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FREEDOM FROM RELIGION FOUNDATION, *et al*., Plaintiffs, – against – MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, *et al*., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: SOMERSET COUNTY DOCKET NO.: SOM-C-12089-15 Civil Action

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

HISTORICAL TEXTS

OTHER AUTHORITIES

I. Morris County's program violates the New Jersey Constitution.

This Court's decision is far simpler than the defendants' briefing suggests. Under the plain terms of the New Jersey State Constitution the government cannot collect and spend taxes to "repair[] any churches." N.J. Const. art. I ¶ 3. Morris County has collected and spent millions of taxpayer funds to do precisely that. Both the New Jersey Supreme Court and appellate division have struck down government financial benefits to religious institutions in decisions that are binding on this Court, and are less egregious factually than granting more than five million dollars directly to churches. The outcomes of those cases, with less straightforward facts, were not altered by appeals to equal protection because there is simply no legitimate equality argument to make if one is claiming that the government must give money to churches. The government's interest in not compelling citizens to financially support religions is fundamental and overrides any concern that churches might be treated differently.

Morris County and the Churches seek refuge in the thesaurus from the religious aid prohibition's plain language and the simple conclusion it prescribes. But constitutional obligations cannot be escaped with synonyms.

First, Morris County argues that the Trust Fund grants are not used to "repair" churches, but only to "stabiliz[e], rehabilitat[e], restor[e], and preserv[e]" them. County's Reply Brief, 3. But Morris County itself uses the word "repair" to describe the church projects, both in the Trust Fund Rules and in the grant awards themselves.[1] That's because the work funded plainly

[1] Joint Stipulation of Facts ("JSSF") Ex. A, 2-1 (defining "Historic Preservation" under the Trust Fund program as "the performance of any work relating to the stabilization, repair, rehabilitation, renovation, restoration, improvement, protection, or preservation of a historic property . . . ."); JSSF Ex. B1, 4 (2014 grant to Presbyterian Church in Morristown included "Repair floor joists & roof rafters"); JSSF Ex. C1, 2 (2012 grant to First Presbyterian Church of New Vernon

amounts to "repair," which means "to restore by replacing a part or putting together what is torn or broken." "Repair," Merriam-Webster Online Dictionary, www.merriam-webster.com (accessed Sept. 25, 2016). The Trust Fund grants are used to repair churches.

Second, the Churches argue that Morris County "is not 'giving' money to a church" by reframing the financial grant as a "consideration for each recipient conveying an interest in their property to the County." Churches' Reply Brief, 1. Whether the taxpayer funds are "given" to a church or paid in consideration for property interests, Morris County collects and distributes taxpayer funds to repair churches and therefore violates the religious aid prohibition. Even if Morris County paid contractors to repair a church, without ever actually granting the church any money, the County would violate the prohibition against "repairing any church" with taxpayer funds.

The defendants' synonyms cannot overcome the binding precedent, *Resnick v. E. Brunswick Twp.,* 77 N.J. 88 (1978), which interprets this plain language. That case enforced the religious aid prohibition broadly, holding that churches were permitted to use public facilities only "as long as they reimbursed the municipality for the 'actual costs,' as opposed to the market rates, incurred by their use of the facilities," *Id.* at 120. *Resnick* allowed the churches equal rental opportunities in schools only so long as the church covered all the actual costs, *i.e.*, so long as there was no financial cost to the government. In other words, the government could not pay

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included "Carpentry Repairs"); JSSF Ex. F1, 4–5 (2014 and 2015 grants to the Church of the Redeemer included "Structural Repairs" and "Sheathing repair allowance," respectively); JSSF Ex. G1, 1 (2012 grant to the Community of St. John the Baptist included "Roof structural deck **repairs**"); JSSF Ex. H1, 1 (2012 grant to Stanhope United Methodist Church described as "Tower & Roof **Repair**"); JSSF Ex. J1 (2014 grant to the First Presbyterian Church in Boonton included "Rose window & sash **repair**" and "Emmaus window & sash **repair**") (emphasis added to each).

even a portion of the church's custodial bill. Morris County's program involves a multimillion-dollar expenditure of taxes to repair churches. These expenditures are unconstitutional under *Resnick* unless they are fully reimbursed so that no tax dollars are actually used to support or repair a church.

