject to litigation second-guessing.

2. The State Constitution Does Not Impose Greater Restrictions on Church-State Relations than the First Amendment

FFRF relies on *dicta* referencing New Jersey's "rich tradition of sometimes construing our own state constitutional protections of individual rights more broadly than cognate provisions in the United States Constitution[,]" Hendricks, 445 N.J. Super. at 476 (emphasis added) to conclude that the State Constitution gives less broad protection to churches' free exercise rights than the federal Constitution. Hendricks,

however, never resolved whether church-State relations are one of those "sometimes."⁶⁹

Instead, Hendricks cited Justice Clifford's dissent in Resnick as an *indication* "that a proper interpretation of [Art. I, Para. 3] is not to be affected by the federal jurisprudence." Id. at 477. Justice Clifford's dissent, however, says nothing about the State Constitution. It rests entirely on his view the First Amendment prohibited the challenged use. In contrast, the majority found the school use program, subject to conditions, did not violate the State Constitution and, subject to those same conditions, also would not violate the First Amendment. Resnick thus provides no support for the proposition the State Constitution bans what the First Amendment permits.

This Court has never held the 1947 Constitution imposes greater restrictions on church-State relations than the First Amendment. In construing the State Constitution's religion clauses, it regularly looks to First Amendment guidance. See Ran Dav's Country Kosher, Inc. v. State, 129 N.J. 141, 151 (1992). Citing the Court of Errors and Appeals' decision in Everson, this Court has declared that there is no substantive difference between the State and federal religion clauses:⁷⁰

⁶⁹ Hendricks, 445 N.J. Super. at 476, expressly declined to do the "divergence factors" analysis, see Muhammad, 145 N.J. at 41, required to determine if the State and federal constitutions were intended to reach different results.

⁷⁰ New Jersey is not alone in taking this approach. Michigan, for example, construes substantially similar state constitutional language, Mich. Const.

the letter and spirit of these New Jersey constitutional provisions, taken together, are substantially of the same purpose, intent and effect as the religious guaranties of the First Amendment and have probably always been regarded as such in this State.

Schaad, 72 N.J. at 266-67 (emphasis added), accord St. Teresa, 150 N.J. at 586.

In fact, New Jersey has been a model of benevolent neutrality. Unlike thirty-seven other states, New Jersey has no "Blaine Amendment" expressly prohibiting funding to religious entities.⁷¹ In 1947, the Supreme Court in Everson built the foundation of modern neutralist First Amendment doctrine on the cornerstone of the 1945 Court of Errors and Appeals decision in Everson, which the 1947 Constitution then firmly embraced.

3. The 1947 Constitution and Everson

There is nothing in the 1947 Constitution's history suggesting it set limits on church-State relations stricter than those in the First Amendment. Here again, opponents of the grant program bury the lead. The 1947 Convention's Delegates considered, and expressly rejected, a stricter standard.

Art. I Sec. 4, in parallel with the federal First Amendment. Scalise v. Boy Scouts of America, 265 Mich. Ct. App. 1, 10 (2005).

⁷¹ See Kyle Duncan, Secularism's Laws: State Blaine Amendments and Religious Persecution, 72 Fordham L. Rev. 72 (2003) (surveying states); Governor's Study Commission on New Jersey's Nonpublic Schools, Quality Education for All of New Jersey's Children: The Importance of Supporting the Complementary Relationship Between New Jersey's Public and Nonpublic Schools (2010) (noting State's refusal to adopt a Blaine Amendment).

By 1947, New Jersey's highest court had declared that Art. I, Para. 3 permitted funding for busing to parochial schools, Everson, 133 N.J.L. at 351, and the Supreme Court had held that the First Amendment did not prohibit what the State Constitution permitted. The 1947 Convention could do nothing about what the Supreme Court said the First Amendment did not prohibit. It could, however, change what the State Constitution permitted. An attempt was made to do so, based on the same argument raised by FFRF that State actions having even an indirect benefit to a sectarian institution, regardless of any secular public benefit, should be banned. See, e.g., N.J. Const. Conv. Vol. 5, p. 789 (Aug. 5, 1947 testimony of Mr. Weidner Titzck to Committee on Taxation and Finance); Statement of Mr. William Dickey, to Committee on Taxation and Finance, N.J. Const. Con. Vol. 5, p. 802 (Aug. 5, 1947). To reverse Everson, opponents of that decision proposed the following amendment:

No tax shall be levied or appropriation of public money or property made by the State or any subdivision thereof, either directly or indirectly, except for a public purpose, and no public money or property shall be appropriated, applied, donated or used directly or indirectly for any sect, church, denomination or sectarian institution[; and that]

No public moneys or funds collected by taxation in this State, by the State, or any subdivision thereof, shall be used, either directly or indirectly, to aid any school or institution of learning, wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

N.J. Const. Con. Vol. 5 p. 792 (testimony of Mr. Titzck to Committee on Taxation and Finance, Aug. 5, 1947). The relevant committee rejected this proposal.

