SUPREME COURT OF NEW JERSEY
DOCKET NO. A-71-16 (079277)

Freedom from Religion Foundation, *et al.* *Petitioners-Appellants* v. Morris County Board of Chosen Freeholders, *et al.* *Respondents-Appellees*.	Civil Action On Certification from the Superior Court of New Jersey, Chancery Division No. SOM-C-12089-15 SAT BELOW: Judge Margaret Goodzeit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS-APPELLEES

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS

INTEREST OF *AMICUS CURIAE*[*]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all faiths and the equal participation of religious people in public life and benefits. It is founded on a simple but crucial principle: that religious freedom is a fundamental human right rooted in the dignity of every human person.

[*] No party's counsel authored any part of this brief. No person other than the *amicus curiae* contributed money intended to fund the preparation or submission of this brief.

To vindicate this principle, Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits in New Jersey, around the country, and around the world. Becket is frequently involved—both as counsel of record and as *amicus curiae*—in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference. *See, e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (counsel for Plaintiffs); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (counsel for Petitioner); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (counsel for Respondents); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (counsel for Petitioner); *Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist.*, 440 N.J. Super. 582 (Law. Div. 2015) (Defendant-Intervenors); *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320 (D.N.J. 2016) (*amicus curiae*).

Becket is concerned, in this case, about attempts to single out religious groups for disfavored treatment based solely on their reli-

gious status, which would not only marginalize and stigmatize religious groups, but would also threaten their access to a wide variety of important public benefits.

INTRODUCTION

This case presents one of the first opportunities for a state supreme court to interpret the United States Supreme Court's recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, decided on June 26. *Trinity Lutheran* rejected a state's interpretation of its constitutional provision that would have "categorically disqualif[ied]" churches and other religious groups from government aid programs. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017). That decision has significant implications for state provisions around the country—like Article I, Section 3 of the New Jersey Constitution at issue in this case—that might be interpreted to prevent otherwise neutral government aid from going to religious groups solely because of their "religious character." *Id.* at 2021, 2022, 2024. *Trinity Lutheran* held that the state's interpretation constituted discrimination against religious groups and violated the Free Exercise Clause.

FFRF and the ACLU ask this Court to exclude religious organizations from the grant programs at issue based solely on their "religious character." *Id.* at 2021, 2022, 2024. These requests would constitute "religious status" discrimination under *Trinity Lutheran* and the Free Exercise Clause. In applying New Jersey's constitution to the programs at issue in *Freedom From Religion Foundation v. Morris County* and *ACLU v. Hendricks*, this Court should interpret its constitution consistent with *Trinity Lutheran* so as to not violate the Free Exercise Clause. New Jersey has no valid interest in such discrimination and therefore these requests must be denied. *Id.* at 2019.

ARGUMENT

I.

Exclusion of religious groups from public benefit programs simply because of their religious status violates the Free Exercise Clause under *Trinity Lutheran*.

The Supremacy Clause of the United States Constitution provides the federal constitution is the "supreme law of the land," notwithstanding any state laws to the contrary. Thus, under the doctrine of constitutional avoidance, this Court has long interpreted New Jersey law to avoid any conflict with federal law. *See, e.g.*,

State v. Johnson, 166 N.J. 523, 543 (2001) (interpreting New Jersey statute to avoid violating Eighth Amendment of U.S. Constitution). Here, however, Plaintiffs seek an interpretation of the New Jersey Constitution that would violate controlling Supreme Court precedent.

Just three weeks ago, the United States Supreme Court held that excluding an otherwise eligible religious organization from a public benefits program solely because of its religious status "is odious to our Constitution . . . and cannot stand." *Trinity Lutheran*, 137 S. Ct. at 2025. The implications of *Trinity Lutheran* for this case and *ACLU v. Hendricks* are clear: government cannot exclude religious organizations from neutral grant programs without surviving strict scrutiny under the Free Exercise Clause of the United States Constitution.

In *Trinity Lutheran*, Missouri's Department of Natural Resources offered reimbursement grants to public and private schools, nonprofit day cares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. *Id.* at 2017. But Missouri interpreted its constitution to require it to "categorically

disqualify[]" churches and other religious organizations from its public benefits program. *Id.* Even though Trinity Lutheran Learning Center ranked fifth out of 44 applicants and would have otherwise received funding, its application was rejected solely because it is a church. *Id.* at 2018. The Supreme Court held that the Department's policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. Such discrimination "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.*

The Court rejected the government's argument that there was no serious burden on the free exercise of religion where the state merely denied a subsidy that it "had no obligation to provide in the first place," and did not directly punish any religious act. *Trinity Lutheran*, 137 S. Ct. at 2022-23. As the Court explained, "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Id.* at 2022 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Just because a religious institution is free

to continue operating as a religious institution, that freedom cannot come "at the cost of automatic and absolute exclusion from the benefits of a public program for which the [religious organization] is otherwise fully qualified." *Id.* Conditioning the availability of a benefit "upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (alterations omitted)).