Historic preservation grants do not fall into *Resnick's* "extreme" exception for police and fire protection. *Id.* at 103. The Churches argue that its historic preservation grants are "no different in purpose or effect than protecting [the Churches] from the ravages of crime or fire or flood." Churches' Reply Brief, 5. If a church catches fire it poses an immediate danger to the entire community and neighboring structures—the same cannot be said for historic preservation. The slow decay that comes with neglect is simply not equivalent to a crisis that, if left unchecked, can consume the entire community. If the Churches cannot afford to maintain their buildings, they can sell the buildings to someone who can. If they fail to do this, Morris County can seize the property by eminent domain and repair it.

The Churches ask the court to interpret the constitutional prohibition against "repairing any church" to mean the government can repair churches so long as they do not give the churches more money than is necessary for the repairs, asserting that "since the grants cover, at most, 80% of project costs, there is no possibility of their (sic) being left over money to divert." *Id*. at 6. In other words, the Churches assert that Morris County may pay to repair historic churches so long as no money is left over for the churches to keep. Even if that interpretation were correct, the churches have admitted that they reap a substantial financial benefit from this program, arguing that it would cripple them financially to lose those funds. According to the Churches, being forced to maintain their buildings without government aid would have "a

considerable ad terrorem effect on grant recipients with limited funds." Churches' Reply Brief, 17.

This admission also highlights the fact that the money is not simply repairing the churches, but supporting their ministries and religious missions. When applying for the taxpayer funds, various churches told Morris County that awarding them grants would support and maintain their religious ministries. This makes the constitutional violation all the worse, given that no person shall "be obliged to pay … 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** . . . ." N.J. Const. Art. I ¶ 3 (emphasis added).

The Churches dismiss as "gotcha" quotes their own admissions that Trust Fund grants will "allow . . . continued use by our congregation for worship services" and that the grants are "essential to carry out the worship activities and community life of [the church]." Churches' Reply Brief, 13–14. Morris County was aware that awarding historic preservation grants to these churches would allow these churches to advance their religious missions in a way that they could not if they had to pay their own repair bills.

The binding precedent also defeats the Churches' constitutional harmonization argument. The Supreme Court was aware of its duties when it decided *Resnick*, a fact the Superior Court Appellate Division noted earlier this year when it foreclosed a harmonization argument and applied *Resnick* to invalidate taxpayer grants spent on two religious schools' buildings. *Am. Civil Liberties Union of N.J. v. Hendricks*, 445 N.J. Super. 452, 478 (2016). The appellate court in *Hendricks* avoided historical analysis of New Jersey's religious aid prohibition to "le[ave] it to the Supreme Court to consider, if it so chooses, whether the arguments presented by the parties

as to the meaning and history of the clause warrant a reexamination of *Resnick*." *Id.* at 455. The history and interpretation of Art. I ¶ 3 are settled. This answers the Churches' request that this Court redefine the *Resnick* rule.

Even if this Court were to put aside *Resnick* and *Hendricks*, the most consistent way to harmonize the various provisions of the New Jersey Constitution is to interpret more recent constitutional amendments involving historic preservation as including an exception for churches, so as not to violate the religious aid prohibition, rather than interpreting the more recent amendments as changing a provision that has been in New Jersey's constitution since 1776 and protects a fundamental and important government interest. The religious aid prohibition could have been just as easily amended to exclude historic preservation grants, but it was not.

Hendricks also undercuts the defendants' reliance on historical preservation as the purpose of the financial award. The purpose is of no concern; the dispositive matter is that taxpayer funds are used to support a church. *Hendricks* applied *Resnick* and struck down financial award to sectarian institutions *because* they were sectarian institutions. *Hendricks*, 445 N.J. Super. at 455. In fact, *Hendricks* limited the scope of its opinion based on the religious character of the schools and buildings involved, not on the government's purpose. *Id.* at 475–76 (comparing religious schools with secular schools that have a religious studies department). Discussing *Resnick*, *Hendricks* noted that "it was the sectarian nature of the groups renting the space for such instruction that was of primary concern to the Court in striking down the subsidized arrangement." *Id*. at 475. *Hendricks* concluded that "unlike other broad-based liberal arts colleges that received grants, both the Yeshiva and the Seminary are sectarian institutions.