Lest the point be missed, the only reason the Convention considered a proposal mandating that "no public money or property shall be appropriated, applied, donated or used directly or indirectly for any sect [or] church" is because in Everson the Court of Errors and Appeals had ruled Art. 1, Para. 3 permitted this. FFRF's contention the 1947 Constitution should be read as banning all appropriations to a church cannot be reconciled with the Convention's rejection of a provision which would have imposed that ban.⁷² The Convention's adoption of Art. I, Para. 5, prohibiting discrimination on the basis of religion, also cannot be reconciled with categorical exclusion of religious entities. In fact, Art. I, Para. 5 and Trinity Lutheran compel the same result in different ways. See also Marsa v. Wernik, 86 N.J. 232, 239 n.2 (1981) (noting but not deciding disparate treatment on basis of religion raised discrimination concerns).

⁷² The Court of Errors and Appeals' Everson decision is not acknowledged in FFRF's brief. It is also not discussed in Hendricks, which, without the context that the proposed amendment was an attempt to change the result in Everson, speculated it may have been rejected because "it was not deemed necessary, as aid to religious schools was already prohibited by Art. I, Para. 3[.]" Hendricks, 445 N.J. at 467-68, 465 n. 8.

III. RLUIPA PROHIBITS DISCRIMINATION AGAINST RELIGIOUS ENTITIES WITH RESPECT TO STATE LAW BENEFITS AWARDED UNDER NEUTRAL TERMS

The Court below did not reach the issue that FFRF's desired relief is barred by the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Land use regulation is in turn defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land[.]" § 2000cc-5(5). This is a strict liability standard.

The County program is a landmarking law which limits or restricts a recipient's use of the land. Under the Grant and Easement Agreements, recipients must preserve the historical elements of their property and provide public access. Excluding religious institutions from this landmarking law would violate RLUIPA. Moreover, under the doctrine of constitutional avoidance, statutes should be construed if all possible to preserve their constitutionality. Art. I, Para. 3 can, and therefore should, be construed to permit historic preservation grants to houses of worship to avoid conflict with RLUIPA.

IV. THERE ARE NO GROUNDS FOR REFUNDING DISBURSED GRANTS

FFRF's civil conspiracy "claw-back" claim seeks to compel defendant grant recipients to refund all County grants received since 2012 even though the funds for the approved work have been expended. The sole basis advanced for this relief in their brief below is that the grant recipients received funds they "knew or should have known was wrong." Trial Pb27. Applying for a grant is protected petitioning activity except for sham, "objectively baseless" requests where no reasonable person could believe the petitioner was entitled to the requested government action. See, e.g., Fraser v. Bovino, 317 N.J. Super. 23, 38-39 (App. Div. 1998), citing Professional Real Estate Invest., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 1920 (1993). See also Rainier's Dairies v. Raritan Val. Farms, 19 N.J. 552, 564-65 (1955) (claim premised on petitioning activity requires proof of actual malice and absence of probable cause).

For a grant application to have been objectively baseless, every argument raised in this brief would have to be not only meritless, but frivolous. This simply is not the case. Therefore, even if any part of FFRF's claim survives, the civil-conspiracy claim seeking disgorgement of already expended grant payments fails as a matter of law.

CONCLUSION

For the reasons set forth herein, defendant grant recipients respectfully requests that the decision below be affirmed.

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Grant Recipients*

By:  _____

Kenneth J. Wilbur

Dated: August 11, 2017

County Grant Recipients 2012-15

Acorn Hall
Ahrens Fox P4 Fire Truck
Ayres Farm House
Boonton Holmes Public Library
Bridget Smith House
Butler Railroad Station
Church of the Assumption
Church of the Redeemer
Community Church of Mountain Lakes
Community of St. John Baptist
Craftsman Farms
First Presbyterian Church of Boonton
First Presbyterian Church of New Vernon
First Reformed Church of Pompton Plains
Ford-Faesch House
Former Baptist Church
Glenburn House
Growing Stage
Hopatcong State Park Fountain
J. Smith Richardson History House
King Homestead Museum
Lake Hopatcong Train Station
L'Ecole Kinnelon Museum
Ledgewood Baptist Church
Little Red Schoolhouse
Loyola Gate House
Macculloch Hall
Martin Berry House
Millington Schoolhouse
Montville Township Morris Canal
Morris Canal Lock 2 East
Morris Museum
Morristown Community Theater
Moses Estey House
Mount Kemble Home
Mount Tabor Historic District
Museum of Early Trades & Crafts
Obadiah LaTourette Grist & Saw Mill
Old Union Cemetery
Oscar A. Kincaid Home of History
Phoenix House
Presbyterian Church in Morristown
Ralston Cider Mill
Rockaway Borough Free Public Library
Schuyler-Hamilton House
Seward House
Smith-Baldwin House
St. Peter's Episcopal Church
St. Peter's Mountain Lakes
Stanhope United Methodist Church
Union School House
Waterloo Village
Willow Hall
Willows at Fosterfields
Woman's Club of Morristown