The Court found that Trinity Lutheran was not claiming "any entitlement to a subsidy," but rather "a right to participate in a government benefit program without having to disavow its religious character." *Id.* at 2022. Moreover, the "express discrimination" at issue there was "not the denial of a grant" but instead "the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id.*

The grant program at issue in this case (and in the accompanying case *ACLU v. Hendricks*) is governed by *Trinity Lutheran*. Here, Morris County's historic preservation grant program is a generally available public benefit whose recipients are selected through a

competitive grant application process based on secular criteria and which is open to "all historic sites within the State" without reference to religious status. Op. at 2. The grants "are limited to preservation of exterior building elements and the buildings' structural, mechanical, electrical, and plumbing systems." Op. at 3. The grants are released only after the work has been completed. Op. at 5. The only relevant difference between the historic preservation grant program and the program in *Trinity Lutheran* is that Morris County has done the right thing: It has *not* excluded religious organizations merely because of their religious status. *See Trinity Lutheran*, 137 S. Ct. at 2017.

FFRF's lawsuit attempts to change that—seeking precisely the result forbidden in *Trinity Lutheran*. FFRF argues that Article I, Section 3 of the New Jersey Constitution forbids historic preservation grants to churches and requests that this Court require a policy equivalent to Missouri's "absolute exclusion" of churches. *Trinity Lutheran,* 137 S. Ct. at 2022; Op. at 3 (FFRF "contends that . . . the New Jersey State Constitution prohibits use of government funds . . . if those funds would be paid to any church, places of worship or

ministry"). But the *Trinity Lutheran* Court characterized that forbidden path as a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 2017. In short, FFRF requests a policy of "No churches need apply." *Id.*

Even before *Trinity Lutheran* was decided, the court below in *Morris County* correctly rejected this argument and interpreted Article I, Section 3 to avoid violating the federal Free Exercise Clause. It upheld the historic preservation grant program because "[e]xcluding historical churches from receipt of reimbursements available to all historical buildings would be tantamount to impermissibly withholding of general benefits to certain citizens on the basis of their religion." Op. at 12 (citing *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947)). In so holding, the court interpreted Article I, Section 3 in light of this Court's decision in *Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88 (1978). In *Resnick*, this Court held that under Article I, Section 3, religious groups must be permitted to rent space in public school facilities—

even if the public space would be used by the religious groups for religious education. *Id.* at 103-04.

This analysis continues to be required by *Trinity Lutheran*. This Court must consider the Free Exercise implications of its decisions. Here, to withhold the historic preservation grants from only churches—as FFRF asks this court to do—would be to "impose[] a penalty on the free exercise of religion" that should be avoided with the proper constitutional interpretation. *Trinity Lutheran,* 137 S. Ct. at 2024.

The force of *Trinity Lutheran*'s holding applies equally in *Hendricks*.[1] In that case, the ACLU has challenged a series of New Jersey state higher education grants given for capital improvements at both religious and nonreligious schools. *ACLU v. Hendricks*, 445 N.J. Super. 452, 455 (2016). The grants were awarded based on neutral criteria without reference to religion. *Id.* at 456-67. Again, the

[1] *Trinity Lutheran* was issued after briefing concluded in *ACLU v. Hendricks*. Because *Trinity Lutheran* has direct application to this court's decision in *Hendricks*, *Amicus* addresses the facts in *Hendricks*, too.

only relevant difference between the higher education grant program and the program in *Trinity Lutheran* is that in *Hendricks*, New Jersey did the right thing: it awarded grants to Princeton Theological Seminary (the Seminary) and Beth Medrash Govoha (the Yeshiva) on the same terms as nonreligious schools. But again, like FFRF, the ACLU attempts to change that—seeking precisely the result forbidden in *Trinity Lutheran*.

Before *Trinity Lutheran* was decided, the *Hendricks* panel held that under *Resnick*, Article I, Section 3 forbids grants to the Seminary and the Yeshiva because of their "sectarian nature." But *Trinity Lutheran* rejected precisely that sort of "express discrimination" based on "religious character." *Trinity Lutheran,* 137 S. Ct. at 2021-22, 2024. To deprive the Seminary and the Yeshiva of the grants solely because of their "religious character" would be to "impose[] a penalty" on their belief, "put[ting] them to the choice between being a [religious organization] and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2021, 2024. That is precisely what *Trinity Lutheran* forbids.

Resnick is not to the contrary. It explicitly did *not* decide "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Resnick*, 77 N.J. at 113. The best interpretation of *Resnick* is that the grants in *Hendricks* constitute a form of generally available public assistance that is permissible for churches under New Jersey's Constitution. To the extent, however, that *Resnick* "does require that religious organizations be singled out" for disfavor, it has been overruled by *Trinity Lutheran*. *Id.* at 103-04.[2]

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[2] Respondents-Appellees and their *amici* may attempt to argue that *Trinity Lutheran* is limited due to a footnote that was joined by only four Justices. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.") But such a narrow construction of the Court's opinion is unwarranted. The footnote garnered the votes of only four justices and is not part of the Court's opinion. Such a reading would also be "unreasonable for [the Court's] cases are 'governed by general principles, rather than ad hoc improvisations.'" *Id.* at 2026 (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25 (2004)) (Gorsuch, J., concurring). Finally, in any event, this case *does* involve an attempt to discriminate "based on religious identity," and does *not* involve "religious uses of funding." *Id.* at 2024 n.3.