Their facilities funded by the Secretary's grants indisputably will be used substantially if not exclusively for religious instruction. The planned uses by these sectarian institutions clearly fall within the prohibitory ambit of *Resnick.*" *Id.* Morris County relies on limiting language in *Hendricks,* suggesting that "religiously affiliated institutions" with "a broader non-sectarian scope" might not be barred from government grants. County's Reply Brief, 5. But no such limitation applies when public money flows to the quintessential religious institution, a church. Here the decision is more straightforward because the grant recipients are **actually churches**, not schools that are more or less church-like.

Morris County tries to differentiate *Hendricks* by stating that while the *Hendricks* grants "unquestionably advanced the religious education of the students," the benefit to Morris County churches "is secondary to the secular purpose of the program." County's Reply Brief at 4–5. However, *Hendricks* did not hinge on whether the government had a primarily secular purpose. The court did not even mention the government's purpose, which may very well have been primarily secular. The two dispositive facts in *Hendricks* are present here as well: (1) taxpayer money is flowing to (2) a religious institution.

Morris County also presumes that the *Hendricks* court would "follow the Establishment Clause analysis" under a different set of facts and goes on to suggest that the grants would pass muster under such an analysis. County's Reply Brief, 5. This is wrong twice. First, both *Resnick* and *Hendricks* contradict the presumption; neither used the federal Establishment Clause analysis to practices challenged under the religious aid prohibition. The federal Establishment Clause, and its accompanying jurisprudence do not apply to this challenge. Second, if that analysis were applicable, the outcome would not be different. *See Hendricks*, 445 N.J. Super. at

472 (discussing the dissents of Justice Clifford and Judge Conford in *Resnick*, who agreed with the result but would have done the same or gone "even further" under an Establishment Clause analysis.)

II. Protecting New Jersey citizens from compelled support of church repairs does not violate the First or Fourteenth Amendments.

The Equal Protection Clause does not prohibit Morris County from excluding churches from its Trust Fund program because similarly situated secular nonprofits are also excluded from the Trust Fund program. The language of the statute and ordinances are clear on this point, yet the defendants disagree.

To succeed on their Equal Protection defense, the Churches must show **first** that they are actually discriminated against—that they are excluded relative to similarly situated entities. FFRF contends that they are not, both under the plain terms of the Trust Fund rules and in practice. Defendants argue that they are, citing an improper certification that should be stricken from the record (which plaintiffs have requested), but which also fails to demonstrate that similarly situated secular nonprofits are treated equally to churches.

Second, even if the Trust Fund program did treat churches less favorably than similarly situated entities, defendants have to show that churches are a suspect class, or that the government has violated a fundamental right, for this Court to apply the higher standard of strict scrutiny. Otherwise, the more deferential rational basis standard is appropriate. The classification of religious organizations verses nonreligious organizations does not automatically trigger strict scrutiny, because it is not inherently suspect when the government is enforcing antiestablishment laws such as the federal Establishment Clause or New Jersey's religious aid prohibition, and

enforcing New Jersey's religious aid prohibition does not violate any fundamental rights. Rational basis is therefore the appropriate standard of review.

Third, even if this Court applied strict scrutiny, the Churches would still have to show that the state's interest in enforcing its religious aid prohibition does not justify excluding churches from the Trust Fund program. But the government's antiestablishment interest is compelling—as compelling as a government interest gets—and excluding houses of worship from the Trust Fund program is narrowly tailored to achieve that interest because this is precisely what Art. I ¶ 3 demands—that taxpayer funds not be used to repair churches. The Supreme Court has emphasized that antiestablishment interests are especially strong "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) (citations omitted). Narrowly enforcing New Jersey's religious aid prohibition survives any level of scrutiny.

First, excluding churches from the Trust Fund program would only remove the favored treatment they currently receive. Notwithstanding the restrictive language in the Trust Fund Rules, Morris County asserts that Trust Fund grants would be given to any secular nonprofit if it occupied a historical building. County's Reply Brief, 6–7, and the Churches argue that Morris County has awarded grants to secular programs that lack a historic preservation purpose. Church's Reply Brief, 10–11.

Even if Morris County would allow any secular nonprofits to participate in the grant program if they "designate as one of its priorities the preservation of its historical building," *Id.*, the grant program still favors religious institutions over secular counterparts, both facially and in practice.

Facially, the program states that only "religious institutions" and "charitable conservancies whose purpose includes historic preservation" are eligible, apart from government entities. JSSF Ex. A, 22. Secular nonprofits without a purpose that includes historic preservation, such as FFRF or the Red Cross, would reasonably understand that they need not apply.

In practice, Morris County has allowed churches to participate in the program even though they refused to add historic preservation to their stated purpose. The County asked the First Presbyterian Church in Boonton to add historic preservation to its purpose, the church refused, and Morris County awarded it a grant anyway. JSSF, Ex.J2, 1661. The Churches argue that the Boonton church's statement "affirmed the Church's commitment to historic preservation in a manner that is consistent with the perceived limits on ecclesiastical documents," but this does not alter the fact that the church was given a grant despite refusing to alter its purpose to include historic preservation. Organizations make many commitments, but those commitments are separate from the organization's stated purpose.

Second, churches are not suspect classes in this context and excluding churches from the Trust Fund program would not violate any fundamental rights. Therefore, rational basis is the proper standard of review.

The rationale behind the "strict scrutiny" standard is that courts apply "close judicial scrutiny" when a group singled out for disparate treatment is "inherently suspect." *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). Classifications based on race or sex, for instance, are inherently suspect because there is presumably no good reason for the government to be singling out anyone based on these traits. In the context of maintaining an appropriate separation between state and church, however, there is an obvious need to single out religious verses non-religious

entities. Classifications *among* religions, such as excluding only Catholic churches, would be a suspect class that would trigger strict scrutiny, but a classification of churches versus non-religious institutions does not.

Neither defendant rebuts this point in their briefing. Morris County wrongly asserts that "religious groups are unquestionably a protected class," citing cases that either have nothing to do with religion or involve classifications *among* religions. *See, e.g., Bastanipour v. I.N.S.*, 980 F.2d 1129, 1132 (7th Cir. 1992) ("But of course Christians, like members of other religious groups, are a protected class"). This is a vital difference: the government cannot discriminate between different religious sects, but it can, in the interest of state-church separation, distinguish between religious and nonreligious entities.

The only other way strict scrutiny would be appropriate would be if a fundamental right, such as those protected under the First Amendment, were violated. However, enforcing the religious aid prohibition does not violate the First Amendment. The Free Exercise Clause prohibits Morris County from interfering with the Churches' religious activities, but does not require Morris County to repair the Churches' houses of worship. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). The County may not prohibit the Churches' free exercise of religion, but this does not mean Morris County must pay the Churches' repair bills.

Religious aid prohibitions can be enforced without violating the Free Exercise Clause. *Locke v. Davey*, 540 U.S. 712 (2004). New Jersey's religious aid prohibition is very similar to

the provision upheld in *Locke* against a Free Exercise challenge. The Churches offer no rebuttal to this, other than stating that this principle is not "absolute," Church's Reply Brief, 16. However, New Jersey's provision has a similarly strong antiestablishment interest and survives an Equal Protection challenge without any expansion of *Locke*, much less pushing it to an absolute extreme.

Since churches are not a suspect class when enforcing the religious aid prohibition, and no fundamental rights are violated, this Court should apply rational basis review and hold that the state's exclusion of churches is rationally related to a legitimate government interest.

Third, the state interest in this case is strong enough to overcome any level of scrutiny. New Jersey's interest is protecting its taxpayers from being *compelled* to repair a church. This goes to the core of the Founders' intent in drafting the federal Establishment Clause and individual state counterparts. A state could scarcely establish a religion more clearly than by compelling taxpayers to fund the construction or repair of a particular church. Preventing this abuse, as New Jersey's religious aid prohibition does, is at least as substantial as the State of Washington's interest in excluding religious studies from a neutral scholarship program in *Locke*.

Morris County's tax amounts to coercion. It requires, as part of a citizen's duties, the support and maintenance of a church and that church's ministry. It is precisely to prevent this coercive misuse of government power to benefit religion that Article I, Section 3 was written: "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." (emphasis added). Plaintiffs in this case have not voluntarily agreed to give their money to a church, nor do they believe the churches' professions of faith to be right.

Defendants have sought to minimize the government's interest in not coercing citizens in violation of this provision. Churches' Reply Brief, 17. But protecting citizens from this type of compulsion is one of the bedrock purposes underlying the separation of state and church and all the constitutional provisions—state or federal—that put that separation into practice. In the Framers' view, the decision whether to adhere to or support a particular faith, or none at all, was one that every person had a right to make without the slightest coercion, and taxpayer funding of religious institutions violated that ideal. James Madison, in his *Memorial and Remonstrance* ¶ 3, phrased the interest in the form of a question: "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?". The New Jersey Constitution prohibits Morris County from coercing citizens into supporting religions with which they disagree. This principle is one of America's founding principles—we were the first country to separate state and church. The governmental interest in upholding the religious aid prohibition is as strong and overriding an interest as exists in political theory, despite the churches assertions about the State's "minimal" interest. Churches' Reply Brief, 17.