II.

The government has no compelling interest in denying public benefit grants to churches and religious schools.

Both FFRF and the ACLU seek to exclude churches and religious schools from neutrally available public benefit programs expressly because of their religious character, which "triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2021. There is no compelling interest to justify the exclusion in these cases.

The Supreme Court in *Trinity Lutheran* explicitly rejected the argument that excluding churches from a neutral grant program is justified by anti-establishment concerns. When religious groups are excluded from a neutral program based only on their religiosity, a government interest in "nothing more than [a] policy preference for skating as far as possible from religious establishment concerns . . . cannot qualify as compelling." *Id.* at 2024. Here, in *Morris County*, New Jersey's anti-establishment interest in excluding religious groups from its grant programs is nil. Historic preservation does not invoke an anti-establishment interest, as the lower court correctly reasoned. New Jersey has a "long history of making historic preservation grants to active houses of worship." Op. at 6.

Any state interest in anti-establishment also would be insufficient because the grant program does not even come close to violating the federal Establishment Clause. Even under the Supreme Court's most stringent "no aid" decisions in the 1970s—around the time that *Resnick* was decided—the inclusion of churches in a historical preservation program would have survived scrutiny. In those cases, the Court's basic rationale was that certain types of aid to religious schools could be "intentionally or inadvertently [used to] inculcat[e] particularly religious tenets," could "provid[e] a subsidy to the primary religious mission of the institutions," or could reasonably appear to do so. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

But even in those cases, the Court acknowledged that "a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities," because these are "secular and nonideolgical services unrelated to the primary, religion-oriented educational function of the sectarian

school." *Meek v. Pittenger*, 421 U.S. 349, 364 (1975), *overruled by Mitchell v. Helms,* 530 U.S. 793 (2000). Historical preservation is just that. It is a "secular and nonideological service[]" that simply prevents the county from losing its historic facades.

A fortiori, as *Trinity Lutheran* confirmed, including churches in the historic preservation program is not a problem under the Court's modern Establishment Clause jurisprudence. The program makes historic preservation "available to both religious and secular beneficiaries on a nondiscriminatory basis" and would employ "neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231 (internal quotation marks omitted). Thus, it would create no "incentive to undertake religious indoctrination"; and certainly no indoctrination that could be "attributed to the State." *Id.* at 230-31; *see also Mitchell*, 530 U.S. at 829-30 (plurality opinion). Furthermore, the court below rightly concluded that diversion is not at issue in this case. Because the grant funding is strictly limited to "historic elements of the structures" and "funds are not released until architects certify the specific work has been

performed," diversion of funds to religious indoctrination is "impossible." Op. at 5. *See Mitchell*, 530 U.S. at 855-56 ("It does not follow, however, that we should treat as constitutionally suspect any form of secular aid that might conceivably be diverted to a religious use.").

Finally, there is no reason to suspect that the facially neutral criteria in this grant program have the hidden effect of channeling aid disproportionately to religious entities. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002) (Souter, J., dissenting) (noting that "96.6% of current voucher money go[es] to religious schools"). Here, the vast majority of grant applicants are nonreligious. Thus, this case is more like the unanimous decision in *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986), where the benefit went only to one religious entity among many secular ones, rather than the vouchers in *Zelman*, where 96.6% went to religious schools (and the program was still upheld). There is no legitimate anti-establishment interest that would forbid the government from preserving historical buildings.

Likewise in *Hendricks*, the government's anti-establishment interest is nil because the money isn't going directly to religious education, but to the general provision of facilities for public use. In *Mitchell v. Helms*, the Supreme Court upheld a program whereby equipment was loaned to schools, including library and technology materials. 530 U.S. at 802. The program applied equally to public and private schools, and placed restrictions on the materials going to private schools, ensuring that all of it was "secular, neutral, and nonideological," and that it remained in control of the state. *Id.* at 802-03 (citation omitted).

That is precisely what is occurring in *Hendricks*. The grants that the Yeshiva and the Seminary received go towards a library and research center building, and technological support, 445 N.J. Super at 459-60; the grant funds are distributed based on neutral criteria, *see id.* at 456-57 (outlining criteria); institutions are required to provide matching funds to avoid misuse or diversion, *id.* at 457; and the Yeshiva and Seminary would be slated to receive less than 1% of the $1.3 billion the state allocated, and less than 25% of the $52.5 million allocated for private schools, *id.* at 455-56. These factors

place the grants well within the Establishment Clause's boundaries.

The United States Supreme Court has laid out a clear rule that governs this case. Denying participation to these churches and religious schools without a compelling interest violates the Free Exercise Clause.

CONCLUSION

For the reasons above, the judgment of the Superior Court of New Jersey, Chancery Division, should be *affirmed*.

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Respectfully submitted.

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