On the other hand, being excluded from the grant program—*i.e.* obeying the law—is not a substantial burden on the Churches. The Churches assert that their burden would be great because they would be forced to "choose between praying in or preserving their historic structures," but this is no greater a burden than churches always endure when interacting with the

government. The separation between state and church excuses churches from many governmental obligations—paying taxes, filing Form-990s, etc. But with those excused burdens, churches must forego certain government benefits. The Churches seek the best of both worlds by maintaining all the benefits of the government's "hands-off" approach toward religion, while being entitled to government building repair grants.

III. Excluding churches from Morris County's Trust Fund program does not violate RLUIPA.

RLUIPA does not apply because the grant program is not a "land use regulation" as defined by RLUIPA. 42 U.S.C. § 2000cc-5. The defendants have not refuted this simple point.

The Churches freely admit that "a grant award itself is not a restriction," which means it cannot be a "regulation" under the scope of RLUIPA. The churches seem to argue that because the Trust Fund program imposes some restrictions on grant recipients, that portion of the program is a "land use regulation" under RLUIPA, rather than the award of grants. Churches' Reply Brief, 16. This contradicts the Churches' *quid pro quo* argument attempting to justify the grants as a payment for some property interest. Using the churches' rationale, the land use restrictions are either a property interest fully paid for by the County, in which case they are not an RLUIPA land use regulation; or, the land use restrictions are merely conditions attached to an award of taxpayer funds, in which case the Churches' *quid pro quo* argument fails. This self-contradictory approach shows the flaws in both arguments: the Trust Fund program is not the purchase of a property interest, nor is it a land use regulation.

Further, entities that are excluded from the program are not subject to these restrictions, and thus do not receive unequal treatment under any land use regulation. In other words, the Churches are arguing that excluding them would treat them unequally because they would *not* be

subject to the program's restrictions. This gets RLUIPA completely backwards; it protects religious organizations from enduring an unequal burden, but it does not entitle churches to receive any government benefits that have accompanying land use restrictions.

IV. The Churches are liable for conspiring to violate the New Jersey Constitution.

This Court can, and should, require the Churches to refund money it conspired to improperly receive from Morris County.

First, the sole element at issue is "the existence of an unlawful purpose, or of a lawful purpose to be achieved by unlawful means." *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 414 (3d Cir. 2003). The unlawful purpose element is met in this case if the Trust Fund church grants, agreements the Churches are a party to, are held by this Court to be unlawful. However, the Churches state, citing no authority, that an element of civil conspiracy is "a separate intentional tort." Churches' Reply Brief, 18. The Churches offer no justification for imposing their proposed limitation to this element.

The Churches then turn to defending their entering into an unlawful agreement with Morris County as "absolutely privileged" under constitutional guarantees that citizens may "petition for redress of grievances." N.J. Const., art. I ¶ 18. But applying for an unlawful grant is not petitioning for redress of grievances. The churches are not complaining or seeking redress, they are seeking access to taxpayer funds—a funding source prohibited to churches since the founding, a fact of which they were surely aware.

Yet, the Churches still insist they had no way of knowing these grants violated New Jersey's religious aid prohibition, but list no authority that would lead a reasonable person to conclude that the plain language of New Jersey's constitution does not apply to these facts,

particularly when New Jersey courts have enforced the provision in far less egregious cases of using taxpayer funds to aid churches. The Churches were also actually shown why these grants were unlawful, by being defendants in this lawsuit, but have continued to accept taxpayer funds anyway. Assuming this Court holds that the church grants are impermissible, taxpayers who have been improperly compelled to repair churches deserve to have their tax dollars refunded so that they can be used in a lawful and secular way.

V. Conclusion: This Court should enforce the New Jersey Constitution and prohibit Morris County from subsidizing church repairs.

New Jersey's constitutional language is excessively clear and has been interpreted by the New Jersey Supreme Court. FFRF asks that this Court apply that interpretation and issue a permanent injunction to stop Morris County's funding of church repairs. Enforcement of this provision does not violate any state or federal protections and is essential to protect New Jersey citizens from being compelled by their government to pay for the maintenance of churches with active congregations.

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